



THE GEORGE WASHINGTON UNIVERSITY

GOVERNMENT PROCUREMENT LAW PROGRAM

THE NEW U.S. RULE ON REVERSE AUCTIONS A CRITICAL ASSESSMENT

Wednesday, September 11

9 am ET / 15:00 CET



Welcome

Christopher Yukins

Lynn David Research Professor in
Government Procurement Law
GW Law School – Government
Procurement Law Program

- Recording and materials at www.publicprocurementinternational.com and recording at **GW Law Government Procurement Law Program YouTube** page
- Audience Questions & Answers
- Speakers' statements are in their personal capacities
- Background discussion paper is on <https://publicprocurementinternational.com/webinar-after-chevron/>

Panelists

- **Gian Luigi Albano** is a senior manager with CONSIP, the Italian government's centralized purchasing agency. He wrote his doctoral dissertation on auction theory, helped design a European Union-wide public auction mechanism on behalf of the Italian government, and will be teaching a course on auction theory at LUISS, a leading university in Rome.
- **David Drabkin** is the chair of the [Procurement Roundtable](#), a group of leaders from the federal procurement community. He was previously the Senior Procurement Executive for the General Services Administration (GSA), and in that role he was a member of the FAR Council which writes federal procurement rules, and participated in early assessments of a possible FAR rule on reverse auctions.
- **Chris Yukins**, moderator, is a professor at George Washington University Law School's Government Procurement Law Program. He has been speaking and writing on reverse auction issues in procurement for over 20 years, and helped draft the United Nations model procurement rule on reverse auctions.



Gian Luigi Albano



David Drabkin



Christopher Yukins

Agenda

- **Background on Reverse Auctions**
- **New Rule: Issues**
- **Proposed Rule on Reverse Auctions and Construction Services**

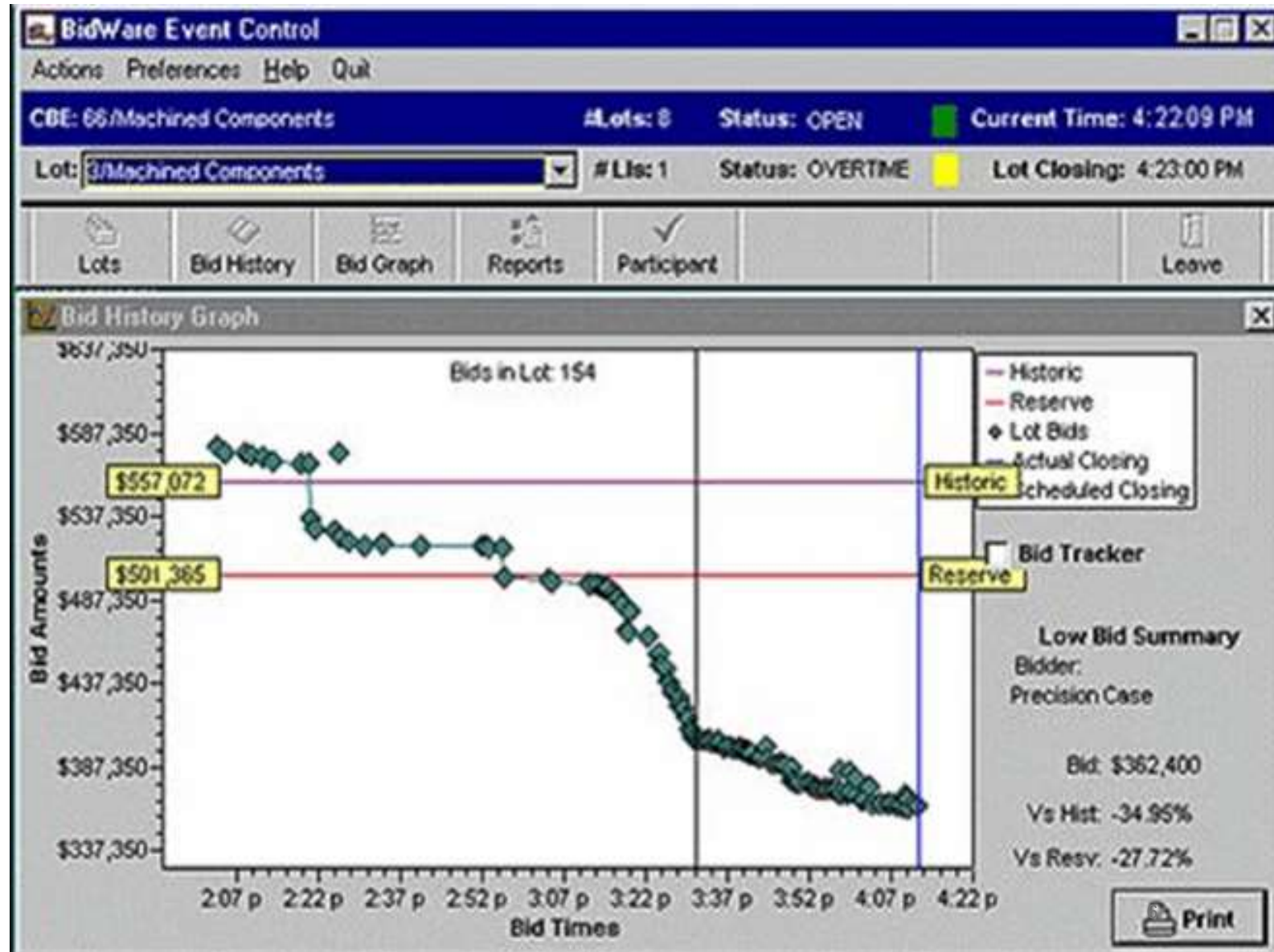
Background

- For centuries, governments have asked bidders to submit bids against government specifications, and made award to the lowest-price, qualified bidder
- Reverse auctions are the next step in that evolution: iterative bidding at ever-lower prices



Photo: *Financial Times*

Sample Reverse Auction



Over the Last 20 Years, Procurement Regimes
Around the World – But Not the FAR – Have
Embraced Electronic Reverse Auctions



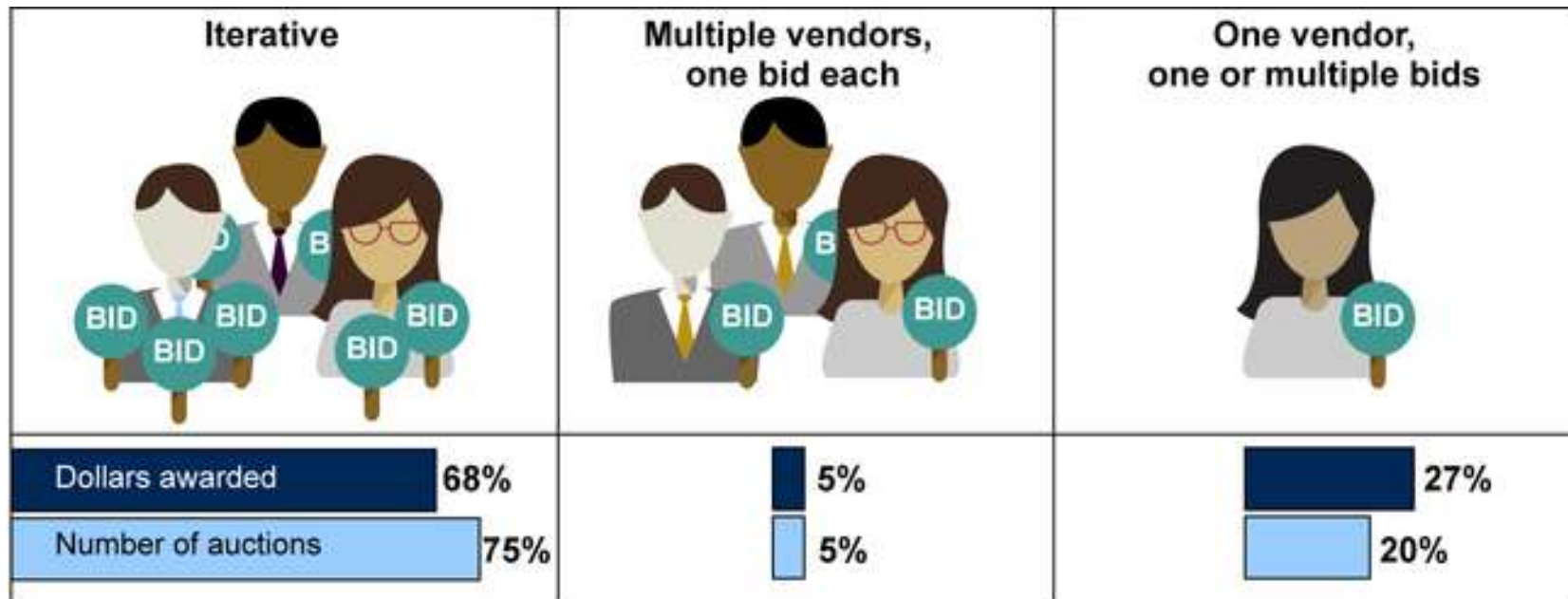
Reverse Auctions Can Yield Substantial Savings

GAO 2013 report found that “the **four agencies [GAO] studied (Army, Department of Homeland Security (DHS), Department of the Interior, and the Department of Veterans Affairs (VA)) reported approximately 12% in savings** from purchases totaling more than \$800 million during fiscal year (FY) 2012 for a range of commercial items The **Department of Energy separately reported seeing an average savings of about 14% per contract awarded** to provide core supplies and services for its National laboratories. These savings were generally calculated by **comparing the agency’s independent government cost estimate to the closing price of the reverse auction.**”



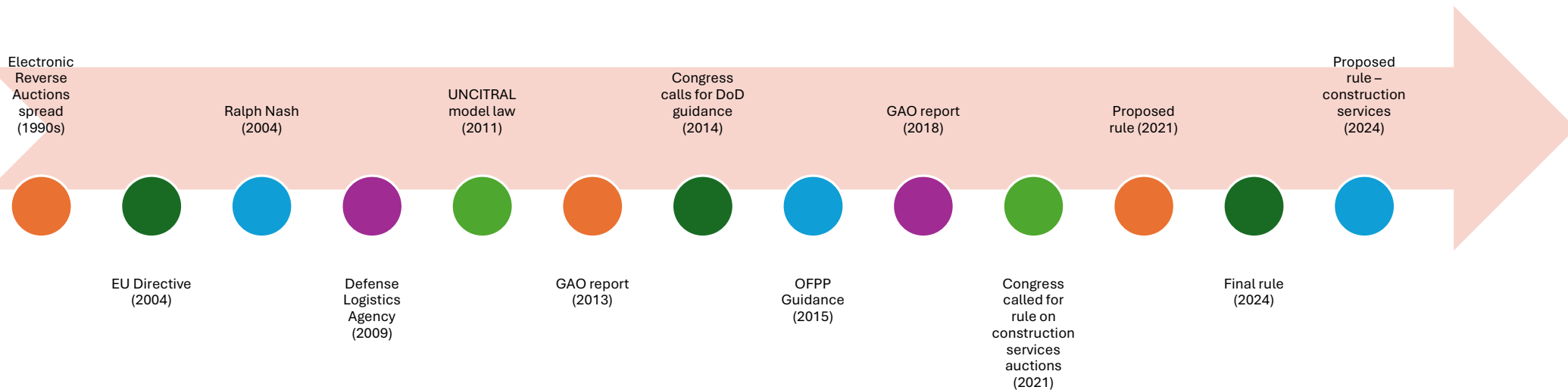
Lack of Governmentwide Rule Has Impaired Reverse Auctions

GAO's 2018 report showed that 1/3 of reverse auctions had only one bid or bidder



Source: GAO analysis of Compusearch, FedBid, and General Services Administration data. | GAO-18-446

Pathway to the Final Rule



Q: Have reverse auctions been adopted broadly in other public procurement markets?

What the Final Federal Rule Says

- **Coordinating with the OFPP Memorandum**
- **Enforcers' Access to Auction Data Through Service Providers**
- **Disclosure of Lowest Bidder Prices**
- **Limited Guidance on When to Use Reverse Auctions**
- **Limited Guidance on Conducting a Reverse Auction**
- **Only a Contracting Officer May Exclude Bidders**
- **Reverse Auctions Integrated Into Other Contracting Methods**
- **Reverse Auction Service Providers and Bidders**
- **If Only One Bidder**

Issues with the Final Rule

Federal Register / Vol. 89, No. 146 / Tuesday, July 30, 2024 / Rules and Regulations		
DEFENSE		
GENERAL SERVICES		
ADMINISTRATION		
NATIONAL AERONAUTICS AND SPACE ADMINISTRATION		
FAR Parts 2, 3, 7, 13, 15, 17, and 52		
AC 2024-06; FAR Case 2015-038, Item 17.801, and the Government's use, disclosure and disposition requirements.		
Docket No. FAR-2015-0038; Sequence No. 1]		
RIN 9000-AN31		
Federal Acquisition Regulation: Reverse Auction Guidance		
AGENCY: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).		
ACTION: Final rule.		
The contract clause for the Reverse Auction Service will incorporate the new definition of 17.801, and the Government's use, disclosure and disposition requirements.		
II. Discussion and Analysis		
The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:		
A. Summary of Significant Changes		
Several changes were made to the		
B. Analysis of Public Comments		
1. Support for the Rule		
<i>Comment:</i> Several respondents voiced support for the proposed rule.		
<i>Response:</i> The Councils acknowledge support for the rule.		
2. Removal of Reverse Auction Data		
<i>Comment:</i> Several respondents were concerned that the proposed FAR changes requiring the removal of all documentation received from offerors in response to the reverse auction from its business and computer systems will impact the Government's ability to carry		

No Encouragement to Use Reverse Auctions

- Why has the federal government not moved more quickly to embrace reverse auctions?
- DLA's rule calls for an explanation if a contracting official *does not* use reverse auctions – why not create that sort of presumptive encouragement?



Limited Guidance on When To Use Reverse Auctions

Reverse auctions may be used when:

- a competitive marketplace exists,
- multiple offerors could satisfy the agency's requirements, and
- the nature of the acquisition (e.g., clearly defined specifications for less complex requirements) lends itself to iterative bidding.

Questions:

Would these criteria cover automobiles?

Are there other criteria which should be considered?

ARMY FEDERAL ACQUISITION REGULATIONS SUPPLEMENT

Army Guidance on When to Use Reverse Auction

Reverse auctions are especially appropriate where there are:

- Healthy price competition
- A well-defined requirement
- Bulk commodity type procurements (such as IT equipment, spare parts)
- Procurements in which there is a well-defined supplier base
- Procurements where the award evaluation criteria are not subject to interpretation (e.g., lowest price versus multiple criteria for tradeoffs and subjective judgments)

Guidance on How To Design an Auction

- **Almost no guidance in final rule on how auctions to be structured (FAR 17.804)**
- **National Defense Authorization Act** in 2014 called for guidance from Defense Department which would state:
 - If a reverse auction is to be conducted by a third party, **“inherently governmental functions are not [to be] performed by private contractor,”** and any **“past performance or financial responsibility information created by the third party is [to be] made available to offerors.”**

Questions:

- **Is guidance on structuring a reverse auction important?**

Defense Logistics Agency Guidance on Structuring a Reverse Auction

- **Notification** to bidders
- Use of a reverse auction in conjunction with **other competitive methods**
- **Price information to be disclosed to bidders** during the auction
- In reverse auctions for delivery orders under a standing contract (L10): the **contracting officer's discretion to declare whether all prices or only the lowest ("lead") price will be disclosed during the auction**
- **How final auction prices will be treated**, and how the auction may be reopened
- **Conditions for vendors to participate** in the reverse auction
- How to deal with **two bids that are tie** (equal) offers
- What the contracting officer will do if a **vendor cannot access the auction**
- Contracting officer's authority **to extend the auction**
- **Training** for offerors



The Bidder's Curse

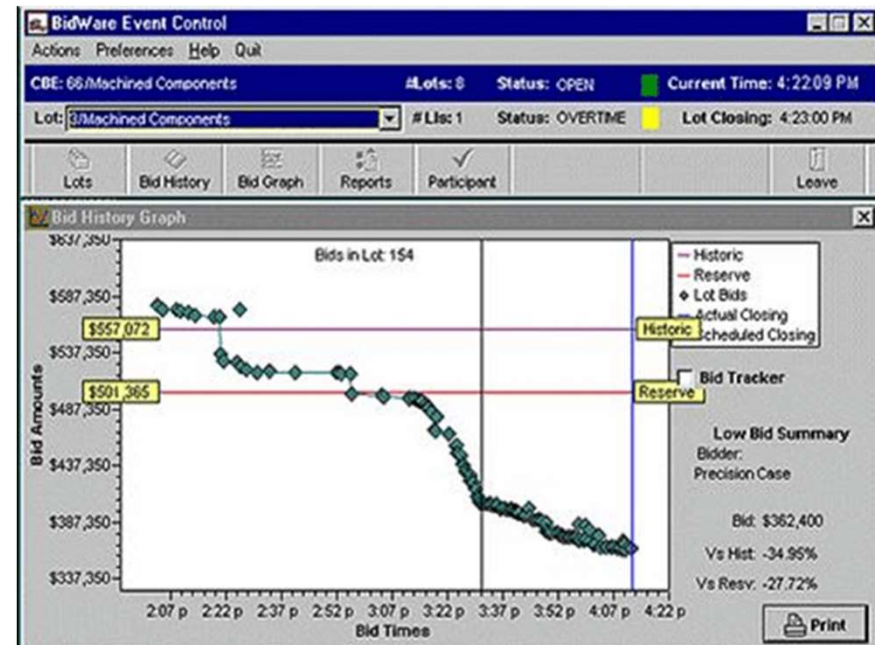
Question: Nothing in the final rule addresses **unrealistically low (abnormally low) bids**. Is this a problem?



Bidders' Prices Disclosed During Auction

- Final rule says that reverse auction service provider **must**:
“Allow[] offerors to see the successive lowest price(s) offered in the auction without revealing an offeror's identity.”

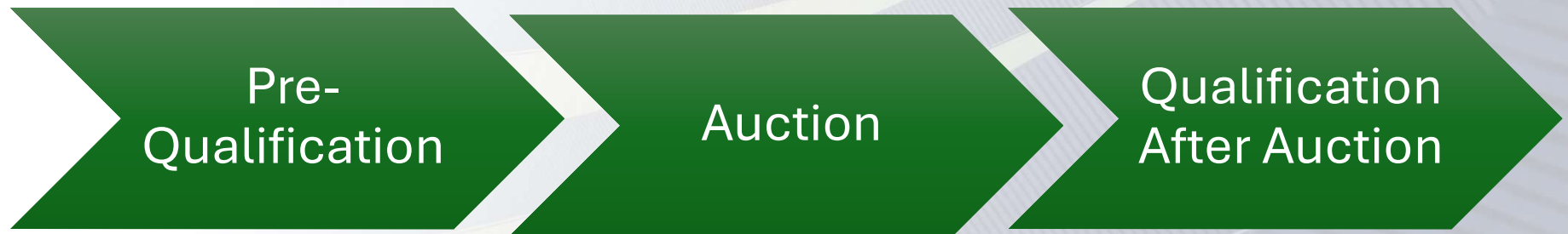
Question: Does this raise risks of collusion?



When the Awardee Will Be Found Qualified (Responsible)

- Final rule is silent on when bidders to be assessed for qualification (responsibility)

Question: Is this an important issue?



Utah: Qualification Before Auction

“Reverse auction is a **two-phase process** consisting of a **technical first phase composed of one or more steps in which bidders submit a statement of qualifications** to be evaluated against the established criteria by the executive director, and a **second phase in which those bidders whose statement of qualifications are determined to be acceptable** during the first phase **submit their price bids through a reverse auction.**”

Service Providers and Source Selection Concerns

- The final guidance does not, however, detail the source selection issues that may arise with private service providers — **due, for example, to the reverse auction providers' unique access to non-public information** on when an agency might launch a reverse auction.
- Compare the **multilateral development banks' guidance** on reverse auctions, which **bars premature disclosure of materials on an upcoming reverse auction**.

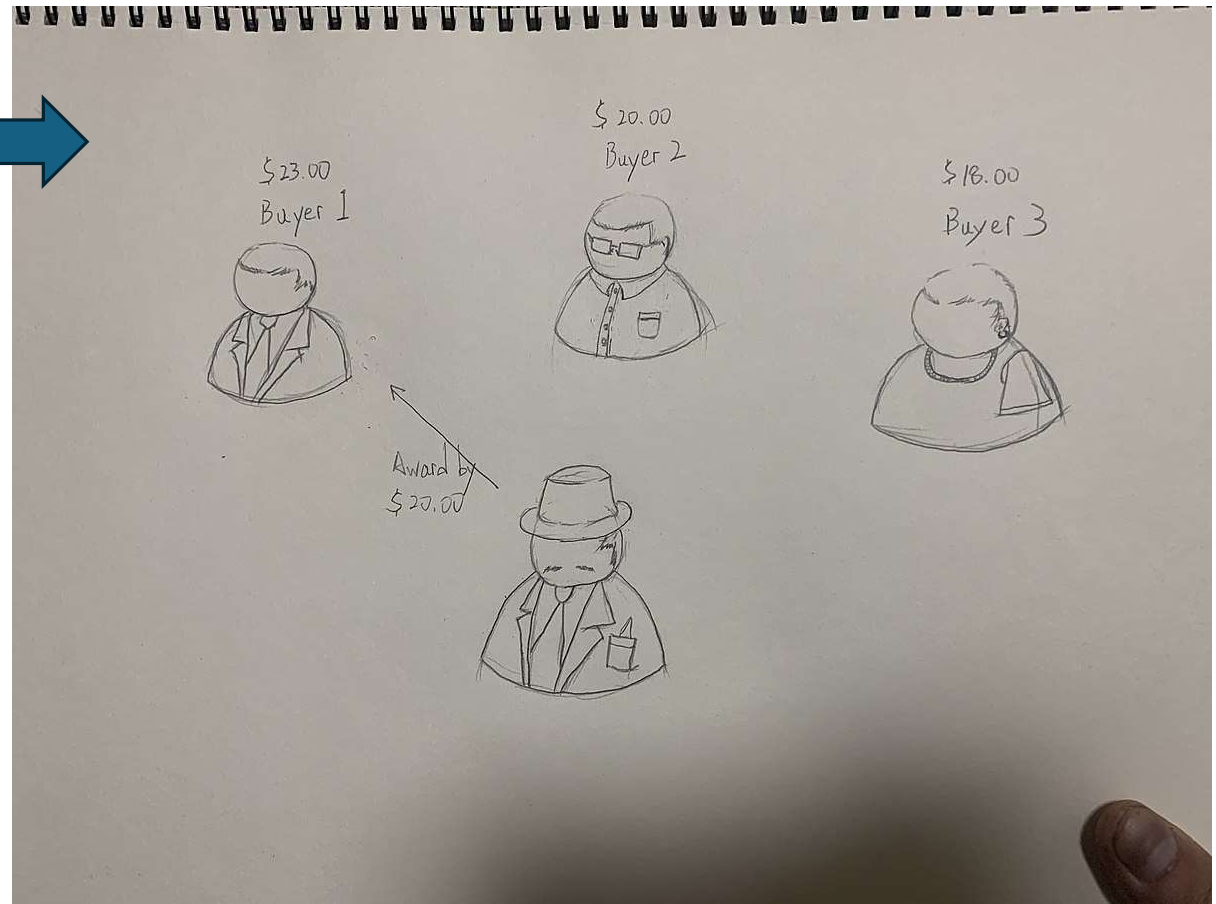


Alternative Approaches

Vickrey Auction
(Ryan Taft)

- No guidance in the final rule on alternative auction formats

Question: Are there successful alternative models for reverse auctions, such as (1) Vickrey auctions, or (2) auctions in which quality is taken into account in an initial evaluation, and those scores are fed into the price portion of the auction by algorithm to give “better-quality” bidders an advantage?



Sharing Pricing Outcomes Across Government

- Final rule is silent on disseminating pricing outcomes
- OFPP Guidance (2015) called for sharing pricing information across government

Question: Should pricing information from the outcome of a reverse auction be shared across government, and/or made publicly available?





Assessment of Costs and Benefits



Because this was deemed **not a “significant” rule with over \$200 million impact, no cost/benefit** assessment

Questions:

- Is this rule **likely to have over \$200 million impact** on an \$800 billion procurement market?
- Would cost/benefit analysis **help clarify the rule’s assumptions and guidelines**, and **set benchmarks** for assessing future use of reverse auctions?

The background of the slide is a photograph of the United States Supreme Court Building. The building is a large, white, neoclassical structure with a prominent portico supported by tall columns. The pediment above the columns is filled with intricate carvings. The building is set against a clear blue sky. The foreground shows the steps leading up to the entrance and a statue on the left side.

The *Loper Bright* Effect

Loper Bright (June 2024) abandoned judicial deference to agency interpretations of ambiguous legislation.

Question: Who might bring a court challenge against the final rule or its implementation?

Assessing the **Proposed Rule on Reverse Auctions and Construction Services**

Enabling legislation: Congress noted --

- Reverse auctions **provide “value for the vast majority of Federal acquisitions, including certain construction related acquisitions”**
- But are “limited in value for complex, specialized, or substantial design and construction services.”



Conclusion

Video recording of today's session will be available on GW Law – Government Procurement Law **YouTube Page** & **www.publicprocurementinternational.com**