

Rhode Island for these revisions by a final action, which can be found in the “Rules and Regulations” section of this **Federal Register**. We have explained the reasons for this authorization in the preamble to the final action. The action also corrects errors made in the State authorization citations published in the March 12, 1990, March 5, 1992, October 2, 1992, and August 9, 2002 **Federal Register**. Unless EPA receives written comments that oppose this authorization during the comment period, the final action will become effective on the date it establishes and EPA will not take further action on this proposal.

DATES: Send your written comments by September 30, 2024.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R01–RCRA–2023–0612 by mail to Liz McCarthy or Joe Hayes, RCRA Waste Management and Lead Branch; Land, Chemicals, and Redevelopment Division; EPA Region 1, 5 Post Office Square, Suite 100 (Mailcode 07–1), Boston, MA 02109–3912. You may also submit comments electronically or through hand delivery/courier by following the detailed instructions in the **ADDRESSES** section of the final action located in the Rules section of this **Federal Register**.

FOR FURTHER INFORMATION CONTACT: Liz McCarthy or Joe Hayes at (617) 918–1447; (617) 918–1362, mccarthy.liz@epa.gov; Hayes.Joseph@epa.gov.

SUPPLEMENTARY INFORMATION: In the “Rules and Regulations” section of this **Federal Register**, EPA is authorizing the revisions by a final action. EPA did not make a proposal prior to the final action because we believe this action is not controversial and do not expect comments that oppose it. We have explained the reasons for this authorization in the preamble of the final action.

Unless EPA receives written comments that oppose this authorization during the comment period, the final action will become effective on the date it establishes, and EPA will not take further action on this proposal. If EPA receives comments that oppose the authorization, we will withdraw the final action and it will not take immediate effect. EPA will then respond to public comments in a later final action based on this proposal. You may not have another opportunity for

comment. If you want to comment on this action, you must do so at this time.

David W. Cash,

Regional Administrator, U.S. EPA Region 1.

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 17, 36, and 52

[**FAR Case 2023–003; Docket No. FAR–2023–0003; Sequence No. 1**]

RIN 9000–AO51

Federal Acquisition Regulation: Prohibition on the Use of Reverse Auctions for Complex, Specialized, or Substantial Design and Construction Services

AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement a section of the Construction Consensus Improvement Act of 2021 that prohibits the use of reverse auctions for certain construction services.

DATES: Interested parties should submit written comments to the Regulatory Secretariat Division at the address shown below on or before October 28, 2024, to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR Case 2023–003 to the Federal eRulemaking portal at <https://www.regulations.gov> by searching for “FAR Case 2023–003”. Select the link “Comment Now” that corresponds with “FAR Case 2023–003”. Follow the instructions provided on the “Comment Now” screen. Please include your name, company name (if any), and “FAR Case 2023–003” on your attached document. If your comment cannot be submitted using <https://www.regulations.gov>, call or email the points of contact in the **FOR FURTHER INFORMATION CONTACT** section of this document for alternate instructions.

Instructions: Please submit comments only and cite “FAR Case 2023–003” in all correspondence related to this case. Comments received generally will be posted without change to [https://](https://www.regulations.gov)

www.regulations.gov, including any personal and/or business confidential information provided. Public comments may be submitted as an individual, as an organization, or anonymously (see frequently asked questions at <https://www.regulations.gov/faq>). To confirm receipt of your comment(s), please check <https://www.regulations.gov>, approximately two to three days after submission to verify posting.

FOR FURTHER INFORMATION CONTACT: For clarification of content, contact Mr. Michael O. Jackson, Procurement Analyst, at 202–821–9776 or by email at michaelo.jackson@gsa.gov. For information pertaining to status, publication schedules, or alternate instructions for submitting comments if <https://www.regulations.gov> cannot be used, contact the Regulatory Secretariat Division at 202–501–4755 or GSARegSec@gsa.gov. Please cite FAR Case 2023–003.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA are proposing to revise the FAR to implement section 2 of the Construction Consensus Procurement Improvement Act of 2021 (Pub. L. 117–28). Section 2 of the Construction Consensus Procurement Improvement Act of 2021 amended section 402 of Title IV of Division U of the Consolidated Appropriations Act, 2021 (Pub. L. 116–260) entitled the Construction Consensus Procurement Improvement Act of 2020 to require rulemaking to promulgate a definition of “complex, specialized, or substantial design and construction services”, which includes site planning and design; architectural and engineering services (as defined in 40 U.S.C. 1102); interior design; performance of substantial construction work for facility, infrastructure, and environmental restoration projects; and construction or substantial alteration of public buildings or public works. The statute prohibits the use of reverse auctions for such services having a value that exceeds the simplified acquisition threshold (SAT).

II. Discussion and Analysis

The proposed rule establishes a new definition at FAR 2.101 for “complex, specialized, or substantial design and construction services” that reflects the statutory definition to support its use at FAR 17.803 and 36.103. In addition, the definition of “reverse auction” in FAR 2.101 is revised to better reflect the statutory definition provided in the Construction Consensus Procurement Improvement Act of 2021.

The proposed rule implements the prohibition against using reverse auctions for the procurement of complex, specialized, or substantial design and construction services exceeding the SAT at FAR 36.103, Methods of Contracting. This placement will reinforce to contracting officers the need to comply with the statutory prohibition. While the statute does not prohibit the use of reverse auctions for the subject services at or below the SAT, a reverse auction may only be used if market research indicates it is appropriate (see FAR 17.802(a)) and not prohibited by regulation or statute (see FAR 17.803, 36.104, and 36.601).

The FAR identifies two types of procurements for which reverse auctions may not be used, regardless of dollar value:

- Procurements for the design and construction of a public building, facility or work using the two-phase design-build selection procedures authorized by 10 U.S.C. 3241 and 41 U.S.C. 3309, as implemented at FAR 36.104, may not be conducted using a reverse auction.
- Procurements for architectural and engineering services subject to 40 U.S.C. chapter 11, commonly known as the Brooks Architect Engineer Act, may not be awarded using reverse auctions because reverse auctions do not comply with the qualifications-based selection processes required by statute and implemented at FAR subpart 36.6.

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Products (Including Commercially Available Off-the-Shelf (COTS) Items) or for Commercial Services

This proposed rule does not impose any new requirements on contracts at or below the simplified acquisition threshold, for commercial products including commercially available off-the-shelf items, or for commercial services.

IV. Expected Impact of the Proposed Rule

The proposed rule is not expected to have a significant impact on the public or the Government because the rulemaking does not supersede current statutory direction on the use of FAR part 36 procedures for construction. Contracting officers are still required to conduct market research to determine the most appropriate contracting method for the particular procurement. Requirements for sealed bidding, design-build construction, and

architect-engineering services remain unchanged.

Offerors participating in competitive procurements that are valued at or below the SAT will still be provided advance notices and solicitations in accordance with FAR 36.211 and for actions anticipated to be awarded to a small business, 15 U.S.C. 644(w). Use of a reverse auction as the method of obtaining pricing does not impact these requirements.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 (as amended by E.O. 14094) and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Regulatory Flexibility Act

DoD, GSA, and NASA do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601–612, because the rulemaking is not expected to change how construction services valued above the SAT are conducted while providing some flexibility for certain awards valued at or below the SAT. However, an Initial Regulatory Flexibility Analysis (IRFA) has been performed and is summarized as follows:

DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to implement section 2 of the Construction Consensus Procurement Improvement Act of 2021 (Pub. L. 117–28), which prohibits the use of reverse auctions for complex, specialized, or substantial design and construction services exceeding the simplified acquisition threshold (SAT). DoD, GSA, and NASA published FAR case 2015–038, Reverse Auction Guidance, as a final rule at 89 FR 61327 on July 30, 2024, with an effective date of August 29, 2024. The final rule added policy on the use of reverse auctions to the FAR.

The objective of the proposed rule is to establish a definition for complex, specialized, or substantial design and construction services and to implement the statutory prohibition against using reverse auctions for such services that are valued above the SAT. The legal basis for the rule

is the Construction Consensus Procurement Improvement Act of 2021 (Pub. L. 117–28). Promulgation of the FAR is authorized by 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

The proposed rule will apply to all entities submitting offers in response to solicitations for construction services pursuant to FAR part 36; however, the impact of the rule on construction services valued above the SAT is expected to be de minimis because the rule maintains current direction.

The rule may impact entities submitting offers in response to solicitations for construction services valued at or below the SAT, if a contracting officer determines that market research supports the use of a reverse auction and the use of a reverse auction is not otherwise prohibited by statute (*i.e.*, 40 U.S.C. chapter 11, commonly known as the Brooks Architect Engineer Act).

Since the Government does not currently collect data on the number of awards that utilized a reverse auction to obtain pricing, the burden estimates are based upon data obtained from the Federal Procurement Data System (FPDS) for all construction services. The Government assumes that reverse auctions are not widely used for construction services, so the actual number of procurements utilizing reverse auctions is estimated to be only a small fraction of the total awards described below.

Data obtained from FPDS for fiscal years 2020, 2021, and 2022 indicates that an average of 1,318 unique small entities were awarded an estimated 2,644 construction service awards valued above the SAT annually. Data obtained from FPDS for the same period indicates that an average of 1,277 unique small entities were awarded an estimated 3,064 construction service awards valued at or below the SAT annually. Of those actions, approximately 122 small entities were awarded an estimated 577 construction service awards annually using procedures other than FAR part 36. For awards at or below the SAT, the use of reverse auctions to obtain pricing may be appropriate.

The proposed rule does not include additional reporting or recordkeeping requirements.

The proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no available alternatives to the proposed rule to accomplish the desired objective.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat Division. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this proposed rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in

subparts affected by the proposed rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2023–003), in correspondence.

VII. Paperwork Reduction Act

This proposed rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501–3521).

List of Subjects in 48 CFR Parts 2, 17, 36, and 52

Government procurement.

William F. Clark,

Director, Office of Government-Wide Acquisition Policy, Office of Acquisition Policy, Office of Government-Wide Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 2, 17, 36, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 17, 36, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

PART 2—DEFINITIONS OF WORDS AND TERMS

- 2. Amend section 2.101 by—
- a. Adding in alphabetic order the definition of “Complex, specialized, or substantial design and construction services”; and
- b. Revising the definition of “Reverse auction”.

The addition and revision read as follows:

2.101 Definitions.

* * * * *

Complex, specialized, or substantial design and construction services (section 2 of the Construction Consensus Procurement Improvement Act of 2021 (Pub. L. 117–28)) means—

- (1) Site planning and landscape design;
- (2) Architectural and engineering services (as defined in 40 U.S.C. 1102);
- (3) Interior design;
- (4) Performance of substantial construction work for facility, infrastructure, and environmental restoration projects; or
- (5) Construction or substantial alteration of public buildings or public works.

* * * * *

Reverse auction means a real-time auction generally conducted through an

electronic medium among two or more offerors who compete by submitting bids for an award of a supply contract, service contract, purchase order, or blanket purchase agreement, or for an award of an order under a contract or blanket purchase agreement, with the ability to submit revised lower bids at any time before the closing of the auction (section 2 of the Construction Consensus Procurement Improvement Act of 2021 (Pub. L. 117–28)).

* * * * *

PART 17—SPECIAL CONTRACTING METHODS

- 3. Amend section 17.803 by—
- a. Revising paragraph (a);
- b. Removing paragraph (b); and
- c. Redesignating paragraphs (c) and (d) as paragraphs (b) and (c).

The revision reads as follows:

17.803 Applicability.

* * * * *

(a) Complex, specialized, or substantial design and construction services as defined in 2.101, valued above the simplified acquisition threshold (see 36.103(c));

* * * * *

PART 36—CONSTRUCTION AND ARCHITECT–ENGINEER CONTRACTS

- 4. Amend section 36.103 by adding paragraph (c) to read as follows:

36.103 Methods of contracting.

* * * * *

(c) Contracting officers shall not use reverse auctions for an award of a contract, blanket purchase agreement, or order if the award is anticipated to exceed the simplified acquisition threshold for complex, specialized, or substantial design and construction services in accordance with the Construction Consensus Procurement Improvement Act of 2021 (Pub. L. 117–28). Contracting officers may use reverse auctions for procurements for complex, specialized, or substantial design and construction services at or below the simplified acquisition threshold—

- (1) If market research indicates it may be appropriate (see 17.802(a)); and
- (2) Use of a reverse auction is not otherwise prohibited by regulation or statute (see 17.803, 36.104, and 36.601).

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 5. Amend section 52.217–10 by—
- a. Revising the date of the provision; and
- b. In paragraph (a), revising the definition of “Reverse auction”.

The revisions read as follows:

52.217–10 Reverse Auction.

* * * * *

Reverse Auction (DATE)

(a) * * *

Reverse auction means a real-time auction generally conducted through an electronic medium among two or more offerors who compete by submitting bids for an award of a supply contract, service contract, purchase order, or blanket purchase agreement, or for an award of an order under a contract or blanket purchase agreement, with the ability to submit revised lower bids at any time before the closing of the auction (Section 2 of the Construction Consensus Procurement Improvement Act of 2021 (Pub. L. 117–28)).

* * * * *

- 6. Amend section 52.217–11 by—
- a. Revising the date of the clause; and
- b. In paragraph (a), revising the definition of “Reverse auction”.

The revisions read as follows:

52.217–11 Reverse Auction-Orders.

* * * * *

Reverse Auction—Orders (DATE)

(a) * * *

Reverse auction means a real-time auction generally conducted through an electronic medium among two or more offerors who compete by submitting bids for an award of a supply contract, service contract, purchase order, or blanket purchase agreement, or for an award of an order under a contract or blanket purchase agreement, with the ability to submit revised lower bids at any time before the closing of the auction (Section 2 of the Construction Consensus Procurement Improvement Act of 2021 (Pub. L. 117–28)).

* * * * *

- 7. Amend section 52.217–12 by—
- a. Revising the date of the clause; and
- b. In paragraph (a), revising the introductory text and the definition of “Reverse auction”.

The revisions read as follows:

52.217–12 Reverse Auction Services.

* * * * *

Reverse Auction Services (DATE)

(a) *Definitions.* As used in this clause—

* * * * *

Reverse auction means a real-time auction generally conducted through an electronic medium among two or more offerors who compete by submitting bids for an award of a supply contract, service contract, purchase order, or blanket purchase agreement, or for an

award of an order under a contract or blanket purchase agreement, with the ability to submit revised lower bids at

any time before the closing of the auction (Section 2 of the Construction

Consensus Procurement Improvement Act of 2021 (Pub. L. 117-28)).

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