

110TH CONGRESS
1ST SESSION

H. R. 3854

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

OCTOBER 16, 2007

Mr. KANJORSKI (for himself, Mr. MORAN of Virginia, Mr. GONZALEZ, and Mrs. MALONEY of New York) introduced the following bill; which was referred to the Committee on Oversight and 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.

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 2007”.

6 **SEC. 2. FINDINGS.**

7 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

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

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

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

11 (b) FINAL REGULATIONS.—Final regulations shall be
12 published not less than 180 days after the date of enact-
13 ment of this Act and shall be effective on the date that
14 is 30 days after the date of publication.

15 **SEC. 4. REQUIREMENTS REGARDING SUBCONTRACTORS**
16 **FOR FEDERAL CONTRACTORS ON CONSTRUC-**
17 **TION PROJECTS.**

18 (a) REQUIREMENT TO LIST SUBCONTRACTORS.—

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

1 awarded the contract, will subcontract for work in
2 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) GROUND 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.

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