

February 5, 2021

General Services Administration
Regulatory Secretariat Division
1800 F Street NW, 2nd Floor
Washington, DC 20405

RE: FAR case 2015-038

On behalf of the undersigned 13 construction industry trade and professional organizations, I would like to thank the Federal Acquisition Regulation (FAR) Council for the opportunity to comment on this proposed rule to amend the FAR to provide guidance on the use of reverse auctions. For background, the undersigned 13 construction industry trade and professional organizations represent tens of thousands of firms and individuals engaged in architecture, engineering, construction program and project management, surveying and mapping, prime contracting, subcontracting, specialty trade contracting, supplying, and surety bond producing. As such, these organizations have a unique knowledge concerning reverse auctions and federal procurement. As discussed below in greater detail, it is our recommendation that FAR Subpart 17.803 be amended to comply with the recently enacted law (Public Law No: 116-260) directing the FAR Council prohibit the use of reverse auctions in the procurement of construction services.

**Reverse Auctions are an Inappropriate Method of Procurement for
Design and Construction Services**

Reverse auctions are inappropriate platforms for procurement of construction services. Due to the complexities of design and construction projects, the procurement of these services using the reverse auction method fails to take into account the unique mix of services and systems tailored to individual owner needs and budgets, site conditions and requirements, and the changing composition of the project team, unlike products and commodities which are manufactured with little or no variability. The reverse auction procurement method often favors businesses offering the lowest price, rather than those that are most qualified, which will compromise quality, overlook small businesses, or even require a new bidding process down the road, eliminating any perceived initial savings.

Reverse auctions do not offer federal owners a good way to evaluate non-price factors nor do they guarantee any proven savings over competitive bidding. When price is not the sole determinant, owners increasingly rely on selection criteria such as past performance, qualifications and the capacity to meet the project's unique needs. Reverse auctions do not promote this dynamic. Instead reverse auctions promote an approach in which parties focus only on price. Software vendors and other similar industries promoting reverse auctions have not proven that reverse auctions generate savings in the procurement of construction or provide benefits of "best value" comparable to currently recognized selection procedures. Unlike many products, for which the government awards contracts to the lowest bidder, or other services, which are awarded based on the "best value", construction services have long been recognized as having a significant impact on public health, welfare and safety. Moreover, reverse auctions can put small businesses at a competitive disadvantage.

Reverse auctions ignore the protections of sealed bid procurement laws and regulations, and years of precedent that address critical factors and ensure the integrity of the process. Where price is the sole determinant, the sealed bid procurement process ensures integrity by assuring that the successful bidder is the most responsive and responsible competitor with the best price. The pressure and pace of the auction environment removes any assurance bids will be responsive and material to the owner's needs. This encourages significant risk taking, which is not appropriate for construction services that potentially impacts life and property safety.

Proponents in support of utilizing reverse auctions might view this procurement method as practicable and economically advantageous for procuring simple off-the-shelf commodities; however, design and construction services are vastly different, far too complicated, and present a high risk of failure when procuring construction contracts using this procurement method. It is for this reason that qualified and sophisticated construction firms do not participate in federal reverse auctions as the process moves too rapidly in order for bidders to accurately assess their costs, which in turn has the potential to jeopardize their construction firm, as well as downstream parties, i.e., subcontractors, and suppliers. Furthermore, the surety industry responsible for furnishing surety bonds, which are mandated on federal construction contracts above \$150,000 by the Miller Act (40 USC 3131, et, seq.) is opposed to reverse auctions for design and construction services due to high-risk and the potential for contract default.

These are just some of the many reasons reverse auctions are an inappropriate method of procurement for design and construction services.

Align Reverse Auction Prohibitions with Statutory Language

Congress has recognized the significant draw backs of procurement by reverse auctions and has recently enacted further restrictions on its use. On December 27, 2020, President Trump signed into law the *Consolidated Appropriations Act of 2021* (Public Law No: 116-260) which included further prohibition of reverse auctions in federal construction services and directs the FAR be amended within 180 days. The relevant text of law is in Title IV, Sections 401-402, and reads as follows:

TITLE IV—CONSTRUCTION CONSENSUS PROCUREMENT IMPROVEMENT ACT OF 2020

SEC. 401. SHORT TITLE.

This title may be cited as the “Construction Consensus Procurement Improvement Act of 2020”.

SEC. 402. PROHIBITION ON USE OF A REVERSE AUCTION FOR THE AWARD OF A CONTRACT FOR DESIGN AND CONSTRUCTION SERVICES.

- (a) FINDING.—Congress finds that, in contrast to a traditional auction in which the buyers bid up the price, sellers bid down the price in a reverse auction.
- (b) PROHIBITION.—Not later than 180 days after the date of the enactment of this Act, the Federal Acquisition Regulation shall be amended to prohibit the use of reverse auctions for awarding contracts for design and construction services.
- (c) DEFINITIONS.—In this section:

(1) The term “design and construction services” means—

(A) site planning and landscape design;

(B) architectural and engineering services (as defined in section 1102 of title 40, United 24 States Code);

(C) interior design;

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

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

(F) construction or substantial alteration of public buildings or public works.

(2) The term “reverse auction” means, with respect to any procurement by an executive agency—

(A) a real-time auction conducted through an electronic medium among or more offerors who compete by submitting bids for a supply or service contract, or a delivery order, task order, or purchase order under the contract, with the ability to submit revised lower bids at any time before the closing of the auction; and

(B) the award of the contract, delivery order, task order, or purchase order to the offeror is solely based on the price obtained through the auction process.

Therefore, it is our recommendation that the FAR Subpart 17.803 be amended to include (d)-(i) below, so that the addition reads as follows:

17.803

Applicability.

Reverse auction processes shall not be used for—

(a) Design-build construction contracts (see part 36);

(b) Sealed bids (see part 14);

(c) Acquisition of personal protective equipment.

(d) Site planning and landscape design;

(e) Architectural and engineering services (as defined in section 1102 of title 40, United 24 States Code);

(f) Interior design;

(g) Performance of substantial construction work for facility, infrastructure, and environmental restoration projects; or

- (h) Delivery and supply of construction materials to construction sites; or
- (i) Construction or substantial alteration of public buildings or public works.

In conclusion, we appreciate the opportunity to share our insights with you and to help advance our common goals of fair competition and of economic and efficient performance of federal procurement. If you would like to discuss this matter with us further, please do not hesitate to contact me.

Sincerely,
The Below Signed Associations:

American Council of Engineering Companies
American Society of Civil Engineers
American Subcontractors Association
Associated General Contractors of America
Construction Management Association of America
Design-Build Institute of America
Independent Electrical Contractors
National Association of Surety Bond Producers
National Electrical Contractors Association
International Institute of Building Enclosure Consultants
National Society of Professional Surveyors
Sheet Metal & Air Conditioning Contractors National Association
Surety & Fidelity Association of America
Women Construction Owners & Executives

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