

111TH CONGRESS  
1ST SESSION

# H. R. 3492

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

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## IN THE HOUSE OF REPRESENTATIVES

JULY 31, 2009

Mr. KANJORSKI introduced the following bill; which was referred to the  
Committee on Oversight and Government Reform

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## A BILL

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

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

3 **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “Construction Quality  
5       Assurance Act of 2009”.

6 **SEC. 2. FINDINGS.**

7       Congress finds the following:

8           (1) In the construction industry, specialty sub-  
9       contractors now perform the majority of construc-  
10       tion work, in certain cases 100 percent of the work,

1       under the management of a prime contractor, making  
2       the subcontractors' price and performance the  
3       key determinant in the overall cost of construction  
4       projects, including those performed for the Federal  
5       Government.

6               (2) Detrimental practices known as "bid shopping"  
7       and "bid peddling" exist in the construction  
8       industry, including construction projects for the  
9       Federal Government.

10              (3) "Bid shopping" occurs when a contractor,  
11       after award of a contract, contracts with subcontractors  
12       at a price less than the quoted price of the sub-  
13       contractor upon which the contractor's fixed bid  
14       price was based, in order to increase the contractor's  
15       profit on the project without any benefit to the enti-  
16       ty for which the contract is being performed.

17              (4) "Bid peddling" occurs when a subcontractor  
18       that is not selected for inclusion in a contractor's  
19       team seeks to induce the contractor, after award of  
20       the contract, to substitute the subcontractor for an-  
21       other subcontractor whose bid price was reflected in  
22       the successful bid of the contractor by offering to re-  
23       duce its price for performance of the specified work,  
24       suggesting that the previous offer of the subcon-  
25       tractor 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) compromise national security by promoting uncertainty about which contractors actually perform work on critical infrastructure projects;

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

(D) 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

(E) 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

1 the bid price, procedures for the substitution of  
2 listed subcontractors for good cause, and other  
3 deterrents to abuse.

#### 4 SEC. 3. DEFINITIONS.

## 5 In this Act:

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

22 (a) REQUIREMENT TO LIST SUBCONTRACTORS.—

23 (1) IN GENERAL.—Each solicitation by an exec-  
24 utive agency for the procurement of construction in  
25 an amount in excess of \$1,000,000 shall require

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

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

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

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

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

22                       (3) RESULT OF FAILURE TO LIST SUBCONTRAC-  
23       TORS.—An executive agency shall consider any bidder  
24       that fails to list subcontractors in accordance  
25       with this Act and the regulations promulgated pur-

1 suant to section 7 of this Act to be non-responsive  
2 and bids by such bidders shall not be considered.

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

5 (1) CONSENT AND GOOD CAUSE REQUIRED.—  
6 No contractor shall substitute a subcontractor in  
7 place of the subcontractor listed in the original bid  
8 or proposal, except with the consent of the con-  
9 tracting officer for good cause.

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

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

19 (B) Bankruptcy of the subcontractor.

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

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

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

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

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

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

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

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

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

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

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

20 (A) be promptly made in writing; and  
21 (B) be included in the contract file.

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

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

3 **SEC. 5. PENALTIES.**

4 (a) IN GENERAL.—

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

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

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

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

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

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

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

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

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

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

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

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

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