



THE AMERICAN INSTITUTE OF ARCHITECTS



American Subcontractors Association, Inc.



Independent Electrical Contractors



The Surety & Fidelity Association of America
Serving the Industry Since 1908

Dear Senator,

We, the undersigned construction industry trade and professional organizations representing tens of thousands of firms and individuals engaged in architecture, engineering, surveying and mapping, prime contracting, subcontracting, specialty trade contracting, supplying, and surety bond producing, strongly urge you to introduce or cosponsor the enclosed bill—the Construction Consensus Procurement Improvement Act of 2014—that would help increase opportunities for small businesses, prevent government waste and fraudulent transactions, and grow federal public-private partnerships (P3).

The bill provides a framework for growth in the construction industry and for more efficient federal government procurement through simple, *no-cost* to the government solutions. Many of these solutions have individually received bipartisan support in the House of Representatives. They include reforms based on H.R. 2750, the Design-Build Efficiency and Jobs Act, H.R. 2751, Common Sense Construction Contracting Act of 2013, and H.R. 776, the Security in Bonding Act. Collectively, these bills would address anti-competitive and efficiency issues with reverse auction procurement for design and construction services, encourage better utilization of design-build project delivery, and help prevent fraud by providing financial certainty to assets that support individual surety bonds.

Additionally, the bill would help grow federal P3 opportunities for small businesses by providing payment certainty. For almost eight decades, the Miller Act (40 U.S.C. §§ 3131–3134) has provided payment protection for subcontractors and suppliers on federal construction projects. While P3s become increasingly common to finance and construct public needs, the protections of the Miller Act must be uniformly available to subcontractors and suppliers, most of which are small businesses, working on such public-private projects. As such, this bill would help ensure that small businesses could work on federal P3 projects without fear of non-payment.

Again, we urge you to introduce or cosponsor the enclosed Construction Consensus Procurement Improvement Act of 2014. If you and your staff would like to further discuss the simple, no cost-solutions in this bill, please contact either Colette Nelson at cnelson@asa-hq.com or Jimmy Christianson at christiansonj@agc.org.

Sincerely,

The Construction Industry Procurement Coalition

“The Construction Consensus Procurement Improvement Act of 2014”

This bill would improve construction procurement policies and help increase opportunities for small businesses, prevent government waste and fraudulent transactions, and grow federal public-private partnerships (P3). Specifically, the bill would help:

- **Make the Design-Build Construction Process More Competitive**
 - Absent any degree of certainty as to how many design/construction teams will participate in design-build contract competitions, many qualified teams—especially small businesses—cannot risk the high cost of producing complete design and engineering technical proposals and, consequently, do not to compete.
 - According to a recent survey, between 2007 and 2011 architecture firms in teams that competed for public- and private-sector design-build projects spent a *median* of \$260,000, by submitting detailed plans, models and other materials.
 - This bill would spur more design-build competition by allowing a predictable number of design/construction teams to submit those expensive technical proposals.
- **Instate Lessons Learned from Reverse Auction Procurement of Construction Services**
 - Procuring design and construction services is different than procuring off-the-shelf, manufactured commodities. In 2004 after several failed experiments, the U.S. Army Corps of Engineers (USACE)—the largest and most experienced construction agency—determined that procuring design and construction services through reverse auctions “should be the very rare exception and not the rule—if used at all.”
 - However, several federal agencies continue to use reverse auctions for construction. According to a 2013 GAO report, federal agencies conducted over 3,600 reverse auctions where only one vendor participated and submitted only one bid.
 - This bill would prohibit federal agencies from procuring design and construction services through reverse auctions and apply the lessons learned from USACE.
- **Prevent Fraud in the Individual Surety Construction Bond Marketplace**
 - Statutory surety bond requirements provide vital financial security to protect the federal government by assuring that interested contractors have been prequalified by a corporate surety to perform the construction contract.
 - Individual sureties, however, are neither subject to the same regulatory oversight as corporate sureties, nor are they required to relinquish the custody and control of the assets that they pledge to secure their bonds on federal construction contracts.
 - This bill would help prevent fraud by providing financial certainty to assets that support individual surety bonds.
- **Provide Payment Certainty to Small Businesses on Federal P3 Projects**
 - For almost eight decades, the Miller Act has provided payment protection for subcontractors and suppliers on federal construction projects.
 - While P3s become increasingly common to finance and construct public needs, the protections of the Miller Act must be uniformly available to subcontractors and suppliers, most of which are small businesses, working on such public-private projects.
 - This bill would help assure that small businesses could work on federal P3 projects without fear of non-payment.

113th CONGRESS

S.

2nd Session

To amend Title 10 and Title 41, United States Code, to improve the manner in which Federal contracts for construction and design services are awarded, to amend the Small Business Act to prohibit the use of reverse auctions for design and construction services procurements, to amend Title 31 and Title 41, United States Code, to improve the payment protections available to construction contractors, subcontractors and suppliers for work performed, and for other purposes.

IN THE SENATE

Mr./Mrs./Ms.

(for himself/herself and [list of original cosponsors is attached])

A BILL

To amend Title 10 and Title 41, United States Code, to improve the manner in which Federal contracts for construction and design services are awarded, to amend the Small Business Act to prohibit the use of reverse auctions for design and construction services procurements, to amend Title 31 and Title 41, United States Code, to improve the payment protections available to construction contractors, subcontractors and suppliers for work performed, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE, TABLE OF CONTENTS.

(a) **Short Title** This Act may be cited as the “**Construction Consensus Procurement Improvement Act of 2014**”.

(b) **Table of Contents** The table of contents for this Act is as follows:

Sec. 2. Congressional Findings.

Sec. 3. Design-Build Construction Process Improvement.

Sec. 4. Prohibition on the Use of a Reverse Auction for the Award of a Contract for Design and Construction Services.

Sec. 5. Payment Protections for Construction Work Performed.

Sec. 6. SBA Surety Bond Guarantee

SECTION 2. CONGRESSIONAL FINDINGS.

The Congress finds that:

(a) The procurement of construction and design services is unique and not always susceptible to the use of acquisition procedures that are effectively used for the procurement of products and other forms of services;

(b) Federal procurement officials have adopted contracting techniques from the private sector, which have been effectively used in Federal procurement for the acquisition of products and services;

(c) Design-build construction is a technique adopted from the private sector that has worked well for the Federal procurement of construction and for which there is a carefully design-build statutory framework, which can benefit from further legislative refinement.

(d) Reverse auctions is another technique adopted from the private sector that is used to successfully select a contract awardee to furnish a commercial product that has reached the commercial equivalence of a commodity, but such technique is completely inappropriate for the procurement of construction and design services given the high level of uniqueness of each construction project;

(e) Cash flow is vital to all businesses, large, but especially small, thus the Government's payment of Federal contractors, subcontractors and suppliers, has received consistent Congressional attention, both in the form of oversight and legislation;

(f) For almost eight decades, the Miller Act has provided payment protection of last resort to subcontractors and suppliers of Federal construction projects;

(g) Public-Private Partnerships are becoming increasingly common to finance and construct public needs, but the protections of the Miller Act have not been uniformly made available to construction subcontractors and suppliers working on such public-private projects;

(h) The periodic threshold increase for the Miller Act will significantly increase the number of contracts where the required payment and performance protections are not provided to subcontractors and suppliers, many of whom are small businesses, as well as for U.S. taxpayer dollars; and

(i) Bonds backed by individual sureties must be supported by assets that are real, sufficient, verifiable and readily convertible into cash to pay valid claims when needed, which are unconditionally backed and placed in the care and custody of the U.S. government, to ensure payment protection of contractors, subcontractors and suppliers when working on federal construction.

SECTION 3. DESIGN-BUILD CONSTRUCTION PROCESS IMPROVEMENT.

(a) In General. Section 3309 of title 41, United States Code, is amended—

(1) in subsection (d) by striking “The maximum number specified in the solicitation shall not exceed 5 unless the agency determines with respect to” and all that follows through the period at the end, and inserting the following: “The maximum number specified in the solicitation shall not exceed 5 unless the head of the agency contracting activity approves the contracting officer's justification that an individual solicitation must have greater than 5 finalists to be in the Federal Government's interest. The contracting officer shall provide written documentation of how a maximum number of offerors exceeding 5 is consistent with the purposes and objectives of the two-phase selection process.”; and

(2) by adding at the end the following:

(f) DESIGN AND CONSTRUCTION CONTRACTS- Two-phase selection procedures shall be used for entering into a contract for the design and construction of a public building or facility, unless the head of the contracting activity, determines that one-step turnkey design-build selection procedures are authorized by law, and that the scope of work set forth in the proposed solicitation is sufficiently detailed with specifications and drawings to require minimal design or engineering efforts by a prospective offeror in order to be able to prepare a proposal in response to the solicitation.

(g) Reports-

(g) Reports –

(1) Reports Regarding Agency Actions.

(A) There shall be compiled an annual report of each instance in which an agency awarded a design-build contract pursuant to Section 3309 of Title 41, in which –

- (i) more than 5 finalists were selected for phase-two requests for proposals; or
- (ii) the contract was awarded without using two-phase selection procedures.

(B) The Director of the Office of Management and Budget shall designate the head of an Executive agency to serve as Executive Agent for the compilation of the report required by paragraph (A) and to facilitate public access to the reports through electronic means. A notice of the availability of each report shall be published in the Federal Register.

(C) The first report shall include reportable instances during the fiscal year that includes date of the effective date of this section. Additional reports shall be issued for the subsequent 4 fiscal years. Each report shall be issued within 60 days after the close of the fiscal year covered by the report.

(2) GAO REPORT-

(A) The Comptroller General of the United States shall issue a report analyzing the compliance of the various Federal agencies in complying with the requirements of Section 3309 of Title 41, as amended by this section.

(B) The report required by subparagraph (A) shall be issued within 270 days of the date on which the final report required under paragraph (1) was to have been issued.

(b) In General. Section 2305a(d) of title 10, United States Code, is amended—

(1) in subsection (d) by striking “The maximum number specified in the solicitation shall not exceed 5 unless the agency determines with respect to” and all that follows through the period at the end, and inserting the following: “The maximum number specified in the solicitation shall not exceed 5 unless the head of the agency contracting activity approves the contracting officer’s justification that an individual solicitation must have greater than 5 finalists to be in the Federal Government’s interest. The contracting officer shall provide written documentation of how a maximum number of offerors exceeding 5 is consistent with the purposes and objectives of the two-phase selection process.”; and

(2) by adding at the end the following:

(f) DESIGN AND CONSTRUCTION CONTRACTS- Two-phase selection procedures shall be used for entering into a contract for the design and construction of a public building or facility, unless the head of the contracting activity, determines that one-step turnkey design-build selection procedures are authorized by law, and that the scope of work set forth in the proposed solicitation is sufficiently detailed with specifications and drawings to require minimal design or engineering efforts by a prospective offeror in order to be able to prepare a proposal in response to the solicitation.

(g) Reports-

(g) Reports –

(1) Reports Regarding Agency Actions.

(A) There shall be compiled an annual report of each instance in which an agency awarded a design-build contract pursuant to Section 2305a(d) of Title 10, in which –

(i) more than 5 finalists were selected for phase-two requests for competitive proposals; or

(ii) the contract was awarded without using two-phase selection procedures.

(B) The Director of the Office of Management and Budget shall designate the head of an Executive agency to serve as Executive Agent for the compilation of the report required by paragraph (A) and to facilitate public access to the reports through electronic means. A notice of the availability of each report shall be published in the Federal Register.

(C) The first report shall include reportable instances during the fiscal year that includes date of the effective date of this section. Additional reports shall be issued for the

subsequent 4 fiscal years. Each report shall be issued within 60 days after the close of the fiscal year covered by the report.

(2) GAO REPORT-

(A) The Comptroller General of the United States shall issue a report analyzing the compliance of the various Federal agencies in complying with the requirements of Section 2305a(d) of Title 10, as amended by this section.

(B) The report required by subparagraph (A) shall be issued within 270 days of the date on which the final report required under paragraph (1) was to have been issued.

SECTION 4. PROHIBITION ON THE USE OF A REVERSE AUCTION FOR THE AWARD OF A CONTRACT FOR DESIGN AND CONSTRUCTION SERVICES.

(a) The Small Business Act (15 U.S.C. 631 et seq.) is amended –

(1) by redesignating section 47 as section 48; and

(2) by inserting after section 46 the following:

“Sec. 47. REVERSE AUCTIONS PROHIBITED FOR CONTRACTS FOR DESIGN AND CONSTRUCTION.

“(a) In General – In the case of any contract for design and construction services, reverse auction methods may not be used if the contract—

“(1) is suitable for award to a small business concern; or

“(2) if the award is made under—

“(A) section 8(a);

“(B) section 8(m);

“(C) section 15(a);

“(D) section 15(j);

“(E) section 31; or

“(F) section 36.

“(b) Definitions- For purposes of this section--

(1) The term “reverse auction” means, with respect to procurement by an agency, a real-time auction on the Internet between a group of offerors who compete against each other by submitting bids for a contract or task order with the ability to submit revised bids throughout the course of the auction, and the award being made to the offeror who submits the lowest bid.

(2) The term “design and construction services” means--

(A) site planning and landscape design;

(B) architectural and engineering services (including surveying and mapping services), as defined in 40 U.S.C. 1101;

(C) interior design;

(D) performance of construction work for facility, infrastructure, and environmental restoration projects;

(E) delivery and supply of construction materials to construction sites; and

(F) construction, alteration, or repair, including painting and decorating, of public buildings and public works.

SECTION 5. PAYMENT PROTECTIONS FOR CONSTRUCTION WORK PERFORMED.

(a) Payment Protections for Construction Subcontractors and Suppliers performing on Public-Private Partnerships.

Any construction performed under a public-private partnership agreement being built upon real property owned by the Federal Government shall be deemed to be construction of a public building or a public work of the Federal Government for purposes of subchapter III of chapter 31 of title 40 (commonly referred to as the Miller Act).

(b) **Miller Act Threshold.** – Section 1908 of Title 41, United States Code, is amended by striking the period at the end of Section 1908(b)(2)(C) and inserting a semicolon and adding the following new paragraph, as follows:

“(D) in Subchapter III of chapter 31 of title 41 (commonly referred to as the Miller Act).”.

(c) Assuring Payment Protections for Construction Subcontractors and Suppliers under an Alternative to a Miller Act Payment Bond.

Chapter 93 of subtitle VI of title 31, United States Code, is amended--

(1) by adding at the end the following new section:

“Sec. 9310. Individual sureties.

“If another applicable law or regulation permits the acceptance of a bond from a surety that is not subject to sections 9305 and 9306 and is based on a pledge of assets by the surety, the assets pledged by such surety shall—

“(1) consist of eligible obligations described under section 9303(a); and

“(2) be submitted to the official of the Government required to approve or accept the bond, who shall deposit the assets with a depository described under section 9303(b).”; and

(2) in the table of contents for such chapter, by adding at the end the following:

“9310. Individual sureties.”.

SECTION 6. SBA SURETY BOND GUARANTEE.

Section 411(c)(1) of the Small Business Investment Act of 1958 (15 U.S.C. 694b(c)(1)) is amended by striking “70” and inserting “90”.