

112TH CONGRESS
1ST SESSION

H. R. 1778

To assure quality and best value with respect to Federal construction projects
by prohibiting the practice known as bid shopping.

IN THE HOUSE OF REPRESENTATIVES

MAY 5, 2011

Mrs. MALONEY (for herself and Ms. HIRONO) introduced the following bill;
which was referred to the Committee on Oversight and Government Reform

A BILL

To assure quality and best value with respect to Federal
construction projects by prohibiting the practice known
as bid shopping.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Construction Quality
5 Assurance Act of 2011”.

6 **SEC. 2. FINDINGS.**

7 Congress finds the following:

8 (1) Federal construction project sealed bid con-
9 tractor selection procedure is a valuable project ac-

1 quisition method that should be preserved and
2 strengthened for projects of appropriate scope.

3 (2) Federal procurement data trends indicate
4 that agencies increasingly are relying on other nego-
5 tiated contractor selection procedures, rather than
6 price-only selection procedures.

7 (3) Requirements for Federal agencies to use
8 major subcontractor bid listing on price-only prime
9 contractor selection procedures would restore the
10 balance in use of low-bid and competitive negotia-
11 tions, which has proven results in other public pro-
12 curement systems.

13 (4) Bid shopping occurs when the successful
14 prime contract low bidder, after project award, uses
15 the successful subcontract low bids as the beginning
16 point for a post-award auction to the same or other
17 subcontractors to agree to perform the subcontract
18 work at an even lower price, with the savings accru-
19 ing only to the benefit of the low-bid prime con-
20 tractor, not the agency program, the project, or the
21 taxpayer.

22 (5) Bid peddling occurs when other subcontrac-
23 tors approach the successful prime contractor bidder
24 after award of the prime contract and offer to per-
25 form the subcontract work at a lower price than sub-

1 mitted by the subcontractor whose sub-bid price was
2 relied on by the successful prime contractor, again
3 with the ostensible savings accruing to the prime
4 contract low bidder only, not the agency program,
5 the project, or the taxpayers.

6 (6) Listing of major subcontract bids in the
7 prime contractor's sealed bid by agencies will effec-
8 tively stem the detrimental and inequitable practices
9 of bid shopping and bid peddling on direct Federal
10 construction contracts that are detrimental to the
11 taxpayers' interest in government procurement
12 transparency, sound public contract administration,
13 and successful construction project completion.

14 (7) Agencies will receive better project perform-
15 ance, by restoring integrity to the low-bid selection
16 system for both prime contractors and major sub-
17 contractors, as abusive selection procedures often
18 lead to greater project disputes, claims, changes,
19 product and material substitutions, and in some
20 cases even contractor defaults—again, all to the det-
21 riment of the agency program, the project, and the
22 taxpayers generally.

23 (8) Restoring equitable safeguards in the low-
24 bid system will assure that agency practice will con-
25 form to the highest standards adhered to by indus-

1 try professionals and contractor associations, and
2 will reflect best practices followed by a great many
3 other public procurement systems nationally and
4 internationally.

5 **SEC. 3. DEFINITIONS.**

6 In this Act:

7 (1) CONTRACT.—The term “contract” means
8 any contract with the Federal Government, exceed-
9 ing \$1,000,000 in amount, for the construction, al-
10 teration, or repair of any public building or public
11 work of the United States.

12 (2) CONTRACTOR.—The term “contractor”
13 means an individual or entity that has been awarded
14 or is seeking to be awarded a construction contract
15 by the Federal Government.

16 (3) SUBCONTRACTOR.—The term “subcon-
17 tractor” means an individual or entity that sub-
18 contracts with a contractor in an amount in excess
19 of \$100,000 for work on a contract.

20 **SEC. 4. REQUIREMENTS REGARDING SUBCONTRACTORS**
21 **FOR FEDERAL CONTRACTORS ON CONSTRUC-**
22 **TION PROJECTS.**

23 (a) REQUIREMENT TO LIST SUBCONTRACTORS.—

24 (1) IN GENERAL.—Each solicitation by an execu-
25 tive agency for the procurement of construction in

1 an amount in excess of \$1,000,000 shall require
2 each bidder to submit as part of its bid the name,
3 location of the place of business, and nature of the
4 work of each subcontractor with whom the bidder, if
5 awarded the contract, will subcontract for work in
6 an amount in excess of \$100,000 on the contract.

7 (2) REQUIREMENTS FOR SPECIFIC CAT-
8 EGORIES.—

9 (A) Except as provided in subparagraphs
10 (B) and (C), the bidder shall list only one sub-
11 contractor for each category of work as defined
12 by the bidder in its bid or proposal.

13 (B) A bidder may list multiple subcontractors
14 for a category of work if each such subcontractor
15 is listed to perform a discrete portion of
16 the work within a category.

17 (C) A bidder may list itself for any portion
18 of work under the contract, which shall be
19 deemed a representation by the bidder that it is
20 fully qualified to perform that portion of the
21 work itself and that the bidder will perform
22 that portion itself.

23 (3) RESULT OF FAILURE TO LIST SUBCONTRACTORS.—
24 An executive agency shall consider any bidder
25 that fails to list subcontractors in accordance

1 with this Act and the regulations promulgated pur-
2 suant to section 7 of this Act to be non-responsive
3 and bids by such bidders shall not be considered.

4 (b) PROCEDURES FOR SUBSTITUTION OF A LISTED
5 SUBCONTRACTOR.—

6 (1) CONSENT AND GOOD CAUSE REQUIRED.—

7 No contractor shall substitute a subcontractor in
8 place of the subcontractor listed in the original bid
9 or proposal, except with the consent of the con-
10 tracting officer for good cause.

11 (2) EXAMPLES OF GOOD CAUSE.—Good cause
12 under paragraph (1) shall include the following:

13 (A) Failure of the subcontractor to execute
14 a written contract after a reasonable period if
15 such written contract, based upon the terms,
16 conditions, plans, and specifications of the con-
17 tract and the terms of the subcontractor's bid
18 or proposal, is presented to the subcontractor
19 by the contractor.

20 (B) Bankruptcy of the subcontractor.

21 (C) The death or physical disability of the
22 subcontractor, if the subcontractor is an indi-
23 vidual.

24 (D) Dissolution of the subcontractor, if the
25 subcontractor is a corporation or partnership.

1 (E) Failure of a subcontractor to meet the
2 surety bond requirements specified by the bid-
3 der as a condition of the subcontractor to per-
4 form on the contract, if awarded to the bidder.

5 (F) The subcontractor is ineligible to per-
6 form on the subcontract because the subcon-
7 tractor is suspended, debarred, or otherwise in-
8 eligible to perform.

9 (G) A series of failures by the subcon-
10 tractor to perform in accordance with the speci-
11 fication, terms, and conditions of its sub-
12 contract resulting in the withholding of
13 amounts requested by the subcontractor in ac-
14 cordance with section 3905 of title 31, United
15 States Code, and the regulations implementing
16 such section.

17 (H) Failure of the subcontractor to comply
18 with a requirement of law applicable to the sub-
19 contractor.

20 (I) Failure or refusal of the subcontractor
21 to perform the subcontract.

22 (3) REQUESTS FOR SUBSTITUTION.—A request
23 of a contractor for a substitution of a listed subcon-
24 tractor shall be submitted in writing to the con-
25 tracting officer and shall include the reasons for the

1 request. The contractor shall provide a copy of its
2 request for substitution to the listed subcontractor
3 by any means that provides written third-party
4 verification of delivery to the last known address of
5 the subcontractor. A subcontractor who has been so
6 notified shall have five working days within which to
7 submit written objections to the substitution to the
8 contracting officer. Failure to file such written ob-
9 jections shall constitute the consent of the listed
10 subcontractor to the substitution.

11 (c) LIMITATION ON ASSIGNMENT, TRANSFER, OR
12 SUBSTITUTION.—

13 (1) LIMITATION ON ASSIGNMENT OR TRANS-
14 FER.—No contractor shall permit any subcontract to
15 be voluntarily assigned or transferred or to be per-
16 formed by any entity other than the subcontractor
17 listed in the bid or proposal without the consent of
18 the contracting officer. Consent of the contracting
19 officer to a contractor for a substitution shall—

20 (A) be promptly made in writing; and

21 (B) be included in the contract file.

22 (2) LIMITATION ON SUBSTITUTION.—No con-
23 tractor that listed itself for a portion of the work
24 under the contract shall subcontract any portion of
25 the work for which it listed itself, unless authorized

1 by the contracting officer to substitute one or more
2 subcontractors to perform such work.

3 **SEC. 5. PENALTIES.**

4 (a) IN GENERAL.—

5 (1) A contractor shall be subject to penalties if,
6 without obtaining the approval of the contracting of-
7 ficer, the contractor—

8 (A) replaces a listed subcontractor for a
9 contract with an executive agency; or

10 (B) awards a subcontract to a subcon-
11 tractor to perform work which the contractor
12 had identified as work to be performed directly
13 by the contractor.

14 (2) A subcontractor shall also be subject to pen-
15 alties if the subcontractor is determined to have
16 knowingly participated in the failure of the con-
17 tractor to comply with the regulatory provisions re-
18 lating to the substitution of a listed subcontractor.

19 (b) AMOUNT OF PENALTIES TO BE IMPOSED.—The
20 amount of penalties imposed under this section shall be
21 equal to the greater of—

22 (1) 10 percent of the amount of the bid by the
23 listed subcontractor;

1 (2) the difference between the amount of the
2 bid by the listed subcontractor and the amount of
3 the bid by the substituted subcontractor; or

4 (3) the difference between the amount of the
5 bid by a substituted subcontractor and the dollar
6 value specified by the contractor for the work which
7 the contractor had listed for its own performance.

8 (c) SOURCE OF FUNDS FOR PENALTIES.—Penalties
9 assessed pursuant to this section shall be deducted from
10 the remaining unpaid contract balance and deposited into
11 the fund from which the contract was awarded.

12 **SEC. 6. GROUNDS FOR SUSPENSION OR DEBARMENT.**

13 The imposition of penalties on a contractor or sub-
14 contractor for failure to comply with the procedures for
15 the substitution of subcontractors on 2 contracts within
16 a 3-year period shall be deemed to be adequate evidence
17 of the commission of an offense indicating a lack of busi-
18 ness integrity or business honesty that seriously and di-
19 rectly affects the present responsibility of a Government
20 contractor within the meaning of part 9.4 of the Federal
21 Acquisition Regulation (Debarment, Suspension, and Eli-
22 gibility) (48 CFR 9.4).

1 **SEC. 7. IMPLEMENTATION THROUGH THE FEDERAL ACQUI-**
2 **SITION REGULATION.**

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

9 (b) **FINAL REGULATIONS.**—Final regulations shall be
10 published not less than 180 days after the date of the en-
11 actment of this Act and shall be effective on the date that
12 is 30 days after the date of publication.

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