

AMENDMENT NO. _____ Calendar No. _____

Purpose: In the nature of a substitute.

IN THE SENATE OF THE UNITED STATES—114th Cong., 1st Sess.

S. 1526

To amend title 41, United States Code, to improve the manner in which Federal contracts for construction and design services are awarded, and to prohibit the use of reverse auctions for design and construction services procurements.

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended
to be proposed by Mr. PORTMAN

Viz:

1 Strike all after the enacting clause and insert the fol-
2 lowing:

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

4 (a) **SHORT TITLE.**—This Act may be cited as the
5 “Construction Consensus Procurement Improvement Act
6 of 2015”.

7 (b) **TABLE OF CONTENTS.**—The table of contents for
8 this Act is as follows:

Sec. 1. Short title; table of contents.

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.

1 **SEC. 2. CONGRESSIONAL FINDINGS.**

2 Congress makes the following findings:

3 (1) The acquisition procedures that are often
4 used effectively to procure products and other forms
5 of services are not always appropriate for procure-
6 ment of design and construction services.

7 (2) Federal procurement officials often adopt
8 contracting techniques from the private sector and
9 have used those techniques effectively to procure
10 products and services.

11 (3) Design-build is a procurement technique
12 Federal officials have adopted from the private sec-
13 tor that has worked well for procurement of design
14 and construction services.

15 (4) The current statutory framework for de-
16 sign-build could benefit from legislative refinement.

17 (5) Reverse auctions are another procurement
18 technique Federal officials have adopted from the
19 private sector and used successfully to award con-
20 tracts for the purchase of products that are commer-
21 cially equivalent to commodities.

22 (6) Despite their success in other contexts, re-
23 verse auctions are generally inappropriate for pro-
24 curement of design and construction services, given
25 the unique nature of each such project.

1 **SEC. 3. DESIGN-BUILD CONSTRUCTION PROCESS IMPROVE-**
2 **MENT.**

3 (a) CIVILIAN CONTRACTS.—

4 (1) IN GENERAL.—Section 3309(b) of title 41,
5 United States Code, is amended to read as follows:

6 “(b) CRITERIA FOR USE.—

7 “(1) CONTRACTS WITH A VALUE OF AT LEAST
8 \$750,000.—Two-phase selection procedures shall be
9 used for entering into a contract for the design and
10 construction of a public building, facility, or work
11 when a contracting officer determines that the
12 project has a value of \$750,000 or greater, as ad-
13 justed for inflation in accordance with section 1908
14 of this title.

15 “(2) CONTRACTS WITH A VALUE LESS THAN
16 \$750,000.—For projects that a contracting officer de-
17 termines have a value of less than \$750,000, the
18 contracting officer shall make a determination
19 whether two-phase selection procedures are appro-
20 priate for use for entering into a contract for the de-
21 sign and construction of a public building, facility,
22 or work when—

23 “(A) the contracting officer anticipates
24 that 3 or more offers will be received for the
25 contract;

1 “(B) design work must be performed be-
2 fore an offeror can develop a price or cost pro-
3 posal for the contract;

4 “(C) the offeror will incur a substantial
5 amount of expense in preparing the offer; and

6 “(D) the contracting officer has considered
7 information such as—

8 “(i) the extent to which the project re-
9 quirements have been adequately defined;

10 “(ii) the time constraints for delivery
11 of the project;

12 “(iii) the capability and experience of
13 potential contractors;

14 “(iv) the suitability of the project for
15 use of the two-phase selection procedures;

16 “(v) the capability of the agency to
17 manage the two-phase selection process;
18 and

19 “(vi) other criteria established by the
20 agency.”.

21 (2) ANNUAL REPORTS.—

22 (A) IN GENERAL.—Not later than Novem-
23 ber 30 of 2017, 2018, 2019, 2020, and 2021,
24 the head of each agency shall compile an annual
25 report of each instance in which the agency

1 awarded a design-build contract pursuant to
2 section 3309 of title 41, United States Code,
3 during the fiscal year ending in such calendar
4 year, in which—

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

7 (ii) the contract or order was awarded
8 without using two-phase selection proce-
9 dures.

10 (B) PUBLIC AVAILABILITY.—The Director
11 of the Office of Management and Budget shall
12 facilitate public access to the reports, including
13 by posting them on a publicly available Internet
14 website. A notice of the availability of each re-
15 port shall be published in the Federal Register.

16 (b) GAO REPORTS.—Not later than 270 days after
17 the deadline for the final reports required under sub-
18 section (f) of section 3309 of title 41, United States Code,
19 as added by subsection (a)(1), the Comptroller General of
20 the United States shall issue a report analyzing the com-
21 pliance of the various Federal agencies with the require-
22 ments of such section.

1 **SEC. 4. PROHIBITION ON THE USE OF A REVERSE AUCTION**
2 **FOR THE AWARD OF A CONTRACT FOR DE-**
3 **SIGN AND CONSTRUCTION SERVICES.**

4 (a) FINDING.—Congress finds that, in contrast to a
5 traditional auction in which the buyers bid up the price,
6 sellers bid down the price in a reverse auction.

7 (b) PROHIBITION.—Not later than 180 days after the
8 date of the enactment of this Act, the Federal Acquisition
9 Regulatory Council, in consultation with the Adminis-
10 trator for Federal Procurement Policy, shall amend the
11 Federal Acquisition Regulation to prohibit the use of re-
12 verse auctions as part of the two-phase selection procedure
13 for awarding contracts for construction and design serv-
14 ices.

15 (c) DEFINITIONS.—For purposes of this section—

16 (1) the term “design and construction services”
17 means—

18 (A) site planning and landscape design;

19 (B) architectural and engineering services
20 (including surveying and mapping defined in
21 section 1101 of title 40, United States Code);

22 (C) interior design;

23 (D) performance of substantial construc-
24 tion work for facility, infrastructure, and envi-
25 ronmental restoration projects;

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

3 (F) construction or substantial alteration
4 of public buildings or public works; and

5 (2) the term “reverse auction” means, with re-
6 spect to procurement by an agency—

7 (A) a real-time auction conducted through
8 an electronic medium among 2 or more offerors
9 who compete by submitting bids for a supply or
10 service contract with the ability to submit re-
11 vised lower bids at any time before the closing
12 of the auction; and

13 (B) the award of the contract, delivery
14 order, task order, or purchase order to the of-
15 feror, in whole or in part, based on the price
16 obtained through the auction process.