ASSESSING GOVERNMENT USE OF DESIGN–BUILD CONTRACTS

HEARING

BEFORE THE

SUBCOMMITTEE ON FEDERAL WORKFORCE, US POSTAL SERVICE AND THE CENSUS

OF THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

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CONTENTS

ASSESSING GOVERNMENT USE OF DESIGN–BUILD CONTRACTS

Tuesday, December 3, 2013,

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON FEDERAL WORKFORCE, U.S. POSTAL SERVICE AND THE CENSUS,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:00 a.m. in room 2154, Rayburn House Office Building, the Honorable Blake Farenthold [chairman of the subcommittee], presiding.

Present: Representatives Farenthold, Walberg, Collins and Lynch.

Staff Present: Molly Boyl, Majority Deputy General Counsel and Parliamentarian; Daniel Bucheli, Majority Assistant Clerk; John Cuaderes, Majority Deputy Staff Director; Adam P. Fromm, Majority Director of Member Services and Committee Operations; Jennifer Hemingway, Majority Deputy Policy Director; Laura L. Rush, Majority Deputy Chief Clerk; Eric Cho, Majority Detailee; Jaron Bourke, Minority Director of Administration; Devon Hill, Minority Research Assistant; Juan McCullum, Minority Clerk; and Bruce Fernandez, Minority Staff Member.

Mr. FARENTHOLD. The committee will come to order.

I would like to begin this committee as we begin all Government Oversight Committee hearings with the committee mission statement.

We exist to secure two fundamental principles. First, Americans have the right to know that the money Washington takes from them is well spent. Second, Americans deserve an efficient and effective government that works for them.

Our duty on the Government Oversight and Reform Committee is to protect these rights. Our solemn responsibility is to hold the government accountable to taxpayers because taxpayers have a right to know what they get from their government. We will work tirelessly in partnership with citizen watchdogs to deliver the facts to the American people and bring genuine reform to the federal bureaucracy.

This is the mission of the Government Oversight and Reform Committee.

At this point, I will start with my opening statement. Then will give Mr. Lynch a chance to give his opening statement. We will move on then to our panel of witnesses.

In fiscal year 2012, the Federal Government spent over $41 billion on construction and engineering contracts. That is eight per-

cent of the roughly $500 billion the government spends annually on goods and services. Of the $41 billion spent each year on construction and A&E contracting, $17 billion goes to small business prime contractors.

As government watchdogs, it is our job to make sure these construction and A&E contracts are managed efficiently and effectively and the taxpayers' money is well spent. This hearing will focus on government award of contracts to those companies who do the best job and not the companies who are the best at competing for government contracts.

Right now when choosing, we use a two step process in most design-build contracts. In others, sometimes we will use a single step or turn key process which requires all construction and design teams to submit a full proposal up front. Sometimes these full proposals cost more than three percent of the entire project cost while the contractors have no idea how many competitors they are up against and what realistic chance they have of getting the job.

More commonly, there is a two phase process. Phase one requires companies to submit limited information, usually related to experience and past performance. Based on this information, a small number of the most qualified offers—usually three to five—are selected for phase two of the competition. Those selected then each submit a more detailed price proposal and technical specifications.

The problem is in many cases now we are getting above that three to five number and in some cases getting into the 10 to 15 numbers. All of a sudden when you are spending three percent of the cost just to prepare the proposal with a 1 in 10 or 1 in 15 chance, this is incredibly difficult for small businesses.

A quick analysis of economics would say how will we this money back? If there are ten people, are we seeing a 30 percent increase in the cost of jobs bid to the government to recover for those not gotten and those lost opportunities?

To help solve this problem, we have come up with a solution. Several members of this committee are co-sponsors of Mr. Graves' bill. Mr. Meadows, Mr. Connolly and I are all co-sponsors of H.R. 2750. H.R. 2750 mandates the use of the two-phase selection procedure for any design-build projects costing more than $750 million.

The bill also requires any contracting officer, who selects more than five finalists, needs to explain why that is being done and get a higher level approval.

I want to take a second to talk about why this is so important and why government contracting is so important. We sometimes lose sight in Washington that there are millions of Americans out there living and fighting to attain the American dream. You start off as a small contracting company and look for opportunities to move into government contracting.

We set the bar so high with potential hundreds of thousands of dollars in costs just to prepare a proposal for the government. It makes the American dream out of reach, drives up the cost for government and to me is a lose-lose situation.

There is a balancing act. We want to give everyone who wants to participate the opportunity to participate, but are we setting that bar so high with the costs to get involved? Is this another form of government regulation, bureaucracy and red tape that is making

the American dream harder to achieve for those in the architecture industry, the construction industry and for anyone interested in participating in the design-build program or, for that matter, in government contracting overall?

We are trying to make the American dream more achievable for everyone. One of the ways we can do that is how we choose to spend our federal dollars, how we choose to spend them wisely and who and how we set the bars to entry.

I look forward to receiving a lot of information from this hearing today. My best friend through high school was a general contractor. I have grown up around folks in the industry. When I had my computer company, I shared an office with architects. Believe me, my phone has been ringing about this hearing. My brother-in-law is a government contracting lawyer.

We look forward to your input. Whether this bill we have so many co-sponsors of or a version of the bill that is modified with amendments based on this testimony, we have a unique opportunity to make the American dream available to more people today. I look forward to the hearing.

Mr. FARENTHOLD. At this point, I will yield to Mr. Lynch for his opening statement.

Mr. LYNCH. Thank you very much, Mr. Chairman. Thanks for holding this hearing.

I want to thank the witnesses for their willingness to participate and help the committee with this work.

Just yesterday, the U.S. Census Bureau reported that total spending on public and private construction for October 2013 was on pace for an annual rate of $908.4 billion, an increase of about 5 percent over the estimate from the same reporting period last year. However, I would note the total annual construction spending is still approximately 25 percent less than it was in 2007 when the global financial crisis began.

These figures suggest that the construction and architectural services industries are still slowly recovering. In addition, the construction and design sectors are bracing for a planned second round of sequestration cuts in 2014 that will inevitably affect construction.

This hearing specifically seeks to address industry reports that agency implementation of design-build contracting is hindering competition and efficiency. As evidenced by today's witness testimony and the hearing held in the Small Business Committee back in May, design-build stakeholders have expressed concern that smaller firms are regularly faced with the dilemma of whether to spend significant time, effort and scarce resources to compete for projects they may have little chance of winning or alternatively, refrain from competitive bidding altogether.

This concern relates to the primary selection methods that are available for the design-build contracting process. Under the so-called on-step selection process which the Chairman described, an agency will require all bidders to submit extensive proposals up front. This includes site plans, design calculations, code analysis, basis of design narratives, renderings and detailed construction cost estimates.

The first one-step process favors large firms that have the ability to make those expenditures to support their one step bid. The alternative method, the two-step selection process includes a preliminary evaluation of team qualifications in order to narrow down a short list. That provides opportunities for smaller firms.

I agree with the Chairman that in many cases the awarding agency is allowing 8 to 10 bidders into that final round, the second round, which diminishes the opportunity of one of the finalist getting that final bid and also presents a cost factor for smaller firms that they simply cannot withstand. They are eventually forced out of the process.

That is what we are trying to get at. We certainly welcome your thoughts on the legislation the Chairman has put forward, the Design-Build Efficiency and Jobs Act of 2013.

I do want to note I think the Chairman misspoke. He said that the line would be $750 million. It is actually $750,000.

Mr. FARENTHOLD. The curse of Washington is the number of zeroes.

Mr. LYNCH. I could not let that one go. That is a whopper.

Mr. FARENTHOLD. Yes, it is.

Mr. LYNCH. So that is $750,000. I want to say at the outset I agree with the spirit of this bill. I know the Chairman and Mr. Graves put it forward. I think they are getting right at the problem.

My issue going forward will be where the line is drawn, the $750,000. In my district, we have small restaurants, 100 seats, that are $750,000. I have condos in my neighborhood, three deckers, where one floor will be $750,000. A $750,000 contract will be four guys and two pickup trucks. It is a very, very low bar. That will create a problem.

I am just wondering where that line should be drawn if not at $750,000. That is where I think I will spend the bulk of my time.

Also, on some of our larger projects, we have seen great success in my district, in my area, with the use of project labor agreements which has really forced contractors to use the benefit of smart design and design-build processes rather than trying to beat down the wages of workers on those medium and large sized projects. We see some success using the PLA model. I might ask some questions about that as well.

Mr. Chairman, I think your legislation is largely right on. I hope we can figure out where the good line is. I do not think it is $750,000 but we can talk about that. Obviously we will greatly benefit from the witnesses' testimony.

Thank you. I yield back.

Mr. FARENTHOLD. Thank you, Mr. Lynch. You are going to save some of my precious questioning time because that was one of the lines of questioning I had, whether that $750,000 number is the right number.

Pursuant to committee rules, all witnesses will be sworn before they testify. Please rise and raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

[Witnesses responded in the affirmative.]

Mr. FARENTHOLD. Thank you. You may be seated.

Let the record reflect that both witnesses answered in the affirmative.

We have your prepared testimony. Time is short always in life and even more so in Washington, D.C. as we have a very crowded agenda. We ask that you take the opportunity to summarize the key points. We will give each of you five minutes to summarize your testimony and the key points to allow time for those members of the subcommittee to ask questions.

Let me introduce the panel and then we will get going. Mr. James Dalton is the Chief of Engineering and Construction, U.S. Army Corps of Engineers. Mr. Charles Dalluge is Executive Vice President, Leo A. Daly, an architectural and engineering firm. He is testifying today on behalf of the American Institute of Architects. Mr. Randall Gibson is President of Whitesell-Green, Inc. He is testifying on behalf of the Associated General Contractors of America.

We will start today with Mr. Dalton. Mr. Dalton, you are recognized for about five minutes or until the red light in front of you comes on.

STATEMENT OF JAMES DALTON

Mr. DALTON. Thank you, Mr. Chairman.

Mr. Chairman and members of the subcommittee, my name again is James Dalton. I am the Chief of Engineering and Construction for the U.S. Army Corps of Engineers' Headquarters Office here in Washington.

I provide engineering and construction leadership to nine divisions, 45 districts and guide development of engineering and construction policy for our worldwide civil works and military program missions.

I thank you for the opportunity to testify today to discuss construction contracting. My testimony will address the Corps' policy regarding two step design-build contracts.

The Corps employs various acquisition strategies and contract types to perform its mission whether the effort is for construction, engineering, environmental services or operation and maintenance of facilities.

During the last ten years, the design-build delivery system has been used for many of the Corps' construction requirements. The FAR Part 36.102 definition of design-build is "the combination of design and construction in a single contract with one contractor responsible for design and construction."

The FAR further defines two-phase design-build, also known as two-step design-build, as "a source selection procedure in which a limited number of offerors"—normally in the range of five or less—"are selected during Phase 1 to submit detailed proposals for Phase II."

The Corps utilizes the two-phase design-build process and has developed policy implementing the FAR. The Corps also uses a one-step design-build or turn key process as authorized by Statute 10 U.S. Code 2862. The Corps policy discourages the use of one-step design-build procedures for most construction requirements.

The two-phase selection procedure allows offerors to submit relatively inexpensively information related to experience and past

performance in step one. Based on this information, the source selection authority selects a limited number of the most qualified offerors to advance to phase two of the competition where the down-selected offerors—again in the range of between three and five generally is what we look for—submit much resource intensive price and technical proposals for evaluation.

The offerors advancing to phase two have a much more favorable chance of winning the competition and are therefore incentivized to submit superior technical and price proposals which reduces overall costs to the government and to the industry.

Mr. Chairman, this concludes my statement. Once again, thank you for allowing me to be here today to discuss the Corps' construction contracting. I would be happy to answer any questions you or other members may have.

[Prepared statement of Mr. Dalton follows:]

RECORD VERSION

STATEMENT BY
JAMES C. DALTON, P.E.
CHIEF, ENGINEERING AND CONSTRUCTION
U.S. ARMY CORPS OF ENGINEERS

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
SUBCOMMITTEE ON FEDERAL WORKFORCE, U.S. POSTAL SERVICE
AND THE CENSUS
UNITED STATES HOUSE OF REPRESENTATIVES

FIRST SESSION, 113TH CONGRESS

TWO-PHASE DESIGN BUILD CONTRACTS

DECEMBER 3, 2013

NOT FOR PUBLICATION UNTIL RELEASED BY THE
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

Mr. Chairman and Members of the Subcommittee, I am James Dalton, Chief of Engineering and Construction for the U.S. Army Corps of Engineers (Corps). I provide engineering and construction leadership to nine divisions, 45 districts, and guide the development of engineering and construction policy for our world-wide Civil Works and Military Programs missions. Thank you for the opportunity to testify today to discuss construction contracting. My testimony will address the Corps policies regarding two-step design build contracts.

The Corps employs various acquisition strategies and contract types to perform its mission whether the effort is for construction, engineering, environmental services, or operation and maintenance of facilities. During the last ten years, the Design-Build project delivery system has been used for many of the Corps' construction requirements. The Federal Acquisition Regulation (FAR) Part 36.102 definition of Design-Build is the combination of design and construction in a single contract with one contractor responsible for the design and construction. The FAR further defines Two-Phase Design-Build, also known as Two-Step Design Build, as a source selection procedure in which a limited number of offerors (normally five or fewer) are selected during Phase One to submit detailed proposals for Phase Two. The Corps utilizes the Two-Phase Design-Build process and has developed policy implementing the Federal Acquisition Regulation. The Corps also utilizes a One-Step Design-Build or Turn-Key process as authorized by Statute 10 USC 2862. The Corps policy discourages the use of One-Step Design Build procedures for most construction requirements.

The Two-Phase selection procedure allows offerors to submit (relatively inexpensively) information related to experience and past performance in step one. Based on this information, the source selection authority selects a limited number of the most qualified offerors to advance to Phase Two of the competition, where the down-selected offerors (generally three to five) submit much more resource intensive price and technical proposals for evaluation. The offerors advancing to Phase Two have a much more favorable chance of winning the competition and are therefore incentivized to submit superior technical and price proposals, which reduces overall costs to the government and industry.

Mr. Chairman, this concludes my statement. Thank you again for allowing me to be here today to discuss the Corps construction contracting. I would be happy to answer any questions you or other Members may have.

Mr. FARENTHOLD. Thank you very much, Mr. Dalton. He gave back 1 minute and 34 seconds.

Mr. Dalluge, you are up.

STATEMENT OF CHARLES DALLUGE

Mr. DALLUGE. Thank you.

Chairman Farenthold, Ranking Member Lynch and members of the subcommittee, I am Charles Dalluge, Associate AIA and Executive Vice President of Leo Daly, an architecture-engineering-interior design and planning firm ranked in the top ten of all firms in the United States and top 25 in the world. Thank you for allowing me to testify on behalf of the American Institute of Architects.

My written testimony covers a number of issues related to federal design-build, but I would like to spend my time now discussing an issue of major concern to architects, namely the impact on architects, engineers, contractors and taxpayers of having too many finalists in design-build competitions.

As you stated before, there are two different methods for the government to procure design-build teams, the one step and the two step, I would like to focus on the two step approach for a moment.

When agencies choose design-build, any interested teams may submit their qualifications to the pre-selection board which creates a short list. The short list of teams then develop a more in-depth proposal to derive a design and construction cost.

Teams must complete up to approximately 80 percent of the design work in advance. They must determine space needs, mechanical, electrical, structural, HVAC and other systems, building supplies and materials and, of course, the cost of construction. As federal buildings become more complex, this work requires a considerable investment of time from the professionals on each of the design-build teams.

A 2012 survey published by the AIA Large Firm Roundtable found that between 2007 and 2011 architecture firms spent a median of $260,000 per project when competing for both public and private sector design-build projects. If the team wins, they can hopefully make up the cost. If they lose, those competition costs are gone for good.

In the past, agencies would typically short list three to five design-build teams for a design-build project. Now, there are reports that some agencies are short listing as many as eight to ten teams for some projects. In these cases, the odds of being selected drop significantly, even as the cost to compete continues to rise.

Design firms face the dilemma of betting it all on a contract they may not get or self selecting out of the federal design-build market altogether. The government also loses out when contacting officers need to spend more and more of their time reviewing larger numbers of proposals which can include design drawings, specifications, complex construction documents and the construction guaranteed maximum price.

This is a serious challenge to the ability of federal agencies to deliver results for taxpayers. Fortunately, there is a way Congress can address the problem.

H.R. 2750, the Design-Build Efficiency and Jobs Act of 2013, requires contracting officers to provide a written justification to the

head of their agency for requiring more than five finalists in the second stage of a design-build solicitation. It requires agency approval of such an increase.

H.R. 2750 will provide more certainty and opportunities for design and construction firms of all sizes. It will help ensure that agencies select the most qualified design-build teams who will deliver the best buildings. It will also limit agencies' burdens in reviewing a large number of very complex proposals. In short, it is a win-win for everyone.

That is why the AIA and a large coalition of organizations have endorsed the bill. I am pleased to note that Chairman Farenthold is a co-sponsor of this bill along with members of Congress from both parties. The AIA commends him for his steadfast support.

In conclusion, I would like to thank the subcommittee for giving me the opportunity to testify today. The AIA looks forward to working with you to advance H.R. 2750.

Thank you.

[Prepared statement of Mr. Dalluge follows:]

AIA

THE AMERICAN INSTITUTE OF ARCHITECTS

STATEMENT OF
CHARLES D. DALLUGE, ASSOC. AIA
EXECUTIVE VICE PRESIDENT, LEO A DALY

"Assessing Government's Use of Design-Build Contracts"

United States House of Representatives
Committee on Oversight and Government Reform
Subcommittee on Federal Workforce, U.S. Postal Service and Census

-

December 3, 2013
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Introduction

Chairman Farenthold, Ranking Member Lynch, and members of the Subcommittee, I am Charles D. Dalluge, Assoc. AIA, Executive Vice President of Leo A Daly. I want to thank you for the opportunity to testify today on behalf of the American Institute of Architects (AIA) and its more than 82,000 members.

The AIA has served as the voice of America's architects and emerging professionals since 1857. With nearly 300 chapters across the country and around the world, AIA architects work to create more valuable, healthy, secure, and sustainable buildings and cityscapes. Members adhere to a code of ethics and professional conduct to ensure the highest standards in professional practice. Embracing their responsibility to serve society, AIA members engage civic and government leaders and the public in identifying solutions to pressing issues facing our communities, institutions, nation and world.

Established in 1915, Leo A Daly is an internationally renowned architecture, planning, engineering, interior design and program management firm headquartered in Omaha, NE. Our work includes award-winning projects in 87 countries, all 50 states, and the District of Columbia. Our firm currently employs approximately 900 architects, planners, engineers and interior designers in 31 offices worldwide. It consistently ranks as one of the top largest architecture/engineering and interior design firms in the United States.

Leo A Daly is pleased to work with several federal agencies on a wide range of design and construction contracts. Federal facilities are the front doors to the U.S. at home and abroad. Therefore, we recognize that these buildings must function well, be safe, flexible and, where appropriate, welcome visitors. More importantly, they must represent good value for taxpayers. Federal design and construction projects have unique standards, processes and contracting vehicles and must balance many competing goals and priorities, from security to design excellence to energy and resource conservation.

The Federal Marketplace

The health of the architectural profession matters greatly to the overall state of the economy. Architects are the leading edge of a design and construction industry that accounts for one in nine dollars of U.S. gross domestic product. Architects are job catalysts – they are the first workers to

be involved in the construction process when they develop designs for homes, offices, retail spaces, hospitals, educational institutions, government buildings, and more. Hiring an architect leads to employment in other construction-related fields, from engineers and manufacturers to steel and electrical contractors. In fact, there is one architectural service worker for every 34 construction industry workers in this country.[1] A study by the George Mason University Center for Regional Analysis found that every $1 million invested in design and construction creates 28.5 new full-time jobs.[2]

The recent economic crisis affected every American, but it hit the design and construction industry particularly hard. Between 2008 and 2012, U.S. architecture firms saw their revenue plummet by 40 percent, and were forced to cut employment by nearly a third.

Recently there has been better economic news for the design and construction industry, but the recovery is fragile at best. According to the Department of Labor, architectural services employment was essentially flat in September (the most recent data available), but continues a slow, but steady, rebound from the most recent low point in August 2011. The AIA Architecture Billings Index (ABI), a leading economic indicator that provides an approximately nine-to-12-month glimpse into the future of nonresidential construction spending activity, shows modest improvements in architecture billings over the last half year[3], suggesting slow but steady growth in construction employment into the middle of 2014. Despite the more positive outlook, however, many firms have simply not recovered from the worst economic crisis that many of us have seen in our lifetimes.

Because of a lack of financing in the private market since the start of the economic crisis in 2008, public sector work has literally been a lifeline for many design firms. Government procurement, including at the federal level, has helped to keep the doors open at numerous firms across the nation. However, budget cuts at all levels of government are reducing the number of projects on which architecture firms can compete.

This struggle has given the federal government additional leverage in negotiations and has enabled them to demand more from candidates. Although competition helps ensure that the

[1] U.S. Department of Labor
[2] www.naiop.org/foundation/contdev.pdf
[3] http://www.aia.org/practicing/AIAB100741

taxpayer receives good value, there is a difference between getting a fair deal for the government and a procurement process that forces architects, engineers, contractors, subcontractors and suppliers to spend more money for a smaller chance of getting the job. The taxpayer does not win when government contracting leaves businesses in difficult economic straits.

Design Build Construction

Federal agencies are able to use a number of different project delivery methods to design and construct buildings, including design-bid-build, design-build, and joint ventures, among others. These methodologies allow agencies the flexibility to choose the right method for a specific project. According to a survey by the AIA Large Firm Roundtable, of which Leo A Daly is a member, almost 66 percent of all domestic competitions from 2007 through 2011 were selected using the design-build method.[4]

On average, the fee design teams receive for a federal project is approximately $1.4 million. The rewards are high for firms that successfully compete for these projects, but the cost to enter the federal market is increasingly prohibitive for firms of all sizes.

When agencies choose design-build, they post a solicitation on FedBizOps. Interested teams, typically comprised of an architect, engineer, contractor and subcontractors, submit their qualifications to the pre-selection board. In this first step, the board will review the teams' qualifications, which include past performance, resumes of key personnel, and examples of relevant projects, to create a short list for the second step in the competition.

At this point, the short-listed teams develop a more in-depth proposal based on the programmatic requirements within the solicitation. In order to develop an accurate construction cost, teams must complete up to approximately 80 percent of the design work in advance. The design work is considerable, as each team must determine space needs; mechanical, electrical, HVAC and other systems; building supplies and materials; and the cost of construction. Without this information, there is simply no way to determine a final price. This design work takes a considerable amount of time from the large group of professionals on each team, which places enormous economic burdens on each design-build team on the short list.

[4] AIA Large Firm Roundtable, *Competition Survey Results,* May 31, 2012.

A 2012 survey published by the AIA Large Firm Roundtable found that 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 making detailed plans, models and other materials.[5] In almost 87 percent of federal design-build competitions, there are no stipends provided to the architectural firm.[6] The firm must hope that they win, with their team, to make up the costs they expend in competing for the job.

The costs of competing for these projects are sizable because of the large amount of effort that goes into preparing a bid. As stated above, up to approximately 80 percent of the design work must be completed in order to develop an accurate price. The amount of work required from an architect is large; but engineers, contractors and subcontractors also must put forth considerable effort to determine a price.

When teams decide whether to compete for a design-build project, they weigh the costs of competing with the odds of winning. Agencies have taken advantage of their purchasing power during the recession to expand the number of short- listed teams. In the past, agencies would typically short-list three teams for a design build project. Now, there are reports that some agencies are shortlisting as many as eight-to-10 teams. In these cases, the odds of being selected drop significantly, even as the cost to compete continues to rise. Due to the current economic climate, design firms face the dilemma of "betting it all" on a contract they may not get, or self-selecting out of the federal design-build market.

Unfortunately, federal law enables agencies to create ever-longer short lists. Under current law, agencies are required to short list between three and five teams. However, the law has an extremely broad exception, stating that contracting officers have the flexibility to increase the number of finalists if increasing the number is "in the Federal Government's interest and is consistent with the purposes and objectives of the two-phase selection process."[7] .

The consequences for design firms are obvious: higher costs to compete with lower chances of winning mean that many firms choose not to enter competitions, and in some cases simply cannot afford to compete in the federal marketplace. The government therefore is losing the ability to

[5] Ibid
[6] Ibid
[7] 11 USC §3309(d)

identify and cultivate talented firms that can provide excellent service to agencies if given the chance. The government also loses out when contracting officers spend increasing amounts of time reviewing larger number of proposals. Simply put, this is not a wise investment of limited budgetary resources.

Although many agencies employ the two-step design-build process outlined above, some agencies use a one-step design-build process. In a one-step process, agencies eliminate the pre-selection step and open the solicitation to all respondents. This allows for the government to review as many responses as they receive without reviewing the qualifications of the bidders prior to receiving a bid.

This concept sounds attractive, but when a contracting officer receives 30, 40, or 50 responses, this selection method becomes an inefficient use of limited federal government time and resources. Moreover, one-step selection allows for teams that do not have experience, effective past performance, or accurate bids to participate in the process. Contracting with teams that do not have the qualifications for the specialized work that is required on government projects frequently creates problems in the execution of the project. This leads to higher costs and longer delivery time which is not in the best interest of the government. In addition, inexperienced or under-qualified teams could become legally obligated to fulfill contractual promises they simply cannot meet—or a mistake in a bid will cause them devastating liability. For a firm that has invested money to develop the design for pricing by the contractor to be told after the fact that they are not qualified is not fair.

The Design-Build Efficiency and Jobs Act of 2013 (H.R. 2750)

The issues that architecture firms face in the federal design-build market are a serious challenge to the ability of federal agencies to deliver results for taxpayers, and they deserve Congress' attention. Fortunately, there is a way Congress can address the problem.

H.R. 2750, the Design-Build Efficiency and Jobs Act of 2013, was introduced by Rep. Sam Graves (R-MO) in July. H.R. 2750 requires contracting officers to provide a written justification to the head of an agency for requiring more than five finalists in the second stage of a design-build solicitation and agency approval of such justification. It also requires the use of two-stage selection process for contracts having a value of $750,000 or greater. This threshold, I will note, is based on U.S. Army Corps of Engineers guidance that was issued in August 2012. Lastly, H.R.

Mr. FARENTHOLD. Thank you very much.
We will now recognize Mr. Gibson.

STATEMENT OF RANDALL GIBSON

Mr. GIBSON. Good morning, Chairman Farenthold and Ranking Member Lynch.

Thank you for inviting the Associated General Contractors of America, of which I am a member, to testify before the subcommittee on this important topic.

My name is Randy Gibson. I am President of Whitesell-Green, Inc., a small business construction contracting firm founded in 1970 and based in Pensacola, Florida. My firm focuses on federal contracts in the eastern United States.

My company has participated in many federal design-build procurements and has successfully performed more than 50 of these projects after the good fortune of receiving an award. I hope to address today those design build-procurements that many AGC members like myself decide not to compete for, some of the reasons why and how H.R. 2750 can help overcome the impediments to full competition for the benefit of taxpayers as well as our industry.

During the first step of the two step design-build option, the federal agency generally limits the proposal requirements to the qualifications of the offering design-build teams. This information necessary to respond to these questions is generally kept on file by most contractors so gathering it for a response is relatively easy and inexpensive.

Any contractor with good qualifications should be inclined to offer a step one proposal. When this happens, the federal agency can also easily choose the best three or more candidates from a good quantity of offerors to move on to step two.

Step two generally requires submission of extensive and expensive technical and design information. The short-listed three or more design-build teams can generally justify this expense as an acceptable risk when compared to the reward of possibly winning the contract in competition with that reasonable number of similarly qualified design-build teams.

In contrast, in the single step design-build option there is no first round evaluation of qualifications. Instead, all teams must submit full proposals requiring the high cost described earlier. Design-build teams considering pursuit of single step proposals have no way to judge their prospects for success as no team can be sure how many other teams are pursuing the project.

Many qualified teams, especially small businesses like mine, cannot afford to chance these large costs when perhaps 20 or more teams might also be blindly competing thus limiting options for the government. In today's budget constraints, agencies must evaluate the one step proposals of all such offerors and are expending much effort and resources analyzing these technical proposals, an added expense they could avoid by using the two step option.

In AGC's written testimony we provide anecdotal examples of problems that my firm and other AGC members have experienced with federal agency single step design-build procurements. I would be happy to address those in questions if you like.

H.R. 2750 would address AGC's main concerns expressed today by reasonably limiting the single step design-build procurements and reasonably limiting the second step of the two step design-build process to three to five finalists.

First, the bill would prohibit one step procurements valued at or above $750,000 which AGC suggests may need to be adjusted to provide the contracting officer necessary flexibility for the demands of unusual or special projects.

Second, the bill effectively limits the federal two step design-build procurement to no more than five finalists while also allowing a reasonable degree of agency flexibility.

In conclusion, AGC supports federal agency use of the two step design-build procurement method and recommends that Congress reasonably limit one step design-build procurements. AGC has long held for and continues to support the reasonable limitation of the second step selection to three to five finalists design-build teams.

For these reasons, AGC is generally supportive of H.R. 2750 as a means to improve competition and eliminate waste in federal design construction procurements.

Again, thank you for this opportunity to provide the views of the construction industry in this important matter.

[Prepared statement of Mr. Gibson follows:]

Statement of

Randall D. Gibson of Whitesell-Green, Inc.

on behalf of

The Associated General Contractors of America

to the

Subcommittee on Federal Workforce, U.S. Postal Service and the Census

Committee on Oversight and Government Reform

U.S. House of Representatives

For a hearing on

"Assessing Government's Use of Design-Build Contracts"

December 3, 2013

AGC of America
THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
Quality People. Quality Projects.

The Associated General Contractors of America (AGC) is the largest and oldest national construction trade association in the United States. AGC represents more than 25,000 firms, including America's leading general contractors and specialty-contracting firms. Many of the nation's service providers and suppliers are associated with AGC through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more.

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Statement of Randall D. Gibson
Whitesell-Green, Inc.; Pensacola, Florida
Subcommittee on Federal Workforce, U.S. Postal Service and the Census
House Committee on Oversight and Government Reform
United States House of Representatives
December 3, 2013

Chairman Farenthold and Ranking Member Lynch, thank you for inviting the Associated General Contractors of America (AGC)—of which I am a member—to testify before the subcommittee on reforms to the federal government's procurement of construction services through design-build procurement. My name is Randy Gibson. I am president of Whitesell-Green, Inc. (WGI)—a federal, small business construction contracting firm based in Pensacola, Florida that services the Southeast region. Since WGI's founding in 1970, we have constructed over 400 heavy/commercial projects—public and private—resulting in nearly one billion dollars of completed contracts. On the federal government side, WGI has completed numerous projects for the U.S. Army Corps of Engineers, Naval Facilities Engineering Command, the Air Force Civil Engineer Center, and Department of Veterans Affairs.

My company has participated in many federal agency design-build procurements. We have won some (approximately 50), lost some and (in more than 150 instances) decided not to compete in others.

I am here today to address:

1. Those design-build procurements that my company, and many AGC members, often decide not to compete for;
2. How H.R. 2750, the Design-Build Efficiency and Jobs Act of 2013, could help overcome some reasons contractors like my firm decide not to compete; and
3. How such reform legislation can possibly increase future competition for the benefit of taxpayers.

I. General Overview: Design-Build Construction Procurement

Federal agencies have a number of different options in how they can procure design and construction services that will, in turn, affect who performs the different stages of a project.
One of those options is DESIGN-BUILD. Under design-build procurements, a single entity—the construction and design team—submits proposals for both the design and construction of the project.

Design-build is different from the traditional construction procurement method—DESIGN-BID-BUILD. Under design-bid-build, the design work, i.e., final construction drawings and specifications, is completed under a separate contract for design. These separate design contracts are most often competed for and awarded to architect-engineer (AE) firms. The federal agency will then ask contractors to compete for the construction contact, based on the design documents completed under the prior, separate design contract.

AGC recommends that owners—both public and private—select the project delivery systems that best fit their particular needs but with due regard for their independent interest in an open and competitive construction industry. As such, AGC is project delivery system "neutral" and merely recommends the project delivery system that fits the owner's and project's needs. That stated, many federal agencies have come to prefer design-build for a number of reasons, including the improvements in time of delivery and efficiency inherent in reducing the number of "steps" in the procurement process. Also, as design-build has become established in the federal contracting industry, agencies, designers and contractors have learned to use the close-working relationships inherent with this contracting method to better address the particular project needs of the federal end-user client.

A. One-Step versus Two-Step Design-Build Procurement:

i. Congress Should Reasonably Limit One-Step Design-Build Procurements to Ensure Robust Competition

In general, there are two major types of design-build procurement:

1. Two-step design-build; and
2. One-step design-build.

AGC supports federal agency use of the two-step design-build procurement method as the preferred method over single-step design-build procurement for construction projects.

Generally, during the first step of the two-step design-build option, the issuing federal agency limits the proposal requirements to the qualifications of the offering design-build "teams." These qualification criteria are most often evidence of past experience with the specific facility type; client performance evaluations for that past work; and sometimes other performance criteria such as safety ratings, bonding, etc. Design-build teams are inclined to submit proposals for these relatively simple first-step opportunities, because this information is readily available in their company records and inexpensive to gather and present. As a result, the federal agency obtains a good quantity of qualified proposals to choose from and can be confident that they can select the best qualifiers for "second-step." Furthermore, the first-step review effort by the federal agency is similarly inexpensive, as they can quickly and easily judge the submitted qualification information.

In the "second step" of the two-step procurement the federal agency generally selects three or more teams to submit much more detailed technical proposals, including extensive and expensive design information. When the competing design-build teams know that they will be competing against a limited number of other teams in step two, they can justify the significant technical proposal expense when weighed against the "acceptable risk" of competing against a reasonable competition technical offers, and similarly controls their "review" expense and quality by being able to focus judging only the small number of finalists.

In the single-step design-build option, in contrast, there is no qualification "first round." Instead, all interested design-build teams must submit full proposals, requiring extremely large costs necessary for each team to prepare the technical and design documents (described in step two of the two-step option above). Design-build teams considering pursuit of a "single-step" proposal have no way to judge their prospects for success, as no team can be sure how many teams are pursuing the project. As a result, competition suffers because many qualified teams, especially small businesses like mine, choose not to incur these large costs to participate where perhaps 20 teams or more can offer. Why spend those proposal dollars for a 1 in 20 chance, when you can enter a two-step procurement, reach the second round and have a 1 in 5 or better chance of winning the award? Also, how does the government benefit from spending significant time and resources thoroughly evaluating all 20 proposals, some of which may be from unqualified teams?

AGC holds that agencies should strive to reasonably limit single-step design-build procurement to less complicated and less expensive projects, where very little design work is required for submission with the proposal.

ii. Recent Contractor Examples of Inappropriate One-Step Design-Build Projects

As my own anecdotal example of this dilemma, my company teamed with a large business firm to pursue a one-step aircraft maintenance hangar proposal (approximately $40 million in size). The technical submission requirements emphasized energy efficient design as the main selection criteria. Our team made sense, because my firm has extensive hangar experience and our joint-venture partner had extensive experience in high-efficiency energy system design and construction. Our team expended in excess of $100,000 in design and proposal costs, but our offer was not selected based in part on the government rating our qualifications lower than our competition. We later learned that more than 20 firms offered, meaning that if our expense was "typical," this proposal generated at least $2M of industry expense, most of which went unrewarded. The agency could have dismissed my team, and perhaps many others, on this analysis of our qualifications by way of a two-step approach, saving all of us much expense and wasted time, and saving themselves a lot of source selection review effort. In my case, this unsuccessful expenditure limited my opportunity to pursue other projects, both while working on this offer and afterwards as a result of the impact on our company budget for proposal "pursuit."

In addition, AGC has received anecdotal complaints from members over the years on this issue. Most recently, AGC members where particularly concerned about two expensive and complex projects: one at the U.S. Military Academy at West Point, New York and another at Fort Carson, Colorado. At the West Point project, the U.S. Army Corps of Engineers (USACE) issued a request for proposal for a $170 million project under one-step design-build procurement. Similarly, at Fort Carson, USACE solicited a $100 million barracks project under the one-step process. In both cases, AGC alerted USACE that the prohibitive cost of entry into such high dollar, complex one-step design-build competitions in conjunction with low odds of winning awards can serve to decrease the number of qualified teams, often eliminating small business participation in total.

To the credit of the USACE Headquarters, in response to industry concerns at the Fort Carson project in particular, the agency issued an Engineering and Construction Bulletin[1] in August 2012 to serve as agency-wide guidance for when the one-step design-build process could be used. However, AGC recognizes and respects that USACE implementation of reasonable and consistent policies across an agency with such a wide scope is a challenge. USACE is tasked with ensuring the safe, secure and efficient construction of the nation's military and civil works infrastructure and facilities at home and abroad across 38 District offices within 8 Divisions. In the case of this particular guidance, AGC members have seen some inconsistency between the Districts in policy implementation.

B. Final Round of the Two-Step Design-Build Procurement:

i. Congress Should Reasonably Limit the Final Round to Three to Five Construction and Design Teams

As previously noted, during the two-step design-build procurement process, a federal agency selects a limited number of finalists to enter the second-step of the competition and to submit full proposals with more complete—and more expensive—design materials and cost estimates. AGC has long held and supported the reasonable limitation of the second-step selection to three to five finalist construction and design teams. Such a range of finalists still allows for a sufficient and reasonable competition, allowing federal agencies and taxpayers to realize the benefits of robust competition without driving away qualified competition. As with the example of 20 proposals in the one-step design-build process, the less predictable the competition and the odds of success, the more likely qualified teams do not compete.

Like AGC, I strongly support full and open competition for the many contracts necessary to construct improvements to real property. I recognize that the reviewer might ask how AGC and I can still support full and open competition while arguably advocating for limiting competition during this second-step of design-build procurement? I respectfully submit that by limiting the finalists in the final round of the two-step procurement, federal agencies will help ensure that they receive pre-proposal packages from any and all interested and qualified construction and design teams, including small businesses like mine. Such predictability allows businesses to consider the odds of participating in an expensive proposal process, as opposed to the one-step procurement process. As a result, this defined competition certainty with less risky odds for success encourages greater competition in the first-step of the two-step design-build process.

II. H.R. 2750, the Design-Build Efficiency and Jobs Act of 2013

AGC is generally supportive of H.R. 2750, the Design-Build Efficiency and Jobs Act of 2013. This bill would address AGC's two design-build procurement concerns:

1. Reasonably limiting single-step design build procurements; and
2. Reasonably limiting the second-step of the two-step design build process to three to five finalists.

[1] http://www.wbdg.org/ccb/ARMYCOE/COEECB/eeb_2012_23.pdf

First, the bill limits federal one-step design-build construction procurements. Specifically, the bill would prohibit one-step procurements valued at or above $750,000. This is the same dollar threshold USACE Headquarters denoted in its guidance on design-build procurement in August 2012. While AGC generally believes that one-step procurements should be limited for all the reasons previously discussed, the association generally holds that the $750,000 threshold may be too low in certain situations. A dollar amount is an easy to state and administer threshold, but the decision to use a one-step design-build procurement process must also consider the type of project, its design and construction requirements, its uniqueness, and its degree of complexity. The contracting officer may need a reasonable degree of flexibility—but not unfettered discretion—to adjust the limitation upward when this factor applies.

Second, the bill effectively limits federal two-step design-build construction procurements to no more than five finalists, while allowing for a reasonable degree of agency flexibility. The bill balances these points by enabling the agency head to approve a contracting officer's written justification for requiring more than five finalists in an individual, two-step design-build procurement. Consequently, contracting officers still have the flexibility to have more than five finalists. However, as opposed to the current law where a contracting officer needs no written justification for making such a decision, this bill would mandate such written justification. Thereby, the bar is slightly raised, but the contracting officer's flexibility to successfully undertake any design-build two-step procurement remains intact.

In conclusion, AGC is generally supportive of H.R. 2750 as a means to improve competition in federal design-build construction procurements.

Thank you for this opportunity to provide the views of the construction contractor industry in this important matter.

Mr. FARENTHOLD. Thank you very much, Mr. Gibson.

Let be say before we get started, if any member has an opening statement, we will give them five days to submit that for the record. Without objection, we will do that.

I will now recognize myself for five minutes for questioning.

Mr. Gibson, you said you got about 50 of your contracts in the two step process. How many did you not get? Without trying to be proprietary, give me a ballpark.

Mr. GIBSON. Probably 300 or more.

Mr. FARENTHOLD. You could spend as much as three percent of the cost in the design-build. Where do you make up that money?

Mr. GIBSON. You have to receive awards enough to have a profit margin that supports the general overhead of pursuing.

Mr. FARENTHOLD. Would it be a fair statement that if you were not competing against so many people you would have a higher chance of getting them? You would actually be able to offer these projects to the government at a lower cost?

Mr. GIBSON. That is true.

Mr. FARENTHOLD. Why does it cost so much to compete for these projects?

Mr. GIBSON. In the one step option, the technical submission requirements generally involve a percentage of design. My firm uses out-of-house designers. I have a lot of good design partners who are members of AIA. I get a lot of feedback from these partners. Their expenditures are significant, not only their firms' expenditures but the subconsultants they bring—mechanical designers, electrical designers. Everybody incurs costs answering the questions necessary to respond to the technical qualifications.

Mr. FARENTHOLD. Is there additional reform that could be had in how that is done that would save money in either the one or two step process?

Mr. GIBSON. I think the real savings would be in minimizing the one step. I do sympathize with the agencies. They have to get a feel for what the design-build team's proposal requires technically. We do see a lot of streamlining in the agencies in what they do require.

For example, when I first got into design-build competition, there were a lot of drawings required for submission. When most agencies can accept a narrative to explain design, they now are taking that option rather than requiring a lot of drawings. That always helps our design partners minimize their expense.

Mr. FARENTHOLD. Mr. Gibson touched on the expenses that go into that. Mr. Dalluge, one of the concerns I have is, are you able to do anything creative or innovative in any of this? Are we getting cookie cutter stuff that doesn't necessarily take advantage of the latest design technology? Are we sacrificing aesthetics? Are there any other losses in there?

Mr. DALLUGE. I think every procurement method has its pros and cons, but the limitation to design-build is typically there isn't as much engagement between the architect and engineer with the ultimate client. There is the builder partner and it is a subprime relationship. I believe there is some stifling in that process.

Also if you look at the economics of a design-build project, referring back to the AIA Large Forum Roundtable survey of its mem-

bers, the average fee to the architect for a federal design-build opportunity was $1.4 million.

Mr. FARENTHOLD. What percentage of overall construction costs is that? How does that compare to private sector jobs?

Mr. DALLUGE. Mr. Dalton may know better, but there are stipulations for the fee range which I believe is up to six percent for federal work for basic services.

Mr. FARENTHOLD. So we got you guys down?

Mr. DALLUGE. I think rightfully so but if you look at the cost to compete, anywhere on average or median of $260,000, your expected fee to be $1.4 million, you can see that with more competition, you win fewer projects, and it becomes very difficult.

Mr. FARENTHOLD. I am limited on time. We may have a second round of questions. I do want to address new entrants, small businesses, new contracting firms, and new architecture firms. Does the proposed legislation address that or how can we improve it where we lower the bar for new entrants while still getting quality work for the taxpayers' dollars?

Mr. DALLUGE. In my opinion, this bill goes a long way to providing more clarity and transparency about the system which will invite more people and allow small firms to compete better.

The only next step that could be looked at would be quality based selection in both the first and second steps of the selection process.

Mr. FARENTHOLD. I see my time has expired. I will now recognize Mr. Lynch for his questions.

Mr. LYNCH. Thank you, Mr. Chairman.

In our offline discussion this morning, I mentioned I spent about 20 years in the construction industry as an iron worker. I have run work as a foreman and general foreman. My Bachelor's Degree is in Construction Management and is an engineering degree, so I know just about enough to make myself dangerous in this hearing.

I recently had feedback from some of my local folks. One gentleman, Ray Porfillio from West Roxbury, is an architect with a small architectural and planning firm, has spent over 15 years of his 30 year career working on design for federal contracts. His experience is design-build teams have often had to make the difficult choice of withdrawing from consideration when an agency using two step selection has short-listed more than three to five finalists, the very situation you described.

He has been forced to make that choice because the significant time, effort and cost that is involved in preparing a detailed proposal could not be justified with the decreased likelihood of winning the contract that results from a large number of finalists.

Mr. Dalluge and Mr. Gibson, is it true, do small business design-build teams often feel pressure to withdraw from competition when an agency selects eight or ten finalists?

Mr. DALLUGE. I would certainly agree. The risk versus rewards just is not there.

Mr. LYNCH. Mr. Gibson?

Mr. GIBSON. Yes, I agree. I think that the agencies have a responsibility when they put their solicitations out to identify how many finalists they expect, the maximum number. Also, it is very important they identify what the step two technical qualification requirement will be. We sometimes see solicitations where they

only tell you what you have to submit for step one and we are always sending RFIs. If they tell us what is going to be in step two, we can decide whether to go forward.

Mr. LYNCH. Let me also say on behalf of the agency, they are trying to get competition. They are not selecting just three bidders because if three bidders know pretty much know the other firms, you can pump up the price of a contract if there is only two or three. You can have collusion—not explicit, not illegal but a general sense of what the operating overhead is for these other firms so you know a neighborhood of prices.

If you can get some outliers in there—I am sure that is what they are trying to do—where someone comes in at a rock bottom price, that helps the taxpayer. In the end, it may result in a poorer quality project, but I can see the interest of the agency to try to get that bid down. You want more competition.

I want to ask, if am a small contractor in round one and I am selected to go to round two and I decide this is not for me, say I am in Mr. Porfillio's situation where he is backing out, is there any backlash or any negative consequences from the awarding agency? They are lining up people for bid and all of a sudden you back out. It is round two and they only have a certain number of people eligible to bid on round two or phase two. Is there any backlash or any negative consequences when you decide not to go forward in round two? Mr. Dalton, you might have some observations on this as well.

Mr. DALLUGE. From our perspective, there are no repercussions but I think that would only happen, somebody withdrawing, when the number of competitors exceeds five.

Mr. DALTON. From the agency point of view, I am unaware of any backlash from firms withdrawing once they have been down selected.

If you would allow me the opportunity to talk about the three to five, the experience we have in the Corps of Engineers is that we try to limit that down selected number of firms to between three and five. As part of the part one requirements, it is expected and actually required of us to identify how many of those firms would be identified to down select. We want to make sure that companies are aware they are competing with five or less and not beyond.

Mr. LYNCH. Where are these examples where there are eight and ten finalists in the second round? Where is that coming from? Is that GSA or some other awarding agency?

Mr. DALTON. I do not know about other agencies. In one case where we may have more than five but it is not for a single design-build contract. It is actually for a multiple award contract. In a case like that, we may have up to ten firms going into the second round.

Mr. LYNCH. That is a special case though.

Mr. DALTON. Absolutely. We are going to award five contracts and not one.

Mr. LYNCH. I have exhausted my time and I yield back.

Mr. FARENTHOLD. Thank you very much.

I will now recognize the gentleman from Georgia, Mr. Collins, for five minutes.

Mr. COLLINS. Thank you, Mr. Chairman.

I actually went through design-build from a private standpoint and saw benefits both ways. Mr. Dalton, you said there was a special circumstance as far as the multiple awards. How special is that? Does that mean one out of every ten bids, five out of every ten bids? What is special?

Mr. DALTON. For a multiple award task order contract, we will likely award up to five firms. We are trying to have a pool of contractors from which we can select. Special means there is more than one design-build contract.

Mr. COLLINS. I apologize. That was a bad question.

How many of these types of awards do you make where you have multiple projects lumped together? I can see a problem here. If you take on multiple contracts, even though they are for multiple projects and you lump them together, you are sort of skirting a little bit even though you are going to award multiple contracts, you are still grouping a lot more people together to provide those. I am just asking how many of those multiple kind of proposals do you have?

Mr. DALTON. I do not have a number or even a percentage. I would have to get back to you. We actually award more single award contracts than multiple award contracts. We use those types of contracts for various different services, a lot for ok services, for our standardized facilities such as barracks and those type things on military installations.

Mr. COLLINS. I am not saying they are bad. I am just asking how many do you have.

In both opening statements, $750,000 was the threshold number here. There was discussion of whether that was a good or bad number. I would open it to the panel. What is your belief?

Mr. GIBSON. I believe that number was generated from a Corps of Engineers action. We applaud someone drawing a line in the sand and saying let's have a number.

From a contractor's perspective, we do see a need to allow the contracting officer some flexibility in a case where you go above a limit like $750,000. As an example, we are seeing a lot of design-build jobs these days that are improvements of energy efficiency in an existing building.

Lots of times the government can save expense and time going with the one step because they can get the design information from the design-build team in the form of a narrative—things like upgrading an air conditioning system, giving narratives about capacities, scope of work and so forth.

I would hate to see them lose the opportunity to use a one step for something like that when the dollar expenditure was a little bit higher than $750,000. We do applaud the Corps' step forward and putting a line in the sand.

Mr. DALLUGE. In my opinion, it is purposely kept small so that you do not have businesses of any size having to risk doing a lot of design work, spending hundreds of thousands of dollars and not even being qualified in the one step and not to put a lot of firms at risk, to purposely keep that small.

When there is a lot of money at stake, go ahead and take the time to do it right. Do the two step and make sure that before a

firm has to invest a lot of money in doing design that the government knows they have the qualifications and experience to do it.

Mr. COLLINS. I was not questioning the ability of the line. There was just some question is that the right number; is $750,000 the right number? Should it be higher or lower and making sure it is right. I think the bill is a good bill. The question is whether that number is the right number. I know it may fit the Corps but is it something we can apply in other places?

Mr. DALTON. Let me try to clarify because I think this is a major point I need to try to make in this hearing. The Engineering Construction Bulletin we issued in August of 2012 that first identified the number of $750,000 was not intended to be a blanket $750,000 line in the sand for all types of contracts.

It actually referred to O&M Army funded construction work. The $750,000 is not our limit; that is a statute limit for ok funded construction work.

The other two categories in that same Engineering Construction Bulletin were MILCON which does not have a limit and unspecified minor MILCON construction Army, UMMCA funding. That has a limit of $2 million.

Mr. LYNCH. I want to back you up a bit. I know you love acronyms and I do too. So UMMCA is operations maintenance. The limit you implied in your bulletin was regarding operations and maintenance and not FAR construction?

Mr. DALTON. It was for construction work funded using ok Army money. The dollar limit on that is $750,000.

Mr. FARENTHOLD. We are back to a second round of questions. I am going to recognize myself for five minutes and follow up on that a bit.

I want to get the scope of this because I understand where Mr. Lynch is coming from. If this is a contract to go out and build a new post office or a new federal courthouse, I cannot imagine a federal building coming in much under $750,000, anything of any size, as much as I would like it to.

Can you give me some examples of an O&M? Is that like replacing all the air conditioning in a barracks, putting Internet access in a facility? I want to get an idea of the scope of O&M is and the size of the other types of jobs. Are there different limits for different types of jobs we might want to look at? Mr. Dalton, we will start with you.

Mr. DALTON. There are different limits for different types of funding.

Mr. FARENTHOLD. Give me two or three examples.

Mr. DALTON. If you wanted to do a pavement widening project, that would be considered part of your O&M. That is new construction but you could spend up to $750,000 with that O&M Army funded fund.

Mr. FARENTHOLD. It could be dredging or something like that?

Mr. DALTON. No, that is totally different.

Mr. FARENTHOLD. Maybe will go to Mr. Dalluge or Mr. Gibson from the private sector who deal with this. I don't think there is as much design work for an architect, say I need a road to go from here to here. Obviously some engineering needs to be done, soil types and so forth. I want to get an idea of the size of projects that

typically fall under this. I am trying to get at where we need to draw that $750,000 line.

Mr. DALTON. I think it is a great question. The difference between the one step and two step procurement methods is the one step really does not lend itself to any project where the architects and engineers have to invest a lot in doing free design at risk. Maintenance, upgrades, paint up, fix up, those types of projects work very well for one step which is why the limit of $750,000 seemed appropriate.

For projects like a courthouse, a post office, a project that requires some sophisticated design, engineering and construction, that really lends itself to the two step process which can be any size.

Mr. FARENTHOLD. Everyone on this panel tends to agree on the number five. How do we avoid getting into a situation like Mr. Lynch alluded to? I could name the five general contractors in the district I represent who will probably get 80 percent of the jobs. How do we encourage new applicants and get in new people while still protecting the government—the wild card applicant, the new startup who just built a school for the school district and now wants to build something or who has done hundreds of miles of county roads and now wants to build a federal road?

Does anyone have any thoughts on that? Mr. Dalluge?

Mr. DALLUGE. Two points, sir. To begin, the federal agencies have very sophisticated and long experience levels of looking at projects. From the cost side, the competition know what is fair and appropriate based on project types and certain geographies, so I do not think there is the chance for unfair competition by limiting the number in the second step.

I think by more clarity and transparency in this bill, you will encourage more young startups and small businesses to get engaged with federal projects because of that clarity and transparency. You will actually encourage that through this bill.

Mr. FARENTHOLD. I am just about out of time but I would like to give Mr. Gibson and Mr. Dalton an opportunity to weigh in on that question. Mr. Gibson?

Mr. GIBSON. I think the agencies do a good job of trying to encourage new people getting involved. I build a lot for the military and I do recognize the challenges they have because if you step into the military construction arena, you step into a whole different regulation of building. A firm coming from outside the military arena has a learning curve, so they have to deal with that, too.

I do see a lot of the RFPs where if they are qualifying people for a hangar, they would say we will accept an example of past hangar experience in the private sector or we will accept a dormitory built for a college campus as an example of a relevant job for the dormitory we are building on the military reservation.

Mr. FARENTHOLD. Mr. Dalton, did you have anything to add?

Mr. DALTON. I would echo what Mr. Gibson said. We are trying to open up and consider similar type design and construction efforts for the federal rather than only look at federal construction work. We do still have a focus on bringing in more small businesses. We do that with our design-build contracts as well as our design-bid build contracts.

Mr. FARENTHOLD. Thank you very much.

Mr. Lynch, you are up for six and a half minutes. I want to be fair about the time.

Mr. LYNCH. Thank you.

The legislation the chairman and Mr. Graves have put forward has two operative sections. Let me take the one I agree with first. One would be that in phase two no more than five offerors would be in the mix, so you would have a cap of five. I have no problem with that. I think that is a fair number. It will induce competition without being overly burdensome and give each of those five contractors—presuming they all proceed—a fair chance at getting the contract. I have no question on that.

As Mr. Dalton has pointed out, the bulletin he issued was not necessarily one that said anything over $750,000 has to be two step. That is what I want to get away from, that assumption. Mr. Dalton, do you agree with what I just said?

Mr. DALTON. I absolutely agree with it. The intent was for us to describe that we want to encourage everyone to use a two step process. We were trying to tie the $750,000 to a specific type of funding. That is where the $750,000 came from. It was not intended to say that was the threshold everyone should use in order to use two step.

Mr. LYNCH. I agree with that. This is somewhat archaic language so I can see how someone might assume the intent was different.

I do want to point out that under the Engineering and Construction Bulletins that were used, 2012–23, a one selection procedure may only be used when all of the following conditions are met: the planned contract is for an authorized military construction project, typically a minor MILCON funded project or O&M Army minor new construction projects less than $750,000; in those cases where the offerors are not required to submit design products as part of their technical proposal; and also approval to use a one step selection process shall be obtained from the headquarters of the Army Corps of Engineers, Chief of Construction.

I want to avoid painting this with a broad brush that everything over $750,000—I think we are in trouble there. I think it is well intended.

I do have a comparable piece of legislation at the State level on bids and when to use design-build and when not to use it. Their number is $5 million, just to show you where the cutoff is. This is Massachusetts general laws, Chapter 149A in Massachusetts, which is one example out of 50. It shows the marked difference in where they draw the line.

Hopefully during the legislative process, we can find a better number than $750,000 which I think is much too low and maybe incorporate some of the complexity we are talking about here as well and use some other factors like previous experience on similar construction projects. That would make sense so you have good hard numbers and we are not out in space with a very, very low number or God forbid, a number that is off the charts we are forced to accept and someone taking advantage of the taxpayer. We do not want that to happen either.

I think that is pretty much it as far as I am concerned. I have seen project labor agreements work very, very well on the right

projects, mostly large projects where speed, quality of construction, getting firms in early on, making sure there are no interruptions, making sure we have plenty of qualified people on the job, and making sure we have apprenticeship programs that provide quality workers who are well trained to get out on those jobs.

Mr. Gibson, have you worked on any projects that have had project labor agreements?

Mr. GIBSON. No, sir, I have not. The region of the country where I work most often is open shop area. Most contractors there do not have labor agreements with the unions. The competition level would be impeded by that being forced into that particular market area.

Speaking as a member of AGC, we are always for maximizing competition. We feel that PLA is limited.

Mr. LYNCH. Mr. Dalluge?

Mr. DALLUGE. I am speaking more from the architecture point of view so from our point of view, we don't really get involved with that. I may be on the construction side but certainly not on the architecture side.

Mr. LYNCH. Thank you. I yield back.

Mr. FARENTHOLD. Following up on your line of questioning on whether the $750,000 is the magic number, I would like to invite Mr. Dalluge, Mr. Gibson and Mr. Dalton, if the Corps wants to be in there, if your organizations have some ideas either for another number or some more flexible language or refinements to this, we want to hear them. We would ask you submit them to this committee sooner not later and certainly not before we get to a potential mark up on this bill so we can look at amending the legislation with something we could all agree to.

I see the Vice Chair of the committee, the gentleman from Michigan, Mr. Walberg, has arrived and has some questions. I would recognize him for five minutes.

Mr. WALBERG. Mr. Chairman, thank you. I apologize for being late. I am going from Pell grants to design-build contracts. I am interested in both.

Mr. Dalluge, you testified, according to what I read, that having more finalists in competition increasing costs for agencies because contracting officers have to spend more time reviewing the proposals. Isn't competition beneficial to the taxpayer?

Mr. DALLUGE. Absolutely, sir. I think what is wonderful about the two step process is it does not stifle competition at all. The first step, anyone from anywhere, big or small, is able to compete for the work based on their qualifications and experience they have—the requirements set out by the agency. There could be thousands of people pursuing that.

The second step merely tries to select the best of the best of those many, many firms competing for the work. Whether you short list three firms, five firms or eight to ten, as we are seeing as the trend, you haven't stifled competition at all. In fact, I would argue you are encouraging more competition by limiting the number.

Mr. WALBERG. Mr. Gibson?

Mr. GIBSON. Speaking as a small business, I work with small business design firms as well. I have a default firm that I like to

go to most often and they tell me straight out they are judging whether to participate in a job by the prospects of how many they will have to compete with if they moved on to phase two.

They cannot afford to be spending the multiple tens of thousands, upwards of $100,000, to submit a proposal whereas maybe some of the larger design firms can have that in their budget.

I personally feel an excellent performing designer, such as my default partner, when he steps out of the arena, competition is stifled. He does like the fact if you want to pick me on my qualifications and I know I am going against five, I will take my chances and I will spend the money to turn in that phase two proposal.

He is stepping away at a percentage rate of perhaps half the time from opportunities to offer a proposal out of fear of having to spend that money and go unrewarded in step two.

Mr. WALBERG. Let me ask a question of each of you beginning with Mr. Dalton. Do contracting officers have a reasonable understanding of what goes into a design-build project and do they have proper expertise to undertake that?

Mr. DALTON. Our contracting officers work within a team so I have people on that team from the technical side of the house. The combined team of contracting officer plus the engineering and construction knowledge we have I think absolutely provides the right level of understanding of what it takes to go into a design-build project.

Mr. WALBERG. Mr. Dalluge?

Mr. DALLUGE. I believe in some agencies there is a lack of understanding as to the implication of short listing multiple firms. While many have the proper training, I think sometimes selection groups believe they are making the right decision, they believe they are doing the right thing; they just do not understand the ramifications.

Mr. WALBERG. What are those ramifications or implications you are referring to?

Mr. DALLUGE. By short listing more firms, thinking more competition rather than stifling it, the burden in the next phase of the review committee having to review more complex proposals which takes more of the agency's time as well.

Mr. WALBERG. Mr. Gibson?

Mr. GIBSON. I do think at some of the local levels there is a lack of understanding of the benefits of short listing a limited number of participants. I think the best example I could give you is the one I gave a while ago. We have a lot of designers who are stepping out of the arena out of fear of how many they will have to compete against. They are going to have to put their money up against a very low percentage of possible awards. That is the best example I can give as to why competition is limited.

Mr. WALBERG. Thank you, Mr. Chairman. I yield back.

Mr. FARENTHOLD. Thank you very much, Mr. Walberg.

I would like to thank the witnesses for their participation in our hearing. We look forward to moving ahead with this legislation.

Thanks as well to the committee members and staff for putting this together.

With that, we are adjourned.

[Whereupon, at 11:05 a.m., the subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

"Assessing Government's Use of Design-Build Contracts"

- In fiscal year 2012, the Federal Government spent **over $41 billion** on construction and architect and engineering (A&E) contracts. This represents approximately **eight percent** of the roughly $500 billion the federal government spends annually to procure goods and services.

- Of the $40 plus billion spent each year on construction and A&E contracting, approximately 41 percent -- or $17 billion -- goes to small business prime contractors. In other words, there is particularly strong participation by small businesses in this area of federal contracting.

- Congress needs to ensure that these construction and A&E contracts are managed by the government in the most efficient and effective manner.

- To procure this type of service, federal agencies often use what are known as "design-build" contracts. These contracts combine design and construction into a single requirement. The contract is awarded to one company -- often a team -- responsible for both the design and the construction. This approach holds substantial benefits for the government, since it provides clear accountability for performance and administrative convenience.

- Within design-build contracting, there are two source-selection techniques. Under a "single-step design-build" -- or "turn-key" process -- all construction and design teams must submit full proposals up front. The procuring agency then evaluates all proposals received, and selects a winner.

- A more frequently used technique is "two-phase design-build." Under this technique, step one requires companies to submit limited information related to experience and past performance. Based on this information, the procuring agency selects a small number of the most qualified offerors -- generally three to five -- to advance to phase two of the competition. The down-selected offerors then submit much more detailed price and technical proposals for evaluation.

- This two-phase design-build approach is meant to enhance the pool of bidders by reducing the cost burden associated with bids and proposals. Contractors are unlikely to invest significant resources preparing detailed bids unless they feel they have a reasonable chance of success.

- I have cosponsored H.R. 2750 -- along with fellow OGR committee members Mr. Meadows and Mr. Connolly -- to improve the use of the design-build contracting process.

- H.R. 2750 mandates the use of two-phase selection procedures for any design-build requirements with a value of $750,000 or greater. Further, the bill requires that any contracting officer that selects more than five offerors for step two of a design-build process provide written documentation as to why more offerors are necessary.

- We will hear from government and industry experts whether this change is necessary and appropriate, and whether any improvements may be made to the proposed legislation.

REP. STEPHEN F. LYNCH
Subcommittee on Federal Workforce, U.S. Postal Service and the Census
"Assessing Government's Use of Design-Build Contracts"
December 3, 2013
10:00 a.m., 2154 RHOB

THANK YOU, MR. CHAIRMAN. I'D LIKE TO THANK YOU FOR HOLDING THIS HEARING TO EXAMINE THE USE OF "DESIGN-BUILD" CONTRACTS BY THE FEDERAL GOVERNMENT. I'D ALSO LIKE TO THANK OUR WITNESSES FOR HELPING THIS SUBCOMMITTEE WITH ITS WORK.

JUST YESTERDAY, THE U.S. CENSUS BUREAU REPORTED THAT TOTAL SPENDING ON PUBLIC AND PRIVATE CONSTRUCTION FOR OCTOBER 2013 WAS ON PACE FOR AN ANNUAL RATE OF $908.4 BILLION - THAT'S AN INCREASE OF 5.3% OVER THE ESTIMATE FROM THE SAME REPORTING PERIOD LAST YEAR. HOWEVER, I WOULD NOTE THAT TOTAL ANNUAL CONSTRUCTION SPENDING IS STILL APPROXIMATELY 25% LESS THAN IN 2007, BEFORE THE GREAT RECESSION AND GLOBAL FINANCIAL CRISIS. THESE FIGURES SUGGEST THAT CONSTRUCTION AND ARCHITECTURAL

SERVICES INDUSTRIES ARE STILL SLOWLY RECOVERING. IN ADDITION, THE CONSTRUCTION AND DESIGN SECTORS ARE BRACING FOR A PLANNED SECOND ROUND OF SEQUESTRATION IN 2014 THAT WILL INEVITABLY AFFECT CONSTRUCTION SPENDING.

THIS HEARING SPECIFICALLY SEEKS TO ADDRESS INDUSTRY REPORTS THAT AGENCY IMPLEMENTATION OF DESIGN-BUILD CONTRACTING IS HINDERING COMPETITION AND EFFICIENCY. AS EVIDENCED BY TODAY'S WITNESS TESTIMONY AND THE HEARING HELD IN THE SMALL BUSINESS COMMITTEE BACK IN MAY, DESIGN-BUILD STAKEHOLDERS HAVE EXPRESSED CONCERN THAT SMALLER FIRMS ARE REGULARLY FACED WITH THE DILEMMA OF WHETHER TO SPEND SIGNIFICANT TIME, EFFORT, AND SCARCE RESOURCES TO COMPETE FOR A PROJECT THAT THEY MAY HAVE LITTLE CHANCE OF WINNING OR REFRAIN FROM COMPETING ALTOGETHER.

THIS CONCERN RELATES TO THE PRIMARY SELECTION METHODS THAT ARE AVAILABLE FOR DESIGN-BUILD CONTRACTING. UNDER THE SO-CALLED "ONE-STEP" SELECTION PROCESS, AN AGENCY WILL REQUIRE ALL BIDDERS TO SUBMIT EXTENSIVE PROPOSALS UP FRONT – THIS INCLUDES SITE PLANS, DESIGN CALCULATIONS, CODE ANALYSIS, BASIS-OF-DESIGN NARRATIVES, RENDERINGS, AND DETAILED CONSTRUCTION COST ESTIMATES. ALTERNATIVELY, AGENCIES MAY CONDUCT A "TWO-STEP" SELECTION PROCESS THAT INCLUDES A PRELIMINARY EVALUATION OF TEAM QUALIFICATIONS IN ORDER TO NARROW DOWN, OR SHORTLIST, THE FIELD OF THOSE WHO WILL PREPARE DETAILED PROPOSALS. WE ARE HEARING FROM SMALL DESIGN AND CONSTRUCTION FIRMS THAT AGENCIES ARE TOO OFTEN RELYING ON "ONE-STEP" SELECTION IN AWARDING DESIGN-BUILD CONTRACTS AND WHEN THEY DO USE THE "TWO-STEP" METHOD, THEY ARE TOO OFTEN SHORTLISTING MORE

FINALISTS THAN THE USUAL FIVE CONTEMPLATED UNDER CURRENT LAW.

IN RESPONSE TO THESE CONCERNS, CHAIRMAN GRAVES OF THE SMALL BUSINESS COMMITTEE HAS INTRODUCED LEGISLATION, H.R. 2750, THE *DESIGN-BUILD EFFICIENCY AND JOBS ACT OF 2013*, THAT SEEKS TO REVISE THE DESIGN-BUILD CONTRACTING PROCESS. I LOOK FORWARD TO DISCUSSING THIS PROPOSAL THIS MORNING.

LASTLY, I WOULD SUGGEST THAT WHILE WE ARE EXAMINING HOW TO REDUCE COSTS IN FEDERAL CONSTRUCTION CONTRACTING, WE COULD ALSO DISCUSS THE IMPORTANCE OF PROJECT LABOR AGREEMENTS IN DESIGN-BUILD PROJECTS. AS AN IRONWORKER FOR 18 YEARS AND A GENERAL FOREMAN ON SEVERAL LARGE-SCALE CONSTRUCTION PROJECTS, I CAN CERTAINLY ATTEST TO THE VALUE OF P.L.A.s IN ENSURING THAT A PROJECT EMPLOYS HIGHLY-SKILLED WORKERS, IMPROVES

WORKPLACE SAFETY, AND PROVIDES FAIR WAGES. THEY HELP TO MAKE CERTAIN THAT PROJECTS COME IN ON TIME, OFTEN AHEAD OF SCHEDULE, AND ON BUDGET. FOR THAT REASON, IN 2009, PRESIDENT OBAMA SIGNED EXECUTIVE ORDER 13502. THE ORDER ENCOURAGES AGENCIES TO CONSIDER REQUIRING THE USE OF PROJECT LABOR AGREEMENTS ON LARGE-SCALE CONSTRUCTION AND OTHER PROJECTS IN FURTHERANCE OF GOVERNMENT EFFICIENCY AND THE EXPEDITIOUS COMPLETION OF FEDERAL CONSTRUCTION CONTRACTS.

THANK YOU, MR. CHAIRMAN. I YIELD THE BALANCE OF MY TIME.

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