

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.

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## 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

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## 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-

duce its price for performance of the specified work,  
suggesting that the previous offer of the subcontractor was padded or incorrect.

(5) Bid shopping and bid peddling—

(A) threaten the integrity of the competitive bid system for construction that benefits the Federal Government, the construction industry, and the economy of the United States as a whole;

(B) deprive taxpayers of the benefits of full and open competition among prospective contractors and subcontractors for the performance of Federal construction projects;

(C) expose Federal construction projects to the dangers of substandard performance, substitution of lower quality materials, and other detrimental cost-cutting practices by an unscrupulous substituted subcontractor; and

(D) can be effectively deterred in Federal construction by modifying the Federal Acquisition Regulation to require bid listing, which is the practice of requiring each offeror for a Federal construction contract to list the subcontractors whose performance is reflected in 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) GROUNDS FOR SUSPENSION OR DEBARMENT.—

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

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

21   **SEC. 5. DEFINITIONS.**

22          In this Act—

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

1       ment of construction in an amount in excess of  
2       \$1,000,000; and

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

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