84TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { No. 2362

FEDERAL CONSTRUCTION CONTRACT ACT

JUNE 15, 1956.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. BOYLE, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1644]

The Committee on the Judiciary, to whom was referred the bill (S. 1644) to prescribe policy and procedure in connection with construction contracts made by executive agencies and for other purposes, having considered the same, report favorably thereon with amendments and recommend that the bill do pass.

The amendments are as follows:

1. Page 1, line 4, strike the figures "1955" and insert in lieu thereof the figures "1956".

2. Page 4, line 1, immediately after the semicolon, insert the following clause (2) and renumber the present clause (2) as clause (3):

> (2) the total contract price is adjusted by the net difference in cost in the event such substitution results in a lower cost to the prime contractor than that specified for such work in the construction contract;

3. Page 6, line 12, insert the following new clause (b) and renumber present clause (b) as clause (c):

> (b) Nothing contained in this Act shall be construed to limit or diminish any rights or remedies which the United States or any agency thereof may have against the prime contractor arising out of the construction contract, or to relieve the prime contractor of any responsibility for performance of the construction contract because of any action taken by the United States or any agency thereof to approve or accept a contractor named by the prime contractor or to permit, approve, or deny the substitution of a contractor named by the prime contractor under any provisions of this Act.

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EXPLANATION OF AMENDMENTS

Amendment No. 1 changes the title of the act from "The Federal Construction Act of 1955" to "The Federal Construction Act of 1956."

Amendment No. 2 is to expressly provide that where the prime contractor with the permission of the Government agency concerned, substitutes a subcontractor pursuant to the provisions of section 1 (g) any savings in cost, if any, resulting from the change in subcontractors will be credited in the Government's favor against the amount due the prime contractor under the contract.

Amendment No. 3 reinserts a provision in the bill which was originally in the bill as reported by the Senate Judiciary Committee, but which was stricken out on the floor of the Senate. There was some doubt as to whether such an amendment was necessary, in view of the language of section 4 (a) which ostensibly covers the same area of subject matter. However, since many of the Government agencies feel that such a provision is required and, too, in order to eliminate any doubt on the subject, it was decided to reinstate the provision.

HISTORY OF THE LEGISLATION

In the 82d Congress a number of bills similar in purpose to S. 1644 were introduced but were not acted upon by the committee.

During the 83d Congress, H. R. 1825, together with companion bills, H. R. 1515, H. R. 1051, H. R. 1066, H. R. 1520, and H. R. 1563 were considered by this committee. Hearings were held jointly with a subcommittee of the Senate Judiciary Committee which had before it a companion bill, S. 848. Both H. R. 1825 and S. 848 were favorably reported to the respective Houses of Congress.

In the 84th Congress, S. 1644 was introduced by Senator Kilgore, for himself and 16 other Senators. This bill represents a very substantially revised, much simplified, and much less inclusive version of the prior bills. It was unanimously reported to the Senate by the Senate Judiciary Committee, and passed by the Senate on July 27, 1955.

Simultaneous six substantially similar bills were introduced by House members: H. R. 7637, by Representative Lane; H. R. 7638, by Representative Miller of New York; H. R. 7668, by Representative Priest; H. R. 7676, by Representative Wright; H. R. 7686, by Representative Bray; and H. R. 7693, by Representative Madden.

PURPOSE

The purpose of the proposed legislation is to prescribe policy and to improve existing procedure and practices in connection with the letting of lump-sum Federal construction contracts and to place the awarding of such contracts on a more efficient basis.

This is accomplished by establishing procedures for Federal agencies to follow in awarding construction contracts in line with the practices followed by prudent organizations in private industry. Many large industrial firms require their prime contractors to submit the names of their mechanical specialty contractors, if any, as a part of the prime bid in order to assure themselves that there is active competition for the mechanical subcontracts and that the price to them reflects the

final low price for the mechanical specialty work which makes up a large part of the total cost.

The bill is also designed to eliminate the unfair-trade practices of bid shopping and bid peddling in connection with Federal-construction contracts. This will provide assurance to the mechanical-specialty contractors that their bids will not be misused and, accordingly, give the Government the benefit of a full range of mechanical-specialty bids and of greater competition in this field.

PROVISIONS OF THE BILL

This bill simply provides that the prime contractor on Federal lump-sum construction shall state in his bid the names of the mechanical-specialty contractors, if any, that he intends to engage to accomplish the mechanical-specialty work.

In the event of default of the mechanical-specialty contractor named, the prime contractor may have the work done by a substitute or different mechanical-specialty contractor. There are no restrictions, in such event, on whom he may engage as a substitute.

Regardless of default by the mechanical-specialty contractor originally named, the prime contractor may engage a substitute or different mechanical-specialty contractor providing the Government, in writing, permits such substitution. Any savings engendered by the substitution accrue to the Government.

Provisions of the bill are not applicable to contracts to be performed outside of the United States and those of $100,000 or less or in cases where the head of the contracting executive agency determines that public exigency warrants waiver.

The bill expressly provides that it shall create no cause of action by a mechanical-specialty contractor against the Government; that permitting or denying the substitution of any mechanical-specialty contractor, shall not be deemed approval of such mechanical-specialty contractor named or substituted or relieve the prime contractor of any responsibility for performance of the contract or diminish any of the Government's remedies against the prime contractor; and that executive agencies are not thereby prevented from making any other conditions with respect to any subcontractors to be engaged by the prime contractor.

SECTION-BY-SECTION ANALYSIS

Section 1

Short title: Federal Construction Contract Act of 1956.

Section 2

(*a*) Executive agencies shall list in bidding or contract documents on each lump-sum construction contract each major category of mechanical specialty work involved therein.

(*b*) No executive agency shall award a lump-sum construction contract unless the prime contractor lists in his bid or proposal the names of the contractors whom he has or will engage to perform each major category of mechanical specialty work.

(*c*) Any prime contractor himself may perform any major category of mechanical specialty work under a lump-sum construction contract provided he states his intention to do so under (*b*) above.

(*d*) Executive agencies are not prevented from awarding separate or several prime construction contracts for any one construction project.

(*e*) The prime contractor shall have each major category of mechanical specialty work performed by the contractors named by him except as provided in (*f*) and (*g*) below.

(*f*) In the event of default by the subcontractor named, a substitute subcontractor may be engaged by the prime contractor providing the prime first notifies the contracting executive agency in writing of the name of the substitute.

(*g*) Regardless of default by the contractor named, a substitute subcontractor may be engaged if the prime contractor first notifies the contracting executive agency in writing of the name of the proposed substitute subcontractor and that agency permits the substitution in writing. The executive agency may require the prime contractor to submit in writing information as to any change in cost to the prime involved in the change in contractors in accordance with this subparagraph (*g*), and further that any savings resulting from such substitution shall be credited to the Government against the amount due the prime contractor under the contract.

(*h*) The act is not applicable to construction contracts:

(1) To be performed outside the United States.

(2) Of $100,000 or less.

(3) When agency head determines that public exigency requires waiver.

Section 3

1. *Executive agency.*—Any executive department or independent establishment in the executive branch of the Government, including any wholly owned Government corporation.

2. *Construction contract.*—Any contract by an executive agency for the erection, repair, moving, remodeling, modification, or alteration of any structure upon real estate excluding aqueducts, reservoirs, dams, irrigation and regional water supply projects, jetties and breakwaters, or structures incidental thereto.

3. *Mechanical specialty work.*—Plumbing, heating, piping, air conditioning, refrigerating, ventilating, and electrical work, including but not being limited to the furnishing and installation of sewer, drainage, and water supply piping and plumbing, heating, piping, air conditioning, refrigerating, ventilating and electrical materials, equipment and fixtures.

4. *Prime contractor.*—Person having direct contractual relationship with an executive agency for the performance of a construction contract.

5. *Person.*—Individual, corporation, partnership, association, or other organized group of persons. References to contractor or prime contractor shall include those within the definition of "person."

6. *Lump-sum contract and lump-sum construction contract.*—Construction contract whether awarded after bid or negotiated, under which the price is fixed or to be fixed by any method other than the cost-plus-a-fixed-fee method.

Section 4

(*a*) No privity of contract created between the Government and any mechanical specialty contractor and hence no cause of action by any mechanical specialty contractor exists against the Government.

(*b*) Permitting or denying the substitution of a contractor shall not be deemed approval by the Government of such mechanical specialty contractor named or substituted or relieve the prime contractor of any responsibility for performance of the contract, or diminish any of the Government's rights against the prime contractor.

(*c*) Executive agencies are not prevented from making other requirements with respect to subcontractors to be engaged by the prime contractor or from requiring any information deemed advisable relative to the cost of performance of any construction contract.

GENERAL STATEMENT

The underlying purpose of the bill is to improve procedures of Federal agencies in relation to Federal construction contracting and also to curb present abuses and unfair and unethical trade practices of "bid shopping" that prevail in the field of Government construction contracting.

During the hearings it was pointed out that, with respect to lump-sum construction contracts, the practice of "bid shopping" or "bid peddling" is not only unfair and plagues the construction industry, but is also detrimental to the best interests of the Government.

"Bid shopping" was described at hearings as the continuation of negotiation between the general contractor and the subcontractor after the former has been awarded the contract on the basis of a bid given him by the latter. The practice of "bid shopping" was more aptly described by the Tax Court of the United States in the case of *Ring Construction Corporation* (8 T. C. 1070) as follows:

> There is a practice among some contractors of shopping among subcontractors after successfully bidding for a construction job in order to obtain lower subcontract prices than those previously submitted and used in making up the successful bid. Such a contractor is known as a bid-jobber or bid-shopper and there is a policy among subcontractors either not to bid with a contractor known to be such a bid-jobber or to bid so high that he, the subcontractor, can still come down on his price and get the job.

Obviously, after an award, the bargaining position of the prime contractor, who has the contract, and the subcontractor, are not equal—the subcontractor being at a decided disadvantage. The code of ethics of the General Contractors Association and the Handbook of American Architects contain strong admonitions against bid shopping, and it is clear from the testimony that the majority of contractors and subcontractors have no desire to indulge in this unfair method of competition.

However, the testimony is also clear that this practice still exists in connection with Government construction projects, and its continuation is making it increasingly difficult for both the ethical general contractor and the ethical subcontractor to compete against unethical members of the industry who engage in bid shopping. The results of this evil are to restrict the number of qualified subcontractors who are willing to participate in Federal construction and to make those who do participate wait until the last minute to put in their bids (sometimes at artificially increased figures), to the distress of the general contractors. A further result is that prime contractors are

forced in some instances to submit their bids without any clear idea of what their subcontractors' bid (mechanical specialty subbids frequently account for 40 percent of the total cost of a project) will be.

There is, presently, no general Federal statute which requires a prime contractor, at the time of submitting his general bid to an executive agency of the Government, to name the subcontractors who will perform the mechanical specialty work involved. The instant bill contains this requirement. It is believed that it will have the effect of "firming" the contracts which are finally awarded. In addition, it will give the Government the benefit of a widened field of subcontractors, willing to submit bids in connection with construction contracts. It will also help eliminate the unhealthy condition, existing under present procedures, which results in the last-minute submission of subbids and afford the prime contractor the benefit of having his low firm mechanical specialty subbids reasonably in advance of submitting his general bid. It will eliminate the competitive disadvantage under which the ethical general contractor presently must operate in refusing to engage in bid shopping.

The hearings before this committee and before the Senate Judiciary Committee on this legislation contain documentary evidence pointing out that many of our largest corporations employ identical, or substantially similar, procedures in the letting of contracts for construction work. In addition, several of the States, by State statute, require prime contractors to list their mechanical specialty subcontractors in their general bids. And these statutes have been operating effectively to the economic benefit of the States concerned.

The instant bill will also result in savings to the Government in that it will make available the price advantage of a wider circle of subbidders and more competition. Under current bidding procedures the price the Government receives is, in many instances, too high. This is due to the thinness of competition, and to the fact that subbids do not reflect the final price for the mechanical specialty work. As noted earlier the general bid is submitted, in many instances, before the final low subcontract price is agreed upon. Accordingly the Government does not get the full benefit of the low competitive price from the prime contractor since the bids on which the contract is awarded do not reflect the final low subcontract cost. S. 1644 can give the Government this protection in having the subcontract prices reflected in its prime bids. In addition, the bill specifically provides that if and when a prime contractor is permitted to substitute subcontractors after a contract has been awarded, any savings which may result from the substitution shall accrue to the benefit of the Government.

The argument has been made that since no standards are set forth for determining the responsibility or acceptability of subcontractors under this legislation, an undue burden will be placed on the contracting agency in accepting or rejecting the bids of prime contractors. There is, of course, no express requirement under the bill that the Federal Government make a determination as to the responsibility or acceptability of subcontractors listed. The Government agencies may, of course, if they wish to do so, so require a determination and, under such circumstances, could follow, as authorized by section 4 (c), a procedure similar to the one now utilized by the Corps of Army Engineers (General Conditions of the Corps of Engineers' Standard

Lump-Sum Construction Contracts) or as done under Armed Services Procurement Regulations, which govern cost-plus-fixed-fee jobs.

It has also been urged that the provisions of this bill will impose additional and heavy administrative responsibilities upon the Government in permitting the substitution of subcontractors and that such burdens would offset any savings that may be effected by this legislation. However, much evidence has been presented to the committee both by testimony and by the submission of documents that enactment of this bill should result in substantial savings to the Government. For example, the State of California, which utilizes similar procedures, has found that substantial savings have resulted from this system. Moreover, in the case of *Stewart Earl Marling* v. *Board of Education of Baltimore County* (circuit court for Baltimore County, October term, 1952), the court found that utilization of subcontractor listing procedure lowered the cost of construction to the board of education. It is believed that additional administrative duties can only arise when a change of substitution of a mechanical specialty subcontractor is requested for reason other than default. And even such instances will involve little more than an additional bit of paperwork. Actually, with the incentive to change eliminated, because the profits are taken out of making the change, it is unlikely that a change will be requested in very many instances. On the other hand, when requested and permitted, the substitution can result in direct money savings in the contract cost to the Government which could more than offset any increase in administrative cost.

Another contention urged was that the bill discriminated in favor of certain mechanical specialty subcontractors to the exclusion of other trades, material man and suppliers. Sufficient testimony, however, was presented at the hearings to the effect that the majority of material men and suppliers do not view this legislation as being discriminatory against them. The only substantial mechanical specialty category which is not specifically included within the provisions of this legislation is the sheet-metal specialties. However, a representative of the Sheet Metal Constructors' National Association testified that that organization wholeheartedly endorsed the measure. It should be noted that the major mechanical specialty categories which come within the provisions of this bill such as electrical, plumbing, heating, etc., concern specialties which require a great deal of time and effort and money in estimating construction work. Estimating with regard to these specialties is an expensive process, requiring highly trained technicians to estimate the cost of various mechanical specialty work. This expensive process, however, is not the case in calculating and assembling the cost of brickwork, plastering, excavation, etc., each of which can be figured accurately on a mathematical basis.

It has also been argued that to require prime contractors to "firm up" subcontractor arrangements prior to the submission of their bids can be expected to reduce the number of prime contractors willing to bid on a particular construction job. Experience, however, has indicated that this situation has not resulted in the States which now use a subcontracting listing procedure similar to that provided by this bill. Such States include California, Idaho, and Massachusetts. Testimony on this very point was presented to the committee by witnesses thoroughly and fully acquainted with the situation in the various States. Moreover, a study made by the Senate Judiciary

Committee indicated that many of our larger corporations utilize the system prescribed by the bill or a similar one, and that they did so because they are satisfied that it was the most efficient and economical system. Actually, it is believed that the subcontractor listing provision in this bill will not only assure a greater number of prime contractors bidding on Government construction, but will also result in the prime contractors themselves receiving an adequate number of mechanical specialty subbids.

Under existing statutes the ethical prime contractor is at a decided disadvantage with the unethical competitor, who shops the subbids after award of the prime contract. Passage of this bill will place all prime contractors on an equal basis. Hence, the logical supposition is that it will increase competition for Federal construction among prime contractors.

An issue which was of concern to the committee was whether this legislation will give rise to claims for suits against the Government by subcontractors and by prime contractors. It is believed, however, that subsections 4 (a) and 4 (b) of the bill effectively take care of this question by expressly providing (1) that this act creates no privity of contract between the Government and the mechanical specialty subcontractor and hence no cause of action against the Government, and (2) that permitting the substitution of a contractor will not relieve the prime contractor of any responsibility for the performance of the contract.

Under the legislation, the Government still looks wholly and solely to the plans and specifications and to the prime contractor. The mere permitting of a change from one subcontractor to another certainly does not constitute the exercise of any degree of managerial control by the Government. It may be well to point out that under the regulations promulgated by many of our Government agencies, the agencies themselves not only can permit the substitution of subcontractors, but in addition expressly retain the right at any time during the progress of the work, for reasons of incompetency or undesirability, to terminate the work of the subcontractor, and these same agencies by regulations expressly provide that nothing contained in the contract creates any contractual relations between the subcontractors and the Government.

Generally, the Government agencies which reported on this legislation, and whose communications are made a part of this report, do not favor the enactment of this legislation. Some of their objections have been eliminated by the new section, 4 (b), of the bill, holding the prime contractor wholly responsible for the performance of the contract work. Their other objections relate, for the most part, to certain apprehensions concerning questions of policy which, in the final analysis, the Congress must decide. This committee has been considering this legislation during the last three Congresses. An abundance of evidence has been obtained, and on the basis of the entire record, it is its considered opinion that the instant legislation, policywise, will place the awarding of lump-sum construction contracts on a more efficient basis and will benefit the Federal Government and private industry alike.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, September 6, 1955.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives.

DEAR MR. CHAIRMAN: Reference is made to your letters of August 9, 1955, enclosing copies of S. 1644, H. R. 7637, and H. R. 7676, 84th Congress, 1st session, each of which is entitled "An act to prescribe policy and procedure in connection with construction contracts made by executive agencies, and for other purposes," and requesting our views thereon.

S. 1644, which passed the Senate on July 27, 1955, is apparently designed to prevent the practice of bid shopping. The bill requires generally that executive agencies shall list in their invitations for bids each major category of mechanical specialty work involved in the contemplated construction and that a prime contractor's bid shall list the name of the subcontractor (or himself) who will perform each of the listed categories.

Section 4 (b) authorizes (but does not direct) the contracting executive agency to require its approval or acceptance of the subcontractors.

Section 2 (e) precludes the prime contractor's use on a category of major specialty work of anyone other than the one named in his bid, except in accordance with the provisions of subsections 2 (f) and (g).

Section 2 (f) authorizes the prime contractor to substitute a subcontractor for the one named in his bid where the subcontractor so named fails or refuses to perform under the terms of his subbid. In such cases, no prior approval by the contracting agency is required unless pursuant to that agency's requirements under the authority of section 4 (b). In this connection, attention is invited to the colloquy between Senators Kilgore and Gore during debate on S. 1644—page 10060 of the Congressional Record for July 27, 1955—wherein Senator Kilgore explained that if a subcontractor named by a prime contractor in his bid is not acceptable to the contracting agency, the "agency would not reject the subcontractor. Instead the Government agency would simply say to the prime contractor, 'You are not the lowest responsible bidder; therefore we are going to give the contract to the lowest responsible bidder who employs responsible subcontractors.' " In further explanation, Senator Kilgore said, "[The subcontractors] are merely listed. If they are not *satisfactory*, of course, *the prime contractor's bid can be rejected on the ground that he is not a responsible bidder.*" [Italics supplied.] At present, the contracting agencies' determination as to the responsibility of bidders in lump-sum contracts is confined to the prime contractors. It is difficult to perceive how under these bills the contracting agencies can avoid the burden of making similar determinations in respect to the listed subcontractors. Compare Senator Morse's statement during the Senate debate, as recorded in the third paragraph, center column, page 10062 and the antepenultimate paragraph, first column, page 10068 of the Congressional Record for July 27, 1955, relative to the rejections of subcontractors listed in bids before awards of contracts. No standard for determining the responsibility or acceptability of subcontractors is provided and, even if such a standard were provided, it would open the way for a sub-

contractor who is declared by the contracting agency to be unacceptable to attack such determination on the ground that the statutory standards were not properly applied to him.

Section 2 (g) authorizes the prime contractor to substitute a subcontractor for the one listed in his bid for any reason—other than the listed subcontractor's failure or refusal to perform as covered by subsection 2 (f)—which is acceptable to the contracting agency, provided he first submits the name of the substitute subcontractor in writing and receives approval in writing of the contracting agency. It should be noted that the substitution authorized does not include specific authority for the prime contractor to substitute himself for the subcontractor named in his bid.

No provision is made in the bill for penalties in the event a prime contractor fails to comply with its provisions. If a prime contractor substituted a subcontractor in violation of the terms of the bill but the work was inspected and found to have been performed according to specifications, we perceive no legal grounds upon which the Government could refuse acceptance of the work or establish damages for the violation.

H. R. 7637 is identical with S. 1644, except for the inclusion of a provision that no acceptance by the contracting agency of a prime contractor's bid, or permitting or denying the substitution of a subcontractor in accordance with section 2 (g), shall be construed as approval or acceptance by the agency of such subcontractors, or relieve the prime contractor of responsibility for performance of the contract. A provision similar to subsection 4 (b) of H. R. 7637 was included in S. 1644, as introduced, but was deleted by the amendment offered by Senator Morse (p. 10069, Congressional Record, July 27, 1955) to preclude the Government from accepting a prime contractor's bid and thereafter refusing to accept one of the subcontractors named in the bid. However, it should be noted that the deleted section also contained a specific provision that the prime contractor is not relieved of responsibility for performance of the contract by virtue of the Government's acceptance or nonacceptance of the subcontractors. We recommend that such provision be retained as a precaution.

As previously indicated, the acceptance by the Government of a prime contractor's bid appears to require the Government to raise any objection to listed subcontractors before award of the contract. In the case of competitive (sealed) bid procedures, the prime contractor will risk having his bid rejected on the grounds that he is not a "responsible" bidder if one or more of the subcontractors he has listed in his bid are unacceptable to the Government. No provision is made for the prime contractor to amend his bid after opening by substitution of an "acceptable" contractor or for a change in his bid price, if required by such substitution. In this connection, we have held that under present law a bidder may not change a provision in a bid subsequent to its opening if the provision is material and in any way affects the price or quality of the articles to be furnished (31 Comp. Gen. 660). Also, we have held that, in the absence of information reflecting upon the quality of services offered by a low bidder, the low bid must be accepted (33 Comp. Gen. 265).

H. R. 7676 is identical with S. 1644 except that, like H. R. 7637, it includes a subsection 4 (b) which is analogous to the subsection deleted from S. 1644 by Senator Morse's amendment, and does not include section 4 (b) of S. 1644.

S. 1644, H. R. 7637, and H. R. 7676 do not include many of the burdensome administrative features contained in previous bills of this nature (H. R. 6176 and S. 848, 83d Cong., 1st sess., and S. 2907, 82d Cong., 2d sess.) on which we have reported and have recommended against favorable consideration thereof. The present bills undoubtedly will have some salutary effect upon bid shopping after the award of the contract. However, the question of whether the Government should endeavor to protect subcontractors in the manner provided is a matter of congressional policy. Accordingly, aside from the foregoing analyses and comments, we make no recommendations with respect thereto.

Sincerely yours,

FRANK H. WEITZEL,
Acting Comptroller General of the United States.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington 25, February 3, 1956.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives.

DEAR MR. CHAIRMAN: Further reference is made to your letter of January 24, 1956, advising that public hearings will be conducted February 7 on bills Nos. S. 1644, H. R. 7637, H. R. 7638, H. R. 7668, H. R. 7678, H. R. 7686, and H. R. 7693.

All of the bills are designed primarily to protect prospective mechanical subcontractors by preventing so-called bid shopping after award of the prime contract.

In the past we have objected to similar proposed legislation primarily on the ground that it would impose additional unnecessary burdens of administration on Government agencies. In expressing our views, however, on bills S. 1644, H. R. 7637, and H. R. 7676, in letter to you, dated September 6, 1955, B–109181, we pointed out that inasmuch as those bills did not include many of the burdensome administrative features which we had objected to in previous bills of a similar nature we had no recommendations regarding the merits of the question as to whether the Government should endeavor to protect subcontractors in the manner proposed in the bills.

We did call attention to certain technicalities which we felt warranted consideration if the legislation were enacted. For example we pointed out that no provision was made in the bills for assessing damages in the event a prime contractor substituted a subcontractor in violation of the terms of the bills. Also, we recommended that any legislation enacted should include a provision, such as that contained in subsection 4 (b) of H. R. 7637 and H. R. 7676, to the effect that the prime contractor is not relieved of responsibility for performance of the contract by virtue of the Government's acceptance or nonacceptance of the subcontractor. We further pointed out that, although section 2 (b) of the proposed bills did not expressly provide that before awarding a contract the Government must approve the subcontractors listed by the prime contractor in his bid, it was difficult to perceive how the contracting agencies could avoid determining the responsibility of such subcontractors. In that connection, attention was called to the statement of Senator Kilgore appearing at page 10060

of the Congressional Record for July 27, 1955, during debate on S. 1644, wherein he explained that if a subcontractor named by a prime contractor in his bid is not acceptable to the contracting agency, the "agency would not reject the subcontractor. Instead the Government agency would simlpy say to the prime contractor, 'You are not the lowest responsible bidder; therefore we are going to give the contract to the lowest responsible bidder who employs responsible subcontractors'." In further explanation, Senator Kilgore said, "[The subcontractors] are merely listed. If they are not satisfactory, of course, the prime contractor's bid can be rejected on the ground that he is not a responsible bidder." Under this view, it appears that in the case of competitive (sealed) bid procedures, the prime contractor will risk having his bid rejected on the grounds that he is not a responsible bidder if one or more of the subcontractors he has listed in his bid are unacceptable to the Government. Perhaps consideration should be given to the question as to whether it would be in the interest of the Government to authorize the prime contractor submitting the lowest bid, otherwise acceptable, to amend his bid after opening by permitting him to substitute an acceptable subcontractor and change his bid price, if required by such substitution. In this connection, we have held than under present law a bidder may not change a provision in a bid subsequent to its opening if the provision is material and in any way affects the price or quality of the articles or services to be furnished (31 Comp. Gen. 660).

Furthermore, we believe that if the contracting agencies are charged with the duty of determining the responsibility of subcontractors, it not only will place an additional burden on them but also may give rise to numerous protests from those subcontractors declared by the contracting agency to be unacceptable. Protests may also be received questioning the Government's action in approving any particular subcontractor.

There is an additional feature which we believe to be pertinent for consideration by your committee. It is our understanding that sometimes a prime contractor is unable to obtain a bid from all of his subcontractors in sufficient time to submit a bid to the Government. In such cases, an experienced prime contractor estimates the cost of the subcontract work involved and thus is able to submit a bid. Under the proposed legislation the bid would not be responsive to the invitation and would necessarily be passed over or rejected even though it might be the low bid and the most advantageous to the Government.

Since we have nothing further to offer we do not intend to testify at the hearings on February 7, 1956.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

ATOMIC ENERGY COMMISSION,
Washington 25, D. C., February 6, 1956.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives.

DEAR MR. CELLER: This is in reply to your letter of January 24 1956, concerning a hearing February 7, 1956, on S. 1644, H. R. 7637, H. R. 7638, H. R. 7668, H. R. 7676, H. R. 7686, and H. R. 7693, bills to prescribe policy and procedure in connection with construction contracts made by executive agencies, and for other purposes.

In a recent letter to you, we furnished the views of the Commission on three of these bills—S. 1644, H. R. 7637, and H. R. 7676. The other bills mentioned above are the same as H. R. 7637 and our comments on that bill are applicable to them.

I am enclosing a copy of our recent letter and, as it expresses our views on the bills, we would rather have it included in the record than have a representative attend the hearing on February 7, 1956.

Sincerely yours,

K. E. FIELDS, *General Manager.*

ATOMIC ENERGY COMMISSION,
Washington 25, D. C., February 3, 1956.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives.

DEAR MR. CELLER: This is in response to your request for our views with respect to S. 1644, H. R. 7637, and H. R. 7676, bills to prescribe policy and procedure in connection with construction contracts made by executive agencies.

As we understand S. 1644, which has passed the Senate, it would require each executive agency when requesting bids or proposals for construction work, with certain exceptions, to list each major category of mechanical specialty work which will be involved in performance of the work. Prime contractors offering bids or proposals would be required to name the subcontractors who would perform the mechanical specialty work so listed and would be permitted to have work performed by a substitute subcontractor only if a named subcontractor failed or refused to perform or complete his work or if the Government determined that a proposed substitution was necessary and permitted the substitution in writing. The legislation would not be applicable to cost-plus-a-fixed-fee construction contracts and would permit the head of the agency to exempt specific contracts from the provisions of the bill after making required determinations.

The Commission does not now require bidders on construction work to identify their subcontractors prior to the award of a construction contract. We are unable to determine whether enactment of this bill and the resulting limitation on possible bid shopping after the award of a contract would result in any benefit to the Commission. However, provisions requiring the listing of each major category of mechanical specialty work in invitations for bids, listing of mechanical specialty subcontractors in prime contractors bids or proposals, and requiring a determination that a substitution is necessary and granting

permission in writing for substitution of subcontractors, except in cases where the substitution is due to the default of the subcontractor, will increase the duties involved in the administration of construction contracts. In addition, if mechanical specialty subcontractors are entitled to the treatment specified by the bill, we believe it would be difficult to resist a broadening of the provisions to include other types of subcontractors. Extended application of these provisions would tend to increase administrative costs further. It is impossible at this time to ascertain whether the increase in administrative cost would be nominal or substantial, the complexity of the work to be contracted and the frequency of substitution requests under section 2 (g) would influence the degree of increased administrative costs.

In addition to some increase in the cost of administering construction contracts, the provisions of section 2 (b) requiring the listing of subcontractors in bids and the provisions of section 2 (g) requiring a determination that a substitution is necessary and requiring written permission from the contracting agency prior to substituting a subcontractor, except in cases of default by the subcontractor, would seem to relieve the prime contractor of some of his responsibility for performance of the entire contract. This result would be inconsistent with the principle that a lump-sum contractor alone is responsible for the work required by his contract. If a subcontractor listed in a bid which had been accepted by a contracting agency should default, it is possible the contracting agency would be considered jointly responsible with the prime contractor because it had accepted the bid with knowledge of the proposed subcontractor. Also, if under section 2 (g) (2) permission to substitute was granted or withheld and the subcontractor defaulted, it is possible the contracting agency would be considered jointly responsible with the prime contractor. Because of this possibility, section 4 (b) of S. 1644, as it was reported by the Senate Judiciary Committee, provided that in either of the foregoing circumstances the contracting agency's action shall not be construed to relieve the prime contractor of any responsibility for performance of the contract. The Senate deleted this section of the bill as it was reported because of other provisions contained in the section. We consider such a provision very desirable.

H. R. 7676 is the same as S. 1644 as reported by the Senate Judiciary Committee except that it does not contain a section 4 (c) providing that nothing in this act shall be construed to prevent a contracting agency from requiring, in its discretion, approval or acceptance by it of subcontractors or from making any other requirements it deems advisable.

H. R. 7637 is the same as S. 1644 as reported by the Senate Judiciary Committee. It differs from S. 1644 as passed by the Senate in that it does not require under section 2 (g) a determination by the contracting agency that a proposed substitution is necessary and it contains in section 4 (b) a provision that the prime contractor shall not be relieved of responsibility for performance because of the acceptance of its bid listing subcontractors or the granting or withholding of permission to substitute subcontractors. Because of these differences, H. R. 7637 would appear to increase the duties involved in the administration of construction contracts somewhat less than the other bills. In addition, it contains the provision with respect to the prime contractor's continuing responsibility for performance which we consider desirable.

Since we are unable to determine whether enactment of S. 1644, H. R. 7676 or H. R. 7637 would result in any benefit to the Commission, and since enactment of any of these bills will increase in some degree the burden of administering construction contracts, we are unable to recommend enactment of any of these bills. In addition, enactment of S. 1644 or H. R. 7676 might reduce the prime contractor's responsibility for performance of the work.

The Bureau of the Budget has advised us that it has no objection to the submission of these views.

Sincerely yours,

W. F. LIBBY
(For Chairman).

DEPARTMENT OF THE ARMY,
Washington, D. C., February 6, 1956.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives.

DEAR MR. CHAIRMAN: Reference is made to your request to the Secretary of Defense for the views of the Department of Defense with respect to S. 1644, as passed by the Senate July 27, 1955, H. R. 7637, and H. R. 7676, 84th Congress, bills to prescribe policy and procedure in connection with construction contracts made by executive agencies, and for other purposes. The Department of the Army has been delegated the responsibility by the Secretary of Defense to express the views of the Department of Defense thereon.

The Department of the Army, on behalf of the Department of Defense, has considered the above-mentioned bills. These bills in many respects are materially different from S. 848, 83d Congress (S. Rept. No. 448) and H. R. 1825, 83d Congress (H. Rept. No. 892), companion bills. However, the main purpose of S. 1644, H. R. 7637, and H. R. 7676, 84th Congress, like S. 848 and H. R. 1825, 83d Congress, is to eliminate a practice in the construction industry, generally referred to as bid shopping. This is a practice where, in some instances, general contractors look around for specialty subcontractors to do the work at a lower price than the proposal submitted by some other subcontractor and which may have been used by the prime contractor in preparing his bid. By letter of April 13, 1953, addressed to the former chairman of the Senate Committee on the Judiciary, the Department of the Army, on behalf of the Department of Defense, recommended that S. 848, 83d Congress, not be given favorable consideration.

While certain objectionable features of S. 848 and H. R. 1825, 83d Congress, have been removed from S. 1644, H. R. 7637, and H. R. 7676, 84th Congress, other objections to the instant bills remain.

S. 1644 as passed by the Senate differs from H. R. 7637 and H. R. 7676 in that section 4 (b), which follows, contained in the two House bills, was stricken by the Senate:

"Acceptance by an executive agency of a bid or statement of a prime contractor setting forth the name of a proposed contractor, or awarding a contract to such prime contractor after such acceptance, or permitting or denying the substitution of a contractor in accordance

with the provisions of section 2 (g), shall not be construed to be approval or acceptance by the executive agency of the United States Government of any contractor named or substituted, or to relieve the prime contractor of any responsibility for performance of the contract."

The foregoing provision was reported out by the Senate Judiciary Committee as an amendment of section 4 (b). (S. Rept. No. 617.) The effect of the Senate action was to strike out this provision in its entirety.

Another difference between the Senate bill as it passed the Senate and the two House bills is that the words "as determined necessary by the respective contracting agencies and" were added by the Senate in the first line of section 2 (g).

H. R. 7676 differs from H. R. 7637 and S. 1644 in that H. R. 7676 does not contain section 4 (c) as follows:

"Nothing in this Act contained shall be construed to prevent any executive agency from requiring, in its discretion, approval or acceptance by it of contractors engaged or to be engaged by any prime contractor on a construction contract or from making any other requirements it deems advisable in its discretion with respect to contractors engaged or to be engaged by prime contractors on any construction contract or from requiring any information it deems advisable in its discretion as to the cost of performance of any construction contract."

The above provision was renumbered as section 4 (b) in the Senate bill as it passed the Senate, since section 4 (b) as it originally appeared in S. 1644 was stricken from the bill.

In reporting to the chairman of the Senate Committee on the Judiciary under date of May 11, 1955, on S. 1644, the Department of the Army, on behalf of the Department of Defense, recommended that the bill not be enacted into law, and pointed out:

"It is * * * believed that there should be no departure from the principle that the prime contractor shall remain solely responsible as to the selection of his subcontractors. The need for adherence to this principle has been borne out on projects where specialty phases of a construction job were separately let rather than all being placed by and under one general contractor. This departure from the normal procedure resulted in numerous claims for damages.

"Policing by the Government to protect the bids or proposals of subcontractors doing mechanical specialty work would undoubtedly result in demands for similar action by other subcontractors participating in the performance of Government construction contracts. If any particular classes of subcontractors are entitled to the special treatment which the bill would allow, no sound reason appears for not according the same treatment to all classes of construction and supply subcontractors. In such event, the administration of construction contracts would become unduly burdensome.

"In summary, it may be stated that the bid shopping of general contractors which the bill seeks to overcome is a matter to be cleaned up by the construction industry itself, if such a practice is regarded by the industry to be unethical. The Government has always taken the position that it should look only to the general contractor for performance. This places the responsibility for the performance of the work in one place and eliminates the necessity of dealing with many persons rather than with the one who is responsible for the entire work.

The subcontract price, conditions of the subcontract, and any other agreements entered into by the general contractor and his subcontractors are, in our opinion, matters of concern only to those parties and should be of no concern to the Government so long as the provisions of the prime contract are being adhered to, there is no patent violation of law, and there is no evidence of collusion or fraud."

As was pointed out by the spokesman for the Department of Defense at hearings before a subcommittee of the Senate Committee on the Judiciary on S. 1644 (hearings, p. 92 et seq.), it would appear that the only recourse available to the contracting agency for failure on the part of the prime contractor to comply with the proposed legislation would be to terminate the construction contract for default, no remedy or sanction being provided.

Resort to termination of the construction contract to enforce the provisions of the proposed legislation because of default, regardless of the degree or flagrancy of the violation, may well prove highly undesirable. Thus, although the prime contractor has failed to comply with a provision of the proposed legislation relating to the substitution of a subcontractor but is performing the construction work in strict accordance with the contract requirements, the contracting agency, if there is to be enforcement, would be put to the necessity of terminating the contract. A reletting of the construction work would result in delay in completion with attendant problems in making adjustment with the defaulting prime contractor.

The Department of the Army, on behalf of the Department of Defense, adheres to the views as stated in its report to the chairman of the Senate Committee on the Judiciary of May 11, 1955, on S. 1644 and as expressed by the spokesman for the Department of Defense at the hearings on this bill before the subcommittee of the Senate Judiciary Committee on May 12, 1955. The recommendation previously made that the proposed legislation not be enacted is reiterated.

It is to be emphasized that the proposed legislation if enacted would be a departure from a long-established practice in principle, policy, and procedure in the letting of construction contracts which has proved practicable.

It is recognized, however, that in ultimate analysis the proposed change in the law is a matter of legislative policy for the Congress to determine. If the Congress is disposed to enact any of the instant bills, there should be ample provision for the protection of the Government with respect to legal problems which may arise as the result of the change in policy and procedure.

In its previous report on S. 1644 (letter of May 11, 1955, quoted above) it was pointed out by the Department of the Army, on behalf of the Department of Defense, that the provision in the bill which would disclaim the creation of any privity of contract between the Government and any subcontractor (sec. 4 (a)) would not overcome certain legal questions which may be presented. This was further explained in a memorandum dated May 3, 1955, from the Office of the Judge Advocate General (hearings before subcommittee, Senate Committee on the Judiciary, on S. 1644, pp. 93, 94). After a review of the legal difficulties which may be encountered, the Office of the Judge Advocate General stated in conclusion that "sections 4 (a) and (b) of S. 1644 are not broad enough to protect the Government from becoming entangled in legal issues resulting from actions under the act."

The Senate Committee on the Judiciary, in reporting out S. 1644, apparently recognized that the bill needed some additional support to overcome these legal difficulties and made certain amendments to the bill, particularly with respect to section 4 (b), quoted above. These amendments, the Senate Committee on the Judiciary stated, when read with other language in the bill, "made it abundantly clear that nothing contained therein shall create privity of contract between the United States Government and any subcontractor or give any subcontractor any cause of action against the United States on a Federal construction contract or in any degree diminish the responsibility of the prime contractor to the Government" (S. Rept. No. 617, p. 2). The Senate, however, as previously stated, rejected section 4 (b), striking this provision both as first recited in the bill and as amended by the Senate Committee on the Judiciary (Congressional Record, July 27, 1955, p. 10069).

In order to allay the legal problems that may arise, particularly in the relationship of the Government to the prime contractor, it is recommended that a new section 4 (b) be inserted in the Senate bill as it passed the Senate (renumbering the present section 4 (b) of such bill to 4 (c)), and that section 4 (b) in H. R. 7637 and H. R. 7676 be amended, all to read as follows:

"Nothing in this Act contained shall be construed to limit or diminish any rights or remedies which the United States or any agency thereof may have against the prime contractor arising out of the construction contract, or to relieve the prime contractor of any responsibility for performance of the construction contract because of any action taken by the United States or any agency thereof to approve or accept a contractor named by the prime contractor or to permit, approve, or deny the substitution of a contractor named by the prime contractor under any provisions of this Act."

The Senate amendment in the first line of section 2 (g) of S. 1644, referred to above, was made to clarify the authority of the contracting agencies to determine the necessity for the prime contractor to engage a substitute contractor. It should be emphasized, however, that although each of the bills would impose a responsibility upon the contracting agency to determine the circumstances under which substitution of subcontractors by the prime contractor should or should not be permitted, no standards are provided to guide the judgment of the contracting agency in this matter. The legislative intent implicit in these bills would be very difficult to implement in the absence of such standards and would undoubtedly be the subject of wasteful dispute between the agency and its construction contractors and subcontractors. Without such guidance administration of the proposed legislation will virtually require each agency to "legislate" and "adjudicate" ethics for the construction industry.

Further, if the Congress sees fit to enact this legislation it is recommended that section 2 (h) of each of the three bills here considered be revised substantially as follows:

"(h) This Act shall not apply to the following proposed construction contracts:

"(1) Proposed contracts to be performed outside the continental limits of the United States or the Territory of Alaska.

"(2) Proposed contracts which are estimated by the contracting agency to involve less than $100,000.

"(3) Any proposed contract with specific reference to which a chief officer responsible for the procurement determines that the procedure described herein would result in undue delay and that the public exigency or military necessity will not admit of such delay."

This revision is necessitated by the fact that the requisite decisions must be made in advance of entering into a contract or accepting bids and proposals. It would also permit the determination required by subparagraph (3) to be made by a responsible officer at a lower level than that of the "heads of the contracting executive agency," namely, the Secretaries of the military departments.

As already noted H. R. 7676 does not contain section 4 (c), hereinbefore quoted. The Senate Judiciary Committee in its report to accompany S. 1644 stated that this section "permits the agencies to impose other requirements with respect to subcontractors or with respect to other subcontractors, if they wish" (S. Rept. No. 617, p. 10). Confined to this purpose, there appears to be no reason why this provision, which is contained in S. 1644 and H. R. 7637, should not also be included in H. R. 7676.

The fiscal effects of the bill cannot be estimated by the Department of Defense; however, enactment of the bill would increase Government construction costs through increased administrative expenses. Furthermore, the Comptroller General, in a letter of March 30, 1953, to the former chairman of the Senate Committee on the Judiciary commenting on S. 848, 83d Congress, indicated that the requirements contemplated by the proposed legislation "could only result in higher bids" on construction work.

This report has been coordinated within the Department of Defense in accordance with procedures prescribed by the Secretary of Defense.

Inasmuch as the committee has requested that the report be expedited, it is submitted without a determination by the Bureau of the Budget as to whether or not it conforms to the program of the President. As soon as such advice is received it will be forwarded to your committee.

It is desired that a representative of the Department of the Army, in behalf of the Department of Defense, be afforded an opportunity to appear before your committee to explain the position of the Department of Defense in more detail.

Sincerely yours,

WILBER M. BRUCKER,
Secretary of the Army.

UNITED STATES DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SECRETARY,
Washington, D. C., March 20, 1956.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D. C.

MY DEAR MR. CELLER: This responds to your request for the views of this Department on S. 1644, a bill to prescribe policy and procedure in connection with construction contracts made by executive agencies, and for other purposes.

We recommend that the bill not be enacted.

S. 1644 provides that executive agencies, advertising for bids on lump-sum construction contracts, shall list each major category of mechanical specialty work. Prime contractors would be required to list in their bids the names of subcontractors who will perform the work in each specialty category. The bill would not prevent prime contractors from performing their own mechanical specialty work. If a subcontractor should fail or refuse to perform, the prime contractor would be permitted to engage a new subcontractor and he would be required to give notice of the change to the contracting agency. Should the prime contractor desire to engage a subcontractor, other than one designated in his bid, for some other reason, he would have to notify the contracting agency of the proposed change and such information regarding any change in cost to him resulting from the change in subcontractor as the contracting agency might request, and he would have to obtain the approval in writing of the contracting agency in order to engage the substitute subcontractor. The bill would apply to contracts for amounts in excess of $100,000 which are to be performed within the continental limits of the United States and Alaska, unless the head of the agency were to determine with reference to a particular contract that the provisions of the bill would result in undue delay which the public exigency will not permit. The provisions of the bill would not apply to certain types of construction, defined in section 3 (2), including water supply and power development projects.

A substantial amount of the funds appropriated annually to the Department of the Interior is expended on construction work under contracts which are of the type that would be subject to the provisions of S. 1644. In our opinion, the cost of the work to the Government would be increased by an adherence to the provisions of the bill. Many major construction contracts take as long as 2 or 3 years to complete. In accordance with present practice, mechanical specialty subcontracts are often let at the time the particular work is to be performed, since a substantial portion of this work is done near the end of the construction period. The contractor lets the subcontracts at prices then applicable, without affecting the cost to the Government. In general, where prime contractors are unable, or do not attempt, to obtain firm bids for specialty work prior to bid opening, their experience permits them to roughly estimate the cost of the work for bidding purposes and to anticipate possible savings from further negotiations with specialty contractors. In the event S. 1644 is enacted, it is likely that subcontractors will agree to perform the work only at a price sufficiently high to protect themselves against every possible contingency which might arise between the time of the bid of the prime contractor and the time of performance. Secondly, the Government would lose the possible price benefit resulting from a longer period of negotiations between prime contractors and their prospective subcontractors.

Another element of cost to the Government inherent in the bill is the increased administrative expenses involved in connection with the Government's proposed increased responsibilities. The cost of designing and preparing specifications would be increased because of the necessity for arranging and subdividing bid items under the various categories of work susceptible to such contracting, as defined in the proposed bill. Difficulties arising in the determination of the

categories for specialty work, because of varying practices in different areas, might well result in troublesome and time-consuming problems for the contracting agency. In addition, the bill would require a certain amount of policing by the Government of prime contractors' activities in connection with their use of subcontractors, and would inevitably draw the Government into controversies between prime contractors and subcontractors. Under existing law, the Government personnel administering contracts do not expend their time and efforts on these matters and the Government's sole concern is with the prime contractor's performance of his contract in an acceptable manner within the contract period.

We are aware that the bill is designed to do away with so-called bid shopping by prime contractors on Government construction jobs. Quite apart from, and in addition to, the adverse effect it would have on the Government's objective to have the work done at the lowest possible cost, we anticipate that enactment of the bill will have certain other adverse effects. For example, it could tend to promote the acquisition by large contractors of specialty concerns so that their bids on contracts could be made with a minimum of additional effort in complying with the requirement that there be listed the persons or concerns to perform the specialty work. This could result in less competition for specialty work and would reduce opportunities for small-business concerns to participate in Government work.

We do not consider that any public policy or interest is harmed in the present system of negotiating and bargaining to secure the lowest cost for specialty work, either before or after an award of contract: rather, this is the normal and usual method of transacting such business in our free enterprise system which has historically resulted in the lowest cost to the Government for the acceptable performance of its contracts.

The Bureau of the Budget has advised that there is no objection to the submission of this report to your committee.

Sincerely yours,

FRED G. AANDAHL,
Assistant Secretary of the Interior.

DEPARTMENT OF JUSTICE,
OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D. C., March 1, 1956.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D. C.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice concerning the bills (H. R. 7637, H. R. 7676, and S. 1644) to prescribe policy and procedure in connection with construction contracts made by executive agencies, and for other purposes.

The bills would require executive contracting agencies entering into lump-sum construction contracts to list each major category of mechanical specialty work in the contract documents; prohibit an agency from entering into a contract unless the name of the subcontractor who will perform each major category of mechanical specialty work

has been specified in the prime contractor's bid or proposal; require that, except under specified conditions, the prime contractor have the specialty work performed by the subcontractor designated; and provide that substitution of subcontractors must be approved by the contracting agency.

Whether legislation of this general character should be enacted involves a question of policy concerning which this Department prefers to make no recommendation. It is believed however that section 4 of the bills should be amended in certain respects.

The major differences in the three bills appear in section 4 thereof. Portions of this section of each bill were apparently inserted in an attempt to effect a disclaimer of any privity of contract between the Government and the subcontractors for the purpose of avoiding potential liability of the Government to subcontractors under the prime contract. It is doubtful however that the language of any of these bills would fully protect the Government from liability in litigation which can foreseeably result from the proposed legislation.

Two types of claims or suits against the Government might arise under legislation on this subject; namely (1) directs suits or claims against the Government by subcontractors, and (2) suits by the prime contractor arising from alleged interference by the Government in the control or approval of subcontractors. The Government has historically recognized only one party, the prime contractor, and any legislation which would alter that relationship would appear undesirable. While the language of the three bills would apparently avoid the possibility of direct governmental liability to subcontractors, and that of certain of the bills might meet the problem with respect to liability to prime contractors, it is believed advisable to incorporate provisions to disclaim the creation of any new area of governmental liability to either prime contractors or subcontractors. Accordingly, it is suggested that the following new section 4 be substituted for that in the bills:

"SEC. 4. (a) Neither this Act nor compliance with the provisions thereof shall be construed to create any privity of contract between the United States Government, or any agency thereof, and any contractor contracting with the prime contractor under any construction contract, or give any such contractor any cause of action against the United States or any of its agencies.

"(b) Acceptance by an executive agency of a bid or statement of a prime contractor setting forth the name of a proposed contractor, or awarding a contract to such prime contractor after such acceptance, or permitting or denying the substitution of a contractor in accordance with the provisions hereof, shall not be construed to be approval or acceptance by the executive agency of the United States Government of any contractor named or substituted, or to relieve the prime contractor of any responsibility for performance of the contract, or to give either the prime contractor or any subcontractor any cause of action by reason thereof against the United States or any of its agencies.

"(c) Nothing contained in this Act shall be construed to prevent any executive agency from requiring, in its discretion, approval or acceptance by it of contractors engaged or to be engaged by any prime contractor on a construction contract or from making any other requirements it deems advisable in its discretion with respect

to contractors engaged or to be engaged by prime contractors on any construction contract or from requiring any information it deems advisable in its discretion as to the cost of performance of any construction contract, nor shall the imposition of such requirements give rise to any cause of action against the United States or its agencies by the prime contractor or by any contractors engaged or to be engaged by the prime contractor."

The Bureau of the Budget has advised that there is no objection to the submission of this report.

Sincerely,

WILLIAM P. ROGERS,
Deputy Attorney General.

(H. R. 7637, H. R. 7676, and S. 1644.)

GENERAL SERVICES ADMINISTRATION,
February 3, 1956.

Re S. 1644, H. R. 7637, and H. R. 7676.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D. C.

DEAR MR. CHAIRMAN: This is in further response to your request for our views on S. 1644, as passed by the Senate, July 27, 1955, H. R. 7637 and H. R. 7676, 84th Congress, all entitled "To prescribe policy and procedure in connection with construction contracts made by executive agencies and for other purposes."

In general, these bills require that executive agencies shall list in their invitations to bid on lumpsum construction and related projects each major category of the mechanical specialty work involved.

Prime contractors would be required to list in their bids either the names of the subcontractors who will perform each of the listed categories of work or that such work would be undertaken by the prime contractor.

Substitutions are permitted only if (1) a named subcontractor failed or refused to perform or complete his work, or (2) if the prime contractor prefers and requests a substitution and the contracting agency determines the proposed substitution necessary for a reason specified in (1) above and the use of the substituted contractor is permitted in writing.

A section by section analysis and comparison of the three bills reveals that sections 1 through 4 (a) thereof are identical except that section 3 (g) of S. 1644 reposes in the contracting agency the burden of determining the necessity for substitution for reasons other than specified in subsection (f).

Section 4 (b) of H. R. 7637 and H. R. 7676 are identical as are sections 4 (c) of H. R. 7637 and 4 (b) of S. 1644, which latter provision is not contained in H. R. 7676. Such provision is to the effect that no acceptance by the contracting agency of a prime contractor's bid, or permitting or denying the substitution of a subcontractor in accordance with section 2 (g), should be construed as approval or acceptance by the agency of such contractors, or relieve the prime contractor of responsibility for performance. The inclusion of the above pro-

vision or one similar thereto would strengthen the Government's present reliance upon the prime contractor for the responsibility for performance of the work.

While many of the objectionable features of previous bills introduced on the subject have been eliminated, we do not favor or recommend the enactment of these bills for the following reasons:

(*a*) Since no standards for determining the responsibility or acceptability of subcontractors are set forth, an undue burden is placed on the contracting agency in accepting or rejecting the bids of prime contractors or in authorizing substitutions of subcontractors;

(*b*) The imposition of additional administrative responsibilities, duties and burdens on the Government's contracting procedures could only result in increased cost offsetting, in our opinion, any savings it may be purported that the bills would effect;

(*c*) The mechanical specialty trades are singled out to the exclusion of the other trades and materialmen and suppliers. Although the bills make discretionary the addition of other trades, to do so would increase the administrative problem to the extent of making Government construction procedures unduly and unnecessarily burdensome and expensive. Enactment of the bill may "open the door" to such possibilities;

(*d*) Our experience does not indicate any inability on the part of our prime contractors to secure the services of responsible subcontractors to the extent that regulatory legislation must be enacted to achieve such results;

(*e*) The requirement that prime contractors name mechanical specialty subcontractors means that fairly firm arrangements must be completed between these parties. This will cost prime contractors both money and effort and can be expected to reduce the number of prime contractors willing to bid. A reduced number of bidders on Federal construction likewise can be expected to increase the cost of Federal construction.

In our opinion, the enactment of legislation of this nature is a matter of congressional policy. Should the passage of such legislation be determined necessary, it would appear that H. R. 7637 would prove better to protect the Government's interest than the other two bills.

The Bureau of the Budget has advised that there is no objection to the submission of this report to your committee.

Cordially yours,

(Signed) EDMUND F. MANSURE,
Administrator.

HOUSING AND HOME FINANCE AGENCY,
OFFICE OF THE ADMINISTRATOR,
Washington, D. C., May 29, 1956.

Re S. 1644, H. R. 7637, H. R. 7638, H. R. 7668, H. R. 7676, H. R. 7686, and H. R. 7693, 84th Congress.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D. C.

DEAR MR. CHAIRMAN: This is with further reference to your letter of January 27, 1956, informing us that Subcommittee No. 2 would

conduct public hearings on the subject bills on February 7, and inviting us to have a representative attend and acquaint the subcommittee with the views of this agency or, in the alternative, to submit a statement for the record. In my acknowledgment of February 3, I confirmed our telephone response to a member of your staff advising that this agency would not present testimony relating to the bills before your committee and I informed you that we were studying the bills and would furnish you with a letter giving our comments on them as soon as appropriate Executive clearances were obtained.

The bills would require executive agencies to list in their bidding or contract documents relating to lump-sum construction contracts each major category of mechanical specialty work involved. They would also require prime contractors to list in their bids or proposals the names of the subcontractors they will use for each major category of such work. The bills would prohibit a prime contractor from having any major category of mechanical specialty work performed by a substitute subcontractor, unless the listed one should fail or refuse to perform (in which case a substitute might be engaged after his name is submitted to the contracting agency) or the contracting executive agency should in writing permit the use of a substitute, after being furnished the name of the proposed substitute and such information as the agency might request as to any change in cost to the prime contractor involved in the substitution.

The legislative history of the bills indicates that their primary purpose is to attempt to insure that the prices bid to the Government by prime contractors reflect the final low prices eventually paid by the latter for mechanical speciality work, and, as a corollary, to eliminate a practice in the construction industry known as bid shopping.

The kind and volume of direct construction work undertaken by this agency varies from year to year depending upon the types of programs the agency currently is administering. At the present time the principal construction contracts awarded by this agency that would be affected by the proposed legislation would be those entered into under the school-construction program carried on under arrangement with the Office of Education, Department of Health, Education, and Welfare, under Public Law 815, 81st Congress, as amended.

Enactment of any of the above identified bills would in our judgment have serious adverse effects upon the construction operations of contracting executive agencies. It would impose upon them a whole new area of troublesome administrative responsibilities. Under present contracting procedures, it is unnecessary for an agency to concern itself in the multitude of problems which may arise between a prime contractor and his potential or actual subcontractors. Under the proposed legislation, contracting agencies might be called upon to mediate disputes concerning the substitution of subcontractors. In addition the exercise by agencies of the administrative discretion that would be granted them to approve or disapprove substitutions may be subject to judicial scrutiny. Although the bills would disclaim any privity of contract between the Government and subcontractors, such legislation would seem to set up some form of relationship between the two parties which might be regarded by the courts as establishing certain vested rights in the subcontractors, enforceable by them in a role such as that of incidental beneficiary. Similarly, refusals by agencies to grant requests for substitutions may lead to

confusion as to responsibility for any defective work performed by a listed subcontractor and to claims against the Government by prime contractors for extra costs allegedly occasioned by such refusals.

Enactment of any of these bills may ultimately place upon contracting agencies administrative burdens in addition to those immediately imposed. If this kind of legislation is enacted for the benefit of the mechanical speciality trades, it is difficult to conceive of convincing arguments why similar legislation should not be enacted to aid other kinds of subcontractors and possibly lower tier subcontractors, materialmen and suppliers.

The increased administrative responsibilities which the proposed legislation would place upon contracting agencies would, of course, significantly increase their administrative expenses. Although such new expenses might not be shown directly as increased construction costs, they inescapably would constitute an additional monetary burden upon the taxpayer.

Moreover, such legislation would delay contract awards and operations. Under current law and practice agencies are under no duty to approve specific subcontractors under lump-sum contracts at the time of the bid opening. Under the proposed statutory provisions agencies probably would feel a responsibility for evaluating the capability and fitness of each listed subcontractor before making an award. Such a procedure would be more time consuming, as well as more expensive, than the present practice.

The proposed legislation would also dilute the responsibility for performance which is now fixed upon the prime contractor under a lump sum or unit price contract. It seems administratively undesirable to inject the Federal Government into such a prime contractor's operations and to authorize or direct it to hear, or deal with, several persons or organizations rather than one in connection with the performance of such a contract.

This Agency has not been aware of any increase in the amounts of bids because of bid shopping. In our opinion the present statutory provisions requiring advertising for bids and as a consequence competitive bidding, adequately protect the Government.

For the foregoing reasons, the Housing and Home Finance Agency would recommend that none of the bills be enacted.

I have been advised by the Bureau of the Budget that there would be no objection to the submission of this report.

Sincerely yours,

ALBERT M. COLE,
Administrator.

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