H.R. 4012, THE CONSTRUCTION QUALITY ASSURANCE ACT OF 2000

HEARING

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, INFORMATION, AND TECHNOLOGY

OF THE

COMMITTEE ON GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

ON

H.R. 4012

TO ASSURE QUALITY CONSTRUCTION AND PREVENT CERTAIN ABUSIVE CONTRACTING PRACTICES BY REQUIRING EACH BIDDER FOR A FEDERAL CONSTUCTION CONTRACT TO IDENTIFY THE SUBCONTRACTORS THAT THE CONTRACTOR INTENDS TO USE TO PERFORM THE CONTRACT, AND FOR OTHER PURPOSES

JULY 13, 2000

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H.R. 4012, THE CONSTRUCTION QUALITY ASSURANCE ACT OF 2000

THURSDAY, JULY 13, 2000

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON GOVERNMENT MANAGEMENT,
INFORMATION, AND TECHNOLOGY,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2154, Rayburn House Office Building, Hon. Stephen Horn (chairman of the subcommittee) presiding.

Present: Representatives Horn, Biggert, Walden, Ose, Burton (Ex Officio), Turner, and Kanjorski.

Staff present: J. Russell George, staff director and chief counsel; Randy Kaplan, counsel; Bonnie Heald, director of communications; Bryan Sisk, clerk; Elizabeth Seong, staff assistant; Will Ackerly, Chris Dollar, and Davidson Hullfish, interns; Trey Henderson, minority counsel; Mark Stephenson, minority professional staff member; and Jean Gosa, minority assistant clerk.

Mr. HORN. The Subcommittee on Government Management, Information, and Technology will come to order.

We're here today to examine H.R. 4012, the Construction Quality Assurance Act of the year 2000, introduced by Representative Kanjorski from Pennsylvania. This bill is an attempt to ensure quality construction on Federal public works projects. The bill is designed to discourage practices known as "bid shopping" and "bid peddling." Bid shopping occurs when a general contractor seeks to obtain lower-priced subcontractors than those listed in the original bid. Bid peddling occurs when a subcontractor reduces its price to induce the prime contractor to substitute that company for a subcontractor listed on the bid.

H.R. 4012 would require companies that bid on Federal construction projects costing more than $1 million to list the subcontractors they intend to use on the project. The bill would also establish a set of procedures that contractors must follow if they want to substitute a subcontractor listed in the original bid. The bill limits these substitutions, however. A contractor could only replace a listed subcontractor for good cause, such as death, dissolution, or bankruptcy of the subcontractor and with the consent of the contracting officer.

From 1963 until 1983 the General Services Administration Procurement Regulations required companies bidding on Federal construction projects to list the subcontractors they intended to use for the project. The General Services Administration in 1984 rescinded

this requirement, in part, to reduce project delays and administrative costs and burdens associated with the requirement. Currently, there is no Federal bid-listing requirement.

Today we will examine a number of issues related to H.R. 4012, including the extent to which contractors are engaging in bid shopping and/or bid peddling on Federal construction projects. In addition, we will hear testimony of the impact of these practices on contractors and construction projects and whether the provisions of this bill would ensure quality Federal construction.

We welcome our witnesses. We look forward to your testimony and are now delighted to yield to the ranking member on the subcommittee, the gentleman from Texas, Mr. Turner.

[The text of H.R. 4012 follows:]

I

106TH CONGRESS
2D SESSION

H. R. 4012

To assure quality construction and prevent certain abusive contracting practices by requiring each bidder for a Federal construction contract to identify the subcontractors that the contractor intends to use to perform the contract, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 16, 2000

Mr. KANJORSKI (for himself, Mr. HORN, Mrs. MALONEY of New York, Mr. KUCINICH, and Mr. HINCHEY) introduced the following bill; which was referred to the Committee on Government Reform

---

A BILL

To assure quality construction and prevent certain abusive contracting practices by requiring each bidder for a Federal construction contract to identify the subcontractors that the contractor intends to use to perform the contract, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Construction Quality Assurance Act of 2000".

SEC. 2. FINDINGS.

Congress finds the following:

1 (1) In the construction industry, specialty sub-
2 contractors now perform the majority of construc-
3 tion work, in certain cases 100 percent of the work,
4 under the management of a prime contractor, mak-
5 ing the subcontractors' price and performance the
6 key determinant in the overall cost of construction
7 projects, including those performed for the Federal
8 Government.
9 (2) Detrimental practices known as "bid shop-
10 ping" and "bid peddling" exist in the construction
11 industry, including construction projects for the
12 Federal Government.
13 (3) "Bid shopping" occurs when a contractor,
14 after award of a contract, contracts with subcontrac-
15 tors at a price less than the quoted price of the sub-
16 contractor upon which the contractor's fixed bid
17 price was based, in order to increase the contractor's
18 profit on the project without any benefit to the enti-
19 ty for which the contract is being performed.
20 (4) "Bid peddling" occurs when a subcontractor
21 that is not selected for inclusion in a contractor's
22 team seeks to induce the contractor, after award of
23 the contract, to substitute the subcontractor for an-
24 other subcontractor whose bid price was reflected in
25 the successful bid of the contractor by offering to re-

1 duce its price for performance of the specified work,
2 suggesting that the previous offer of the subcon-
3 tractor was padded or incorrect.
4 (5) Bid shopping and bid peddling—
5 (A) threaten the integrity of the competi-
6 tive bid system for construction that benefits
7 the Federal Government, the construction in-
8 dustry, and the economy of the United States
9 as a whole;
10 (B) deprive taxpayers of the benefits of full
11 and open competition among prospective con-
12 tractors and subcontractors for the performance
13 of Federal construction projects;
14 (C) expose Federal construction projects to
15 the dangers of substandard performance, sub-
16 stitution of lower quality materials, and other
17 detrimental cost-cutting practices by an unscru-
18 pulous substituted subcontractor; and
19 (D) can be effectively deterred in Federal
20 construction by modifying the Federal Acquisi-
21 tion Regulation to require bid listing, which is
22 the practice of requiring each offeror for a Fed-
23 eral construction contract to list the sub-
24 contractors whose performance is reflected in
25 the bid price, procedures for the substitution of

listed subcontractors for good cause, and other deterrents to abuse.

SEC. 3. IMPLEMENTATION THROUGH THE GOVERNMENT-WIDE PROCUREMENT REGULATIONS.

(a) PROPOSED REVISIONS.—Proposed revisions to the Government-wide Federal Acquisition Regulation to implement the provisions in this Act shall be published not later than 120 days after the date of the enactment of this Act and provide not less than 60 days for public comment.

(b) FINAL REGULATIONS.—Final regulations shall be published not less than 180 days after the date of enactment of this Act and shall be effective on the date that is 30 days after the date of publication.

SEC. 4. REQUIREMENTS REGARDING SUBCONTRACTORS FOR FEDERAL CONTRACTORS ON CONSTRUCTION PROJECTS.

(a) REQUIREMENT TO LIST SUBCONTRACTORS.—

(1) IN GENERAL.—(A) Each solicitation by an executive agency for the procurement of construction in an amount in excess of $1,000,000 shall require each bidder to submit as part of its bid the name, location of the place of business, and nature of the work of each subcontractor with whom the bidder,

1 if awarded the contract, will subcontract for work
2 in an amount in excess of $100,000 on the contract.
3 (2) REQUIREMENTS FOR SPECIFIC CAT-
4 EGORIES.—(A) Except as provided in subparagraphs
5 (B) and (C), the bidder shall list only one subcon-
6 tractor for each category of work as defined by the
7 bidder in its bid or proposal.
8 (B) A bidder may list multiple subcontractors
9 for a category of work if each such subcontractor is
10 listed to perform a discreet portion of the work with-
11 in a category.
12 (C) A bidder may list itself for any portion of
13 work under the contract, which shall be deemed a
14 representation by the bidder that it is fully qualified
15 to perform that portion of the work itself and that
16 the bidder will perform that portion itself.
17 (3) RESULT OF FAILURE TO LIST SUBCONTRAC-
18 TORS.—An executive agency shall consider any bid-
19 der that fails to list subcontractors in accordance
20 with this Act and the regulations promulgated pur-
21 suant to section 3 of this Act to be non responsible.
22 (b) PROCEDURES FOR SUBSTITUTION OF A LISTED
23 SUBCONTRACTOR.—
24 (1) CONSENT AND GOOD CAUSE REQUIRED.—
25 No contractor shall substitute a subcontractor in

1 place of the subcontractor listed in the original bid
2 or proposal, except with the consent of the con-
3 tracting officer for good cause.
4 (2) EXAMPLES OF GOOD CAUSE.—Good cause
5 under paragraph (1) shall include the following:
6 (A) Failure of the subcontractor to execute
7 a written contract after a reasonable period if
8 such written contract, based upon the terms,
9 conditions, plans, and specifications of the con-
10 tract and the terms of the subcontractor's bid
11 or proposal, is presented to the subcontractor
12 by the contractor.
13 (B) Bankruptcy of the subcontractor.
14 (C) The death or physical disability of the
15 subcontractor, if the subcontractor is an indi-
16 vidual.
17 (D) Dissolution of the subcontractor, if the
18 subcontractor is a corporation or partnership.
19 (E) Failure of a subcontractor to meet the
20 surety bond requirements specified by the bid-
21 der as a condition of the subcontractor to per-
22 form on the contract, if awarded to the bidder.
23 (F) The subcontractor is ineligible to per-
24 form on the subcontract because the subcon-

1 tractor is suspended, debarred, or otherwise in-
2 eligible to perform.
3 (G) A series of failures by the subcon-
4 tractor to perform in accordance with the speci-
5 fication, terms, and conditions of its sub-
6 contract resulting in the withholding of
7 amounts requested by the subcontractor in ac-
8 cordance with section 3905 of title 31, United
9 States Code, and the regulations implementing
10 such section.
11 (H) Failure of the subcontractor to comply
12 with a requirement of law applicable to the sub-
13 contractor.
14 (I) Failure or refusal of the subcontractor
15 to perform the subcontract.
16 (3) REQUESTS FOR SUBSTITUTION.—A request
17 of a contractor for a substitution of a listed subcon-
18 tractor shall be submitted in writing to the con-
19 tracting officer and shall include the reasons for the
20 request. The contractor shall provide a copy of its
21 request for substitution to the listed subcontractor
22 by any means that provides written third-party
23 verification of delivery to the last known address of
24 the subcontractor. A subcontractor who has been so
25 notified shall have five working days within which to

1 submit written objections to the substitution to the
2 contracting officer. Failure to file such written ob-
3 jections shall constitute the consent of the listed
4 subcontractor to the substitution.

5 (c) LIMITATION ON ASSIGNMENT, TRANSFER, OR
6 SUBSTITUTION.—

7 (1) LIMITATION ON ASSIGNMENT OR TRANS-
8 FER.—No contractor shall permit any subcontract to
9 be voluntarily assigned or transferred or to be per-
10 formed by any entity other than the subcontractor
11 listed in the bid or proposal without the consent of
12 the contracting officer. Consent of the contracting
13 officer to a contractor for a substitution shall—

14 (A) be promptly made in writing; and

15 (B) be included in the contract file.

16 (2) LIMITATION ON SUBSTITUTION.—No con-
17 tractor that listed itself for a portion of the work
18 under the contract shall subcontract any portion of
19 the work for which it listed itself, unless authorized
20 by the contracting officer to substitute one or more
21 subcontractors to perform such work.

22 (d) IMPOSITION OF LIQUIDATED DAMAGES.—

23 (1) IN GENERAL.—(A) A contractor shall be
24 subject to payment of liquidated damages if, without

1 obtaining the approval of the contracting officer, the
2 contractor—
3 (i) replaces a listed subcontractor for a
4 contract with an executive agency; or
5 (ii) awards a subcontract to a subcon-
6 tractor to perform work which the contractor
7 had identified as work to be performed directly
8 by the contractor.
9 (B) A subcontractor shall also be subject to the
10 payment of liquidated damages if the subcontractor
11 is determined to have knowingly participated in the
12 failure of the contractor to comply with the regu-
13 latory provisions relating to the substitution of a
14 listed subcontractor.
15 (2) AMOUNT OF DAMAGES TO BE IMPOSED.—
16 The amount of liquidated damages imposed under
17 this subsection shall be equal to the greater of—
18 (A) 10 percent of the amount of the bid by
19 the listed subcontractor;
20 (B) the difference between the amount of
21 the bid by the listed subcontractor and the
22 amount of the bid by the substituted subcon-
23 tractor; or
24 (C) the difference between the amount of
25 the bid by a substituted subcontractor and the

1 dollar value specified by the contractor for the
2 work for which the contractor had listed for its
3 own performance.

4 (e) GROUNDS FOR SUSPENSION OR DEBARMENT.—
5 The imposition of liquidated damages on a contractor or
6 subcontractor for failure to comply with the procedures
7 for the substitution of subcontractors on 2 contracts with-
8 in a 3-year period shall be deemed to be adequate evidence
9 of the commission of an offense indicating a lack of busi-
10 ness integrity or business honesty that seriously and di-
11 rectly affects the present responsibility of a Government
12 contractor within the meaning of part 9.4 of the Federal
13 Acquisition Regulation (Debarment, Suspension, and Eli-
14 gibility) (49 CFR 9.4).

15 (f) MODIFICATION OF FEDERAL ACQUISITION REGU-
16 LATION.—The Administrator for Federal Procurement
17 Policy shall ensure that the Federal Acquisition Regula-
18 tion is modified, in accordance with section 25 of the Of-
19 fice of Federal Procurement Policy Act (41 U.S.C. 421),
20 to carry out the requirements of this Act.

21 **SEC. 5. DEFINITIONS.**

22 In this Act—

23 (1) the term "contractor" means an entity that
24 contracts with an executive agency for the procure-

1 ment of construction in an amount in excess of
2 $1,000,000; and
3 (2) the term "subcontract" means an entity
4 that subcontracts with such a contractor in an
5 amount in excess of $100,000 for work on a con-
6 struction contract with an executive agency in an
7 amount in excess of $1,000,000.

○

Mr. TURNER. Thank you, Mr. Chairman.

H.R. 4012, the Construction Quality Assurance Act of 2000, was sponsored by Representative Paul Kanjorski; and I think Congressman Kanjorski will join us shortly, Mr. Chairman. This bill ends the practice of bid shopping by requiring prime contractors to list the names of the subcontractors that they intend to use on a project on bid day and stick with those subcontractors through the duration of the project. This process is known as bid listing.

The bill also allows substitution of subcontractors only for situations such as bankruptcy or inability of the subcontractors to perform the contract. In this matter, the preliminary contractors are required to use the subcontractors that they used to prepare the bid at the price they agreed to pay on bid day.

I want to commend Representative Kanjorski for his leadership on the issue. I appreciate the chairman holding this hearing, and I welcome all the witnesses here today to talk about the issues that the legislation raises.

Thank you, Mr. Chairman.

Mr. HORN. Thank you.

Since we're waiting for Mr. Kanjorski, I'll give you the ground rules for testifying here. Some of you have been regulars and others haven't. We will go by the order on the agenda. And when we call your name like, let's say, Mr. Drabkin, who is going to be the first witness, your resume, your full texts are automatically in the hearing record. We'd like you to summarize that in 5 minutes, whatever your text is, because the Members have had it, and they know what the written text is. So we would like to get down to the essences, if you will, so then we can have a dialog between the Members and you and within those if there are differing opinions.

We also—since we are an investigating subcommittee of the full Committee on Government Reform, we swear all witnesses or affirm. So we will do that right now. So if you will stand, raise your right hands—and that includes your assistants behind you if they might be whispering in your ear. So get them to stand, too.

[Witnesses sworn.]

Mr. HORN. The clerk will note the six witnesses and any supporters behind, and they will be affirmed now.

Since Mr. Kanjorski is a little late, we'll begin with David Drabkin, the Deputy Associate Administrator, Office of Acquisition Policy for the U.S. General Service Administration. Mr. Drabkin.

STATEMENT OF DAVID DRABKIN, DEPUTY ASSOCIATE ADMINISTRATOR, OFFICE OF ACQUISITION POLICY, GENERAL SERVICES ADMINISTRATION

Mr. DRABKIN. Thank you, Congressman Horn.

Mr. Chairman, getting to the meat of the testimony, there are essentially three points that we wanted to make as to why the administration is opposed to this bill. First point deals with locking the prime contractor into business relationships that can be revised only with permission of the contracting officer, which requires the contracting officer to become involved in prime subcontractor relationships, an issue which the Federal Government has traditionally avoided, invading the privity of contract between primes and subs.

We believe that this will not only do damage to the existing contract system overall by requiring contracting officers to spend a great deal of time involved in these private relationships between the prime and the sub, but it also will invade the prime's ability to manage his contracts or her contracts in an efficient manner. Inserting the government in that process won't add any value.

Second, we point out that the subcontractors listing requirements could adversely affect the timeliness and cost of contract performance and would increase the government's administrative expenses.

One of the key issues to getting the job done that the Congress gives us to do in terms of construction is getting the contracts awarded and getting the construction started and getting the project delivered on time for the money which the government has agreed to pay.

This process proposed in H.R. 4012 would result in government contracting officers having to spend a great deal of time up front and during contract administration should there be a need for changing a subcontractor as outlined in the bill. This time normally will result in work getting stopped while we resolve the issue of who's going to be permitted to perform the work during the course of the general construction project. Every time you delay performance, there's an additional cost to the government in terms of real dollars, filing claims and there's time; and that time will affect the ability of the government to deliver that project in accordance with the schedule.

Third, we point out that there's an issue dealing with what I like to refer to as subbing up. One of the things that in my last position at the Pentagon renovation we were trying to do was to allow the government to have access to the best subcontractors team possible. As you know, today in major construction projects most of the work—a large portion of the work is done by subcontractors. If we force contractors in the community to go out and enter into exclusive arrangements with subcontractors before we make award of the contract, the result would be a suboptimized subcontractors team.

One of the things we were trying to figure out how to do in a fair and equitable manner was to allow the prime, after award, to go out and pick the best subcontractors team to help get the job done. And in a community like Washington there are not a lot of big—or small, for that matter—mechanical, electrical, and other types of subcontractors.

Typically, prime contractors engage, they lock one up, and there's no others for them to choose from. If this bill were passed as the way it's currently written, the government would always wind up with a suboptimized subcontractor team instead of the possibility of getting the best of the subcontractors available post award.

For these three reasons, then, essentially we oppose the bill.

We also provide in our testimony later on the results of our experience from 1964, I believe it was, to 1983 in terms of having this kind of provision and what impact it had on the agency.

Thank you for this opportunity to present the administration's position.

Mr. HORN. We thank you.

[The prepared statement of Mr. Drabkin follows:]

STATEMENT OF DAVID A. DRABKIN

DEPUTY ASSOCIATE ADMINISTRATOR

OFFICE OF ACQUISITION POLICY

OFFICE OF GOVERNMENTWIDE POLICY

U.S. GENERAL SERVICES ADMINISTRATION

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT,

INFORMATION, AND TECHNOLOGY

COMMITTEE ON GOVERNMENT REFORM

U.S. HOUSE OF REPRESENTATIVES

July 13, 2000

Mr. Chairman, Members of the Subcommittee, I am pleased to discuss with you today the Administration's views on H.R. 4012, the "Construction Quality Assurance Act of 2000." At the outset, I want to emphasize that the Administration shares the Subcommittee's desire to ensure quality construction on Federal public works projects. In my capacity as the Deputy Associate Administrator for Acquisition Policy of the agency primarily responsible for Federal public works construction, I fully appreciate the need to make the most effective use possible of taxpayer dollars on our construction projects. Contracting Officers and Program Managers in the construction business today have available to them a mixed set of tools. These tools range from traditional sealed bid contracting to the more recently authorized two-phase design-build selection procedures. These options make it possible for contracting officers to use the source selection process that will achieve the best results given the nature of any particular construction project. Irrespective of the process used, our overall goal is always the same: to take full advantage of competition and structure contracts to effectively incentivize quality and timely contractor performance.

H.R. 4012 raises the issue of whether our ability to achieve this goal is being undermined by "bid shopping" and "bid peddling." The bill finds that prime construction contractors, after being awarded a contract by a Federal agency, may seek or otherwise be induced to subcontract with lower price subcontractors to increase their profits. The bill states that bid shopping and bid peddling result in the use of subcontractors with questionable abilities that expose Federal construction projects to the dangers of

substandard performance. To address this concern, H.R. 4012 would direct executive agencies to require that bidders for Federal construction contracts over $1,000,000 include in their offers specific information about subcontractors who would perform work over $100,000 under the contract. Contractors would be required to show good cause and seek a contracting officer's approval in order to substitute a subcontractor in place of one listed in the original offer. The government could impose damages on contractors who violated the substitution requirements, and repeated violations (where damages were imposed) could serve as grounds for possible debarment or suspension of a contractor from Federal contracts.

The Federal Acquisition Regulation (FAR) does not currently include the subcontractor listing requirements called for by H.R. 4012. The FAR instead relies on our Contracting Officers to enter into effective contracts that hold prime contractors accountable for the performance of their subcontractors – a customary commercial practice. This notwithstanding, the FAR precludes a contractor from entering into a subcontract in excess of $25,000 with a contractor that is debarred, suspended, or proposed for debarment unless there is a compelling reason to do so. (This requirement is set forth at FAR 9.409(b) and FAR clause 52.209-6.) Before entering into a subcontract with a party that is debarred, suspended, or proposed for debarment, a corporate officer or a designee of the contractor must, among other things, provide the Contracting Officer with compelling reasons for doing business with the subcontractor notwithstanding its inclusion on the List of Parties Excluded from Federal Procurement and Nonprocurement Programs ("the list").

Beginning in 1984, GSA has included a clause in all building construction, alteration and repair contracts precluding the successful bidder from subcontracting with any contractor who, at the time of subcontract award, is identified on the list. Since that time, GSA is not aware of major resultant problems in its construction program or significant problems with inferior work due to bid shopping or peddling.

The Administration believes that mandating subcontractor listing requirements for our construction contracts as H.R. 4012 proposes would create more harm than benefit and strongly opposes H.R. 4012 for the following reasons. First, locking a prime contractor into business relationships that can be revised only with the permission of the contracting officer is contrary to the commercial practice of holding prime contractors accountable for properly managing their subcontracts. The bill would insert the contracting officer into contractor management decisions that should best reside with the contractor. There is little or no protection to be gained by the government through this process, because the government does not control the subcontractors used in the original bid or offer. Focusing instead on desired mission-related outcomes and tying payment to the contractor's success in achieving those outcomes -- a performance-based approach -- puts the burden of good contract performance on the contractor and enhances performance. The government's protection lies not in micro-managing the prime contractor, but rather in being a smart buyer, specifying the right quality, and holding the contractor and its subcontractors to meeting the specifications by performing sufficient quality inspections to ensure they are met.

Second, subcontractor- listing requirements could adversely affect the timeliness and cost of contract performance and would increase the government's administrative expenses. The process for changing a designated subcontractor is cumbersome and could well have an impact on the work completion schedule as well as any efforts of other subcontractors whose work is dependent on the replacement subcontractor. As a practical matter, a prime contractor may not be able to identify all subcontractors at the time of proposal. Often, a prime contractor proposes based on estimates and past experience. Prime contractors deprived of this flexibility might well decide not to bid on government construction contracts or, alternatively, submit higher bids that could increase the cost to construct public works. We are concerned that this would likely reduce the quality of the winning contractor's subcontract team if we force prime contractors to enter into binding relationships with potential subcontractors prior to award of the prime contract. No one contractor is going to be able to lock in each of the best subcontractors. One prime contract competitor will get the best mechanical, another will get the best electrical, and so on.

Third, the Bill would negatively impact the overall quality of the subcontractors by forcing primes to "sub-up" prior to contract award, thus depriving the prime and the government of the best subcontract team. Prime contractors sometimes enter into exclusive agreements with subcontractors. Because of such arrangements, the best subcontractors may not be available for Government work if they are part of a losing bid. The Bill would promote these practices to the Government's detriment.

Lastly, the bill could draw the government into disputes between contractors and their subcontractors, with concomitant liability. A major tenet of government contracting is that the Federal government has no privity of contract with subcontractors. This bill blurs that distinction and is unacceptable on that basis alone.

On a historical note, GSA adopted a policy similar to that in H.R. 4012 in 1963. We required bidders on construction contracts to submit with their bids the name and address of their subcontractors for designated categories of work. The intent was to curtail the practice of bid shopping by the successful bidder for lower subcontract prices after bids were publicly opened. We were concerned that in many instances bid shopping had resulted in substandard work by lower price subcontractors whose competence and responsibility were questionable. We also believed that the elimination of bid shopping would create a competitive market among construction subcontractors, with resultant savings accruing to the government. GSA's subcontractor listing requirements subsequently were included in GSA's procurement regulations.

During the late 1970's, GSA met with various general contractor groups such as the Associated General Contractors of America, subcontractor groups such as the American Subcontractors Association, and specialty subcontractor firms. The ultimate result of several months of discussions with these groups resulted in the agreement that the administrative burden to manage subcontractor-listing efforts exceeded the benefits.

In 1983, based on 20 years of experience with GSA's subcontractor listing requirement, GSA decided to eliminate the requirement and to add a construction subcontractor eligibility requirement. The new requirement incorporated a clause in all building construction, alteration and repair contracts precluding the successful bidder from subcontracting with any contractor who, at the time of subcontract award, was identified on the list.

We published the proposed change in the Federal Register for public comment in October 1983. Our notice explained that during the past several years, bidding problems and protests related to the listing of subcontractor's requirement adversely affected the GSA construction program. These problems resulted in delays in awards of contracts. Low bids were sometimes rejected, preventing the timely completion of important projects and resulted in higher procurement costs. The purposes of the proposed change were to simplify procurement procedures, reduce paperwork burdens associated with procurement, establish uniformity with other Federal construction agencies which for the most part, did not require subcontractor listing, and to eliminate potential delays and financial losses experienced as a result of the listing requirement.

GSA received numerous responses to its Federal Register notice from individual contractors, subcontractors, and specialty contractors, as well as their local and national associations and representatives. After reviewing the comments received in opposition to the proposed change, we found no evidence that the elimination of the subcontractor listing requirement would cause the prime contractors to bid shop,

those few subcontractors now covered by the listing requirement to provide inferior work or to submit inflated bids, or the prime contractor to reap a windfall at the expense of the subcontractor or the government.

Accordingly, GSA concluded that eliminating the subcontractor- listing requirement would be in the government's best interest and published a final rule in the Federal Register on February 15, 1984. Since that time, as I noted earlier, GSA is not aware of major problems in its construction program due to the elimination of the subcontractor-listing requirement.

Mr. Chairman, Members of the Committee, for the reasons I have just outlined, the Administration strongly urges the Subcommittee not to impose subcontractor listing requirements on Federal construction contracts. The potentially significant resources that would otherwise be required to carry out H.R. 4012 should instead remain fully focused on the smartest application possible of the acquisition tools available to our workforce today. This focus will better serve our taxpayers in achieving the positive results on our construction contracts that we jointly desire.

This concludes my prepared statement. I would be pleased to answer any questions you may have.

Mr. HORN. We're going to go out of order now. Mr. Kanjorski, the author of the bill, of Pennsylvania is here. If he has an opening statement he's certainly welcome, and we'll put the testimony following his statement.

Mr. KANJORSKI. Mr. Chairman, I look forward to listening to the testimony. I pass for a few more extra minutes when we get to questions.

Mr. HORN. I thank the gentleman.

We now have our second witness, which is William K. Swab, the president of the Ennis Electric Co. in Manassas, VA, representing the American Subcontractors Association. Mr. Swab.

STATEMENT OF WILLIAM K. SWAB, PRESIDENT, ENNIS ELECTRIC CO., MANASSAS, VA, REPRESENTING THE AMERICAN SUBCONTRACTORS ASSOCIATION

Mr. SWAB. Mr. Chairman, members of the committee, thank you for this opportunity to speak today in support of H.R. 4012. Hopefully, I can give you a little different perspective.

My name is Chip Swab, and I'm president of Ennis Electric Co. in Manassas, VA. My company performs Federal construction work, including 19 specific contracts in the past 2 years. I am a member of the American Subcontractors Association, which represents over 6,500 construction specialty trade contractors all over the United States, and I am speaking on their behalf today.

The American Subcontractors Association strongly supports H.R. 4012, the Construction Quality Assurance Act of 2000, because it will end the practice of bid shopping on Federal construction, a practice which cheats the government out of value and quality.

Bid shopping occurs when a prime contractor approaches its subcontractor after it has been awarded a construction contract and tells the subs to lower their prices or lose the subcontracts. The savings from that subcontract enrich the prime contractor to the detriment of the value delivered to the owner. Although bid shopping may be unethical, it currently is legal and sometimes seems to be encouraged on Federal construction. Of the 19 Federal contracts my company has performed work on and the many more that we have bid on during the past 2 years, every single one has featured some form of bid shopping.

Today, the Federal Government does not get the best value for construction. This is because in most cases the final decisions as to which contractors, suppliers and manufacturers will be used on a project are not made until after the government accepts a bid or proposal from a prime contractor. Let me give some background, explain how the current system operates, and provide my assessment of how H.R. 4012 will benefit both taxpayers and the construction industry.

For many years, the accepted method of procurement for Federal construction was the "Invitation for Bid" or "IFB." We referred to it as the "rip it and read" process, since bid envelopes were brought to the public area of a Federal agency, and at a given hour on a given date all bids received were opened, read and recorded in public.

Having the paperwork properly executed was important, but the overriding factor was the lowest price. Participating contractors

saw this process as open and fair, but it did not offer the Federal agency discretion to choose a contractor on any basis other than price. Reputation, past performance, financial stability and special expertise were not factors that were available for review. As a result, many jobs suffered because the low bidder was not always the best available contractor to perform the work. Contractors that performed good or even exemplary work were not rewarded for their efforts unless they had the low bid.

Fortunately, the government learned an important lesson: You get what you pay for. By only considering price, much of the construction delivered under the IFB process was inferior. So the government looked to the private sector for another way, Best Value Procurement.

Out went the Invitation for Bid process, and in came the Request for Proposal, of which there are many forms. The main feature is the increased ability of a Federal agency to weigh factors in addition to price in making a choice of prime contractor. Unlike the IFB process, the review and decisionmaking process followed for an RFP is done in private, and pricing is not revealed until after the notification of award to the prime contractor.

Under the RFP process, the emphasis is on getting the best value for the price paid, not just on having the lowest price.

But the RFP process is undermined and the government's value is reduced by a practice known as bid shopping. Bid shopping occurs when a general contractor forces a subcontractor to reduce the price or forfeit the subcontract after the prime contractor's bid has been accepted by the government. Since subcontractors know they'll be asked to lower their price once the prime wins the contract, few subcontractors put their best price out on the street at the beginning of the proposal process. They wait until the actual buy decisions are made, a process that takes place after the government awards the prime contract. Starting at the manufacturer level, through their authorized sales agents or distributors, through suppliers, then subcontractors and specialty contractors and finally through the prime contractor, there is a bid shopping markup of costs at every level to the final price that is quoted to the government.

Since few of these parties offer their best pricing when they submit their original proposals because they know they will be shopped after the contract is awarded, the government gets an inflated bid, not the best value or best quality that the RFP process is supposed to provide. The construction delivered under the current system costs the government considerably more than it is actually worth, with the prime contractors pocketing whatever amount they are able to squeeze out of their subcontractors.

Further, under the current system everyone knows that there will be another bite at the apple after the prime bid is awarded and all of the subcontracts are shopped. Therefore, many firms won't expend the time and effort required for a detailed review prior to bid day, because they know they can afford to wait until the bid shopping that will come later. This lack of attention to detail is a major contributor to errors and omissions that plague a project from its inception and further detract from the quality side of the best value equation.

H.R. 4012 and its requirements for bid listing of major subcontractors would change this process. By requiring a general contractor to make its final decisions on what subcontractors and suppliers it is going to use and to commit to those decisions in writing at the time it submits its proposal to bid, the dynamics for the pricing of a project change. To use a few cliches, the day of reckoning, the time to play your hand, the chance to lay all your cards on the table is the due date for submission of the proposal.

Under H.R. 4012, prime contractors and subcontractors such as myself can tell all of our suppliers and specialty firms that in order to be named on the proposal we must have everyone's best price on bid day. In order to provide the best price, we have to spend the time and effort necessary to study the contract specifications and to assure that we all fully understand all the requirements, because there is going to be no going back for another round.

Once our suppliers know that we are going to make a buy commitment on bid day, they can take the same leverage and use it with the manufacturers and the agents that represent them. The combination of open competition and a date and time certain when final choices will be made assure that each party at each level is willing to quote its best number on bid day. That way the final real price is passed directly to the end user, in this case the Federal Government and the taxpayers. H.R. 4012 would assure that taxpayers receive full value and quality for the price they are paying.

Sorry, I've gone over my time. I would just like to state that we respectfully urge your support for and quick action on H.R. 4012. Thank you very much.

Mr. HORN. I thank you very much.

[The prepared statement of Mr. Swab follows:]

STATEMENT OF CHIP SWAB, PRESIDENT, ENNIS ELECTRIC COMPANY, MANASSAS, VIRGINA

to the Subcommittee on Government Management, Information and Technology of the House Committee on Government Reform on Thursday, June 13, 2000 in Room 2154 of the Rayburn Office Building.

Mr. Chairman, members of the Committee, I thank you for the opportunity to speak today in support of H.R. 4012.

My name is Chip Swab and I am President of Ennis Electric Company in Manassas, Virginia. My company performs federal construction work, including 19 specific contracts in the past two years. I am a member of the American Subcontractors Association which represents over 6,500 construction specialty trade contractors all over the United States and am speaking on their behalf today.

The American Subcontractors Association supports H.R. 4012, the Construction Quality Assurance Act of 2000 because it will end the practice of bid shopping on federal construction, a practice which cheats the government out of value and quality.

Bid shopping occurs when a prime contractor approaches its subcontractors after it has been awarded a construction contract and tells the subs to lower their prices or lose the subcontracts. The savings from that subcontract enrich the prime contractor to the detriment of the value delivered to the owner. Although bid shopping may be unethical, it currently is legal and sometimes seems to be encouraged on federal construction. Of the 19 federal contracts my company has performed work on and the many more that we have bid on during the past two years, every single one has featured some form of bid shopping.

Today, the Federal Government **does not** get the best possible value for construction. This is because in most cases the final decisions as to which sub-contractors, suppliers, and manufacturers will be used on a project are not made until *after* the government accepts a bid or proposal from a prime contractor. Let me first give some background, explain how the current system operates, and provide my assessment of how H.R. 4012 will benefit both taxpayers and the construction industry.

For many years, the accepted method of procurement for federal construction was the "Invitation for Bid" or "IFB". We referred to it as the "rip it and read" process, since bid envelopes were brought to a public area of a federal agency, and at a given hour on a given date, all bids received were opened, read and recorded in public. Having the paperwork properly executed was important, but the overriding factor was the lowest price. Participating contractors saw this process as open and fair, but it did not offer the federal agency discretion to choose a contractor on any basis other than price. Reputation, past performance, financial stability and special expertise were not factors that were available for review. As a result many jobs suffered because the "low bidder" was not always the best available contractor to perform the work. Contractors that performed good or even exemplary work were not rewarded for their efforts unless they had the low price.

Fortunately the Government learned an important lesson: You get what you pay for. By only considering price, much of the construction delivered under the IFB process was inferior. So the government looked to the private sector for another way, "Best Value Procurement."

Out went the "Invitation for Bid" process, and in came the "Request for Proposal," of which there are many forms. The main feature is the increased ability of a federal agency to weigh factors in addition to price in making a choice of prime contractor. Unlike the "IFB" process, the review and decision making process followed for an "RFP"

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Since few of these parties offer their best pricing when they submit their original proposals because they know they will be shopped after the contract is awarded, the government gets an inflated bid, not the "Best Value" or best quality that the RFP process is supposed to provide. The construction delivered under the current system costs the government considerably more than it is actually worth, with the prime contractors pocketing whatever amount they are able to squeeze out of their subcontractors.

Further, under the current system everyone knows that there will be another bite at the apple after the prime bid is awarded and all of the subcontracts are shopped. Therefore many firms won't expend the time and effort required for a detailed review prior to bid day, because they know they can afford to wait until the bid shopping that will come later. This lack of attention to detail is a major contributor to errors and

omissions that can plague a project from its inception and further detract from the quality side of the "Best Value" equation.

H.R. 4012 and its' requirement for "Bid Listing" of major subcontractors would change this process. By requiring a general contractor to make its final decisions on what subcontractors and suppliers it is going to use, and to commit to those decisions in writing at the time it submits its proposal or bid, the dynamics for pricing the project change. To use a few clichés, the day of reckoning, the time to play your hand, the chance to lay all of the cards on the table, is the due date for submission of the proposal.

Under H.R. 4012 prime contractors and subcontractors such as me can tell all of our suppliers and specialty firms that in order to be named on the proposal we must have everyone's best price on bid day. In order to provide the best price, we have to spend the time and effort necessary to study the contract specifications and to assure that we all fully understand all requirements, because there is going to be no going back for another round.

Once our suppliers know that we are going to make a "buy" commitment on bid day, they can take the same leverage and use it with the manufacturers and the agents that represent them. The combination of open competition and a date and time certain when final choices will be made assure that each party at each level is willing to quote its best number *on* bid day. That way the final "real" price is passed directly to the end user, in this case the federal government and the taxpayers. H.R. 4012 would assure that taxpayers receive full value and quality for the price they are paying.

Enactment of H.R. 4012 will force changes in how construction constructors and suppliers at all levels price their services. Many will oppose this legislation merely because it requires change. Others will oppose it because it will force them to behave more ethically. Others will oppose it because they perceive it as government intrusion (even though in this case the government is acting as a responsible construction owner not a regulator).

But nine states -- Arkansas, California, Connecticut, Delaware, Florida, Massachusetts, New Mexico, New York and South Carolina -- have adopted some form of bid listing to combat bid shopping. And none of the dire predictions of prime contractors, nervous public agencies or other opponents have come to pass. To the contrary, those nine states report excellent results as they receive the value and quality of construction for which they pay.

H.R. 4012 will help deliver the promise of the "Best Value Procurement" process. As a subcontractor involved in this process on a daily basis, I can tell you that H.R. 4012 will assure that the government realizes the quality and value promised by the best value process. As a taxpayer, I implore you to stop allowing prime contractors to line their pockets at the expense of quality and value in the federal construction process.

I respectfully urge support for and quick action on H.R. 4012. Thank you.

Mr. HORN. Our next witness is George Petzen, the skylight specialist from the TRACO Skytech Systems in Bloomsburg, PA. I assume that's in Mr. Kanjorski's district. Good. Welcome. We're glad to have you here.

STATEMENT OF GEORGE PETZEN, SKYLIGHT SPECIALIST, TRACO SKYTECH SYSTEMS, BLOOMSBURG, PA

Mr. PETZEN. I'm very glad to be here. Thank you very much, Mr. Chairman, members of the committee.

I'm here to testify in support of this legislation. I think it's very important. The Construction Quality Assurance Act of 2000 will actually benefit not only the government, it will benefit subcontractors, and it actually will benefit the general contractors on a project by leveling the playing field not only where the general contractors play but for the subcontractors and for the—for everyone underneath, not only second-tier players but third-tier material suppliers where we sometimes play as well.

We talk about these things kind of in generalities, but I think it's important to look at what bid shopping actually does in the real world.

Several years ago, the Veterans Administration did a major renovation of a property in Wilkes-Barre, PA. The bid process worked as it usually does, subcontractors and material suppliers preparing bids to the bidding general contractors. On the selection of the low general contractor for the bid, everyone knows who is going to be doing the job.

The day following that award, the general contractor puts several of the bid packages, the major parts of the construction documents, major parts of the scope of work, back out on the street and rebids them. He owns the contract from the government. He's going to build this building at this price. And the day after he takes major sections of the package and rebids them.

I strongly suspect that the government was not benefited by a rebate from the contractor at that point. This process happened not once but twice. And, after that, there were negotiations. We were called in to look at certain areas of scope; and at that point, at the end of our discussion, we were presented with the low contractor's proposal, subcontractor's proposal and told this is the number you have to beat to write the business.

That's not a fair process. It's not what the government expects. Certainly it's not what subcontractors expect. But we are exposed to these practices not every once in a while but on virtually every job. It is absolutely undemocratic; and, at times, subcontractors are our worst enemy. We're approached with, beat this number and you play the game of how low can you go. And our margins get skinnied up past the point of it being a safe margin, but in order to write the business, it's what have you to do. It's not a fair process. It really needs to change.

To testify in this room, which is so nicely appointed, I kind of wonder if the guy that was low on bid day for all the case work and all of the appointments in this room actually was a subcontractor that did the work. It would be nice to think that that was the case, but my experience is it probably was someone else. It was probably someone else. Not fair for the government.

There's a lot of pride in doing this work. You know, to walk into this room as a subcontractor that performed this business is a source of great pride. And we hang our hats on that. To walk in being low on bid day and look at someone else's work that was based on your price, doesn't give you the same source of pride. We need to reinstate pride across the board for the material suppliers, for the subcontractors, for the primes, for the design professionals, and for the government. Thank you.

Mr. HORN. Thank you. That's a very moving statement.

[The prepared statement of Mr. Petzen follows:]

OPENING STATEMENT OF GEORGE ANDREW PETZEN, CSI

Submitted to the Subcommittee on Government Management, Information and Technology of the Committee on Government Reform of the United States House of Representatives on the morning of Thursday, June 13, 2000 in Room 2154 of the Rayburn Office Building.

Mr. Chairman, I thank you for inviting me to testify before you this morning. I am here today to speak in support of h.r. 4012 – The Construction Quality Assurance Act of 2000. This legislation will benefit everyone involved in the construction of federal buildings, from the federal government to the companies that supply material and labor. It even helps the Prime Contractor.

I appear this morning with 19 years selling commercial and institutional aluminum and glass skylight structures. My testimony will focus on my professional experiences in the process of bidding these materials. I function as a 2nd tier subcontractor and as a material supplier for privately owned construction projects as well as those procured by agencies of the Federal government. I also assist Specifiers and Design Professionals in developing comprehensive and understandable bid documents in preparation of a federal Request for Proposal or RFP.

I have had many pleasant and rewarding experiences over the years. The inclusion of our products into the building envelope of the various federal buildings is one of the greatest sources of professional pride that I have ever experienced. I will always be able to point out these projects to my nieces and nephews and say, "Your Uncle George sold that project – isn't it beautiful"!

But, I have also been involved with some federal projects that have caused much frustration and negative financial burden. The frustration starts with the bidding process, which sometimes seems to be governed not by the intent of the owners or designers, but more the laws of the Wild, Wild West.

I would emphasize that I have a strong entrepreneurial streak. I know that these projects are going to be delivered by the Prime Contractor with the lowest bid. That is both right and fair. I also know that competition brings out the best in a product - and, sometimes - the worst in people.

During the pre-bid process, sub-contractors and material suppliers attempt to provide a complete, low competitive bid to the Prime Contractors. On many of these projects, it takes one or two of our staff several weeks of concentrated effort to

review the drawings, specifications and addenda in order to provide a complete and detailed scope of work, using the resources of our estimators, engineers, fabrication technicians and outside vendors. It is these sub-contractors and material suppliers that comprise the greatest portion of the cost that a Prime Contractor uses to be successful on Bid Day.

General Contractors (or Prime Contractors) bear a responsibility to adhere to many requirements in submitting a bid in response to a federal RFP. It's a tough job but it gives the federal government a safe and comfortable feeling that the field is level for all of the players, much like standing on a ship looking out over a calm sea.

But, like the ocean, there is more beneath the surface than meets the eye. It is common for a Prime Contractor to shop prices between competing suppliers prior to the bid date. It is even more common that a Prime Contractor will shop for a better (lower) price after his bid has been accepted and a Contract is awarded.

In a recent Veterans Administration construction project in Wilkes-Barre, Pennsylvania, the Prime Contractor took some of the larger subcontract sections and rebid them "on the street" after the contract had been awarded and further negotiated the prices after that. Trust me when I say there was no pride in that. This was an example of bid shopping at it's very worst.

When a subcontractor or supplier is called and told that they have submitted a price that is "*competitive – but not low*" another egregious practice occurs – bid peddling. The obvious response is "How much money do I have to give up to "beat" your current lowest bid and stay in the competition for an order"? This is a horrible position to be in – the contractor can then continue shopping with a new low bid. And the worst thing is – we do it to ourselves as much as they do it to us. It is a vicious cycle and it has to stop.

The lower costs that are obtained this way come out of the pockets of the 2nd tier sub-contractors and material suppliers and are transferred into the accounts of the Prime Contractor. The government neither sees the transaction – or the money. It is akin to a shark in a feeding frenzy upon a school of bait. I can tell you this, it seems that way when your are in that lower level.

No doubt, you will be told that "a few bad apples spoil the barrel" or that my plight is not widespread enough to warrant this legislation. In my experience, there are a few good apples at the top of the barrel and that these practices are not common, they are endemic.

And why shouldn't they be? After all, there is nothing to say that a Prime Contractor cannot engage in this practice of bid shopping. And nothing to prevent bid peddling at the 2nd tier level. But a lack of rules or regulations doesn't make it a good practice. It is wrong. It needs to be corrected and we all need your help.

The ramifications of these practices are like the stormy ocean.

You understand what happens to subcontractors and material suppliers. We lose net profit. You see what happens to the Prime Contractors. They gain that net profit. And you see what happens to the government. Nothing. Or so it seems…

There are other events under these crashing waves.

When we tighten our belts, we look for ways to get back our lost monies. Prime Contractors may solicit and/or accept 2nd tier bids that do not meet the design specifications, prompting the design firm to spend hundreds of staff-hours reviewing submittals that are not according to the specifications or drawings. Often, there is not sufficient time to reject a submittal for a product that is in compliance without ruining the construction schedule. The government then has a product that is below the minimum anticipated level of quality or performance.

There are also shortcuts on the work site – sometimes life-safety issues are ignored or workmanship suffers because of aggressive price shopping. Aside from on the job injury claims, the building may suffer lower quality material and/or workmanship that requires more energy, more maintenance, shorter product life and a building that fails to meet the expectations of the owner. And since it is a federal building, we still have to pay the full asking price. Just to line someone else's pocketbook.

My hope is that the passage of the language in h.r. 4012 will do several things. It will provide a level field for all material suppliers and subcontractors. It will insure that a bidding Prime Contractor will insure in advance that that the subcontract and material supply bids they accept are in full compliance with the bid documents by pre-qualifying his 2nd tier team.

This legislation will allow bidding Prime Contractors the opportunity to win fair and square – and me too. Just the way you intended.

After all, if I provide a proposal that contributes to a winning bid by a Prime Contractor, it is only fair that I am awarded the work, and, at the price that I offered.

I thank you for the opportunity to appear before this committee and urge the Committee to adopt this language as written and send it to the full House of Representatives for passage.

Mr. HORN. The next witness I've known for a number of years and am delighted to see him here, and that's John Fuqua, the chief executive officer of Carol Electrical Co. in Los Alamitos, CA, right over my district line—why don't you move that, John—representing the National Electrical Contractors Association. Pleasure to have you here.

STATEMENT OF JOHN FUQUA, CHIEF EXECUTIVE OFFICER, CAROL ELECTRICAL CO., INC., LOS ALAMITOS, CA, REPRESENTING THE NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION

Mr. FUQUA. Mr. Chairman, members of the committee, first of all, thank you for the opportunity to testify here this morning. I am an electrical contractor, and I'm also here today speaking for the National Electrical Contractors Association.

Mr. HORN. I was going to tell you. The clerk ought to go down and do that. Move that mic closer to you.

Mr. FUQUA. Is that better?

Mr. HORN. I think so.

Mr. FUQUA. Bid shopping has been with us a long time—certainly as long as I have been an electrical contractor. It is an unethical practice which works not only to decrease the value of the construction the owner receives for his price but also to undermine the ability of the contractor to offer his best price and guarantee the quality of work produced for that price. Unfortunately, it's a common practice on Federal, State, local and private work alike.

When I spend time and money to prepare a bid, I expect that it will be accepted and honestly used if it is low and responsive. It's my best price, one that will give the general contractor and the owner true value for their construction price and where I can do the work properly and also make a reasonable profit.

If, after he has been awarded the contract, the general contractor shops my bid or tries to lower my price by threatening to shop it, he is doing me and his customer a disservice. When he attempts to shop my bid, he is trying to increase his own profitability at my expense and also the expense of the customer.

I have given the prime contractor my best price. I want the work, and there is no reason for me to add a margin to my bid. Doing so could mean that I would not be low and not get the job. Squeezing me or another for a better price once the prime contractor has the contract means that I would have to cut or eliminate my profit or, worse yet, cut corners on a job. I'm not in business to work at a loss. I'm not in business to lower quality on my jobs or endanger a hard-won reputation of quality. So when a contractor shops my bid or threatens to do so, I don't play the game. I do not bid that contractor in the future. It's simply not worth the danger to my company's reputation.

But if I choose not to work for the contractor again, I have already lost time and money spent to estimate the job and price it. From that standpoint, this committee, the customer is a loser, too. He doesn't know it. He doesn't know he is a loser. He's paid for my best workmanship, quality and expertise as part of the contract price; and he's not going to get it. It's going to the prime contractor's wallet as a windfall profit.

A legislative approach to bid listing has been around for a long time. Since 1931, in the 72nd Congress, and again in 1938, a measure passed both Houses of Congress, was vetoed by the President because of an unrelated provision requiring agencies to supervise subcontractor payments.

Bills have been introduced in many Congresses since then with varying degree of activity. Both the House and Senate have each again passed bid listing measures in years since the veto. This activity has caused the GSA and others to take a close look at the practice.

In 1963, the General Services Administration tried a pilot bid listing regulation. In 1964, it issued general bid listing regulations covering contracts over $150,000 and subcontracts over 3.5 percent of the total. In 1965, the Interior Department issued similar regulations. Both agencies experienced good results.

Speciality contractors have been consistent in their efforts to implement a policy of bid listing. In March 1965, the Associated General Contractors also adopted an official policy supporting bid listing for mechanical and electrical specialty contractors on all Federal building construction products. They are on record as of this day abhorring the bid shopping and peddling practice.

In the meantime, in 20 years experience with the bid listing policy in the Federal agencies, they exposed flaws in the regulations, administered under sometimes unclear and confusing regulations. These led to some administrative complications and costly lawsuits. By 1984, the GSA, the last remaining Federal agency requiring bid listing, dropped its use. And that brings us right back to where we were in 1931, seeking a legislative remedy to a costly pervasive and divisive problem, the ongoing unethical practice of bid shopping and peddling.

H.R. 4012 makes use of seven decades of experience in legislative and executive approaches to bid listing. It is simple enough to be understandable. Its scope is broad enough to be effective, and yet it's limited enough not to be an insurmountable burden. It sets the administrative standard that's fair, understandable and enforceable, taking Federal agencies off the hook and protecting them from unwanted lawsuits. The language is clear, concise and workable.

Federal agencies should compare this measure objectively against what has gone on before. We believe they will find it a usable and cost-effective tool to assure the government and taxpayers alike receive quality construction for what they've paid for.

NACA would like to thank Congressman Kanjorski, Chairman Horn and other Members, cosponsors of this committee for providing us with a superior piece of legislation. We urge this subcommittee to report it favorably and to move it swiftly through the legislative process. Thank you.

Mr. HORN. Thank you very much.

[The prepared statement of Mr. Fuqua follows:]

Testimony of

John R. Fuqua

Carol Electric Company

Los Alamitos, California

speaking for the

National Electrical Contractors Association, Inc

before the

House Government Reform Subcommittee

on

Government Management, Information and Technology

July 13, 2000

in regard to

H.R. 4012

Bid Listing Legislation

by Rep. Paul E. Kanjorski, et. al.

Mr. Chairman, Members of the Committee, my name is John Fuqua, Chairman of the Board of Carol Electric Company in Los Alamitos, California. I am an electrical contractor, here today speaking for the National Electrical Contractors Association - NECA.

NECA is an organization of electrical construction specialty contractors, speaking nationally for a segment of the construction industry comprised of more than 70,000 electrical construction contracting firms. The industry has an annual volume of nearly $70 billion and employs over 650,000 electrical workers and support personnel. NECA employers spend over $90 million a year training 42,500 apprentices and upgrading the skills of more than 60,000 journeymen electricians. Ninety-eight percent of our contractors are small businesses.

Bid shopping has been with us a long time - certainly as long as I have been an electrical contractor. It is an unethical practice which works not only to decrease the value of the construction the owner receives for his price, but also has a costly impact on specialty contractors doing business in good faith. Bid shopping and peddling undermine the ability of a contractor to offer his best price and to guarantee the quality of the work produced at that price. This unsavory practice is attempted quite often on federal, state, local and private work.

When I spend time - and money - to prepare a bid it is with the expectation that it will be accepted and honestly used if it is low and responsive. It is my best price - one that will give a general contractor and the owner true value and quality construction at a price where I can do the work properly and make a reasonable profit.

If, after he has been awarded the contract, the general contractor shops my bid or tries to lower my bid price by threatening to shop it, he is doing me and his customer a disservice. When he attempts to shop my bid, he is trying to increase his own profitability at my expense and that of his customer.

I have given him my best price. Squeezing me - or others - for a better price once he holds all the

cards means that I would have to cut or eliminate my profit and possibly even cut corners on the job. I am not in business to do work at a loss. And I am not in business to lower quality on my jobs or endanger a hard won reputation for quality. So when a contractor shops my bid, or threatens to do so, I reject doing so. And I do not bid to that contractor in the future. It is not worth the danger to my company's reputation.

But even if I choose not to work for that contractor again, I have still been a victim of this shady practice. I have lost the time and money spent to estimate that job and price it to the best of my ability. The customer is a loser too, since he has paid for my workmanship, quality and expertise...and he is not going to get it. It is going into the general contractor's wallet.

As I said, the practice of bid shopping has been around a long time. The concept of bid listing as a remedy also has been around for a long time. Congress first took a look at bid listing in 1931 in the 72nd Congress. It was reported out of Committee in the House but received no further action. The measure was reintroduced in the 73rd Congress. Then, in 1938, H.R. 146 in the 75th Congress, sponsored by Rep. John William Gwynne (D-IA), passed both houses of the Congress. It was vetoed in June of that year by President Franklin Roosevelt because of a provision that required agencies to supervise subcontractor payments.

Another bid listing bill was introduced in 1940, but then the war years intervened. In 1951 an effort began with the federal agencies to halt bid shopping and peddling on federal work. Legislation was introduced in the 82nd and 83rd Congresses. In the 84th Congress a bid listing measure passed the Senate, but died when it failed to pass the House by a 2/3 majority under suspension of the rules just before adjournment.

In the 85th Congress the reverse occurred - the House passed a bid listing measure, which was reported out of Committee in the Senate, but never made it to the Senate floor. A measure was introduced in four of the next five Congresses. However, movement in the executive branch agencies drew industry efforts away from legislation.

Meanwhile, in the federal agencies, 20 years experience with the sometimes unclear and confusing regulations they themselves had written exposed flaws in these rules which led to complex and sometimes costly administrative complications. Ambiguities in procedure led to some costly lawsuits. By 1984 the GSA, the last remaining federal agency requiring bid listing, dropped its use.

And that brings us, today, back to where we were in 1931 - seeking a legislative remedy to a costly, pervasive and pernicious problem, the ongoing unethical practice of bid shopping and peddling.

The author of H.R. 4012 has taken note of this history and it is a better piece of legislation for it. It makes use of the seven decades of experience in legislative and executive branch approaches to bid listing. It is simple enough to be understandable. It's scope is broad enough to be effective, yet limited enough not to prove an insurmountable burden. It has set forth administrative standards that are fair, understandable and enforceable - taking federal agencies off the hook and protecting them against lawsuits rooted in ambiguity. The language is clear, concise and workable. We believe federal agencies which compare this measure objectively against what has gone before will find it a useable and cost-effective tool to assure they receive the quality construction they have purchased.

NECA would like to thank Congressman Kanjorski, Chairman Horn and the other co-sponsors of this measure for providing us with a superior piece of legislation. We urge this Subcommittee to report it favorably and to move it swiftly through the legislative process to final passage. Thank you for allowing us this opportunity to present our views.

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Attachments:

- History of Bid Listing Legislation and Regulation (2 pgs.)
- Record of CMSCI Efforts to Protect Specialization and Expand Business Opp. (10 pgs.)
- GSA News Release 6/4/1965 (1 pg.)
- Dept. of Interior News Release 11/17/1965 (1 pg.)

HISTORY BID LISTING LEGISLATION

72nd Congress (1932) S. 437, S. 4081, S. 4680, H. R. 9921 - Reported out of House Executive Committee

73rd Congress (1934) H. R. 4937, H. R. 9776

75th Congress (1938) H. R. 10087

H. R. 146 passed by both Houses after Reconsideration vote in Senate.

Franklin D. Roosevelt vetoed H. R. 146 as it had a vague penalty provision and small contracts of $500 were covered.

76th Congress (1940) S. 1639

82nd Congress (1952) S. 2907, H. R. 7819

83rd Congress (1953), S. 848, H. R. 1825

84th Congress (1955)
S. 1644 - passed Senate Judiciary June 21, 1955 (Report 617)
passed Senate July 27, 1955
passed House Judiciary Committee June 15, 1956
failed to obtain 2/3 for Suspension July 23
House adjourned July 27, 1956

85th Congress (1957)
H. R. 7168 - passed Judiciary Committee May 9, 1957
passed House June 24, 1957
passed Senate Judiciary August 26, 1957
Senate adjourned August 30, 1957
Bill not brought up Second Session 1958

86th Congress H. R. 10940 Sisk

88th Congress (1963) H. R. 11072, Leggett, Hanna, Senator Inouye

89th Congress (1965) H. R. 489 Leggett

90th Congress (1969) H. R. 3345, Leggett, Hungate, Hogan

Regulations History (C. M. S. C. I. Action)

1963 - GSA pilot project on 23 contracts

1964 - Interior Department pilot program

November 1964 - GSA Regulations covers their contracts over $150,000 and over 3 1/2 percent subcontracts (Good Results)

November 1965 - Interior Regulations - contracts over $150,000 and over 2 percent subcontracts (Good Results)

Regulations have been amended to require Scope of Work Notice - Rehabilitation exception

omnibus -
archives
bid listing

RECORD OF THE EFFORTS OF THE MECHANICAL AND
ELECTRICAL CONTRACTING INDUSTRIES TO PROTECT
THEIR SPECIALIZATION AND EXPAND THEIR BUSINESS OPPORTUNITIES

The mechanical specialty contracting industries were developed around engineering knowledge and application and the use of skilled craftsmen to perform the more intricate and costly items of building construction. They have had to be eternally alert to maintain their identity and independence and prevent their specialty from being amalgamated. This started during the Depression of the 1930s as an aftermath of the first big construction boom of the 1920s. It has been going on ever since. Following is a chronology of the struggle:

1931:	First bid-listing bill introduced in Congress; advocated by informal committee comprised of electrical, plumbing and heating contractors. It provided broadly for the listing of all subcontractors and materialmen. It made no progress largely because of this last feature and the opposition it generated from the administrative agencies.
1938:	The Gwinn bill (H.R.146, 75th Cong.), introduced by Rep. Gwinn (D. of Iowa), passed the Congress. This was somewhat modified from the 1931 version but still required listing of all subcontractors.
June 25, 1938:	The Gwinn bill was vetoed by President Roosevelt who explained that it would be an administrative monstrosity partly because of the requirement for the listing of all subcontractors. The strongest opposition was made however to a provision for supervising subcontractor payments.
1940:	Representatives of the electrical, plumbing and heating groups, notably Laurence Davis, NECA; Frank Clucas, NAMP; and Joseph Fitts, HPACCNA; met several times to review the effect of government defense construction contracting policies on their industries. A trend toward favoring large integrated construction and engineering concerns on the big cost-plus-fee jobs with the prime contract performing all the work was evident.
1941:	Officers of the IBEW advised NECA that aggressive action was necessary to maintain the identity of the trade, and, indeed, the very existence of the independent specialty contractor. The AFL Building Trades negotiated with the Armed Services a Memorandum of Understanding whereby premium time was waived on condition the Armed Services adhered to a subcontracting requirement on defense construction contractors.

May 25, 1951: Committee wrote General Pick of Army Engineers complaint on bid shopping and bid peddling and on this day Mr. Geary and Mr. Clucas called on H. E. Foreman, managing director of the AGC to discuss general contractor attitude on enforcing AGC code of ethics against bid shoppers. AGC response cool, tended negative.

July 25, 1951: Liaison Committee met in Washington and a proposal for national legislation on bid shopping and bid peddling was advanced as a result of several months of staff contacts with federal contracting agencies. Senator Sparkman's Small Business Committee was consulted and was receptive to supporting such legislation. James Marshall, staff official of the AGC, was invited to this meeting and attended. He expressed doubt that the AGC would be interested in supporting such legislation but agreed to refer the matter to Managing Director Foreman.

Sept. 20, 1951: Mr. Geary and his assistant, William J. Cour, had informal conference with AGC Director Foreman to discuss shopping and peddling. AGC attitude very chilly.

Nov. 21, 1951: Mr. Geary received from Mr. Foreman a letter rejecting as "unnecessary" any discussion between AGC and NECA or other subcontractor groups inasmuch as AGC had its own code of ethics which Foreman said covered the subject.

Jan. 15, 1952: Liaison Committee met. Attending were: NAMP, Mr. Killian, Mr. Clucas, Oliver Erickson; NECA, Mr. Geary, Roscoe and Cour; HPACCNA, Fitts, Fred Williams, McGregor. Agreement reached to introduce legislation. Staff study of agencies showed conclusively that separate contract legislation, which the groups tended to favor, was strongly opposed by agencies which had documented evidence of higher costs and disastrous delays to fight it. Agreement reached to support legislation requiring general contractors to list their mechanical specialty subcontractors. The bill was to require (Sec. II) also subcontracting of cost-plus-fixed fee jobs to a limited extent. In these initial meetings HPACCNA was the chief advocate of legislative correction. All groups unanimously approved budget, including retention of legal counsel to draft and promote the bill.

Feb. 29, 1952: Weaver & Glassie retained as counsel to draft and promote the bill. Original agreement signed by Geary, Fitts and Clucas said: "That at the conclusion of this term of employment the matter of final fee will be open for discussion, our assumption being that in the event the effort was successful some reasonable additional payment would be in order and that it will be negotiated at that time." The three associations agreed to divide the fees and retainers equally.

March 24, 1952: S.2907 with Sen. Harley Kilgore (D., W.Va.), as chief author, introduced in the Senate. The Committee and the Secretary were registered under the Lobby Act.

July 29, 1952: The Liaison Committee met in Washington and the vote was unanimous to continue the legislative effort in the 83rd Congress and that Weaver & Glassie be retained on a monthly retainer basis. In the event of final enactment into law, the firm would be paid a substantially additional fee over a period of five years after final enactment. Attending were: NECA, Clayton, Geary; NAMP, Clucas; HPACCNA, Fitts; and Secretary Roscoe.

Nov. 17, 1952: AGC Industry Relations Committee met with NECA Governmental Affairs Committee pursuant to AGC invitation to NECA to discuss bid shopping. Meeting was held after NECA obtained approval from the Liaison Committee. NECA rejected AGC plan to set up local cooperative committees and reported this to the Liaison Committee.

Dec. 7, 1952: Liaison Committee met in Washington to consider tentative action by HPACCNA to withdraw financial support. HPACCNA reconsidered, agreed to continue support. Present were: HPACCNA, W. M. Murray, Fitts; NECA, Geary; NAMP, Gelder V. Lewis, Erickson; and Secretary Roscoe. The legal fee arrangements were confirmed.

Feb. 10, 1953: Federal Construction Contract Act (S.848) introduced in Senate and identical bill (H.R.1825) in House.

March 12, 1953: Liaison Committee met in Washington and reviewed legislative effort. Present: NAMP, Joseph C. Pettigrew and Erickson; NECA, Geary and Cour; HPACCNA, Fitts and William M. Murray; and Secretary Roscoe. Secretary of Sheet Metal Contractors asked to affiliate with Committee but no action taken on this request.

Sept. 24, 1953: Liaison Committee met in Washington: Present: NAMP, Gelder V. Lewis and Erickson; HPACCNA, Robt. W. Lawinger and Lloyd Gruman; NECA, Geary and Secretary Roscoe. Attitude of U.S. Chamber of Commerce in overlooking mechanical specialty contractors in Committee assignments discussed.

Nov. 12, 1954: Liaison Committee met in Washington. Present were: NAMP, Robert Murphy and Erickson; HPACCNA, Lloyd Gruman; NECA, Geary and Secretary Roscoe. A revised bill eliminating the misunderstood Section II on cost plus a fixed fee work and on limiting it to the subcontractor listing provisions was proposed. Mr. Gruman expressed strong

sentiment for the bill but said his directors would have to decide whether the association could afford continued contributions. Mr. Murphy favored continuing the fight but said financing would have to be determined by the NAMP Board of Directors. (NAMP at this point changed its name to NAPC.) Memo giving details of counsel fee agreement sent to all officers and directors of HPACCNA and NAMP. Without any commitment from HPACCNA and NAPC and with NECA underwriting costs, plans were made to introduce a revised bill in Congress.

Jan. 20, 1955: Mr. Gruman advised HPACCNA (now MCA) had formally acted to withdraw financial support but would give "moral" support to bill. About this time NAPC advised that its Board decided to participate in financing only if MCA did likewise.

March 1, 1955: Liaison Committee, unable to get definite yes or no from MCA and NAPC, resolved the stalemate by having NECA assume responsibility for continuation of the legislative campaign. NECA undertook to pay all expenses with understanding other two groups would come in as soon as they could resolve their own problems.

April 1, 1955: S.1644 introduced in the Senate.

June 20, 1955: Soon after the Senate Judiciary Committee favorably reported the bill, Sen. Pat McNamara (D.,Mich.) filed a request for an amendment with the Judiciary Committee. Inquiry developed that the amendment was requested by the MCA at a meeting in Houston and was not discussed or approved by the Liaison Committee. Authors of the bill rejected the proposed amendment on the grounds that it was restrictive and would introduce an element of trade jurisdiction into the bill.

July 8, 1955: MCA registered objections to the bill and a conference was held in Washington between James Morris, MCA Committee Counsel and Secretary Roscoe. At the Liaison Committee meeting at Washington that day NECA representatives insisted that better cooperation be established and that a permanent type organization be set up in place of the loosely organized Committee. Attending were: NECA, Geary and Secretary Roscoe; MCA, Fred Williams and Gruman; NAPC, Robert Morrill and Erickson.

July 11, 1955: MCA advised the Committee it would again give endorsement and moral support to S.1644, but made clear this action did not connote financial support or liability.

Nov. 29, 1955: Plan for permanent organization presented. It provided for direct solicitation of all mechanical specialty contractors for support of the legislative activity, thus removing this obligation from the participating trade

associations. NECA agreed to pay for memberships of all of its members. MCA approved the plan. NAPC had no objection. Attending this meeting were: NECA, Geary and Secretary Roscoe; MCA, Fred Williams and Lloyd Gruman; NAPC, Binder.
The newly-created Council of Mechanical Specialty Contracting Industries held its organization meeting with the following as members of the Board of Trustees: James S. Binder, plumbing, president; Fred Williams, heating-piping, vice president; Walter Limbach, sheet metal; Paul Geary, electrical; Henry Glassie, counsel; Executive Secretary George Roscoe. The Council took over the obligations and executed new contracts, carrying out the terms of the Liaison Committee commitments with counsel.

June 11-14, 1956: NAPC Convention met in Milwaukee. Action by the Convention was in favor of supporting the bill and cooperating with the Liaison Group financially. President Morrill requested an "opinion" from legal counsel on the matter. The opinion rendered on the spot was to the effect that it would be a violation of law (from anti-trust and tax exemption standpoint) for NAPC to join with other trade associations in lobbying activities. The opinion was cited to smother the action of the Convention.

Aug. 22, 1956: Officials of the NAPC met with the Board of Trustees of the Council in Washington, D.C. There were present: William A. Landers, National Secretary Jack G. Irwin, Chairman Byron Eplett of the NAPC Public Relations Committee and Executive Secretary J. O. Hendrickson. Mr. Landers said he favored the Council's objectives and was disappointed at the action of the NAPC Convention in not supporting the legislative program of the Council. He said he would ask the NAPC Board of Directors to review their position and he was confident the NAPC would cooperate fully.

Sept. 25, 1956: AGC President Frank Rooney sent a letter to NECA President Oliver Burnett suggesting a conference on the legislative matters with the hope of working out some compromise. Subsequently, he sent similar letters to the presidents of MCA and NAPC. After NECA obtained Council approval, it agreed to an informal, exploratory conference.

Oct. 11, 1956: President Rooney, Executive Director James Marshall, and his assistant, William Dunn, met with President Burnett of NECA, Mr. Geary and Mr. Roscoe at the Bismarck Hotel, Chicago. AGC convinced NECA AGC sincerely wanted to curb bid shopping and peddling and wanted to extend curbs to private work as well. NECA concluded that fear of separate contract legislation was real

My point in going into this detailed history is that bid shopping and peddling as problems, and bid listing as a solution, have been with us for decades. The problems are widespread. The solution is necessary and evident.

In 1963 the General Services Administration adopted a pilot bid listing regulation. In 1964 that agency issued general bid listing regulations covering contracts over $150,000 and subcontracts over 3.5% of the total. In 1965 the Interior Department issued similar regulations, but covered subcontracts over 2% of the total contract price. Both agencies experienced good results.

The Associated General Contractors incorporated a statement condemning the practice of bid shopping as part of their code of ethics in the early 1950's. In the mid-1960's that organization adopted an official policy and procedure for bid listing on all federal building construction projects. At its March meeting in 1965, the AGC gave official approval to a "fair bidding procedure" which consisted of bid listing for mechanical and electrical specialty contractors on federal building projects. They have reiterated their abhorrence of bid shopping and peddling to the present, in a current joint policy statement with the Associated Specialty Contractors and the American Subcontractors Association.

This policy states:

> Bid shopping or bid peddling are abhorrent business practices that threaten the integrity of the competitive bidding system that serves the construction industry and the economy so well.
>
> The bid amount of one competitor should not be divulged to another before the award of the subcontractor or order, nor should it be used by the contractor to secure a lower proposal from another bidder on that project (bid shopping). Neither should the subcontractor or supplier request information from the contractor regarding any sub-bid in order to submit a lower proposal on that project (bid peddling).
>
> The Associated General Contractors of America, the American Subcontractors Association and the Associated Specialty Contractors oppose these practices.

reason for AGC opposition to the bill. NECA convinced AGC this was NOT the objective. AGC was told any future meetings must be with the Council.

Dec. 14, 1956: A special committee of the AGC and the Board of Trustees of the Council met at the Sheraton-Carlton Hotel, Washington, D.C., to discuss whether a resolvement of differences might be possible. Attending for Council were: Binder, Williams, Limbach, Geary, Roscoe, Glassie and Henry Weaver, counsel. Attending for AGC were: Frank Rooney, Marshall, Dunn, Jack Bowersox, C. B. Solomon, R. A. Smith, C. P. Street.

(NOTE: In the meantime death of Senator Kilgore and succession of Senator Eastland to chairmanship of Judiciary greatly strengthened the hand of AGC.)

The Council took the position that legislation was necessary and that AGC cooperation was welcome but if not given the Council would drive ahead to enact a bill. Prospects seemed dark for any compromise but it was agreed to have another meeting attended by AGC President Rooney, Council President Binder and staffs. Meantime counsel on both sides was instructed to meet and draft a memorandum containing points of agreement and disagreement.

Jan. 8, 1957: PresidentsRooney and Binder, Geary, Roscoe, Marshall, and Dunn met and reviewed the memorandum Mr. Dunn and Mr. Glassie had developed. It appeared this memorandum held promise of a compromise. The points were referred to the appropriate AGC officials and directors and the Council referred the points to the members of the Board of Trustees who, in turn referred them to appropriate officers in the trade associations concerned. The response from both sides was affirmative and work was started by counsel in drafting a new bill incorporating the points in the memorandum.

Jan. 24, 1957: H.R.3340 and five companion House Bills incorporating changes cited in the memorandum of understanding between the Council and the AGC were introduced in the House on this and immediate subsequent days. The AGC agreed that it would NOT object to this bill and would seek to confirm this neutrality at its convention. Copies of the bill were widely distributed, including to all former supporters.

March 27, 1957: During hearings on H.R.3340 before the House Judiciary Subcommittee No. 2, General Wilson, Chief of Army Engineers, suggested some 20 amendments to the bill, including adding to the definition of mechanical specialty work, (Sec. 3(3)), the words "to a point

5 feet outside the building line." The witness for the Council (Glassie) immediately advised the Subcommittee, as may be seen from the record, that this would be an improper and unfortunate amendment.

April 9, 1957: After the hearings the Council induced AGC to sign a joint memorandum and deliver it to the Subcommittee, stating that the 5-foot amendment was not desired by, or acceptable to, either organization. All trade associations through their council representatives were advised of this activity.

April 30, 1957: Nevertheless, the Subcommittee reported to the full Judiciary Committee a bill with this 5-foot amendment proposed by General Wilson.

April 30--May 8, 1957: After this action by the Subcommittee, the staff and attorneys for the Council called upon, and left a strong written memoranda with, Representatives Celler, Miller, Lane, Rodino and Boyle, strenuously objecting to the 5-foot amendment. (Incidentally, during the period (March 27-May 8) neither UA or NAPC took any steps to object to the 5-foot amendment; although the bill in this form had wide circulation.)

May 9, 1957: The House Judiciary Committee reported H.R.7168 (a clean bill) with various amendments, including the 5-foot provision to which the Council had made the above-mentioned strenuous objections, largely because most of the Congressmen alerted did not happen to be present at the meeting.

July 24, 1957: The Rules Committee having given a "rule", the bill passed the House without recorded vote. The debate was very helpful in construing and clarifying the other provisions of the bill but did not mention the 5-foot amendment.

July 8, 1957: Lloyd Gruman advised the Council by phone that there was opposition in the plumbing industry to the 5-foot amendment. This was the first advice we had from anyone in the plumbing industry although several thousand copies of the House Judiciary Committee Report showing this amendment, and copies of the bill showing the amendment had been given wide circulation many weeks earlier.

July 10, 1957: A meeting was held in Washington of representatives of the Council, MCA, NAPC and UA to discuss what might be done about the 5-foot amendment to which MCA, NAPC and UA belatedly raised objection. Attending were J. Hendrickson, NAPC; Charles Donohue, UA; Lloyd Gruman, MCA; Bill Cour, NECA; George Roscoe, Secretary; and Henry Glassie and Ray Donaldson, Counsel. Representatives of the Council outlined the various steps they

had taken in attempting to eliminate the 5-foot measure and called attention to the fact they had never before been advised by UA or NAPC that it was of moment. A legal opinion previously rendered was read to the meeting showing that while the language might be suggestive of trade jurisdictional implication it was not effective in any operational way to injure the mechanical specialty industry. Council representatives suggested in view of the time element and the pre-occupation of the Judiciary Committee with other matters (Civil Rights and the Teamsters hearings) that it might seriously offset the chances of passage in this session to raise any question but suggested however that they would cooperate in every way in an effort to eliminate the 5-foot provision on the floor of the Senate. No objection was expressed by any person present, including the UA and NAPC representatives, to any other feature of the bill and the meeting was adjourned to July 17, 1957, to further discuss the matter with the express understanding that nothing would be done by any party in the meantime.

July 17, 1957: A second meeting was held with the same persons plus the addition of Fred Williams of MCA and William E. Dunn of AGC. Dunn assured the group that AGC would cooperate in eliminating the 5-foot provision and that AGC did not want it, as evidenced by the April 9th memorandum. At this meeting representatives of the Council offered to go to the Judiciary Committee members in an effort to have the 5-foot provision eliminated and requested that the others all use their best efforts to get the bill passed. Again, no representative at this meeting expressed any other objection to the bill or stated that it was not acceptable, although the NAPC representative suggested they were taking no position on this one way or another. Since the Judiciary Committee was still tied up, the group agreed that they adjourn to July 25, 1957, to further discuss the matter and agree on a joint course of action, and again it was understood that nothing would be done in the meantime. Mr. Donohue expressly agreed that Council representatives might have a conference with Mr. Schoemann before the July 25th meeting (never arranged).

July 25, 1957: UA and NAPC, without prior notice to the Council, delivered a memorandum to the Senate Judiciary Committee making broad objection to H.R.7168. At the same time MCA delivered a memorandum objecting to the 5-foot provision. Of course no meeting was held on July 25, though representatives of the Council waited throughout the day expecting to hear from the other conferees.

Aug. 26, 1957: The Senate Judiciary Committee, with the Council exerting maximum pressure for it to act and to eliminate the 5-foot provision, reported H.R.7168 with the 5-foot amendment stricken. There was every reason to believe that if the Council had not taken strong position on the amendment the Committee would have reported the bill without such amendment. This was accomplished despite pressure exerted by UA and NAPC on members of the Judiciary Committee to hold up action on the bill.

Aug. 27, 1957: The Board of Trustees of the Council met in Washington, reviewed the legislative situation, instructed staff not to press for final enactment of H.R.7168 at the first session but to conduct an educational program to acquaint the industry with the important benefits from this measure. The Council also directed that its bylaws be changed to permit direct association membership by the MCA, NECA, SMACCNA and NAPC. Direct membership from individuals would be solicited and accepted but after Jan. 1, 1958, would be used to pay obligations of the legislative campaign. Each participating member association would share equally in budget of the Council after Jan. 1, 1958. The Board also approved setting up a National Joint Cooperative Committee with the AGC to review and make recommendations on matters of industry importance. Present were: Binder, Williams, Joseph Spitzley, president of MCA, Gruman, Robert Peterson, Joe Wilder, secretary SMACCNA, Geary, Glassie and Secretary Roscoe.

Sept. 25, 1957: Board of Trustees of the Council (Binder, Williams, Peterson, Geary, Glassie, Secretary Roscoe) met with AGC representatives to set up the National Joint AGC-Council Cooperative Committee. Joseph Spitzley, president of MCA, and Lloyd Gruman, secretary of MCA, attended. The president and secretary of the NAPC were invited but refused to attend. For AGC were Ira Hardin, A. C. Tester, James Marshall, Welton Snow, William Dunn, Jack Bowersox and Travis Brown, AGC counsel. Agreement was reached to name members as soon as possible, survey the country for existing cooperative efforts and programs, and meet late in November or early December.

Oct. 1-14, 1957: A group sponsored by the NAPC and calling itself Subcontractor Trades Group met in Washington to muster opposition to H.R.7168. Only half as many attended the second meeting. The strategy was to insist on loading the bill with non-mechanical specialty trades for the listing provisions so that it would be administratively impossible and thus certain to be defeated.

Apparently the notable legal opinion rendered at the Milwaukee NAPC Convention in 1956 forbidding NAPC joint legislative activity had been forgotten.

Oct. 21, 1957: The presidents of MCA, NECA, SMACCNA and the Council issued a public statement supporting H.R.7168 and condemning the ill-advised attempts of the NAPC to scuttle the bill.

GSA NEWS RELEASE

OFFICE OF INFORMATION
GENERAL SERVICES ADMINISTRATION
ROOM 6113, 18TH AND F STREETS NW.
WASHINGTON, D.C. 20405
343-4511

FOR IMMEDIATE RELEASE
FRIDAY, JUNE 4, 1965

GSA #2807

File

The General Services Administration today announced changes in its regulations requiring bidders on construction and alteration projects to list major subcontractors.

GSA said it is eliminating the "48-hour rule" which gave prime bidders two days to list their subcontractors after the deadline for submission of bids. Future listings, when required, are to accompany bids or be submitted for attachment by the time of bid opening.

The changes in the bidding requirements will be fully detailed in the Federal Register, the agency said, and in future invitations for bids.

GSA also has altered the criteria for determining which projects will call for an identification of subcontractors.

The requirement for subcontractor listing will be applicable to new construction projects with an estimated cost of more than $150,000 and to building alterations with cost estimates exceeding $500,000. Previously, the figure for both was $150,000.

Contracting officers are to determine the work categories in which subcontractors will be listed and these will be indicated on bidding forms. The work categories will include plumbing, heating, air conditioning and ventilation, electrical, elevators and all others with a value representing at least three and one-half percent of the estimated total contract price.

GSA initiated in August of 1963 the subcontractor listing requirement as a step to help eliminate the practice of "bid shopping" by prime contractors for Federal projects.

Since then the agency has closely evaluated its experience with the subcontractor listing requirement and has conferred with interested segments of the industry.

A clause in future major bid invitations will request the general contractor to urge subcontractors to submit written proposals, with or without price, detailing the sections of specifications to be included in their work. It is also suggested that such proposals be submitted to the bidder at least 48-hours before the scheduled bid opening.

* * * *

FOR IMMEDIATE RELEASE FRIDAY JUNE 4, 1965

BID LISTING

UNITED STATES
DEPARTMENT of the INTERIOR

★★★★★★★★★★★★★★★★★★★★★★★news release

OFFICE OF THE SECRETARY

For Release NOVEMBER 13, 1965

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INTERIOR ADOPTS NEW POLICY ON LISTING OF SUBCONTRACTORS

Secretary of the Interior Stewart L. Udall today announced a new Departmental order which will require bidders on all Interior building construction work throughout the Nation to list with their bids the names and addresses of their subcontractors. This new policy supersedes experimental procedures which had been in effect since December 1963, but which were limited to Interior construction projects in Arizona and New Mexico and parts of the Navajo Indian Reservation in Utah and Colorado.

Under the terms of the new directive, all building construction and alteration projects estimated to involve over $150,000 are to be covered by the subcontractor listing requirement. Illustrative of the types of construction projects affected are visitor centers, school buildings, dormitories, employee housing and hospitals. The requirement applies to both negotiated and formally advertised contracts.

Secretary Udall stated:

"Our new procedures, which closely follow the pattern of regulations on subcontractor listing issued by the General Services Administration, are designed to promote maximum stability in subcontractor selection, and to eliminate as far as possible the practice of 'bid peddling.' In a very real sense, the policy is advantageous to small business."

Secretary Udall pointed out that the required listing of subcontractors is to include such subcontracting activities as plumbing, heating, ventilating, air-conditioning, masonry, elevators, and electrical work when the estimated cost of each of the categories is equal to or greater than 2 percent of the total estimated cost of the entire project. If a contractor's own firm is to be subcontractor, that fact is to be listed.

Selected categories of work to be listed also may be broadened to include categories valued at less than 2 percent "when, in the judgment of the contracting bureau or office, such listing is appropriate to protect the interests of the classes of subcontractors eligible to bid on such categories," Secretary Udall's order says.

# # #

NN. 71610-65

Mr. HORN. We now go to Mr. John J. Dunleavy, the executive vice president of Pierce Associates in Alexandria, VA; and he represents the Mechanical-Electrical-Sheet Metal Construction Alliance. Mr. Dunleavy.

STATEMENT OF JOHN J. DUNLEAVY, EXECUTIVE VICE PRESIDENT, PIERCE ASSOCIATES, INC., ALEXANDRIA, VA, REPRESENTING THE MECHANICAL-ELECTRICAL-SHEET METAL CONSTRUCTION ALLIANCE

Mr. DUNLEAVY. Good morning Mr. Chairman, members of the subcommittee. My name is John Dunleavy. I'm executive vice president of Pierce Associates. Pierce Associates is a member of the Mechanical Contractors Association of America and, I should also add, a proud member of the Associated General Contractors.

I am pleased to be here today on behalf of the Mechanical-Electrical-Sheet Metal Alliance to support H.R. 4012, the Construction Quality Assurance Act of 2000. The Alliance, comprised of MCAA, the National Electrical Contractors Association, and the Sheet Metal and Air Conditioning Contractors' Association of America, represents more than 12,000 speciality construction contracting firms that employ more than 540,000 highly skilled employees.

Alliance contractors hold a growing market share of more than 60 percent of the Nation's nonresidential construction activity. MCAA and Alliance contractors compete vigorously in the market for Federal construction projects and perform as prime contractors, speciality subcontractors, and sub-subcontractors.

Pierce Associates has been in business since 1961, performing work on Federal projects in the Washington, DC, metropolitan area, primarily as a subcontractor. MCAA and the Alliance strongly support H.R. 4012, which is aimed at improving the quality of Federal construction project delivery and the competitiveness of Federal construction markets. By effectively stemming the parallel abuse of business practices of bid shopping and bid peddling, both universally condemned by leading industry groups, but which nevertheless occur in practice, the Construction Quality Assurance Act will bring many more quality construction firms back into competition in the Federal market.

Additionally, the act will lead to project performance based on best-value performance contracting, rather than adversarial buying-the-job practices.

H.R. 4012 is a necessary Federal procurement reform that continues the pattern of procurement policy improvements starting with the Competition in Contracting Act, the Prompt Payment Act and its amendments, the Federal Acquisition Streamlining Act and the recent Miller Act Amendments.

Taken together, these predecessor reforms establish congressional policy allowing Federal construction purchasing officials to be much more discerning market participants by choosing from among the full range of proven best-value contractor selection options, gaining the full performance incentives of past performance evaluations, and fully utilizing FAR authority to evaluate and assess the responsibility and performance capabilities of major subcontractors actually performing the vast majority of work on Federal projects.

By extending bid listing protections to major first-tier subcontractors, H.R. 4012 would ensure that performing contractors and subcontractors are committed to successful project performance. Unfortunately, bid shopping and bid peddling can lead to adversarial wrangling over construction documents, in an effort to recover fiscally from post-bidding auctions selling the job to chisel down the actual cost of the low bid, would be eliminated. Additionally, bid listing would end the administrative and claims processing overhead engendered by bid shopping and bid peddling, overhead that far outstrips any perceived cost savings because these unethical practices leave the performing subcontractors vulnerable to an unprotected auction after the initial bidding.

Attached is an ostensibly humorous trade press item that describes the counterproductive risk transfer dynamics in the low-bid system.

The trend in actual procurement practices requires reform of the low-bid selection procedure. Subcontractor listing is imperative on low-bid as well as the competitive negotiation best-value systems. Over the last decade, Federal contracting officials have voted with their feet in choosing between low-bid versus competitive negotiation in construction contractor selection methods. Attached are tables based on Alliance-commissioned research with the Federal Procurement Data Service, showing the precipitous decline in the use of the low-bid selection method in construction procurements and speciality construction over the period from 1990 to 1999.

The Alliance research documents that agencies are turning more and more to negotiated best-value contractor selection because Part 15 of the Federal Acquisition Regulations encourages identification and past-performance evaluation of major subcontractors. Discerning public officials know they get better results when they know the qualifications, skills and performance records of the contractors and subcontractors who will be performing the work. H.R. 4012 would help preserve the use of the low-bid system as a viable best-value selection method by protecting the integrity of careful estimates and retaining quality construction contractors competing in that market.

Similarly, while FAR encourages the evaluation of major subcontractors in competitive negotiations, the protections against post-award substitutions in H.R. 4012 should specifically be extended to that selection system as well. In that way, the government will be assured the performance premium it bargains for when awarding on the basis of competitive proposals.

In conclusion, the severely deleterious effects of bid shopping and bid peddling on construction industry performance is widely recognized. Similarly, the beneficial aspects of listing major subcontractors are just as widely recognized. Moreover, the trends in direct Federal procurement prove this trend in actual agency experience. Because of that, the subcommittee should continue its impressive record of Federal construction procurement reforms and bring both best-value contractor selection systems—low-bid and negotiated selection—into line with the best private-sector procurement practices.

Mr. Chairman, thank you and your colleagues for your steadfast interest in keeping the Federal construction market up to par with

the best practices in other public and private sector markets. This proposal should clearly apply to all solicitations, both invitations for bid and requests for proposals.

It is our firm conviction that the pace of change in the industry and in Federal procurement law virtually requires bid listing as a way to retain and attract quality performance subcontractors to obtain for the public and taxpayer the quality performance they deserve. Thank you for your opportunity to testify.

Mr. HORN. Thank you, Mr. Dunleavy.

[The prepared statement of Mr. Dunleavy follows:]

Testimony of

John J. Dunleavy

Pierce Associates, Inc.

Alexandria, Virginia

on behalf of the

Mechanical Contractors Association of America (MCAA) and the

Mechanical-Electrical-Sheet Metal Alliance

before the

House Government Reform Subcommittee

on

Government Management, Information, and Technology

July 13, 2000

in support of

H.R. 4012

Construction Quality Assurance Act of 2000

sponsored by

Representative Paul E. Kanjorski and others

Introduction—Mr. Chairman, members of the House Subcommittee on Government Management, Information, and Technology, my name is John Dunleavy, Executive Vice President, Pierce Associates, Inc. Pierce Associates is a member of the Mechanical Contractors Association of America (MCAA). I am pleased to be here today on behalf of the Mechanical-Electrical-Sheet Metal Alliance to support H.R. 4012, the *Construction Quality Assurance Act of 2000*. The Alliance, comprised of MCAA, the National Electrical Contractors Association (NECA), and the Sheet Metal and Air Conditioning Contractors' Association of America (SMACNA), represents more than 12,000 specialty construction contracting firms that employ more than 540,000 highly skilled employees. Alliance contractors hold a growing market share of more than 60 percent of the nation's non-residential construction activity. MCAA and Alliance contractors compete vigorously in the market for Federal construction projects and perform as prime contractors, specialty subcontractors, and sub-subcontractors.

Pierce Associates has been in business since 1961, performing work on Federal projects in the Washington, DC, metropolitan area, primarily as a subcontractor. MCAA and the Alliance strongly support H.R. 4012, which is aimed at improving the quality of Federal construction project delivery and the competitiveness of Federal construction markets. By effectively stemming the parallel abusive business practices of bid shopping and bid peddling—both universally condemned by leading industry groups—but which nevertheless occur in practice, the Construction Quality Assurance Act will bring many more quality construction firms back into competition in the Federal market. Additionally, the act would lead to project performance based on best-value performance contracting—rather than adversarial buying-the-job practices.

Continue Federal procurement reform policy—H.R. 4012 is a necessary Federal procurement reform that continues the pattern of procurement policy improvements starting with the Competition in Contracting Act, the Prompt Payment Act and its amendments, the Federal Acquisition Streamlining Act, and the recent Miller Act Amendments. Taken together, these predecessor reforms establish congressional policy allowing Federal construction purchasing officials to be much more discerning market participants by:

1) choosing from among the full range of proven best-value contractor selection options (competitive bidding or competitive negotiations);

2) gaining the full performance incentives of past performance evaluations, and;

3) fully utilizing FAR authority to evaluate and assess the responsibility and performance capabilities of major subcontractors actually performing the vast majority of work on Federal projects.

Need to stem post-bid auctions—By extending bid listing protections to major first-tier subcontractors, H.R. 4012 would ensure that performing contractors and subcontractors are committed to successful project performance. Unfortunately, bid shopping and bid peddling can lead to adversarial wrangling over construction documents, in an effort to

recover fiscally from post-bidding auctions selling the job to chisel down the actual cost of the low-bid, would be eliminated. Additionally, bid listing would end the administrative and claims processing overhead engendered by bid shopping and bid peddling—overhead that far outstrips any perceived cost-savings because these unethical practices leave the performing subcontractors vulnerable to an unprotected auction after the initial bidding. Attached is an ostensibly humorous trade press item that describes the counterproductive risk transfer dynamics in the low-bid system.

Trend away from low-bid procurement—The trend in actual procurement practices requires reform of the low-bid selection procedure. Subcontractor listing is imperative on low-bid as well as the competitive negotiation best-value selection systems. Over the last decade, federal contracting officials have voted with their feet in choosing between low-bid versus competitive negotiation in construction contractor selection methods. Attached are tables based on Alliance-commissioned research with the Federal Procurement Data Service, showing the precipitous decline in the use of the low-bid selection method in construction procurements (Standard Industrial Classification codes 15, 16, and 17 (general building, heavy construction, and specialty construction, respectively)) over the period from 1990-1999. In summary, the data shows that:

- In 1990, invitations for bids (IFBs) (low-bid) in Standard Industrial Classification Codes 15, 16, and 17 amounted to $3.81 billion out of $4.58 billion, fully 83% of the dollar value, and 872 of the 1037 contracts let (84%) in those SIC codes. In 1990, competitive negotiations were only 16% of the total dollar volume, and 16% of the contracts let.

- By 1999, that level of predominance was fast turning around—competitive negotiation held the lion's share of SIC 15, 16, and 17 procurements at $5.04 of the $8.53 billion in dollar volume (59%), and 662 of the 1409 contract procurement actions (46%). Copies of the Alliance summary research tables are attached.

Enhancing the integrity of the low-bid system—The Alliance research documents that agencies are turning more and more to negotiated best-value contractor selection because Part 15 of the Federal Acquisition Regulations (FAR) encourages identification and past-performance evaluation of major subcontractors. Discerning procurement officials know they get better results when they know the qualification, skills, and performance records of the contractors and subcontractors who will be performing the work. H.R. 4012 would help preserve the use of the low-bid system as a viable "best-value" selection method by protecting the integrity of careful estimates and retaining quality construction contractors competing in that market.

Extend protections against substitution to negotiated procurement—Similarly, while the FAR encourages the evaluation of major subcontractors in competitive negotiations, the protections against post-award substitutions in H.R. 4012 should specifically be extended to that selection system as well. (See FAR provisions attached.) In that way,

the government will be assured the performance premium it bargains for when awarding on the basis of competitive proposals.

Conclusion—The severely deleterious effects of bid shopping and bid peddling on construction industry performance is widely recognized. (See copy of the AGC, ASC, ASA Guideline attached.) Similarly, the beneficial aspects of listing major subcontractors are just as widely acknowledged. (See copy of Design-Build Institute of America Guideline attached.) Moreover, the trends in direct Federal procurement prove this trend in actual agency experience. Because of all that, this subcommittee should continue its impressive record of Federal construction procurement reforms and bring both best-value contractor selection systems—low-bid and negotiated selection—into line with the best private-sector procurement practices.

Mr. Chairman, thank you and your colleagues for your steadfast interest in keeping the Federal construction market up to par with the best practices in other public and private sector markets. This proposal should clearly apply to all solicitations—both invitations for bids (IFBs) (low-bid) and requests for proposals (RFPs) (negotiated selection).

It is our firm conviction that the pace of change in the industry and in Federal procurement law virtually requires bid listing as a way to retain and attract quality performing subcontractors to obtain for the public and taxpayers the quality performance they deserve. Thank you for the opportunity to testify.

Attachments: a) June 5, 2000, Engineering News Record Viewpoint, page 131
b) FAR Provisions
c) Summary of Federal Procurement Data Systems Information
d) Federal Procurement Data Systems charts
e) ASC-ASA-AGC Guideline on Bid Shopping and Bid Peddling
f) The Design-Build Institute of America (DBIA) Enactment and Application of the Model Design-Build Procurement Act

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ESTIMATING
STEPHEN S. SAUCERMAN

Everyone's Bid Is Low with Me

I'm an estimator. My worth depends on my ability to calculate costs for construction projects. I seem to live alone on my "island" with one north window and 26 oz., low-pile Berber carpet over a 3/8-in.-thick pad.

It's Friday. Awash in faded triangular scales and incomprehensible architectural plans, I measure and enter data until muscles in the back of my neck grow too restricted to relay pulse from brain to fingers. Then I go home.

As I drive, myriad details race through my brain. Random, unwelcome shards of data pelt away at more pleasing thoughts: width of the hearth...gas piping...water table...addenda three. I try to push the chatter to the back of my mind, but it ebbs and flows until weariness creeps in to calm the clamor.

PENT-UP. I pull into my driveway (3,500-psi concrete), hit the garage-door button ($^1/_3$-hp, auger-drive operator with two controls) and navigate through the (16x7-ft flush insulated) overhead door. I line the car up perfectly with the mark I made on the back wall and stop my bumper a perfect 10 in. away. Wife and kids are gone tonight. Perfect. It's 13 steps to the back door. I fumble for my (Weiser®) key, and stick it into the (Brass Troy® entry) knob. I turn the key, enter the kitchen, and make a bee-line for the (21-cu-ft Frigidaire®) refrigerator. I reach for a beverage (Budweiser®).

I plop dormant on the sofa and sit motionless for 45 minutes. Mind and body are in neutral. A shot of Korbel® would go good with the beer...but there's no way I'm walking 7 ft to the liquor cabinet. The control's on top of the cabinet, so it looks like tv is out too.

Content in exhaustion, I recount the week's bids. On Monday, I took a little one by $400. I was $69,500, and second place came in at $69,900. That was sweet; small, but sweet. It was nice to know second place was so close. My greatest fear is being too low. Leave too much on the table and I'm out on the street. This one turned out okay, though.

Tuesday was unremarkable and Wednesday was mainly spent gearing up for Thursday's bid. The fire-station bid was due at 2 p.m. I'd been fiddling with it for a couple weeks, but only really got into it on Tuesday. As always, the plans were a mess, the specs incoherent and the architect defensive. I'd worked with this guy in the past and it was always the same--zero help and scared to death to accept responsibility for anything he did. Andy wasn't any help either. He's the city engineer; a typical government emloyee with unnaturally red hair, too much tenure and nothing between his ears but a snotty grin. Alice, his secretary, spends the afternoon hours asleep at her desk.

Contractors
› Top International Contractors
› Top International Design Firms
› Top Environmental Firms
› Top Design Build Firms
› Top CM Firms (fee)
› Top CM Firms (at risk)

Sourcebooks
› Top 500 Design Firms Sourcebook
› Top 400 Contractors Sourcebook
› Global Construction SourceBook

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EMAIL POLICY
PRIVACY POLICY

Addenda four was 33 pages long and arrived late Tuesday afternoon. Bid date and time remained unchanged. The city couldn't extend it because the plans were three months late hitting the streets, and the city wouldn't move back the advertised groundbreaking. The mayor said it "looked bad...especially after the last fiasco." You see, this wasn't the first go-round for the fire station. I'd bid it a year ago along with 14 other general contractors. The low bid (it wasn't mine) was $420,000 over the architect's projected $750,000 budget. The architect's explanation to me was "well, you guys obviously didn't understand the intent of the plans." Sure. The difference was more than 10%, so the city couldn't negotiate with the low bidder. Ordinance wouldn't allow it. So the city ended up going back to the drawing board. The architect charged for the additional revisions. Good gig.

Thursday came, which I spent on the phone and at the computer. We're a small office, so Tim (my boss) and I do both estimating and project management. The fax streamed nonstop as Tim streaked in and out of my office with little purpose other than to assure me that I was going to miss something. I finally let him know I was getting annoyed, so he went to bother Becky, our receptionist. At least he was out of my hair. There must have been a lot of GCs bidding because I was getting really good coverage; we were getting tons of unsolicited proposals. By 1:15, I had 16 plumbing and 20 electrical bids. Gustave Electric was low most of the day, but pulled his bid at about 1:47. Someone must have talked. The toilet accessory guy called me at 1:51 to "see how his number looked."

I didn't attend the bid letting. We sent Becky with my cell phone. I stayed to field any last-minute bids. At 1:55, I gave her the number to write in. We'd written in the alternates earlier, so all she had to do was seal the envelope and give it to the receptionist. Becky called later with the results. She said the letting room smelled like a gym. It didn't help that she was sitting next to a (nervous) contractor. Bubba had poor hygiene, 24 teeth and a strong crush on Becky. The city read his bid first; nervously waiting for the other 17 bids didn't make him smell any better.

DISSIPATED I ended up fifth out of 18 bidders. Pretty good number. I was $48,000 over Bubba's low bid of $802,900. All the bidders were bunched together pretty well; no silly highs or lows. Once I got the results, all the pent-up stress began to dissipate. I exhaled for the first time all day and was relatively sure I wasn't going to accomplish a lot more. I'd justify my existential worth another day.

Tim went golfing. Becky came back about 3:40, but left early because she'd missed lunch. I answered the phone for awhile, but the calls were nothing but subs and suppliers wanting to know how they looked. If I liked them, I told them, and if I didn't, I didn't. I was feeling playful, so I started telling everyone they were low with me. I'm sure Bubba would appreciate the humor in that. Besides, estimating's hard work and a guy's gotta have a little fun.

Stephen S. Saucerman is an estimator and project manager at Gilbank Construction in Clinton, Wis. He may be e-mailed at gilbsteve@aol.com.

FAR Provisions

The federal government has long recognized the value of promoting sound contracting, contractor selection, and project delivery systems. For example, the Federal Acquisition Regulation (FAR) also contains several provisions that require identification and evaluation of subcontractors:

1. FAR part 15: Contracting by negotiation
   a. *Exchanges with industry before receipt of proposals*, 15.201(a) requires the contracting agency to exchange information among all interested parties as soon as possible. Interested parties is defined to include "others involved in the conduct or outcome of the acquisition."
   b. *Proposal evaluation*, 15.305, requires contracting agencies to examine offerors' past performance. In particular, 15.305 (a)(2)(iii) states that "the evaluation should take into account past performance information regarding predecessor companies, key personnel who have relevant experience, or subcontractors that will perform major or critical aspects of the requirement when such information is relevant to the instant acquisition.

2. FAR part 9:Contractor qualifications
   Subcontractor responsibility, 9.104-4(b), states that, "When it is in the Government's interest to do so, the contracting officer may directly determine a prospective subcontractor's responsibility, for example, when there will be substantial subcontracting.

3. FAR part 36: Construction and Architect-engineer contracts
   a. Invitation for bids, 36.213-3, states that bids should contain "any special qualification or experience requirements that will be considered in determining the responsibility of bidders."
   b. Subpart 36.3, Two-phase design-build selection procedures, requires the Contracting Officer to consider the capability and experience of potential contractors, specialized experience and technical competence, capability to perform, and past performance of the offerors' team, who using the design-build construction model.

Summary of Federal Procurement Data Systems Information

The Alliance has obtained information from the Federal Procurement Data System (FDPS) that shows a growing trend: for the last ten years, the number of contracts and total dollar amount of contracts let using sealed bidding has steadily declined, while the number of contracts and total dollar amount of contracts let using competitive proposals has markedly increased.

Specifically—

A. Sealed bids:

1. For total construction, the number of contracts let decreased to 747 from 872, and the dollar value decreased to $3.49 billion from $3.81 billion from 1990 to 1999.

2. For General Contractors (SIC 15), the number of contracts let decreased to 301 from 361, and the dollar value increased very slightly, to $1.78 billion from $1.72 billion from 1990 to 1999.

3. For Heavy and Highway Contractors (SIC 16), the number of contracts let decreased to 366 from 377, and the dollar value decreased to $1.43 billion from $1.53 billion from 1990 to 1999.

4. For Specialty Contracts (SIC 17), the number of contracts let decreased to 80 from 134, and the dollar value decreased to $270 million from $560 million from 1990 to 1999.

B. Competitive Proposals:

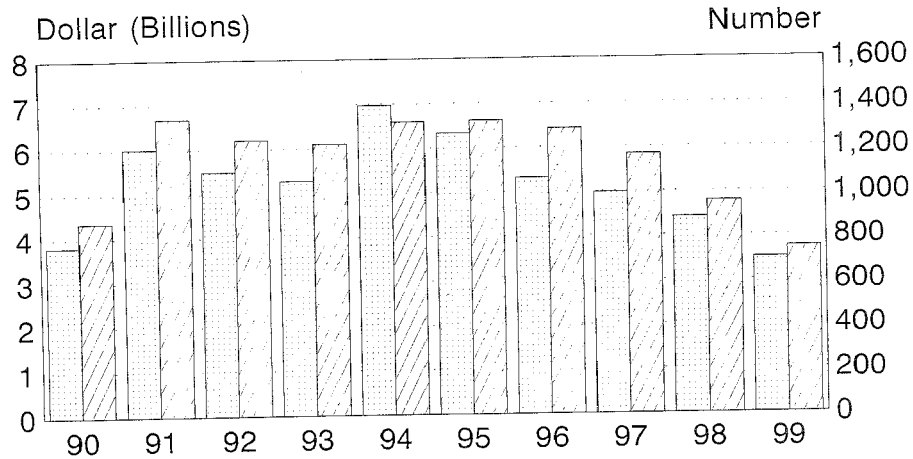
1. For total construction, the number of contracts let increased to 662 from 165, and the dollar value increased to $5.04 billion from $770 million. These figures show stunning increases of 400% and 655%, respectively, from 1990 to 1999.

2. For General Contractors (SIC 15), the number of contracts let increased to 439 from 90, and the dollar value increased to $3.52 billion from $410 million from 1990 to 1999.

3. For Heavy and Highway Contractors (SIC 16), the number of contracts let increased to 120 from 38, and the dollar value increased to $870 million from $240 million from 1990 to 1999.

4. For Specialty Contractors (SIC 17), the number of contracts let increased to 103 from 37, and the dollar value increased to $640 million from $110 million from 1990 to 1999.

Full & Open Competition - Sealed Bid
Total Construction - Number & Value

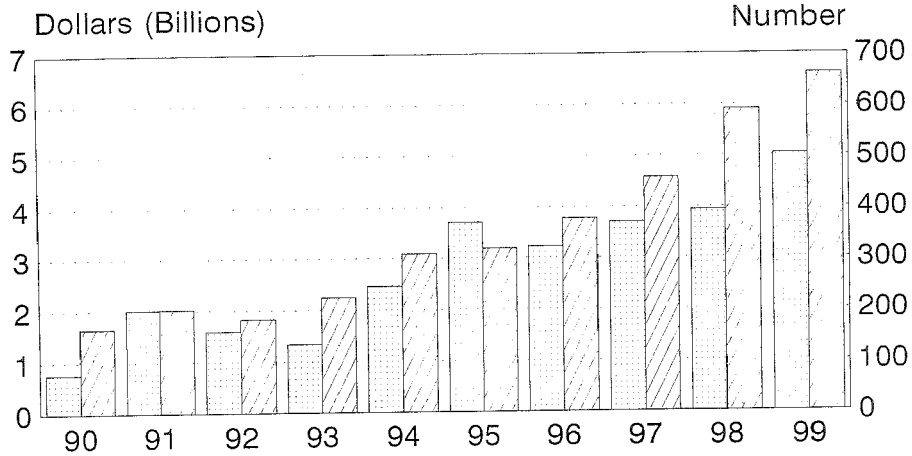


	90	91	92	93	94	95	96	97	98	99
Dollar	3.81	6.01	5.5	5.29	6.97	6.32	5.32	4.98	4.41	3.49
Number	872	1,337	1,240	1,221	1,317	1,322	1,282	1,166	956	747

Year

Dollar, Number

Full & Open Competition - Competitive Proposal
Total Construction - Number & Value



	90	91	92	93	94	95	96	97	98	99
Dollar	0.77	2.01	1.6	1.34	2.46	3.71	3.23	3.71	3.94	5.04
Number	165	202	183	224	309	319	378	458	591	662

Year

Dollar Number

Guideline on
Bid Shopping and Bid Peddling

Bid shopping or bid peddling are abhorrent business practices that threaten the integrity of the competitive bidding system that serves the construction industry and the economy so well.

The bid amount of one competitor should not be divulged to another before the award of the subcontract or order, nor should it be used by the contractor to secure a lower proposal from another bidder on that project (bid shopping). Neither should the subcontractor or supplier request information from the contractor regarding any subbid in order to submit a lower proposal on that project (bid peddling).

The Associated General Contractors of America, the American Subcontractors Association, and the Associated Specialty Contractors oppose these practices.

Design-Build Manual of Practice
Document Number 401

ENACTMENT AND APPLICATION OF THE MODEL DESIGN-BUILD PROCUREMENT ACT

First Edition, October 1996
Design-Build Institute of America
Washington, D.C.

Comment

The procedures for notice and advertisement for bids are generally well developed and suitable for requests for proposals. The performance criteria and the drawings, specifications, and other design work required for the proposal must be well defined. No effort is made in this Chapter to limit the detail required in proposals, on the assumption that the Agency will not make the requirements so onerous that qualified design-build firms will shun the project.

8.0 Proposals

8.1 Proposals shall be sealed and shall not be opened until expiration of the time established for make proposals as set forth in the request for proposals.

8.2 Security for Proposal. Requests for proposals shall require and be accompanied by a cash deposit, letter of credit, or bid bond not to exceed five (5%) percent of the maximum cost of the design-build contract, as established by the proposal. The deposit or bond shall be forfeited if the proposal is accepted but the design-builder fails to execute the design-build contract.

8.3 Proposals shall identify each person to whom the design-builder proposes to sublet obligations under the design-build contract. Persons so identified will not be replaced without the approval of the Agency, or the award may be revoked.

8.4 Proposals shall establish a cost of the design-build contract that will not be exceeded if the proposal is accepted without change. Afterward, the maximum cost in the proposal may be converted to the fixed prices by negotiated agreement between the Agency and the design-builder.

8.5 Unless and until a proposal is accepted, the drawings, specifications, and other information in the proposal shall remain the property of the person making the proposal. The Agency shall make reasonable efforts to maintain the secrecy and confidentiality of all proposals and all information contained in the proposals and shall not disclose the proposals or the information contained therein to the design-builder's competitors or the public. Once a proposal is accepted, the disclosure of the proposal and the information in the proposal, and the ownership of the drawings, specifications, and information therein, shall be determined in accordance with existing law and the terms of the design-build contract.

Comment

Paragraph 8.1 presumes that it would be improper for competitors to have access to one another's proposals before the proposals are opened and considered by the Agency. It also presumes that it would be improper for the Agency to review, critique, or assist the design-builders with their proposals before all of the proposals are submitted. In other words, paragraph 8.1 should discourage collusion and protect competition.

Security for the proposal is appropriate to compensate the Agency if a proposal in not honored. In the design-build context, it is difficult to determine whether one proposal is less costly than another and, indeed, the Agency could be better off purely from the standpoint of cost with an alternate proposal. Nevertheless, chosen proposals are favored for some reason, no matter how intangible or

unquantifiable, and withdrawal of the chosen proposal would deprive the Agency of the benefit of the proposal. Also, the administrative expense of reviewing a design-build proposal should be recompensed if the proposal is dishonored.

The Agency should be able to evaluate the qualifications of the persons to whom duties will be sublet under the design-build contract. Disclosure of such persons will also discourage potentially harmful post-award bid shopping. It is assumed that awards will be induced in part by the qualifications of the persons to whom work is sublet, so replacement of those persons without approval of the Agency is ground for revocation of the award. Whether key persons may be replaced after the design-build contract is executed is a matter to be dealt with in the contract.
Cost is not meant to be the only criteria on which an award is based. Nevertheless, the public has a strong desire to control the cost of public projects. Cost should be disclosed prior to award of a design-build contract and there should be come fixed limit of cost. Fixed prices may have to be negotiable until the design for the project is fully developed, but a design-builder should be able to give a fixed limit on cost on the basis of preliminary or schematic design.

Finally, design work generated for a proposal should be the property of the design-builder unless and until the proposal is accepted by the Agency. The Agency has no need for the design work otherwise, while the design-builder may have a proprietary interest in all or part of the design.

9.0 Acceptance of Design Build Proposal

9.1 Once received, proposals shall be submitted to the performance criteria developer. Clarifications may be required to ensure conformance of proposals with the performance criteria. Clarifications may require revised price and/or technical proposals. No proposal shall be considered until certification is issued by the performance criteria developer that the proposal is consistent with the performance criteria. No proposal or design-build contract may be accepted unless the Agency determines that there was adequate competition for such contract.

9.2 After obtaining and evaluating best and final proposals from each proposer according to the criteria and procedures set forward in the request for proposals, an Agency may accept the proposal it considers most advantageous to the Agency.

9.3 Acceptance of a proposal shall be by written notice to the design builder which submitted the accepted proposal. At the same time notice of acceptance is delivered, the Agency shall also inform, in writing, the other design-builders that their proposals were not accepted.

9.4 The Agency shall have the right to reject any and all proposals, except for the purpose of evading the provisions and policies of this Chapter. The Agency may thereafter solicit new proposals using the same or different performance criteria, budget constraints, or qualifications.

Comment

Once any confirming proposals are submitted, the Agency should be free to select a proposal based on the criteria in the Request for Proposals. Whether a person whose proposal is not accepted may protest is left to existing law.

Mr. HORN. We have with us the chairman of the full Committee on Government Reform. We're delighted to see Mr. Burton, the gentleman from Indiana, who's here for an introduction.

Mr. BURTON. Thank you, Mr. Horn.

I am always interested in legislation Mr. Kanjorski is proposing, and I'm anxious to hear all the testimony. The testimony I've missed thus far I want to apologize for, and I will be reading it, so I will be up to date.

I'm particularly happy to be here at this time because I see my good friend Doug Barnhart and his lovely wife Nancy there; and I think your daughter is with you, isn't she? They're from San Diego.

While I won't get into a lengthy introduction, Mr. Chairman, I will tell you that these are two of the nicest people I have ever met. They do an awful lot of things for the community in San Diego. They're very active in something that's near and dear to my heart, and that is helping abused children, and they worked very hard in the Children's Center out in the San Diego Center for Children. They've raised a lot of money for them and helped. That's how I got to know them.

So I'm very happy to welcome you guys here today. If you don't eat too much, I'd love to take you to lunch.

Thank you, Mr. Chairman.

Mr. HORN. We thank you very much.

We know have Mr. Douglas E. Barnhart, the chief executive officer of Douglas E. Barnhart Inc., San Diego, CA; and he's here representing the Associated General Contractors of America. Mr. Barnhart.

STATEMENT OF DOUGLAS E. BARNHART, CHIEF EXECUTIVE OFFICER, DOUGLAS E. BARNHART INC., SAN DIEGO, CA, REPRESENTING THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

Mr. BARNHART. Thank you, Congressman Burton, for that fine introduction.

Good morning, Mr. Chairman and members of the committee. My name is Doug Barnhart. I'm CEO of the Barnhart Corp. which was founded in 1983 in San Diego, CA. Since that time, my company has constructed various projects for the Federal Government as well as many projects involving State agencies and lots of projects with private owners.

It's received awards from the American Institute of Architects; Coalition for Adequate School Housing; American Public Works Association; Engineering Society of San Diego; four Best of the West awards, including two Grand awards; Grand Orchids, three Build San Diego awards, Build America awards. We're very proud of the diverse work that the corporation has undertaken.

I am here today representing the Associated General Contractors of America and to explain our opposition to H.R. 4012, which is misnamed Construction Quality Assurance Act of 2000. I say it's misnamed because it does nothing to assure quality; and, in fact, from my experience, it will hamper my ability to ensure that quality and safe work is performed on Barnhart job sites.

AGC represents more than 33,000 construction firms, including 7,500 of America's finest general contractors, 12,000 speciality con-

tracting firms, and over 14,000 service providers and suppliers associated with AGC through a network of some hundred chapters.

AGC opposes H.R. 4012, bid listing for Federal procurement, because it is unnecessary and will be harmful to the Federal procurement process. The Federal Government, during a 20-year test period, said bid listing caused project delays, higher completion costs and adversely impacted the construction process. In addition, this legislation underlines the government's attempts to streamline procurement instead of helping them. It removes the flexibility of the prime contractor to manage the project and will do nothing to improve the quality, safety or decrease the cost of construction.

Let me be clear, however, AGC supports industry self-regulation in the area of bid shopping or auctions. In its Model Antitrust Compliance Manual, AGC of America has indicated that it disfavors auctions leading to bidding inefficiencies, demeaning the integrity of the competitive bidding system and reflecting adversely on the industry relationship.

One activity that the Federal Government is engaged in may be leading to a record increase in what is perceived as bid shopping, and that's the negotiated procurement. The way this works is through the best and final offer rounds called BAFOs. What this has done is forced prime contractors to continually revisit bids as they revise to another best and final round and in doing that they resolicit subcontractor bids. This may be being interpreted in the subcontracting community as bid shopping.

The solution is that best and final offers should be solicited and submitted to ensure fairness and confidentiality of a competitor's bid and not used as a tool to continually lower the price the government will pay the prime and his or her team.

I think it's important to remember that construction is not about steel, concrete, mechanical equipment or any of those things. It is a people business. It is a relationship business. Most general contractors are named after a person, such as mine, and that's because our word is on the line every time we sign a contract.

In California, the State requires subcontractor listing on low-bid projects. However, the State of California, if you will check, is moving away from that. They're moving away using design-build, turnkey, and construction management in its agency procurement. The reason it's doing that is a couple of reasons. One is to reduce paperwork and speed up delivery but also to avoid disputes such as those that arise under subcontractor listing. The bid listing process in California is time consuming, burdensome and does little to protect anyone.

Of all the work performed by the Barnhart Corp. only that in the State of California requires bid listing, and we have worked in Nevada and Texas and throughout the Southwest. I'll give you an example.

On a recent high school project in Anza, CA, if you happen to know where that is, there was a high school bid and there were only two electoral bids. The Barnhart bid team questioned both bidders as to bonding and capability. One of the subcontractors said that they could not bond; the other one said they could bond but was unable to provide the source of the bond. The bid team, as it moved on to 2, had to make a decision. They listed the one

subcontractor that said he could bond but would not give us the source of the bond.

Immediately after the award, we went to the school district. The school district had an adverse past history with the subcontractor, expressed concern of how the project would go. Nevertheless, the subcontractor produced the required bond, and there was no legal basis for replacement—and there will be no basis for replacement under your bill either.

The work proceeded, and the ensuing contract was nothing short of a disaster. The electrical subcontractor immediately started installing work that did not conform to the specifications. When the school district complained, we hired, at my expense a special electrical inspector to inspect the work, in addition to the DSA inspectors that were out there for the State of California. Adding more difficulty, the switch gear and those critical elements came in wrong, did not match the shop drawings that had been improved. Finally, after much haggling around, because every one of these individuals has an attorney, we finally were able to get the subcontract terminated and went through a delisting hearing with the school district, all of which took a lot of time.

End result is as follows: The school district received the school 6 months late. That means some California kids did not get to attend their new school. The School district was unable to use the $10 million facility during the delay. The bonding company for the electrical contractor paid me $450,000, but that only covered half the loss. There was another half a million dollars out of the Barnhart Corp. into the project. And, worst of all, a qualified electrical contractor was not allowed to perform the work.

We had liens from the Economic Development Department of the State of California, the IRS, suppliers, trade workers and three lawsuit attachments from previous contracts. But there was no escape because we were locked in, right on the listing.

For every example that these fine subcontractors can give you, I will give you an example that is just as bad the other way. The point I'm trying to make is construction is a relationship-based business. There are owners that I do not work for because those owners do not match our value system.

Subcontractors and general contractors have the same relationship. It is a business relationship. You do not do business with business partners who take advantage of you, and the travel on that road goes both ways.

Requiring prime contractors to list bids puts a lot of strain on the bid room. There's a lot of price maneuvering going on before 2. All this law says is that after 2 all of that changes. It absolutely will not change the face of construction one bit. It will hamper the prime's ability to produce a quality project.

Everyone is moving away from these low-bid systems where price is the only determining factor in whether someone does the job. Everyone is moving to best values—the State, the Federal Government. This is bad legislation. This is unnecessary legislation. And I believe that with my entire heart. Thank you.

Mr. HORN. Thank you.

[The prepared statement of Mr. Barnhart follows:]

Testimony

Of

Douglas E. Barnhart

On behalf of

The Associated General Contractors of America

Regarding

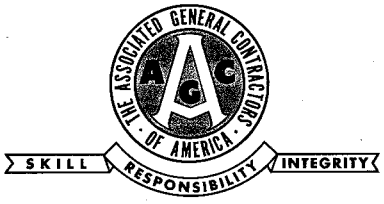
H.R. 4012, Federal Subcontractor Listing Legislation

Before the

Government Management, Information and Technology Subcommittee

On

July 13, 2000



The Associated General Contractors of America (AGC) is a national trade association of more than 33,000 firms, including 7,500 of America's leading general contracting firms. They 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 and site preparation/utilities installation for housing development.

The Associated General Contractors of America
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Good Morning Mr. Chairman and Members of the Committee. My name is Doug Barnhart. I am CEO of the Barnhart Corporation that was incorporated in February 1983 and has constructed various projects for the Federal Government. Currently, federal government work comprises between 10% to 15% of yearly volume. The remaining work program is for public and private owners in the States of California and Texas.

The San Diego Chapter of the Associated General Contractors has recognized my company as Contractor of the Year for two consecutive years. My company recently received a 2000 Build America award for the renovation of the San Diego Center for Children, and two Build San Diego awards for renovating Shiley Theater at the University of San Diego for the 1996 Presidential Debates and for a pioneering seismic retrofit project for the United States Navy. My corporation has received honors from the American Institute of Architects, Coalition for Adequate School Housing, American Public Works Association, and the Engineering Society of San Diego. My company's work and experience is very diverse. I am here today representing the Associated General Contractors of America (AGC) and to explain our opposition to H.R. 4012, the misnamed "Construction Quality Assurance Act of 2000." I say it is misnamed because it does nothing to assure quality, in fact, from my experience it will simply hamper my ability to ensure quality work is done on my jobsites.

The Associated General Contractors of America is the largest and oldest national construction trade association, founded in 1918. AGC represents more than 33,000 firms, including 7,500 of America's leading general contractors, and 12,000 specialty-contracting firms. Over 14,000 service providers and suppliers are also associated with AGC, through a nationwide network of chapters.

AGC Position

AGC opposes H.R. 4012, bid listing for federal procurement, because is unnecessary and may be harmful to the federal procurement process. The federal government, during a 20-year test, said bid listing caused project delays, higher completion costs, and adversely impacted the construction process. In addition, this legislation undermines the government's attempts to streamline procurement, removes the flexibility of the prime contractor to manage projects, and will not do anything to improve the quality or decrease the cost of construction in the federal government program. On the contrary, this legislation could have detrimental effects.

Let me be clear, however, that AGC supports industry self-regulation in the area of bid shopping or auctioning. In its *Model Antitrust Compliance Manual*, "AGC of America has indicated that it disfavors auctions" because it leads to bidding inefficiencies, demeans the integrity of the competitive bidding system and reflects adversely on the industry relationship.

One activity that may cause some to believe bid listing is prevalent is a record increase in the use of negotiated procurement by the government that has led to an increase in best and final offer (BAFO) rounds. This has forced prime contractors to continually rewrite

their bids and resolict their subcontractors to perform federal work. The solution is that best and final offers should be solicited and submitted to ensure fairness and confidentiality of a competitor's bid, not used as a tool to continually lower the price the government will pay to the prime and his or her team. If the federal government subscribed to this policy, in many cases the concerns of those promoting bid listing would be eliminated.

It is important to remember that construction is a relationship business. That is why most general contracting firms, like mine, are named after individuals whose word is on the line every time we sign a contract.

California Experience
In California, the state requires subcontractor listing on low-bid projects. It is my belief, however, that the state is moving toward different project delivery methods such as "design-build", "turnkey", and "construction management at risk" in order to reduce paperwork and speed up delivery to avoid subcontractor listing. The bid listing process is time consuming, burdensome, and does little to protect either party.

Of all our work only the State of California currently requires bid listing. And, as I said, they, like the federal government, are moving away from it. It is our experience that bid listing creates more problems than it solves and I have a short example to make the point.

On a school project for the State of California, only two electrical contractors bid the project. One of the bidders could not bond while the other reported a bond could be obtained, but would not provide the source. The bondable subcontractor was listed. After award the School District expressed concern over the electrical subcontractor based on past experience. The subcontractor, however, provided a bond from an admitted surety and there was no legal basis for replacement. (And there would be no basis for replacement under you bill.)

The ensuing contract was nothing short of a disaster. The electrical subcontractor immediately started installing work that did not conform to specifications. To insure plans and specifications my company hired a special electrical inspector at our expense to insure that the work was acceptable. Adding more difficulty is that critical items such as switched gear, and other critical electrical elements were ordered wrong. Finally, to get the school constructed, the electrical subcontractor was terminated. The end result is as follows:

(1) School District received School six months late.
(2) School District unable to use $10 million facility during the delay.
(3) The bonding company for the electrical subcontractor paid the Barnhart Corporation $450,000.00.
(4) Barnhart lost $500,000.00 on the project.
(5) A qualified electrical contractor was not allowed to perform the work because the bid listing law prohibited it.

We had liens on the subcontractor from the California Economic Development Department, the Internal Revenue Service, suppliers, trade worker and three lawsuit attachments.

Given the history of this electrical subcontractor, which was not known by our company at bid time, there is no way the award should have been made.

On another school project, the subcontractor refused to perform work specified in the scope of his contract. To keep the project moving, we had to bring in another subcontractor to complete the work that the first subcontractor refused to perform. The first subcontractor filed a complaint against my company that was subsequently dismissed. Such disputes only cost the company money in legal bills and wasted time and are exacerbated by a bid listing law that protects unqualified and/or incapable contractors.

We have never had such an experience on any of our federal contracts, our projects for the State of Texas or on our private projects, all of which had no listing requirement. If I lose control of the quality of the partners that we hire, we lose control over the delivery of the project.

Requiring prime contractors to bid list creates unnecessary strains on the contractor's bid personnel. Because the deal is likely to be driven by price, instead of quality and best value driven, the process has proven to have disastrous results. More delays, higher completion cost and more litigation will be the end result.

Will some prime contractors shop bids, possibly, but I can tell you from what I have observed of this, including time as a lieutenant in the Navy Civil Engineers Corps, that bid shoppers will not survive. The reason again is that construction is a relationship business and you must maintain solid principles or your business partnerships with subcontractors, suppliers, and owners will be short lived.

History of Subcontractor Listing

The federal government conducted a twenty-year experiment with bid listing and eliminated bid listing in 1984. From 1963 to 1984, the General Services Administration (GSA) required bid listing for all GSA contracts. In 1984, GSA was still the only federal agency using a bid-listing requirement. In the interim, the Department of Interior utilized subcontractor listing for a short period of time, finally rejecting it in 1975. Among the reasons GSA stated for eliminating bid listing were "delays in award of contracts…preventing timely completion of important projects and resulting in higher procurement cost." (48 FR 49305)(Attachment 1). Clearly, the bid-listing provision caused delays, increased the costs of construction to the government, and increased protests of projects delaying awards. At the time GSA announced its decision, the agency stated that this would not lead to bid shopping or inferior work. To AGC's knowledge, there have been no studies conducted by this committee or anyone else concluding that this situation has changed.

When eliminating bid listing requirements for federal contracts, the General Services Administration stated in the Federal Register:

> During the past several years, bidding problems and protests related to the listing of subcontractors requirements have adversely affected the GSA construction program. These problems have resulted in delays in award of contractors and in some cases the rejection of low bids, thereby preventing the timely completion of important projects and resulting in higher procurement cost. (48 FR 49305).

Congressional Findings

AGC disagrees with the "Congressional Findings" of this legislation and would like to see any research that substantiates the allegations included in the findings. I think GSA would dispute the findings based on their comments on bid listing in the Federal Register (49 FR 5754) (Attachment 2). Prime contractors perform a percentage of the work that fluctuates based on the specifications of the project. There is never an instance where a prime contractor subcontracts 100% of the project. Most importantly, the amount of work subcontracted can be a function of government mandates to cultivate small business, women owned business, minority owned business, or historically underutilized business zone businesses. In addition, the prime contractor also manages the project and assumes the financial risk for timely, quality project completion. This includes design review, cost control, overall scheduling, and construction coordination.

In addition to the Congressional findings, a "Dear Colleague" was circulated stating that "prime contractors subcontract almost all work to specialty contractors-often up to 100% of a project." This is not true and not allowed by the federal government's procurement regulations. The Federal Acquisition Regulation (FAR) Part 36.501 states:

> **36.501 Performance of work by the contractor.**
>
> (a) To assure adequate interest in and supervision of all work involved in larger projects, the contractor shall be required to perform a significant part of the contract work with its own forces. The contract shall express this requirement in terms of a percentage that reflects the minimum amount of work the contractor must perform with its own forces. This percentage is (1) as high as the contracting officer considers appropriate for the project, consistent with customary or necessary specialty subcontracting and the complexity and magnitude of the work, and (2) **ordinarily not less than 12 percent unless a greater percentage is required by law or agency regulation** *(emphasis added).* Specialties such as plumbing, heating, and electrical work are usually subcontracted, and should not normally be considered in establishing the amount of work required to be performed by the contractor. (FAR 36.501)

Prime contractors are required to perform work, are required to manage the work, and are held liable for the timely delivery of quality work.

"Substitution For Good Cause"
Under the current procurement system, once the prime contractor has been awarded the contract, those subcontractors providing bids receive contract documents. This provides the scope of the work, responsibilities of the prime contractor and the subcontractor, progress payment schedule, mechanisms by which the parties agree to changes, salient other contract requirements relating to insurance, termination of the agreement and dispute resolution. This complex relationship is the first line of defense for the prime contractor to ensure quality. H.R. 4012 undermines this relationship by inserting the federal government between the prime contractor and subcontractor regarding the termination of agreement and dispute resolution portions in the contract. This does nothing to improve the quality and safety of a construction project. As GSA stated when they eliminated subcontractor listing, " bidding problems and protests related to the listing of subcontractors requirements have adversely affected the GSA construction program." (48 FR 49305).

AGC has many concerns about the specific requirements of the legislation. AGC is most concerned about the "series of failures" language. If the subcontractor fails to build a retaining wall, how many times does the retaining wall have to fail before the subcontractor can be removed? It is quite possible that the retaining wall is the first step in the construction process. How many days must the project be behind schedule before the prime contractor can replace the subcontractor? If the prime contractor steps in to complete the work to deliver the project on time the company is subject to a fine under H.R. 4012. Why are these draconian penalties necessary?

This could endanger the solvency of prime contractors from taking prompt actions to terminate a poorly performing subcontractor. Under these strictures, the prime contractor would have to prove a variety of failures in order to eliminate the subcontractor. But, forcing the prime contractor to self-perform the work will expose the prime to liquidated damages. This places the prime contractor in a "Catch 22" of not meeting performance milestones facing penalties or self performing the work and facing liquidated damages.

Substitution of listed subcontractors includes nine items, one of which is already required within the Federal Acquisition Regulation. Each of these items requires the contracting officer's consent. This will require the contracting officer to become the mediator of all disputes. What recourse does the prime contractor have to contest a decision by the contracting officer? For that matter, what recourse does the subcontractor have? The legislation is silent. If there is a dispute regarding the ability of a subcontractor to perform, will the project begin as the parties work through the dispute or will the project be at a stand still? Who pays for the inevitable delays?

Given that safety appeared to be of the utmost concern in a "Dear Colleague" circulated to Members of Congress, it is surprising that a prime contractor cannot explicitly remove a subcontractor for failing to have a comprehensive safety program and failing to implement that program. Safety should be the utmost concern for the government. It is for the prime contractor.

The first example of good cause is the "failure of the subcontractor to execute a written contract after a reasonable period." What is a reasonable period of time? How is the contracting officer to determine if a reasonable period of time has passed? What complications in the contract negotiation process would be considered insurmountable? This legislation is asking the government's contracting officer to make decisions about a business relationship in which the contracting officer has not been party to any of the negotiations or discussions. Once that "reasonable time" has elapsed, the prime contractor must then wait five days after notifying the contracting officer and subcontractor before the request for substitution can be finalized. Then the prime has to determine if he will self perform or to hire a new subcontractor if he can find one.

Another example of "good cause" for eliminating a subcontractor includes the bankruptcy of the subcontractor. This provision would actually penalize a subcontractor attempting to "right the ship" by preventing them from obtaining work. Automatic stay provisions in the bankruptcy laws may conflict with this provision. This example of "good cause" is inherently unfair to the subcontractor and should only come in to play if it prohibits the subcontractor from performing the work.

Under the "death or physical disability of the subcontractor" provision AGC cannot understand why the prime contractor needs permission from the government to substitute this subcontractor. It is very clear the subcontractor listed will be unable to perform the work. A government contracting officer must review the vital signs of the subcontractor? Is this not a waste of valuable government resources?

H.R. 4012 prevents a prime contractor from contracting with a subcontractor who has been debarred or suspended. This provision is already part of the Federal Acquisition Regulation (FAR):

> Generally, prospective prime contractors are responsible for determining the responsibility of their prospective subcontractors (but see 9.405 and 9.405-2 regarding debarred, ineligible, or suspended firms). Determinations of prospective subcontractor responsibility may affect the Government's determination of the prospective prime contractor's responsibility. A prospective contractor may be required to provide written evidence of a proposed subcontractor's responsibility. (FAR 9.104-4)

This has been a requirement since 1984, when the General Services Administration *eliminated* subcontractor listing because it had a detrimental impact on government procurement.

Administrative Burden

Placing the contracting officer as the arbitor of disputes between the prime contractor and the subcontractor is an administrative burden. It is also a misuse of federal government resources. A contracting officer would be required to make a determination of "good cause" for substitution if such a cause is not listed, opening the government to further protests and litigation.

Interference in the Contractual Relationship
This legislation would put the federal government in the middle of the contractual relationship between the prime contractor and the subcontractor. The affect of this unwarranted intrusion with the contractual relations between primes and subcontractors allows the government to directly dictate to the prime with whom the prime is doing business with and under what conditions the prime can sever these relations. This, in effect, would remove all business discretion from the prime contractor crippling them from exercising good judgement in their contract administration of subcontractors and having the owner without knowledge of performance of the subcontractor use an inflexible requirement which may lead to situations where poorly performing subcontractors are retained on projects to the detriment to the prime contractor and the government. Such a rote requirement is not in the government's best interest. Protections are already afforded in the existing public procurement laws and bonding requirements.

The government has made the prime contractor responsible for payment to subcontractors and suppliers by requiring surety bonds. The government has made the prime contractor responsible for performance by requiring bonds. Now, this legislation would remove control of performance from the prime contractor, while still placing the performance bond at risk.

What does the government gain from dictating the terms of subcontracts?

Lack of Understanding of the Construction Process
AGC is concerned that this legislation discounts the business and financial risks contractors take when contracting with the federal government. The managing of the project is the key to a successful project. The perception that scheduling the project, coordinating the subcontractors, managing the supplier deliveries, while maintaining construction site safety is a negligible part of a construction project is wrong.

Oregon Experience
Recently, the State of Oregon passed a subcontractor listing law. The various departments and agencies have implemented the law in different ways. In general, the bill requires general contractors to submit a list of first-tier subcontractors submitting labor or materials on public projects greater than $75,000. The general contractor is to submit a list within 4 hours of the bid closing and to list subcontractors valued at greater than 5% of the contract price. Given the different interpretations by different jurisdictions, preparations are being made to overhaul this law.

The Oregon/Columbia Chapter of the Associated General Contractors conducted a survey regarding the experience of both general contractor and subcontractor members with the new listing requirements. On a scale of 1 (bad) to 10 (good), general contractors rated the system a 2.4, while the subcontractors rated the system a 4.9. Neither found the new requirements very positive. Both groups polled expressed frustration over the excessive requirements in the law. A full review of the survey is attached (Attachment 3).

Conclusion

This legislation creates more problems than it solves. Subcontractor listing at the federal level was proven over a twenty year test run to be problematic. The General Services Administration eliminated the listing requirement because it led to cost overruns, time delays, and placed the government in contractual disputes with the prime contractor and the subcontractor. While at least 20 states have some form of bid listing laws, this does not mean that the application of these laws is universal or without problems, cost increases, or controversy. Also, bid listing applies only to low bid work, not innovative procurement methods.

When eliminating bid listing, after a 20-year experiment GSA stated in the final rule:

> "...we have found no evidence that the elimination of the subcontractor listing requirement would cause (1) The prime contractors to bid shop, (2) Those few subcontractors now covered by the listing requirement to provide inferior work or to submit inflated bids, or (3) The prime contractor to reap a windfall at the expense of the subcontractor or the government. (49 FR 5754).

GSA is not asking the subcommittee to reinstate subcontractor listing. This legislation would be harmful to federal contracting and actually undermine the author's intent of improving the quality and safety of federal construction projects. AGC opposes this legislation because of its harmful impacts on prime contractors, subcontractors, and the unwarranted interference in the contractual relationship between these two parties. I cannot imagine why this committee would decide to overrule GSA after a single hearing and little investigation on this important issue.

Mr. HORN. We will now begin the questioning. Does the gentleman, who is Mr. Burton, would you like to begin the questioning?

Mr. BURTON. Thank you, Mr. Chairman.

I think you answered my question, Mr. Barnhart. You ended up losing quite a bit of money on this particular job you were talking about because of the problems you had with that electrical subcontractor.

Mr. BARNHART. Yes, sir.

Mr. BURTON. It slowed down the project by—how much did you say; 6 months?

Mr. BARNHART. Six months.

Mr. BURTON. Is that something that's common or uncommon?

Mr. BARNHART. Well, the problem is, everyone in the United States today has an attorney. And everyone is entitled to due process. So basically we were locked in. There was no legal basis for the replacement. No one wanted this person on the job. Everyone knew from the start that this was a mistake. The law dictated that he be awarded the job. The job was awarded.

And then—basically, then what we suspected might happen is the performance issue started mounting. But, you know, the first time something is done wrong you don't go in for a request for substitution. So you wait and you live with it. You work through it. You do the process. And then, you know, the discussions take place; and it just takes months and months and months.

Mr. BURTON. You said California is moving away from this law? What do you mean? Have they changed it or——

Mr. BARNHART. You know, procurement in this country for a long, long time was done particularly, specifically on a low-bid basis, where everyone was selected on the basis of price. Well, that may have worked well for the United States a long, long time ago, but it doesn't work well for the United States in the year 2000.

These projects are complicated. They're sophisticated. There are computer systems that control the HVAC. There are electrical systems. We got ADA requirements. There's environmental concerns. The management of the project has become much, much—so important and the quality of the relationship. So alternate delivery systems have come in. The Federal Government is using them. So they're using the system as best they can called best value. Prime contractors are doing the same thing.

Because if I'm working for the Federal Government under a best-value system, I better deliver. Even to deliver I'm going to need strong electrical contractors, I'm going to need strong mechanical contractors, and I want to be able to select them. Because, again, construction is a relationship-driven business.

Mr. BURTON. Mr. Drabkin—is that how I pronounce your name?

Mr. DRABKIN. Yes, sir.

Mr. BURTON. I was reading your statement. You said, the ultimate result of several months of discussions with these groups resulted in the agreement that the administrative burden to manage subcontractor listing efforts exceeded the benefits in 1983 based on 20 years of experience with the GSA's subcontractors listing requirement. Can you elaborate on that for me? You may have al-

ready, but if you could give me a little more information I would appreciate it.

Mr. DRABKIN. Unfortunately, Congressman, I wasn't present in the agency in 1983.

Mr. BURTON. You look a lot younger than that.

Mr. DRABKIN. What I have found through doing the preparation for the testimony is that the program that GSA had in place produced administrative costs associated with arbitrating or mediating or becoming involved with the subcontractor disputes with the prime contractors. There were court cases in which the agency was drawn into. There were protests in which the agency was drawn into. And all of those things, added up over that period of time, indicated to the agency through a public rulemaking process that it was better not to have this production, as opposed to have it, that the government's interests were better served without it.

And, to date, I'm unaware of any significant cases where bid listing issues have been brought to the attention of the General Services Administration or, while I was in the Department of Defense, to the Department of Defense involving failure to perform or additional costs or other issues that would be of concern.

Mr. BURTON. Thank you, Mr. Chairman. I think that answers the questions I have. I'll listen to the other questions.

Mr. HORN. I thank the gentleman; and we will now turn to the ranking member, the gentleman from Texas, Mr. Turner.

Mr. TURNER. Thank you, Mr. Chairman.

I think every one of the panelists, irrespective of the side of the issue you're on, for or against this bill, would concur that the practices being complained about are clearly unethical and should not be permitted. Am I correct, Mr. Barnhart?

Mr. BARNHART. Correct.

Mr. TURNER. Now the bill here before us attempts to deal with the abuse that we all agree shouldn't exist. But I think what you're suggesting to us is that the remedy is, or the cure is, worse than the disease. Is that correct?

Mr. BARNHART. Well, not completely. A long time ago, I was in the Civil Engineer Corps and ran contracts. And a value structure in a company is a value structure in a company. And every one of those prime contractors that worked for the U.S. Navy that were difficult to work with were just as difficult to work with with their suppliers and subs.

I can tell you none of those firms exist today. And there's a good reason for that. It's because the market is very dynamic, and it deals with it. Just as this one gentleman down there said that he does not bid those primes anymore who shop his bids. Congratulations. Because you know what? As people make those decisions those firms lose their competitive ability to compete, and they cease to exist. The marketplace deals with that. There's just no need for this bill.

Mr. TURNER. It seems to me that what you say is probably correct. If you get burned a few times you're going to quit submitting a bid to a prime contractor that shops your bid.

But when you get right down there on the firing line and you're the sub that's worked for hours trying to put together a bid and you submit it and then you end up having it shopped on you, I

don't think you worry about the marketplace working. You're worried about what's happening to you in that particular point in time, which obviously is very unfair, and we all agree that it is unfair.

Do you have any suggestions on how we could address this or make it clear that this practice is not acceptable in Federal contracting if the bill itself seems objectionable? Do you have anything you could offer to us that might get at the problem, protect the subcontractors from this kind of unethical behavior and maybe not be as broad as the bill that you object to?

Mr. BARNHART. There's nothing in the bill that requires first-tier subcontractors to list second-tier subcontractors or list suppliers. So the testimony that you've heard that this will clean it up all the way down the line, it won't do that. There's nothing in this bill that says the electrical subcontractor will list who's going to supply the switch gear, who's going to supply the lighting package, who's going to do the fire alarm system, who's going to do the security system—nothing. This bill is a bill solely directed at the general contractor as the root and cause of all evil. That I take great exception to, as do the 75,000 first line of American GC's that belong to the AGC.

I think have you to have a little patience, have some faith in the market. The market deals with this. And I think these are, you know, fine subcontractors; and I think they will agree with me: The market over a period of time determines who succeeds and who doesn't succeed. And I suggest to you that that's based on values and business structure and your relationship with your subcontractors.

I have some wonderful subcontractor relations, and they bid us, and they bid us consistently. And the reason they do is it is because they have trust and faith that we're going to do the right thing and vice versa. That's the nature of the business.

This bill goes against the nature of the business. It goes against human nature.

Mr. DRABKIN. Mr. Turner, if I might add to what Mr. Barnhart has said, existent in our current process is the emphasis since the passage of FAS and the use of past performance, one of the elements that the government evaluates in a major contract on past performance is the relationship that the prime has with the subcontractors and its ability to deliver the project. If there's a circumstance where a prime is mistreating his subcontractors, it will reflect in their performance. And in today's environment, if you get an average performance rating, the chances of you winning a Federal contract is going to be very low. I mean, you've got to score above average today. And that's a success story that is attributable to this Congress in terms of the passage of FAS and the empowerment of the government to use the past performance process.

So it's a little more than just the commercial marketplace deciding who's going to survive or not. There's an active role which Federal Government contracting officers play in the past performance evaluation process of prime contractors and their relationships with subs.

Mr. TURNER. Mr. Chairman, I see my time is up. I wanted to give the subcontractors a chance to respond, but maybe one of our

other members of the committee can do that. Thank you, Mr. Chairman.

Mr. HORN. I now call on the gentleman from California, Mr. Ose.

Mr. OSE. Thank you, Mr. Chairman.

Mr. HORN. Five minutes for questioning.

Mr. OSE. I have read this testimony last night, and I'm a little bit unclear. If I understand Mr. Barnhart's point, I think the only situation in which the bid shopping or bid peddling is occurring, according to the testimony, at least, was within these best and final offer practices that the Federal Government is engaged in.

Mr. BARNHART. That's not true.

Mr. OSE. OK.

Mr. BARNHART. That's—that is a potential source of what's perceived as shopping.

Mr. OSE. Mr. Drabkin, I have seen no—or I have heard no confirmed evidence that the Federal Government's projects are being conducted under a system that basically allows bid shopping.

Mr. DRABKIN. That's correct. The Federal Government does not interfere in the relationship between the prime and the sub. However, as I pointed out in my comments to Mr. Turner's question, we do evaluate the prime on their ability to manage subcontracts and to deliver the project on time. To that extent, in terms of the—evaluating the prime contractor's performance, we do provide oversight to the prime and to the subs and to the lower-tiered subs as well.

Mr. OSE. I think my question really boils down to, to what degree do we wish to intrude into the relationship between the general and the subs? Now having built $50 or $60 million worth of stuff, not as a contractor but as an owner, something analogous to the position of the Federal Government—you know, Mr. Barnhart talked about his relationships with his subs, and I can tell you the relationship between the owner and the general are very, very similar to the relationship between a prime and a sub who has a long history of working with that person. What I'm interested in is, at the end of the day, whether or not the prime or the general—however you wish to describe the person—meets the time deadline on budget or under.

Mr. DRABKIN. That's the task that you have given us in the executive branch and that is to measure our performance by how we perform. In the end, what we're interested in is bringing the project in on the budget and on the schedule and dealing with quality contractors.

Mr. OSE. Mr. Barnhart talked about the complexity of construction projects as they exist today, and I will confirm that, without going into any great detail. I'm curious—the contracting officer that works for GSA, for instance, to what degree does that person have the experience, if you will, the leading edge experience that might exist in a general contractor shop or, for that matter, in a subcontractor's shop? It seems to me that the contracting officer's job is to manage the contract. To what degree do they stay on the edge of construction techniques?

Mr. DRABKIN. I'm glad you asked me that question. It's a problem. It's a problem because we lack the resources to give our people the kind of training they need on a regular basis and the kind of

tools they need. Most of these contracting officers on a daily basis are concerned about processing the paper and getting the actions out.

As you know, in the civilian agencies, which was a shocker to me when I came over from DOD, don't have the kind of training budget, don't have the kind of educational institutions that were available to me when I was in the Department of Defense. And it was a challenge and one which I identified immediately upon my assumption of these duties and one which I'm working toward but one with which I have very few resources to deal.

Mr. OSE. Let me take it to a more mundane level. Mr. Dunleavy, in the sheet metal side of things when you do HVAC work, the controls for HVA systems are moving technically far ahead of where they were even 5 or 10 years ago. In other words, when you build a building, your systems now allow you to balance your demand for cooling air very, very effectively relative to what happened 5 years ago. If this legislation were to pass on day one and on day two industry or science created a system that allowed a far better balancing of the load at a far lower price, and the prime contractor had a sub who wasn't up on that, if I understand the legislation correctly the prime couldn't change the sub. And you could take that to say concrete construction, as it has evolved over the few years, past 5 years—you see my dilemma here.

Mr. DUNLEAVY. I'm not sure I understand your dilemma. There is a remedy to that situation. It's called a change under the contract. I think the same bar would exist as the—in the State we have now before the legislation. If there's a change in technology once the subcontract was awarded, they would have to be handled by some sort of change order mechanism.

Mr. OSE. I see my time has expired. I thank you. I hope we have another round here.

Mr. HORN. We will have a second and possibly third round.

I now yield 5 minutes to the gentleman from Pennsylvania, who's the author of the bill, Mr. Kanjorski.

Mr. KANJORSKI. Thank you, Mr. Chairman.

Mr. Barnhart, I'm sure you are an exceptional general contractor and any of the questions I ask you don't go to your integrity. But I listened to the testimony of the GSA and either he lives in a different world than I do or we're going to get together and start looking at some jobs. Because I've just had three government contracts performed in my congressional district, and if there weren't 20 or 30 suppliers and subcontractors that called me with the offensiveness of bid shopping, I'm surprised.

I think I'm going to take you up to some of these jobs and let you get some experience in the field, Mr. Drabkin. Maybe that is the problem, that too many of GSA's people are staying in Washington and not getting out in the field to find out what's happening.

But you said something that strikes me. Who selects the subcontractor to be put into the prime bid?

Mr. BARNHART. The prime contractor.

Mr. KANJORSKI. That's right. Well, then, if you want a quality subcontractor you decide who you're going to pick to put in there. Why should you put a bumbling fool in as your subcontractor and

then complain that you have to have dictatorial powers over him or brush him aside at your will?

Mr. BARNHART. Congressman, the example I gave you, neither firm we were familiar with.

Mr. KANJORSKI. Why didn't you go out and get a good contractor?

Mr. BARNHART. Well, we tried. But——

Mr. KANJORSKI. Your problem is that California and San Diego has so much construction going on that you don't have enough good subcontractors left in California. But maybe you don't have them left for the very testimony some of these subcontractors said. They're sick and tired of being drummed down to negative losses in doing subcontracting work, and a lot of them have picked up their marbles and have gone somewhere else.

Why would you stay in the business if the prime contractor can constantly come down to you and take your profit away from you and force you to do inferior work or use inferior supplies? Now, I'm not saying you're doing that, but you are aware that some construction jobs by general contractors in this country are doing that, aren't you, Mr. Barnhart?

Mr. BARNHART. Congressman, let's say——

Mr. KANJORSKI. I'd like you to answer that. Are you aware, you know, that—after the conference, when you're at the bar at night, are there any stories in the subcontracting field like there is in the legal profession of who the bums are and who the good guys are?

Mr. BARNHART. I hear rumors.

Mr. KANJORSKI. OK. It's out there. So Mr. Drabkin, if he circulated to some of these conferences or parties—we ought to get him into some of the parties because he could hear at least the rumors and follow through on the rumors. Is that correct?

Mr. BARNHART. Many of rumors I hear are subcontractors complaining about someone else.

Mr. KANJORSKI. Absolutely. I agree with you. There aren't any virgins in this room.

The question that this legislation is geared to—through the last decade or better I have been overwhelmed with frustration—the need to dumb down the operation, to buy inferior products, almost act as a plantation relationship that a lot of subcontractors just don't want to get involved anymore, are being forced out of business or being forced, in order to hold their businesses, to make no profits at all and try a squeeze the few dollars they can out of the job if possible.

Now, why should we, as a matter of public policy, give you, a general contractor, a prime contractor, dictatorial powers? Whereas, opposed to that, under this act, all we're saying to you is, Mr. Barnhart, if you're going to bid this job you break out every category, every subcategory; and when you went to these suppliers or these subcontractors to provide the work at specification, you list them; and if you get the low bid or win the bid, then you use them.

You know, I want to make a point, Mr. Chairman, I don't know if the committee is aware of the fact, but under the common law the principle of a subcontractor giving a contractor his estimation and then that contractor using that in his estimate would constitute a contract. There would be value to the subcontractor, or the general contractor, he used it.

It's only because we have perverted the law now that we go away from common law. And what we've done is provided a servitude of subcontractors doing the hard work and making the analysis, doing the bid pricing, giving the subcontractor the work. Then if he has a good relationship and knows these subcontractors, he knows who's good, he can take their work, plug it in. But then when the prime comes back he knows what he's going to get out of the general job.

Now, if he wants to increase his profit, all he has to do is go to the subcontractors that worked with him in good faith, either dumb them down another 5 or 10 percent or threaten that he's got a nonunion operator, a nonexperienced operator, somebody who's going to do the job at considerably less. That's what's happening now. I don't know whether—maybe my district out of the 435 in the country is unique. So I worry about that.

Yes, Mr. Barnhart.

Mr. BARNHART. Congressman, there is nothing in this legislation that requires the listing of suppliers. So the suppliers that called your office and complained, is it perhaps possible that those suppliers were quoting subcontractors? Nothing in this bill changes that. It's a bill that requires the general contractor and I don't have to list suppliers. So you're going to still get all those calls.

Mr. KANJORSKI. We're going to amend the bill and then make you list your suppliers. That's OK with me.

Mr. BARNHART. And how about making the subcontractors list their suppliers and their second-tier subs and their third-tier subs and see how they like it? What's good for the goose should be good for the gander.

Mr. KANJORSKI. I agree. I think transparency in the bid is the best thing the government can have. Because they honestly know what kind of product and what kind of end result they're going to get if the specifications are held to.

What's happened is everybody has taken the easy way. If you look at the—it's interesting, Mr. Drabkin came from the Defense Department to GSA, but this is a 1984, 1984 change. I wonder what happened in 1984 in this country? A couple things happened.

Mr. HORN. We're going to have another round on this.

Mr. KANJORSKI. I guess I am getting too close to California——

Mr. HORN. You can load the cannons. In the meantime, I'm going to yield 5 minutes for questioning to the vice chairman of the committee, Mrs. Biggert, the distinguished Representative from Illinois.

Mrs. BIGGERT. Thank you, Mr. Chairman.

Mr. Drabkin, on your testimony on page 6 you talk about that a major tenet of government contracting is that the Federal Government has no privity of contract with subcontractors, and you think that this really is a major flaw of this bill. Could you give a little more information on that?

Mr. DRABKIN. Yes, ma'am. The Federal Government, both in the construction area and in all other areas of government contracting, has steadfastly avoided interfering or establishing a relationship between subcontractors and the government, preferring instead to rely upon the expertise and the responsibility of the prime contractor to manage subcontracts.

If you could imagine the additional workload and burden that would be added if all of the—I think it's over several hundred thousand contractors who the government does work with on a prime basis, and then add their subcontractors and, as Mr. Kanjorski suggested, amend the bill, their subcontractors and suppliers, you would have to increase the Federal acquisition work force several folds, already overworked and underresourced in the education and training arena.

So the Federal Government has as a—and the Congress actually has expressed this as a congressional policy, has avoided involving the Federal Government and the executive agencies in the relationships between primes and their subs.

Mrs. BIGGERT. Thank you.

Mr. Swab, do you know of subcontractors where there's been a bid and then it switched to other subcontractors where the—let's say the subcontractors that were in a losing bid were switched into working for the contractor who won the bid?

Mr. SWAB. Yes, ma'am. That happens, unfortunately, all the time.

One point I'd like to make about Mr. Drabkin's statement, this legislation does not ask that the government get involved with any of the subcontractors. It does not ask that they get involved in the contracts or in anything involving the GC's relation with the subcontractor. All it asks is that the general contractor simply, after a certain level of dollars is reached, list the subcontractor that they're going to use on the project.

Mrs. BIGGERT. Well, what would happen, then, if the subcontractor was not able to perform and so there had to be another subcontractor? Wouldn't the Federal Government have to OK a switch in that and, in effect, establish that relationship with a subcontractor?

Mr. SWAB. I think there are provisions where they can ask for a substitution, the general contractor can ask for a substitution.

Mrs. BIGGERT. They could ask, but then again wouldn't——

Mr. SWAB. They——

Mrs. BIGGERT [continuing]. The agency has to approve that after a bid has been let and they're not being able to follow then the contract?

Mr. SWAB. Yes, ma'am. But I think if the criteria that's established is shown, then it's a simple decision. It's not something where they have to develop into any further than the criteria that's established by this legislation.

Mrs. BIGGERT. Mr. Drabkin, would you agree with that?

Mr. DRABKIN. No, ma'am. The legislation would specifically require the contracting officer to become involved in the GC subcontractor dispute, not involved in the current way, which is we monitor the performance and we rate the GC on it, but actually become involved in the dispute and the determination to replace the subcontractor. That would add significant workload, and as I pointed out earlier, it would also involve time, time which will delay the delivery of the construction project.

Mrs. BIGGERT. OK. Then Mr. Swab, you testified that the current construction delivered on the current system cost the government more than it's actually worth with the prime contractor's pocketing

whatever amount they're able to squeeze out of their subcontractors. So if this bill was enacted into law, can you explain how its bidding listing provision would prevent contractors and suppliers from marking up the cost of their services and products any way?

Mr. SWAB. Hopefully I can. Mr. Barnhart mentioned that there would be a real stressful situation involving his bid team and the minutes leading up to the magical hour, which for most bidders is 2 p.m., because as he stated, there's a lot of price adjustment going on. What that price adjustment is, is prebid bid shopping. I'm sure Mr. Barnhart's firm probably does not engage in that. But I will routinely get a call at 20 minutes to 2 and be told that Joe Blow, electrical contractor down the street, has me beat by $50,000. See if you can do anything. So the price adjustments, if they've been made to one GC—and Barnhart Corp. is a very good GC—if I'm going to make that adjustment, I'm going to immediately get on the phone and make sure the other contractors on that work get that same number. That's why all of that price adjustment takes place.

Mrs. BIGGERT. Are these sealed bids?

Mr. SWAB. In many cases the bids that are presented to the Federal Government, yes, ma'am. Requests for proposals are turned in at a date and time certain. The bids that take place between suppliers, subcontractors and general contractors is done verbally, and in most cases, over the phone, followed by faxes, e-mails, or other forms of verification.

Mrs. BIGGERT. Thank you. My time is up. Thank you, Mr. Chairman.

Mr. HORN. Thank you. We now yield to the gentleman from Oregon, Mr. Walden, for 5 minutes for questioning.

Mr. WALDEN. Thank you very much, Mr. Chairman. Some of you may know that Oregon's legislation recently enacted a similar type of law, HB 2895, so we're seeing this take place, put into action out in Oregon. And there are concerns by both contractors and subcontractors about the implementation of that particular law. I'm not sure specifically how it mirrors what's being proposed here. But as I listen to the comments today, I think from my own experience, which is not contracting but broadcasting, and nobody likes the squeeze that you get put in. I'm sure the subs don't like it and the generals and all that. I get it from ad agencies that do exactly the same thing. So maybe I should come here and get a Federal law to protect my industry and myself from this. But what I'd like to do now is yield my time to the Member from California.

Mr. OSE. I thank the gentleman from Oregon. I want to explore something with Mr. Drabkin, and that is, in a Federal project, the actual product is designed by an architect; is it not?

Mr. DRABKIN. It may or may not be, Mr. Ose. As you know, we are now in the Federal Government finally catching up with private industry and going to design-build.

Mr. OSE. In terms of the design-build, what people bid on at any step in the process is well defined in terms of the end product?

Mr. DRABKIN. In terms of the outcome we desire, it's defined, sir. But in terms of what that will actually look like, when you use a design-build, you start without knowing.

Mr. OSE. So, if you will, your specifications then become, by design, somewhat flexible. The objective being we are here, we want

to be there, how you get there, if you can substantiate it, is your choice.

Mr. DRABKIN. Yes, sir. Generally you would outline the number of square feet that you might need, the type of office space or space that this will ultimately be. And then you will—other additional factors, if there's a special heating or cooling requirement, etc., and then leave it to the talent of the winning design-build team to design it, and then to construct it.

Mr. OSE. If I recall correctly, let me just cite the most apparent example of Federal construction, that's the Reagan Building down here. Between the time we first put that building out to bid and the time the turnkey was delivered, was that 2 years, 3 years?

Mr. DRABKIN. I'm sorry I have no specific knowledge regarding the Reagan Building, sir.

Mr. OSE. Let's say it's a year and a half, because it's a big project. I bet up to a year and a half, it probably took that long. Well, in a year and a half time, it would seem to me that under a design-build process, the prime may very well not lock down exactly how he or she will handle the 14th aspect on day 1.

Mr. DRABKIN. That's correct.

Mr. OSE. Would the listing that's proposed, or would the intention of this bill as proposed, facilitate or complicate the prime contractor's efforts to finish a project? Keep in mind, because the prime contractor has got a delivery date, they have to meet, and if they don't meet it, they're going to suffer sanctions, does this legislation facilitate or complicate the delivery of the product from the prime contractor?

Mr. DRABKIN. Effectively precludes the use of design-build contracting as it's currently used in the private sector.

Mr. OSE. Is design-build—did you say the design-build is State-of-the-art?

Mr. DRABKIN. It's one of a number of ways of doing business, but one which the government is trying to follow the private sector in utilizing more and more of.

Mr. OSE. Let me then examine the more traditional approach where you have a set of plans, everything is well defined, the specs are in there and it will say product X or equivalent. The contracting officer, as I understand it, has the discretion to say this substitution is the equivalent of what's defined by the architect; is that accurate?

Mr. DRABKIN. In those types of contracts it is, but I point to the committee that in accordance with the Congress's guidance, we're trying to move to a use of performance specs, but in your example, sir, you're absolutely correct.

Mr. OSE. So the suggestion I'm trying to get to is that a prime contractor, an exercise of judgment in suggesting to a subcontractor or allowing a subcontractor to substitute will have to first go by the contracting officer in any case. It may well be that that substitution allows the prime contractor to deliver the project at a lower price; is that accurate?

Mr. DRABKIN. That's accurate.

Mr. OSE. Thank you. Thank you, Mr. Chairman. I see Mr. Walden's time is up.

Mr. HORN. Thank you. And we now turn to the ranking member, the gentleman from Texas, Mr. Turner.

Mr. TURNER. Mr. Chairman, I think I'll yield to Mr. Kanjorski, let him followup on his earlier line of questions.

Mr. KANJORSKI. Thank you, Mr. Chairman, Mr. Turner. Same question to you, Mr. Drabkin. We do not want to inhibit modern methodologies of construction either to save money or perform things quickly. But can you give me any rationale, assuming we have a straight prime contractor sealed bid award for the total project cost, make the assumption the project comes in at $100 million, after he has assembled all his subcontractors and supplier bids and come up with these figures that probably represent, $88 million for the costs. And he's got his profit. That's all well and good, but you're arguing it's going to cost time, it's going to become cumbersome. And yet the problem is if the general contractor goes out and dumbs down the bids of the subcontractors and drives it down to $80 million on a $100 million project, why should the government not benefit from that $8 million? Why should it go to the prime contractor?

Mr. DRABKIN. There's no reason why the government shouldn't participate in that savings, and that's one of the reasons why we're moving away from sealed bidding.

Mr. KANJORSKI. Absolutely. Let's not talk about—I happen to be for construction management and processes like that. But in the sealed bid process, if we just had this bill saying henceforth, a direct bid by a prime contractor who reduces the subcontractor's prices in that bid and therefore gains a better price and a better profit because he doesn't change the ultimate cost to the government, the government will get the benefit of that profit. What's wrong with that?

Mr. DRABKIN. With the government sharing in the——

Mr. KANJORSKI. Getting the profit. If he's going to dumb down to dumb contractor—or the contractor or subcontractors, and if he's going to go to the suppliers and knock their price down, why should that benefit go to the profit of the prime contractor? Why should it not come to the government?

It seems to me, in listening to your testimony, you're on the position that you don't want your agency to have more responsibility, you don't want to have to do more work, and it's very nice to appoint a dictator. And that's what you do. The day the sealed bid is opened up and the general award is made to the prime contractor, the U.S. Government has said this is a $100 million project, you are the sole dictator. We're not going to get involved. Go out. If you want to break Davis Bacon rules, break them. If you want to go out and knock down the subcontractor, break them. Other than that, you will have a responsibility of oversight. And I think that's what we expect from GSA. But all those things being the same, if he does go out and get the subcontractor to give a lower bid, or the supplier to give a lower bid, and therefore it costs him less, why shouldn't that benefit go to the American taxpayer rather the prime contractor?

Mr. DRABKIN. There's no reason why, but I also make sure, Mr. Kanjorski, you understand that if he breaks Davis Bacon, he's got a problem with me. I am responsible for enforcing that and I——

Mr. KANJORSKI. In the Commonwealth of Pennsylvania, the Department of Labor has one Representative with 22 counties out of 67 counties, for a third of the State of the Commonwealth of Pennsylvania. It's common, rather than bringing a person into a job and treating him as a journeyman, he will treat him as laborer and have him do a journeyman level work and pay him significantly less and he does make more money. I am sure that only happens in the Commonwealth of Pennsylvania and probably, peculiarly, to my district. But you don't have any people out on these jobs. I've got to tell you that. You have got a person that comes by every 2 or 3 weeks checks out with the prime contractor, what's going on, see if anybody has fallen off the roof. And if they haven't, you're gone. You don't have the personnel to do it. I understand that. I'm not knocking you. I think general contractors are doing a pretty good job on the whole. I'm not knocking those general contractors. I think we have a percentage of bad actors. And the way to weed them out is to say that if they use a good subcontractor in their general contract bid and they are awarded the contract, that subcontractor should be able to say that's what I'm going to get paid. If I'm going to get paid any less, and you may have a right to renegotiate, then the benefit will go to the American taxpayer, not to the general contractor.

Mr. DRABKIN. Mr. Kanjorski, any way we can share the benefit and the savings or resultant reductions in cost to the government, I agree with. I also point out to you sir, if I may finish, that if there is a problem with the small percentage of these contractors, the solution isn't a piece of legislation, which is difficult to change. The solution is for me to work harder with my contracting officers, to evaluate the performance, and to weed these people out through the competitive process, which we are being successful in doing. And if we have a few more years, we'll have only great contractors working with the government.

Mr. KANJORSKI. Let me tell you something. I mentioned 1984 before, and the meetings and the conferences were held. If you remember what happened in this country in 1980, then you know why I referred to 1984. This was another way of turning the system, privatizing the government's control of the system to the private market. There's nothing wrong with it if that financially benefited the taxpayer. But suddenly all of you guys down at GSA, for 16 years, haven't realized that there's bid shopping going on. The general contractor is knocking that price down sometimes significantly 5 and 10 percent, and none of that benefit is falling to the U.S. taxpayer. I think you would have been in here running saying hey, there's some practice out there in the field and if it occurs, we want a subcontractor or a prime contractor to certify to us that he did not get a lesser bid from a subcontractor. If he did, we want the money back.

Mr. DRABKIN. Sir, I've been at GSA for 6 weeks and in another 6 weeks I'll be glad to come over to your office and discuss with you any problems and work with you to solve them.

Mr. KANJORSKI. Didn't they have anybody over there that's been there a few more?

Mr. DRABKIN. I think I was the only one they wanted to send over this morning. Something about being the new guy on the block.

Mr. KANJORSKI. I was going to make the comment, you said you came from the Defense Department. I don't think that's the most notorious department in the world for getting cheap prices in construction.

Mr. DRABKIN. Sir, I don't represent them anymore.

Mr. KANJORSKI. My time has expired, Mr. Chairman.

Mr. HORN. Does the gentleman from Indiana, the chairman of the full committee, wish to question the witnesses at this point?

Mr. BURTON. I'm afraid to get started. Mr. Kanjorski and I might end up in fisticuffs, so I'll yield to Mr. Ose.

Mr. OSE. I thank the full chairman. I want to ask my friend from Pennsylvania—I mean, I've spent a lot of my productive life building things. And I'm just—I—I'm struck, it must be a different universe. I'm curious, you must have built something in Pennsylvania that gave you this bad experience.

Mr. KANJORSKI. Personally or you mean as a Member of Congress?

Mr. OSE. Well, personally.

Mr. KANJORSKI. I've been involved in construction and representing contractors as a lawyer for about 20 years. And I've handled both sides of the cases, and my law firm had the definitive Supreme Court decision of the Commonwealth that, in fact, a subcontractor's bid used by a general contractor and submitted as a bid for a general contractor is a contract. And he has an obligation then to pay the subcontractor. That's, in general, private work, not in government work. The one point I do want to point out to you, I think you are from California, aren't you?

Mr. OSE. Oh, yes, last time I checked.

Mr. KANJORSKI. Your State seems to be one of the most enlightened States. They have this legislation. They are doing excellent work, very successful. And Mr. Barnhart here appears to me to be an extraordinary, successful general contractor from San Diego, and he's surviving under this onerous type of law that would disclose your subcontractors.

Mr. OSE. Let me reclaim my time and ask another question. While I am not an attorney, I have great respect for those that are, but I will tell you that what I lack in courtroom experience, I more than make up in field experience. And I can tell you, completing the project on time on budget is far different than arguing the nuances or the niceties of a contract, and its terms in a courtroom. And I don't, I'm not——

Mr. KANJORSKI. Would the gentleman yield?

Mr. OSE. I'd be happy to. I want to make a point though. It's two different arenas.

Mr. KANJORSKI. I agree with you. Mr. Barnhart had suggested that a lot of times in the subcontracting field and whatnot, to do away with some of these people would be beneficial. And I could maybe suggest to do away with some lawyers would be beneficial too.

Mr. OSE. And I would pile on and say some developers too. If I may—I want to kill the phone. I want to explore something. This

legislation is focused on situations where we are talking about a bid or an award that's been made, and then there are savings that the prime contractor may have recognized after the fact and gone back to the subs to try and implement. It does not talk about the reverse situation where a prime contractor, or the amount of money originally set aside or segregated for an award, proves either to be a mistake or inadequate.

So I'm curious, how would this legislation govern situations, Mr. Chairman, where the final bid comes in at a price higher than the allowed amount and the prime contractor, in order to actually complete the award process, must go back to the subcontractors and ask for some adjustments.

Mr. HORN. You want to ask that to the panel?

Mr. OSE. Mr. Drabkin.

Mr. DRABKIN. I'm not sure I understand, Mr. Ose, your point.

Mr. OSE. Let me be more specific. Let's say GSA says we've got $5 million to build this project. We're going to accept awards at 2 p.m., on such and such a date, for the completion by such and such a date of the bids coming in and it's $5.5 million at the lowest responsible bid. Now, under this legislation, the prime contractor is not able to go back and negotiate without——

Mr. DRABKIN. The prime contractor would be precluded from bidding. Because if we set the number at $5 million in a design-to-cost scenario—this is another way to manage our dollars—he could not submit a bid above $5 million. So he would then be out of the competition.

Mr. OSE. As would everybody else, because that's the lowest—we'd be stuck in a position where, boom, we're not going to get the product.

Mr. Swab.

Mr. SWAB. That's where the term BAFO comes from. The Federal Government will routinely come back if the work indeed is worth $5½ million. There's aspects of the design that lead to that cost. The government will issue an amendment, they will adjust certain aspects of the job and they will come back for what's called a best and final offer, where they anticipate that adjustments will be made based on the design changes, and there will be pricing changes accordingly. The general contractor has the BAFO come back to them, they necessarily go to the subcontractors if it involves some speciality; typically it will be mechanical and electrical because those are the most important or expensive parts of a project if it's not the structure itself, and ask for a repricing of the job, based on the new specification. There are many cases, however, where a very minor amendment will be made and the BAFO process is then kicked off and the government comes back again. In cases where it goes once, we call it a BAFO. In cases where it happens twice, we call it a BARFO, best and real final offer.

Mr. DRABKIN. With all due respect to my colleagues, and make sure it's clear in the record, there is no longer anything in Federal Government contracting called BAFO. We specifically changed it to deal with the point Mr. Swab makes when we rewrote FAR 15 in 1997. So that process doesn't occur. In response to your question, they wouldn't be able to submit a bid, so there would be no further

discussion with them if they couldn't come in at the dollar figure we said they had to come in at.

Mr. OSE. I see my red light on. My point is that it seems to me that this legislation puts in place that it's OK to have adjustments when prices rise, but it's not OK when they fall. So with that, Mr. Chairman——

Mr. HORN. Mr. Drabkin, I'm interested in the degree to which the Clinger-Cohen legislation changes the dynamics of what you are now working under by GSA. Since you came from the Pentagon, I assume I have some experience with that. Tell me a little bit about it. Is GSA going to take advantage of that? That's why the legislation was there, to get responsible people and to get flexibility in doing it.

Mr. DRABKIN. One of the things that all of the civilian agencies have been working with is how to implement the requirements of Clinger-Cohen with regard to the acquisition work force. As you know, the Defense Department had DAWIA, which was passed in about 1990, I think 1991. We have—GAO has been to GSA and to the Veteran's Administration, and observed how the implementation was proceeding. We were found wanting in a number of areas. Those are the prime interests I have is dealing with the work force. In fact, it's the only resource we have to deal with the problem that Mr. Kanjorski's bill addresses and other issues associated with acquisition. We have to get our people educated, less than 40 percent of my acquisition work force meets the education requirements.

I have to find a way to get the resources to help them get the education. They need training tools. They need stuff that's available to them just in time. I can't afford to send them to school for 4 weeks. And the Department of Defense, we had a different culture, in sending people away to school for 4 weeks was an accepted thing. In the civilian agencies it's not.

So it is the very top priority I have as the deputy administrator for acquisition policy, it's the problem which I've already realized I have a resource problem in dealing with, and it's one which I hope we can talk about at a subsequent hearing or a meeting, because it's something we really need help with. It's something that will pay benefits in large dollars. In dealing with the problems we've discussed here and in dealing with other issues associated with Federal contracting.

Mr. HORN. Well, I'm glad to hear your commitment in this, because when I came here in 1975 and we had the majority, that was one of the things I wanted to really push. And you're absolutely right, we don't know enough in the civilian sector to train and educate people, and those are the people that we either make it with or don't make it with. And that's our capital infrastructure, if you will, the human being. And the Pentagon is way ahead of everybody else and that, as you quite correctly say, we ought to be doing more, so I'll be glad to talk to you about that.

Let me just ask the panel that are subcontractors, curious, how often do the general contractors require subcontractors to sign exclusive agreements now? This is just based on your own experience. Can we just go down the line?

Mr. Swab, you're a subcontractor. And then Mr. Petzen, and Mr. Fuqua, and also, Mr. Dunleavy. So I'd be interested in what your experience is. How much of a problem is this?

Mr. SWAB. Are you referring, sir—you say sign an exclusive agreement.

Mr. HORN. Yeah, if they've got an exclusive agreement or if they play the games that Mr. Kanjorski has identified.

Mr. SWAB. What common practice is in our experience is all general contractors, and rightfully so, this is a competitive process, are looking for an edge. They are hoping that someone in that process, let's say there are the electrical contractors, they're hoping one of those guys jumps out of the pack, either has a very good source for pricing a particular item on the job or, as the case is in many cases, makes a mistake. If he happens to be 10 percent under the market, for example, you will get a very quick call back from a general contractor asking if you've called your price out to anyone else. And if you State well, no, at the time I haven't, they'll say well, please, we're going to use you on this contract, but make sure you don't give this price to anyone else. Allow it to be our edge.

That happens if you happen to separate yourself from the pack. If all eight contractors are within 2, 3, 4 percent, they then have a very good idea what the job is worth, they won't bother to talk to anyone until after they have a contract awarded.

Mr. HORN. Mr. Petzen, how about your experience?

Mr. PETZEN. I'm still waiting.

Mr. HORN. You'd be glad to have that call.

Mr. PETZEN. I would like to have that call. That would be interesting to have someone commit to me early days instead of when they've waited too long for the project to be delivered on time, which is more the case.

Mr. HORN. Mr. Fuqua.

Mr. FUQUA. We've had several calls. Generally they don't work out. Promises are promises. And we now, at this point in our relationship, we choose not to get into those things if we can avoid it.

Mr. HORN. Mr. Dunleavy.

Mr. DUNLEAVY. Mr. Chairman, I'm not saying that it never happens, it does happen that there is a commitment on bid day. It happens very rarely. I'm told that it does not happen as frequently as it used to happen, by my older colleagues who have been in business longer than I have which are getting fewer and fewer every day. I do—I think it's important to point out as well that one of the indirect results of bid shopping is an upward pressure on the final cost of the project as a result of change orders. It is true that in the market we deal in, the margins are getting extremely low. In fact, it's not uncommon where a subcontractor and perhaps even general contractors I've heard of taking jobs at no markup in anticipation of marking up on the base contract work, plus the change work that will justify a markup for the entire project.

So I think if the GSA and the government is interested in budget and price, they should look to this bill as an aid in helping keep down the final cost by having a less adversarial relationship between the subcontractor, general contractors and the government, and try to underpin the partnering aspect that GSA likes to engage in in its projects currently.

Mr. HORN. We have a vote coming on the floor. So this will be the last round of questioning for the next 10 minutes.

Mr. Barnhart, you testified that the State of California is moving away from its bid listing law. And I wonder, Mr. Fuqua is head of a California contracting company. What are your thoughts on this? And to what degree have you seen that change in California policy?

Mr. FUQUA. This bid listing in California has worked as far as my company is concerned. I don't have the statistics on the rest of our association, but I would be happy to get them and send them to your committee.

Mr. HORN. Without objection, it will be put in the record at this point. Thank you.

Any other questions? Some of you, especially the subcontractors, since that's the reason for this legislation, do you have any other suggestions you'd like to put on the record?

Mr. SWAB. Mr. Horn, there are nine States and the Congressperson states that Oregon has just adopted this type of legislation. So there are now 10 States that have public bid listing requirements. Those are Arkansas, California, Connecticut, Delaware, Florida, Massachusetts, New Mexico, New York and South Carolina. I would think that the staffs would be able to go back to those procurement agencies and see, in the real world, if they have noticed a reduction in their per-square-foot cost of construction, since they put this legislation in place.

Mr. HORN. Mr. Petzen, do you have any additional ideas for the record?

Mr. PETZEN. No, I would just make a comment, Mr. Chairman, that the statement to Mr. Barnhart makes it in this business is based on relationships. He's absolutely right. Unfortunately, in too many instances, the general contractors that comprise the list of bidding primes deal with subcontractors on an adversarial relationship. It's an us-against-them situation before the bid, during the process of constructing the job, and also in collecting moneys. Would that it were not so. But that's what I deal with on a day-in/day-out basis. It's an adversarial relationship. This legislation probably won't completely cure that. There will still be bid shopping and peddling going on before the bid. But this legislation is designed to help someone like me who expends a great deal of time, effort and money in putting these bids together for the general contractors so they can write this business, and hopefully use our number if we're successful in providing the right number so that everyone comes out as a winner.

Currently, that's not the case. If I take a general contractor to the dance, if you will, by virtue of having the right price on bid day, with the right scope of work, I feel like I should be entitled to work the job and perform that scope of work. If that's not the case, why did we go through a bid process at all?

Mr. HORN. Mr. Fuqua, what would you like to leave in this record as something we ought to be considering?

Mr. FUQUA. Well, as far as the Federal construction goes, they're probably one of the biggest consumers of construction dollars. I have figures here that show $16.6 billion used last year.

Mr. HORN. Will the clerk adjust the microphone.

Mr. FUQUA. I have a figure here that shows $16.6 billion on building construction alone in the last year. If we could save some of that, if we saved only 1 percent of that for the Federal Government through this legislation, we're talking $166 million. That's a lot of money for the taxpayers.

Mr. HORN. Mr. Dunleavy, your last word on this.

Mr. DUNLEAVY. Nothing additional comes to mind Mr. Chairman.

Mr. HORN. OK. Mr. Barnhart. What's your last word on this?

Mr. BARNHART. Thank you, Mr. Chairman. I'd like to make three points. First of all, responsible general contractors are not looking for the lowest bid. And we're not looking for the person that makes mistakes because we have to build the project, and we have to build it on time. We're looking for the correct bid from the responsible subcontractor because that's the way we get this stuff done. Second of all, there are exclusive arrangements being arranged because in the design-build arena, each project is unique that's being submitted to the government.

Now, my firm, we're not going to enter into an agreement with a design-build electrical subcontractor or design-build mechanical subcontractor who can then go and talk to our competitors. It is an exclusive lockdown arrangement, because the designs are specific, there are designs and then the government—you know, the government selects which one is the best. So anyone who tells you that those exclusive was agreements aren't in place needs to go back and review the record, because I don't see how you do a design-build without an exclusive agreement with some of them. You don't have an exclusive agreement with the painter, maybe because you haven't decided what color you're going to paint the walls.

Third of all, the Congressman is exactly correct when he talks about oral contracts on bid day. When a person bids our firm, by law, if they're over 15 percent low, we have to call that person back and say you are too low on the project, will you please review your bid. If not, you cannot hold them legally to the bids because you're deemed to have superior knowledge about your other bids. Now invariably, that person will say well, how low am I, and what's the other number? So the cat-and-mouse game that's played is you do not want to give out that other number. You just say you're too low or we wouldn't be calling you. Go back and——

Mr. HORN. Thank you. We're going to have to go to vote. I want to give the last word to the author, Mr. Kanjorski of Pennsylvania. You have 5 minutes. I'm going to go vote. We'll put the record of the excellent staff like Mr. Caplan that have put this together. And you will have the last word.

Mr. KANJORSKI. I won't take too many minutes. The four subcontractors, if we listen to Mr. Barnhart, this bid peddling doesn't happen very often, and GSA is totally unaware of that circumstance. Because it only happens in my congressional district. But I want to ask the 4 subcontractors. How prevalent is bidding and peddling after the bid to subcontractors, in your experience, in the last 16 years since the regulations have been changed?

Mr. SWAB. I can only speak for the market in this particular area and it is very prevalent.

Mr. KANJORSKI. It's more common than not?

Mr. SWAB. It is a normal practice. Yeah, it is unusual if does not happen.

Mr. KANJORSKI. Mr. Petzen.

Mr. PETZEN. Congressman, in my experience it is the order of the day. The first rule is shop the bids, get them peddled. The second rule is if you have any questions, go back to rule 1.

Mr. KANJORSKI. Mr. Fuqua.

Mr. FUQUA. I just reiterate what Mr. Petzen said, it's exactly the same thing. It's even away from the Federal work on the private work in California, it's unbelievably rampant.

Mr. KANJORSKI. Pull the microphone.

Mr. FUQUA. I said even on private work in the State of California, it's unbelievably rampant.

Mr. KANJORSKI. Mr. Dunleavy.

Mr. DUNLEAVY. Mr. Kanjorski, it's persuasive in mine and Mr. Swab's market.

Mr. KANJORSKI. So listening to the testimony on the four subject contractor representatives here, we live in a different world than Mr. Barnhart and Mr. Drabkin live in. They're not aware that it's this pervasive and the government's Representative says gee, this isn't a problem at all. So would it be right for me to conclude that the testimony here of the four subcontractors is that this is not only common, it's pervasive, it's after the bid is awarded, and that it causes a loss to the subcontractors and the benefits derived by the prime contractor of driving down that subcontractor price does not inure to the Federal Government or the taxpayers, is that correct?

Mr. PETZEN. That is correct. If that benefit did go from the general contractor to the Federal Government, I don't know that anybody at this panel would have a problem with that. Certainly they shouldn't. However, if Mr. Barnhart, in his company, does not engage in these practices, then I'd like to be on his subcontract bid list.

Mr. KANJORSKI. OK. Thank you, Mr. Chairman.

Mr. OSE [presiding]. Thank you, Mr. Kanjorski. We are going to leave the record open for questions for 2 weeks. We would like to thank all the witnesses. Appreciate you coming. And with that, we're adjourned.

[Whereupon, at 11:55 a.m., the subcommittee was adjourned.]

[Additional information submitted for the hearing record follows:]

Testimony for the Record

on

H.R. 4012, the "Construction Quality Assurance Act"

before the

Subcommittee on Government Management,
Information, and Technology

submitted by

Anthony I. Shaker, President
Air Conditioning Contractors of America

July 13, 2000

On behalf of the Air Conditioning Contractors of America (ACCA), I would like to thank the Committee for holding this hearing which is of vital importance to the integrity of the procurement process in our nation's federal public works projects. My name is Anthony Shaker, and in addition to being President of ACCA, I am Chief Executive Officer of Boston-based BALCO, Inc., a specialist in energy and environmental systems.

Mr. Chairman, ACCA is the nation's premiere heating, ventilating, air conditioning and refrigeration (HVACR) industry representative, with 68 state and local chapters and 9,000 members nationwide. We appreciate the opportunity to present the views of our small business members regarding the construction industry practices commonly known as "bid shopping" and "bid peddling." We hope the Committee's efforts will help focus attention on these disreputable practices and restore a measure of integrity to the federal procurement process.

As you are aware, bid shopping is an ethically questionable practice that takes place when a general contractor (GC) attempts to pad his profit margin by shopping around for lower-priced subcontractors than those listed in the original RFP after the contract has been awarded. Conversely, bid peddling occurs when a subcontractor or vendor deliberately lowers his standard price in order to persuade the GC to switch his business to that particular subcontractor. These practices are not illegal per se, so why should we care?

ACCA strongly supports H.R. 4012, the "Construction Quality Assurance Act of 2000", for two reasons. First, we believe it is time for the federal government to use its considerable power to end these deceptive practices that cheat the American taxpayer. And second, we believe H.R. 4012 will help prevent further coercion of subcontractors and vendors by GCs to cut prices and quality out of fear of being excluded from available work.

By requiring GCs that bid on federal construction projects to list up front the subcontractors they plan to use on a project, H.R. 4012 both ensures that the taxpayer gets proper value for his hard-earned money and restores integrity to the bidding process and the construction industry.

Some question how exactly the American taxpayer is hurt by bid shopping. It's quite simple. First, the GC's bid submission is frequently inaccurate, if not altogether fraudulent, because the bid is based on arbitrary and inflated pricing. Second, the taxpayer may pay heftily later when the price of higher maintenance costs, due to poor quality construction, hits home. It's simply foolish to believe that subcontractors, operating in an environment marked by bid

shopping and finding themselves faced with the prospect of performing work for little or no profit, will not cut corners in order to salvage their profit margins so they can keep their doors open.

By amending the Federal Acquisition Regulation to require that bids on federal construction projects in excess of $1 million list the subcontractors that will be used should the bid be accepted, the Construction Quality Assurance Act can effectively end the unethical and costly practice of bid shopping. H.R. 4012 makes sense, is consistent with good governance, and one would think that it would elicit little opposition.

But, there are arguments raised in opposition to H.R. 4012 that need to be addressed. First, it has been suggested that the free market will take care of the problem – that GCs who continue to bid shop will soon lose the pool of vendors and subcontractors who will deal with them, that they will, in effect, be boycotted. In a perfect world, this might happen. In the real world, it hasn't happened. In the sixteen years since the federal government gave the green light to the practice on federal projects, it is alive and well, not only in federal construction, but in the private sector as well.

Why hasn't the practice died out? Because, many vendors and subcontractors have little choice, especially during economically-difficult times, but to take every job they can. Survival at any cost, despite cutting their normal profit margins or even cutting corners, drives their decisions. So, bid shopping and bid peddling continues, and the government continues to lose, inadvertently allowing those GCs who play this game to pad their profit at the expense of the subcontractors, vendors, quality of the construction, and the American taxpayer.

Second, the General Services Administration (GSA) has stated that it discontinued its ban on bid shopping and bid peddling in 1984 because it caused delays and resulted in too much paperwork. Welcome to the 21st Century, GSA. Today's data processing technology is light years ahead of what was available in 1984. Today's technology can alleviate undue delays, and it's use can and should be mandated throughout federal construction agencies, as it will save the taxpayer millions of dollars.

Finally, GSA testified that the federal government doesn't wish to interfere in the relations between the GC and his or her subconcontractors and vendors. In testimony, GSA admitted that it doesn't possess the resources or expertise among its contracting officers to meet satisfactorily its charge under the law, which is to judge the quality and appropriateness of

technology being applied to the job. In other words, GSA contracting officers have become paper pushers. Ironically, by allowing bid shopping to continue, GSA is compounding its shortcomings by encouraging a system in which less qualified vendors and subcontractors are working on federal projects simply because they were willing to undercut their competition after the contract was awarded. At least with a transparent process – one in which estimates are honestly arrived at and then accepted – the qualified subcontractors and vendors have participated.

Additionally, does not the process of bid shopping fly in the face of the declared GSA policy of moving away from the "low bidder always wins" philosophy? The GSA may be moving toward a best value or design-build process, but too many GCs are still using the low bid approach when they bid shop or bid peddle. And we know who does the actual construction. It isn't the GC – it's the subcontractor with the lowest bid doing the work.

But H.R. 4012 would increase the incentive for highly qualified and reputable contractors to bid on federal construction projects, while protecting the public's interest by ensuring that the government will receive the high quality work it expects. Clearly, H.R. 4012 helps the taxpayer, the government contracting officer, and the subcontractors and vendors. And clearly, it hurts disreputable general contractors.

Mr. Chairman, on behalf of ACCA, I would like to thank you again for the opportunity to testify on this matter. We are highly suportive of your efforts in this area and believe that H.R. 4012 is a significant step in the right direction. So far, twenty states have found the right side to be on. They've outlawed bid shopping and bid peddling in state construction. By passing H.R. 4012, the federal government can rightly join them.

GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
1600 DEFENSE PENTAGON
WASHINGTON, D. C. 20301-1600

GENERAL COUNSEL

JUL 3 1 2000

The Honorable Stephen Horn
Chairman, Subcommittee on Government, Management, Information and Technology
United States House of Representatives
Washington, DC 20515-6146

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Defense on H.R. 4012, 106th Congress, that, if enacted, would be known as the "Construction Quality Assurance Act of 2000."

The Department of Defense finds that the provisions of H.R. 4012, if enacted, would be administratively burdensome and could adversely affect the cost and timeliness of contract performance. The Department joins the General Services Administration (GSA) in its comments for the Administration in strongly opposing this bill.

H.R. 4012 would direct executive agencies to require bidders for Federal construction contracts over $1 million to include specific information about potential subcontractors for subcontracts over $100,000. Any bidder not providing the required information would be considered non responsible. In addition, it would establish requirements for the substitution of subcontractors listed on the original bid, including requiring "good cause" for substitution and consent by the contracting officer; imposing liquidated damages on a contractor, and potentially on a subcontractor, for violating these substitution requirements; and making the imposition of such damages grounds for the suspension or debarment of a contractor or subcontractor from Federal contracts.

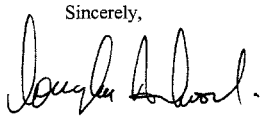
This bill would be cumbersome for the Department of Defense to administer. It could lead to delays and increased costs as the government assesses proposed subcontractor substitutions. It also could result in diminishing the prime contractor's responsibility for contract performance should the Department's contracting officer not accept changes proposed by the contractor. The government, similar to the commercial marketplace, expects its prime contractors to manage their subcontracts properly. Where performance-based contracting is utilized, statements of work are defined in terms of desired outcomes. Payment is tied to the contractor's success in achieving those outcomes. This approach places the burden of good contract performance on the contractor and enhances performance. GSA advises that, in 1984, it eliminated a similar requirement that it had imposed by regulation because, after 20 years of experience, it found that bidding problems and protests related to the requirement adversely affected the timeliness and cost of the GSA construction program.

We are not aware of any circumstances that would warrant the establishment of such an across-the-board requirement as would be done by H.R. 4012. To the extent that such

surveillance is appropriate for an individual procurement, the government already has the ability to require it on a case-by-case basis.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the presentation of this report for the consideration of the committee.

Sincerely,



Douglas A. Dworkin

cc:

The Honorable Dan Burton
Chairman, Committee on Government Reform

The Honorable Henry A. Waxman
Ranking Minority, Committee on Government Reform

The Honorable Floyd D. Spence
Chairman, Committee on Armed Services

The American Subcontractors Association's Comments on H.R. 4012

Opponents of H.R. 4012 have offered several misconceptions regarding bid shopping and bid peddling and H.R. 4012's impact on those practices. The American Subcontractors Association would like to set the record straight.

GSA Misrepresents the 1984 Elimination of the GSA Bid Listing Requirement.
The General Service Administration (GSA) claims that it met with the Associated General Contractors of America as well as subcontractor groups such as the American Subcontractors Association in the early 1980s and that those discussions resulted in the "agreement that the administrative burdens of bid listing exceeded the benefits" and therefore the eliminated the GSA bid listing requirement in 1984. Yet the record from GSA's own regulatory comment process shows that every single subcontractor and subcontracting group that commented on the proposed elimination of the bid listing requirement were vehemently opposed ending the requirement. In fact, the record clearly shows that GSA eliminated this requirement in spite of strong objections and dire warnings from subcontractors and subcontractor groups. GSA grossly misrepresented the history of the 1984 elimination of the bid-listing requirement.

Is Bid Listing Compatible with the Design-Build Process?
The Associated General Contractors (AGC) and GSA are both on record testifying that that bid listing is incompatible the design-build method of construction. This is simply incorrect. In fact, the Design-Build Institute of America's (DBIA) Model Design-build Procurement Act specifically requires bid listing in order to discourage harmful bid shopping under the relatively new design-build construction process. Bid listing is not only compatible with the design-build process it is a key component in ensuring trust during the design-build process.

Is California Moving Away from Bid Shopping?
Opponents of H.R. 4012 claim that the state of California, which has required bid listing on all state projects since 1943 (California Public Contract Code Section 4101), is "moving away from bid listing." This is simply not true. Despite numerous judicial and legislative challenges by those who would like to be able to engage in bid shopping, the California bid-listing requirement is still in effect. In fact, bid-listing requirements are also prominently included in the current draft of California's new design-build construction process.

In one example of bid listing working in California, the San Diego Unified School District recently agreed to modify its Job Order Contraction (JOC) program. The school district was concerned that its JOC program would be incompatible with bid listing. However, at the insistence of two California Superior Court Judges, the School District was eventually forced to comply with the California requirement for bid listing. As a result, the School District agreed to revise its procedure for ordering JOC work to include procedural mechanisms that clearly identify the scope of work to be performed by

subcontractors before bid day. Today, the School District is using the JOC program but is also assured that it will receive the best possible value and quality for its money thanks to California's insistence on bid listing requirements.

Privity of Contract.
GSA claims that H.R. 4012 would drag the federal government into contractor/subcontractor disputes and blur the question of privity of contract with subcontractors. Yet parts 9, 15 and 36 of the Federal Acquisition Regulation all contain specific references to instances where contracting agencies are required to look past prime contractors and even go so far as to directly determine a subcontractor's responsibility. H.R. 4012 does not even go this far. It simply requires prime contractors, as a condition of doing business with the United States, to tell the contracting agency exactly what it can expect for its money.

Can Industry Self-Regulation/Market Forces Cure the Bid Shopping Problem?
The Associated General Contractor of America's (AGC) position is that bid shopping is an abhorrent practice that cheats subcontractors and owners. But AGC supports industry self-regulation and the application of market forces to address this problem. Yet AGC's representatives admit under oath, and the subcontracting panelists confirm, that some prime contractors shop bids specifically to gouge profits after bid day at the expense of the value and quality delivered to taxpayers. So industry self-regulation has clearly failed to date. Market forces have had 16 years to cure the bid shopping problem, but the practice continues to occur on virtually every federal construction project. This record makes it clear that prime contractors will not stop shopping bids after bid day until they are required to do so.

Would Prime Contractors Bottom Line be Hurt by H.R. 4012?
Opponents of H.R. 4012 claim that the bill would make federal construction less profitable for prime contractors. On October 1, 1999 during its mid year meeting in Chicago the Associated General Contractors of America sponsored a three-hour contractor relations forum to specifically discuss the reality of bid shopping and bid peddling. One of the issues discussed at the forum was the fact that general contractors sometimes bid work at margin levels where they cannot make a profit unless they are able to later shop the subcontracts in order to deliver a low bid on bid day. But under H.R. 4012, prime contractors could build their profit into bids and still be competitive on bid day. Meanwhile the government will actually know what it is getting for its money. It is far more fiscally responsible to require *honesty* in the bidding process by requiring everyone to get their best prices from subcontractors before bid day, rather than allowing the speculative bidding/shopping process that takes place today to continue.

Would H.R. 4012 Place an Undue Burden on Prime Contractors on Bid Day?
This gets at the very heart of H.R. 4012. Taxpayers deserve to have due diligence performed by all parties to a federal contract on issues of reliability, quality, performance and especially price prior to bid day. H.R. 4012 would force prime contractors on federal projects to work harder to put together the best possible bid prior to bid day. This way the taxpayers are receiving the best possible value for their construction on bid day. H.R.

4012 will create no additional burden for companies that perform due diligence in selecting the right subcontractor for the job prior to submitting their bid because those prime contractors will not be forced to substitute subcontractors. Meanwhile the taxpayers would be assured of the best possible subcontractors, value and quality for the dollars spent on bid day. Only Prime Contractors that fail to perform due diligence prior to submitting a bid or that try to cheat the taxpayers after bid day will suffer under H.R. 4012.

Construction Industry Round Table

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July 12, 2000

The Honorable Steven Horn
Chairman, Government Management, Information and Technology
Subcommittee, Government Reform Committee
United States House of Representatives
B-373 Rayburn House Office Building
Washington, DC 20515

RE: *HR 4012 --"Construction Quality Assurance Act of 2000"*

Dear Mr. Chairman:

The Construction Industry Round Table (CIRT)[1] would like to raise a number of concerns with respect to HR 4012, the "Construction Quality Assurance Act of 2000" as currently proposed.

While we understand the bill is well intentioned, we believe it saps flexibility from the construction bidding process *without* achieving its stated goals or its advocates' objectives. Simply stated, the increased regulations and rules the bill envisions will drive-up costs as well as lengthen the time to propose on contracts, and may even impact the quality of the project while actually impeding the entry of new, women, and minority subcontractors into the federal marketplace.

Industry Leaders Feedback
The conclusions noted above are the findings of an exclusive poll[2] of construction industry leaders who comprise the CIRT. The feedback from these industry opinion makers indicates that they are **overwhelmingly opposed** (nearly 80% against, only 13.8% in favor) to reinstating the so-called "bid-listing" requirement on federal construction contracts.

Even more surprising, these industry leaders *strongly disagree or disagree* that the bill will achieve the proponents' twin goals of ensuring the government will know who it is doing business with (58.6% strongly disagree/disagree, only 24.1% agree/strongly agree), and preventing prime

[1] *CIRT is the only organization uniquely situated to act as a single voice representing the richly diverse and dynamic design/construction community. The Round Table is exclusively composed of approximately 100 CEOs from the leading architectural, engineering, and construction firms doing business in the United States. These firms represent approximately 3-5 percent of the United States GDP, including billions of dollars a year in federal infrastructure projects.*

[2] *In preparation for hearings on HR 4012, CIRT conducted an exclusive poll of its CEOs during a three-week period beginning on June 15, 2000. The poll had a response rate of approximately thirty percent from the CIRT members.*

contractors from shopping the subcontracted work to get a cheaper price (62.1% strongly disagree/disagree, only 24.1% agree/strongly agree).

In contrast to the bill's purported goals are a number of potential or likely negative impacts on construction contracting. For example:

- Three-quarters of the industry leaders (75.8%) strongly agree or agree that reinstating "bid-listing" will increase the overall cost of federal projects (including preventing "shopping" the costs if that will help keep the overall project on budget);
- Seven out of ten (70.0%) of these CEOs strongly agree or agree that "bid-listing" will also increase the cost and time to prepare proposals;
- Nearly three-quarters (72.4%) see the proposed bill's requirements reducing flexibility in the process; and
- Almost two-thirds (62.1%) believe it will impact finding the most qualified subcontractor, as well as over half (51.7%) see it as potentially impacting the quality of the project.

Finally, the proposed bill may actually have the unintended and undesirable affect of **impeding new subcontractors** (51.7% strongly agreed or agreed this would occur) **as well as minor and women owned subcontractors** (59.3% strongly agreed or agreed this would occur) entry into the federal market.

Recommendations
These findings are serious concerns that should and must be taken into account by Congress before it embarks upon passage of legislation that creates new requirements and constraints on the construction contracting process.

CIRT respectfully submits that the findings warrant delay or defeat of the proposed bill. Short of defeating the bill, the subcommittee should consider modifications to the current proposal. Three such modifications are recommended:

(a) *Apply the "bid-listing" requirement to only the winning proposal.* In this way, the negative impact of the bill will be limited to only the firm or team that has actually won the contract. The government has no real need of a list from submittals that are *not* going to receive the contract (nor should the unsuccessful firms bare the costs/time of providing such a list).
(b) *Substantially increase the threshold to impose the "bid listing" requirement.* A vast majority (67.9%) of the industry leaders view the $1.0 million threshold as too low, and recommend its increase (many suggested $10.0 million).

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July 12, 2000
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(c) *Increase the threshold to include a subcontractor on the "bid-list."* Again, some two-thirds (66.7%) of the CEOs believe the proposed $100,000 figure to be too low, and recommend increasing it to as high as $1.0 million for the subcontract.

On behalf of the Construction Industry Round Table (CIRT), we respectfully request your support to delay or defeat HR 4012 as it is currently proposed, or at a minimum to modify it to take into consideration the recommendations made by industry leaders.

We would be pleased to work with your committee and its staff on issues such as this that affect the design and construction industry.

Sincerely,

Mark A. Casso, Esq.
President

Enclosure: CIRT Poll Results

Construction Industry Round Table

CIRT Opinion Poll - "Bid-Listing" Requirement

Issue: H.R.4012 would require prime bidders on federal construction contracts (of over $1 million) to list all subcontractors whose work is over $100,000 on the project. The so-called "bid-listing" requirement would reinstate a contracting policy dropped during the Reagan administration.

(1) **Do you view your firm primarily as:** ❍ Design - 10.3% ❍ Construction - 65.5% ❍ Both - 24.2%

(2) **What is your view with respect to reinstitution of the so-called "bid-listing" requirement for federal construction contracts?**
❍ Favor - 13.8% ❍ Oppose – 79.4% ❍ Not Sure – 3.4% ❍ No Opinion – 3.4%

(3) **On a scale of 1-5 (with *one* meaning you *strongly disagree* and *five* meaning you *strongly agree*), what are your views of the advocates' contentions that reinstating the "bid-listing" requirement will:**

a. ensure the government will know who it is doing business with:
strongly disagree – 37.9% disagree– 20.7% neutral – 17.2% agree – 13.8% strongly agree – 10.3%

b. prevent prime contractors from shopping the subcontracted work to get a cheaper price:
strongly disagree – 31.0% disagree – 31.0% neutral – 13.8% agree – 10.3% strongly agree – 13.8%

c. may assist minority and women owned subcontractors obtain work:
strongly disagree – 57.1% disagree – 25.0% neutral – 7.1% agree – 3.7% strongly agree – 7.1%

(4) **On a scale of 1-5 (with *one* meaning you *strongly disagree* and *five* meaning you *strongly agree*), what are your views with respect to possible negative or undesirable aspects of reinstating the "bid-listing" requirement:**

a. will increase overall costs of projects:
strongly disagree– 16.9% disagree – 6.9% neutral – 10.3% agree – 41.4% strongly agree – 34.4%
b. will increase the cost and time to prepare proposals:
strongly disagree – 10.3% disagree – 10.3% neutral – 10.3% agree – 24.1% strongly agree – 44.8%
c. will reduce flexibility:
strongly disagree – 10.3% disagree – 6.9% neutral – 10.3% agree – 10.3% strongly agree – 62.1%
d. will impact finding the most qualified subcontractor:
strongly disagree – 24.1% disagree – 10.3% neutral – 3.4% agree – 20.7% strongly agree – 41.4%
e. will potentially impact quality of project:
strongly disagree – 13.8% disagree – 17.2% neutral – 17.2% agree – 20.7% strongly agree – 31.0%
f. will impede entry of new subcontractors into the market:
strongly disagree – 10.3% disagree – 17.2% neutral – 20.7% agree – 17.2% strongly agree – 37.9%
g. will impede minor and women owned subcontractors:
strongly disagree – 14.8% disagree – 14.8% neutral – 11.1% agree – 22.2% strongly agree – 37.0%

(5) **Do you view the $1 million prime contract threshold to impose the "bid listing" requirement as:**
❍ Too High – 0.0% ❍ About Right – 7.1% ❍ Too Low – 67.9% ❍ No Opinion – 25.0%

If too high or too low, what should be the threshold amount? **Range from: $5M - $100M**

(6) **Do you view the $100,000 subcontract threshold to be included in the "bid listing" requirement as:**
❍ Too High – 0.0% ❍ About Right – 11.1% ❍ Too Low – 66.7% ❍ No Opinion – 22.2.0%

If too high or too low, what should be the threshold amount? **Range from: $250K - $10M, or use a percentage approach.**