

Statement on the record

Mechanical Contractors Association of America

to the

Subcommittee on Contracting and Workforce

Committee on Small Business

U.S. House of Representatives

For the hearing on

“Building America: Challenges for Small Construction Contractors”

May 23, 2013



The Mechanical Contractors Association of America (MCAA) serves the unique needs of approximately 2,500 firms involved in heating, air conditioning, refrigeration, plumbing, piping, and mechanical service. We do this by providing our members with high-quality educational materials and programs to help them attain the highest level of managerial and technical expertise. MCAA includes the Mechanical Service Contractors of America, the Plumbing Contractors of America, the Manufacturer/Supplier Council, the Mechanical Contracting Education and Research Foundation and the National Certified Pipe Welding Bureau.

The Mechanical Contractors Association of America

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June 4, 2013

The Honorable Richard Hanna, Chairman The Honorable Grace Meng, Ranking Member Subcommittee on Contracting and Workforce House Small Business Committee United States House of Representatives Washington DC 20515

Subject: MCAA's Statement for the Record on the hearing, Building America: Challenges for Small Construction Contractors, May 23, 2013

Dear Mr. Hanna and Ms. Meng:

Please accept this letter as the formal statement for the record for the hearing you held on May 23, 2013, referenced above.

The Mechanical Contractors Association of America (MCAA) represents over 2,500 specialty construction businesses nationwide that operate across the full spectrum of mechanical construction public and private sector markets nationwide. MCAA members are engaged in heavy industrial, institutional, public facility, commercial and residential new construction, service and maintenance, and energy efficiency retrofit projects of all types. MCAA members perform mechanical systems construction, plumbing and hvac system installation, and mechanical and plumbing service and maintenance projects of all types.

MCAA member companies perform those types of projects variously as either prime contractors with public and private projects owners, or as subcontractors to primes contractors on various projects. Moreover, MCAA's membership is comprised primarily of small business firms, but a substantial number also have progressed from small business status to larger annual dollar volume operations. In all, MCAA member firms understand the broad purpose of the Small Business Committee's mission with respect to Federal construction contracting from both the prime contractor and subcontractor perspectives, and respectfully commend the committee for its work in recent years in enacting several constructive good-government reforms in the Federal construction market.

The topics of the hearing on May 23rd continue in that line of good-government, transparent contracting reforms that is essential for the goals of the committee and the overall responsibility of oversight of the construction procurement process for the benefit of small business and the efficiency of agency construction program effectiveness.

MCAA fully supports all four topics on the hearing docket and suggested reforms embodied in them plus an additional item in Point 5 below.



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1 **The Security in Bonding Act of 2013, H. R. 776** - MCAA joins with the great many other construction prime contractor and subcontractor groups in commending Representative Hanna for recognizing that the procedures under the Miller Act that permit individual surety bonds should be reformed to prevent loss to the Government and injury to subcontractors and suppliers in the event that a non-corporate surety bond is accepted and not backed by sufficient assets to meet the bond obligation. MCAA agrees with the broad industry consensus that the integrity of the surety bonds on a Federal project is key to taxpayer and agency protections and prevention of loss and competitive impairment for subcontractors and suppliers on those projects, who don't have the protections of mechanics' liens and must rely on the assets backing the bonds to prevent losses in the event of prime contractor defaults. This is a good-government reform that strengthens the Federal construction procurement process for all stakeholders.

2 **Lower-tier subcontracting goal credits** - MCAA also agrees with the proposal to allow covered construction prime contractors and subcontractors to take small business subcontracting goal credits for lower-tier subcontracting awards, which serves the overall interests of the government's small business goals while at the same time allowing agency projects to also benefit from project performance flexibility. With added safeguards against double counting by prime contractors and subcontractors for the same lower-tier awards, the Subcommittee's proposal is a win/win/win proposal for agency projects, the national small business contracting goals, and small business primes and subcontractors at all tiers.

3 **Two-step design/build procurement methods** - MCAA also commends the Subcommittee for looking into ways to modulate the growing use of design/build procurement, to continually monitor the growing use of alternative procurement methods to make sure that small businesses and government agencies are both being well served by procurement procedures in the interests of the agency programs overall and small business and the taxpayers in general. MCAA supports the Subcommittee's proposal to make sure that agencies adhere to the two-step design/build procedures, and short list no more than 5 design/build teams after the initial responses to the request for qualifications, unless there is a specific justification for short-listing more teams. The significant shift of direct Federal construction procurement from low-bid selection (now only 10% of dollar volume) to negotiated selections procedures – design/build chief among those (now fully 90% of overall dollar volume – perhaps more for some agencies) should be a continual subject for examination for the committee's procurement jurisdiction. See Point 5 below.

4 **Ban internet reverse auctions for construction prime contractor low-bid selection** - MCAA commends the Subcommittee for finally acting on the U.S. Army Corps of Engineers' recommendation, after the USACE pilot study conducted in 2004, that agencies abjure altogether the use of internet reverse auctions for direct Federal construction prime contractor low-bid selection decisions. As the USACE duly noted after comprehensive study, there are no provable project cost advantages from reverse auctions (a form of open electronic bid shopping of the prime contractor's initial bid), exposing the agency to only significant project drawbacks from an exposed bid shopping system that forfeits all the beneficial discipline of the sealed, low-bid system. Imprudent bidding is engendered by open bid



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shopping at the prime contract level, and the agency and prime contractors and subcontractors alike, small business and otherwise, are detrimentally exposed to predatory prime bidders that would buy the job, and then make up for the lack of discipline in subcontract bid shopping, substitutions, claims and disputes. In those cases, the project suffers and so do all of the project participants.

Virtually all construction prime contract and subcontractor groups join in supporting the USACE and now the Subcommittee's proposal to ban internet reverse auctions for construction low-bid prime contractor selection procedures. Attached is MCAA's policy statement against low bid auction procedures, which is typical of many industry group statements. (Attachment 1).

MCAA commends the Subcommittee for acting on the USACE recommendations, and accepting USACE's fact-based, and evidence-based, analytical procedure backing up their recommendation and the Subcommittee action. MCAA also would recommend that procedure with rigorous, fact-based analysis for other procurement reforms proposals, notably the subcontractor bid listing proposal discussed in Point 5 below.

So, MCAA is in full support of the subjects and types of analysis proposed for the procurement reforms that were subjects of discussion at the May 23rd hearing, except one. MCAA would respectfully request that the Subcommittee take up consideration of H.R. 1942, the Construction Quality Assurance Act of 2013, which would inhibit the universally condemned practices of subcontract bid shopping and bid peddling on direct Federal prime contractor low-bid selection procedures.

5 **Include H.R. 1942, subcontract bid listing in the Subcommittee's positive reforms** – MCAA would urge the Subcommittee to formally consider adding H.R. 1942, the subcontractor bid listing reforms, to its set of proposals to benefit small business and agency procurement programs. H.R. 1942 is fully consistent with the proposed ban on internet reverse auctions for prime contractor low-bid selection, and shares in all the basic reasons cited in the USACE report. That is, imprudent and predatory bidding procedures are just as detrimental at the subcontract level as they are at the prime contract level, and all the detrimental impacts that devolve onto the agency project and the taxpayers are identical in both types of abuses.

In fact, all the prime contract and subcontractor groups that join in opposing internet reverse auctions (electronic bid shopping at the prime contract level) join together in a statement in the *Guidelines for a Successful Construction Project* (Attachment 2), condemning post-award prime contractor subcontract bid shopping and bid peddling as "abhorrent" business practices that are detrimental to successful project performance. And, the American Society of Professional Estimators condemns the practice as unethical (Attachment 3).

However, anomalously, when it comes to legislating against the universally reviled practice, with a long-overdue good-government, transparent contracting reform, it is only the prime contractor group, primarily Associated General Contractors of America, that breaks ranks and pleads administrative inconvenience on behalf of the agencies. At other times, AGC has said there is no proof of the prevalence of the abuses, begging the question then, what need of general industry guidelines and



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statements against the "abhorrent" practices, not to mention why do some 13 states and other state agencies adopt bid listing practices in the face of these evidentiary red herrings?

At the May 23rd hearing, the AGC representative also made some factually incorrect objections as well in response to a question from Ranking Member Meng on the advisability of bid listing. It was said that the General Services Administration had adopted the proposed bid listing protection for only some 5 or 6 years. In fact it was 20 years, from 1963 to 1983. Also, it was said that there were unspecified yet innumerable contract protests relating solely to the bid listing process. In fact, a review of the regulatory record relating to these issues back in 1977 reveals that many of those protests related to other contract specification issues as well. Moreover, a review of some of the GAO protests shows that several were the result of the failure of contracting officer to put the bid listing requirements in the contract specifications in the first place, hardly an argument against the substance of the procedure. Furthermore, the period of time mentioned – pre-1983, was one of highly adversary contracting relations between prime contractors and agencies, going well beyond just bid listing, and giving rise to a number of contracting reform efforts, including the 1984 Competition in Contracting Act and agency Partnering initiatives as well.

The overall point is that the opponents of bid listing, proponents of leeway to engage in post-award bid shopping and peddling, succeed too often in raising time worn objections to subcontract bid listing that are just that, and are now long surpassed by events and contracting practices. For example, the objections to bid listing on the basis of administrative inconvenience is relevant to industry practices as they were in 1983 – when all projects were low-bid, but today just 10% of contract value is awarded on a low-bid basis -rather than those that prevail today. Even in the regulatory comment file back then in 1977, not all General Services Administration regional officials opposed the subcontract bid listing procedures, and in fact some said they thought it was an effective deterrent to post-award bid shopping by unscrupulous prime contractors. Other GSA region comments objected only to administrative inconvenience, not the substance or effectiveness of bid listing, which was based on the fact that back then all awards were low-bid awards.

Another frequently raised red herring is that bid listing interferes with the prime contractor's ability to vet the performance ability and qualifications of prospective subcontractors before entering into a subcontract with that firm. Again, that's an overstatement at best, as industry best practices require that the prime contractor vet the prospective subcontractor's performance record, bonding capacity and qualifications in the pre-bidding prequalification process, well before relying on their subbid in submitting the sealed bid to the owner. It is unassailable that most major prime contractors prequalify their subs before the bidding process begins. (In fact, after the bid opening, H.R. 1942 allows ample leniency for changed conditions allowing proper substitutions, except for post-award bid shopping and bid peddling.)

Again, this facile objection begs the question, if subcontractor bid listing is an obstacle to subcontractor qualification procedures, then why do some 13 states and other agencies hazard these problems, or how do they meet them? The answer is plain, the problem is chimerical, or at least entirely avoidable by



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pre-bidding prudence; the objection serves merely as a roadblock to reforms that would present a hindrance to post-award bid shopping and bid peddling – scourges of fair prime contractors and subcontractors and successful projects. In fact, some agencies that use subcontract bid listing today attest to its effectiveness in making timely responsibility determinations, and avoiding disputes and claims.

See Attachment 4, letters from the Missouri Department of Administration, the California Department of General Services, and Los Angeles Unified School District all lauding the effectiveness of bid listing requirements like H.R. 1942, and answering all the various objections raised above. These letters were submitted to MCAA in response to questions relating to H.R. 1778 in the 112th Congress, which is identical to H.R. 1942 in the 113th Congress.

As set out above, in 1984 Congress enacted the Competition in Contracting Act to get away from the myriad of problems stemming from exclusive use of low-bid prime contractor selection procedures, and the pendulum swung from 100% low-bid in 1983, to just around 10% (\$ volume) low-bid in 2013. Some would say that there is now an overreliance on use of negotiated selection procedures by some agencies, and that a return to better balance with use of low-bid selection may be in the taxpayer's best interest. MCAA agrees with that analysis.

In 1984, Congress allowed agencies to walk or run away from the low-bid system – and they did. Congress did not then go back to address and remedy the underlying problems with the low-bid system that would permit a restoration of a more cost-effective balance between use of negotiated selection procedures for projects of appropriate scope, and the use of an amended low-bid system for jobs that would not otherwise warrant the added expense and administrative overhead of negotiated selection procedures. So again here, the administrative convenience argument too may have turned 180 degrees since 1983. Now, some agencies negotiate virtually all projects above the \$1 million threshold, requiring a degree of administrative attention far greater than sealed bid, price-only selection procedure. If H.R. 1942 were enacted to stem some of the prominent abuses in the low-bid market, price-only procedures may again be used more frequently by agencies, thus saving administrative expense of the contract negotiation selection process and thereby promote cost-effective, successful project outcomes.

Finally, as mentioned previously, some 13 states use a type of bid listing for their construction procurement programs. Some others have sub bid depositories, or even more stringent and protective separate prime contracting laws to remedy construction prime contractor and subcontractor selection abuses on their public construction projects. Attachment 5 below details the latest of these state adoptions. Just last week in Wisconsin the state budget resolution put in place a very effective and stringent sub-bid depository law to stem bid shopping abuses – and the reforms were supported by the entire industry – prime contractors and subcontractors alike.



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In conclusion, MCAA respectfully requests that the Subcommittee open up consideration of the construction procurement reforms discussed on May 23rd with a view to incorporate H.R. 1942 in that legislative proposal banning Internet reverse auctions.

Respectfully submitted,

A handwritten signature in black ink, which appears to read "John McNerney".

John McNerney, General Counsel MCAA

Attachments:

1. MCAA Statement on the Use of Internet Reverse Auctions for Construction Services
2. Guideline on Bid Shopping and Bid Peddling
3. The American Society of Professional Estimators Code of Ethics
4. State Agency Letters
 - 4.1 State of Missouri Office of Administration letter, dated March 5, 2012
 - 4.2 California Department of General Services letter, dated July 30, 2012
 - 4.3 Los Angeles Unified School District Office of Government Relations letter, dated March 19, 2012
5. Wisconsin single prime contracting and sub-bid depository budget legislation

MCAA Statement on the Use of Internet Reverse Auctions For Construction Services

MCAA considers the use of Internet reverse auctions for procurement of construction services to be problematic for owners and contractors alike.

While most applications of various e-commerce and Internet use (project websites, for example) have demonstrated or hold great promise for productivity and service improvements for owners and the industry at large, the same can not be said for Internet reverse auctions. MCAA considers them to be little more than a form of electronic bid shopping; that is, disclosing the proprietary bid price of a competitor to all others for the purpose of obtaining even lower bids.

While reverse auctions may be judged appropriate by some owners for certain well defined projects on a case-by-case basis, an across-the-board policy dictating reverse auction, price-only selection for all projects would be just as short sighted as dictating a single type of project delivery system for projects of all types.

MCAA, along with the industry overall, long ago recognized the long-term detrimental impact of an across-the-board policy of low-bid, price-only selection criteria, and the bid shopping and chopping practices that are inherent in that system and undermine project success, such as: fragmented scopes of work and scope disputes, unnecessary changes and inordinate delays, and overhead waste relating to defensive contract administration, claims, disputes and lawsuits.

In fact, many of the innovations in construction procurement, contracting and project administration over the past 20 years have been in direct response to the inefficiencies that stem from low-bid, price-only selection criteria. Those innovations include value-based selection criteria, careful past performance evaluations, prequalification screening of competitors, project partnering, integrated project contracting and delivery systems, design-build services delivery, and other positive contract administration procedures, including dispute avoidance mechanisms and measures to reduce project dispute overhead costs. Overall, these developments have represented a better investment in overall project quality and life-cycle cost effectiveness.

Unfortunately, Internet reverse auctions can be seen as a way to adapt new technology to return to many of the problems of the past and give back the project efficiency gains that have resulted from innovative, value-added contracting procedures. Nevertheless, given recent experience with reverse auctions, MCAA members have encountered certain approaches that tend to ameliorate the more difficult aspects of the process as discussed below.

> Well-defined scope of work - Reverse auctions are least likely to lead to problem jobs in those cases where the owner has firm, detailed design drawings and specifications. Recent studies strongly indicate that project planning up front is the best predictor of project success and problem avoidance.

> Use of best-value prequalification criteria - Best-value prequalification criteria should be rigorously applied. The criteria should include demonstrated superior past performance related to project performance overall, including cost and schedule delivery, project safety experience, workforce training and development investments, and project management and site supervision expertise relating to equipment purchasing and other aspects of contract administration.

> Transparency of auction procedures - The reverse auction procedures should provide maximum transparency in the interest of fairness for all competitors. The identity of all participants should be disclosed, as well as the dollar amount and ranking of all bids. Similarly, the owner should disclose the existence and amount of any reserved price above which the project would not be let. Just as laws pertaining to the auctions of goods are designed to protect fairness in the process and prevent fraud

and abuse, the owner and Internet service provider for reverse auctions of construction contracts should make sure that all competitors are extended the same privileges under the auction rules.

> Provide adequate procedures for redress of errors - The auction procedures should provide careful safeguards against both imprudent and administrative mistakes in bidding, as overall project success is strongly compromised by mistakes in selection decisions. Even at this early stage, it is widely recognized that the reverse auction process often tempts hasty and imprudent bidding given the tight time frame and competitive context of the auction procedure. The industry recognizes that selection based on competitive frenzy as opposed to more discerning judgment is a high risk factor for project success. Bid decrements and the time intervals for bid adjustments should be appropriate for the scope and size of the project. Clerical mistakes also should be excused in the auction process in the manner of treatment of those mistakes in the sealed bidding context. Overall the owner should not design the process as though construction service auctions can be conducted in the same way as commodities procurement.

> Provide adequate safeguards against other abuses - The reverse auction procedures should also contain adequate safeguards against fraud and abuse, including express warranties against fictitious ("phantom bidders") bidders and other conditions that would constitute fraud in the inducement of the contract award. Moreover, any procedure for post-bid negotiated awards should be disclosed up front so competitors can fairly judge whether they can afford to compete. Similarly, if post-bid price increases are to be permitted, that too should be disclosed up front.

> Policy reservations - Notwithstanding adherence to the suggestions listed above, MCAA member experience suggests that reverse auctions remain a relatively new, untested and unproven method to actually lower construction costs without compromising project success.

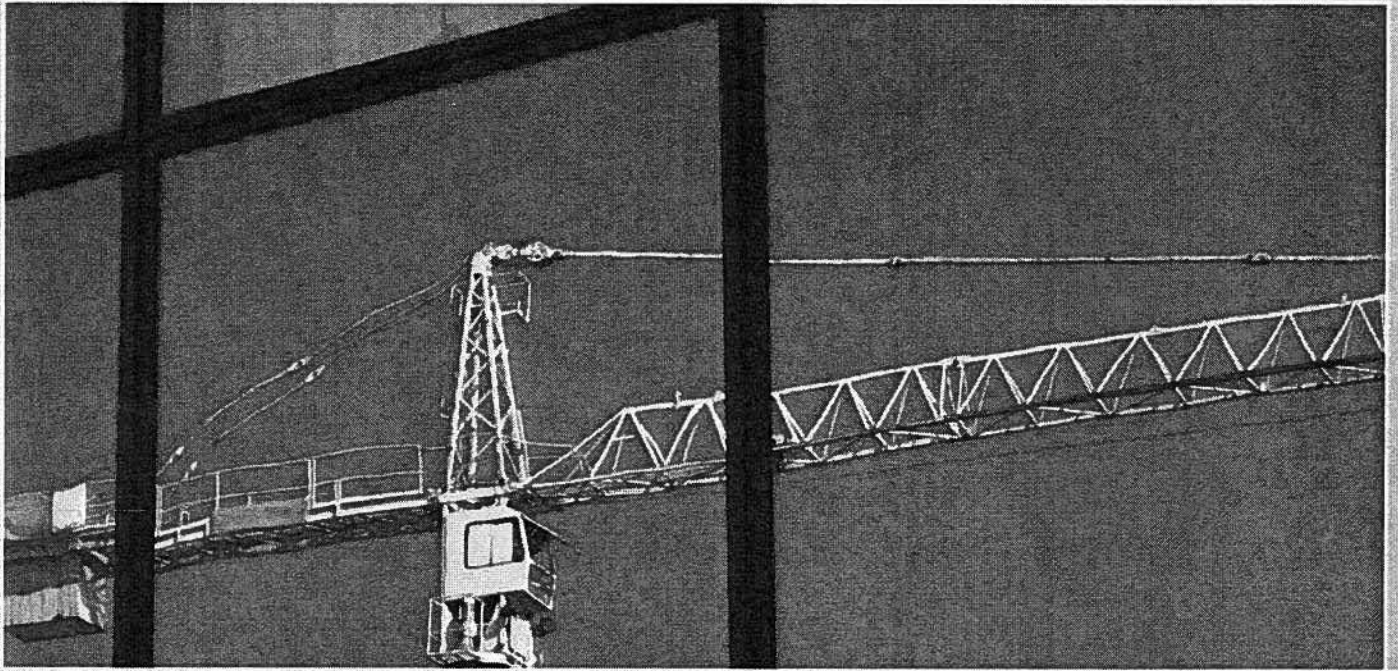
MCAA contractor experience with Internet reverse auctions suggests that the last bid in a reverse auction is not always the lowest and best price that may have been submitted even under sealed bidding procedures. Owners should be aware that a comparison of the opening bid with the last bid is not a valid indicator of actual cost savings on the project. Moreover, while open competition is good policy generally, even with careful prequalification screening, the auction process prompts fast and furious competitive judgments more than prudent decision-making. Negative experiences could significantly shrink the pool of willing competitors, and deliver negative project outcomes.

In conclusion, early experience suggests that the risks of mistakes, misjudgments and the added costs of Internet services may well in many cases outweigh the perceived costs savings realized through the use of reverse auctions.

MCAA will continue to monitor experience with reverse auctions for a continuing factual assessment of their costs and benefits and effect on project outcomes.

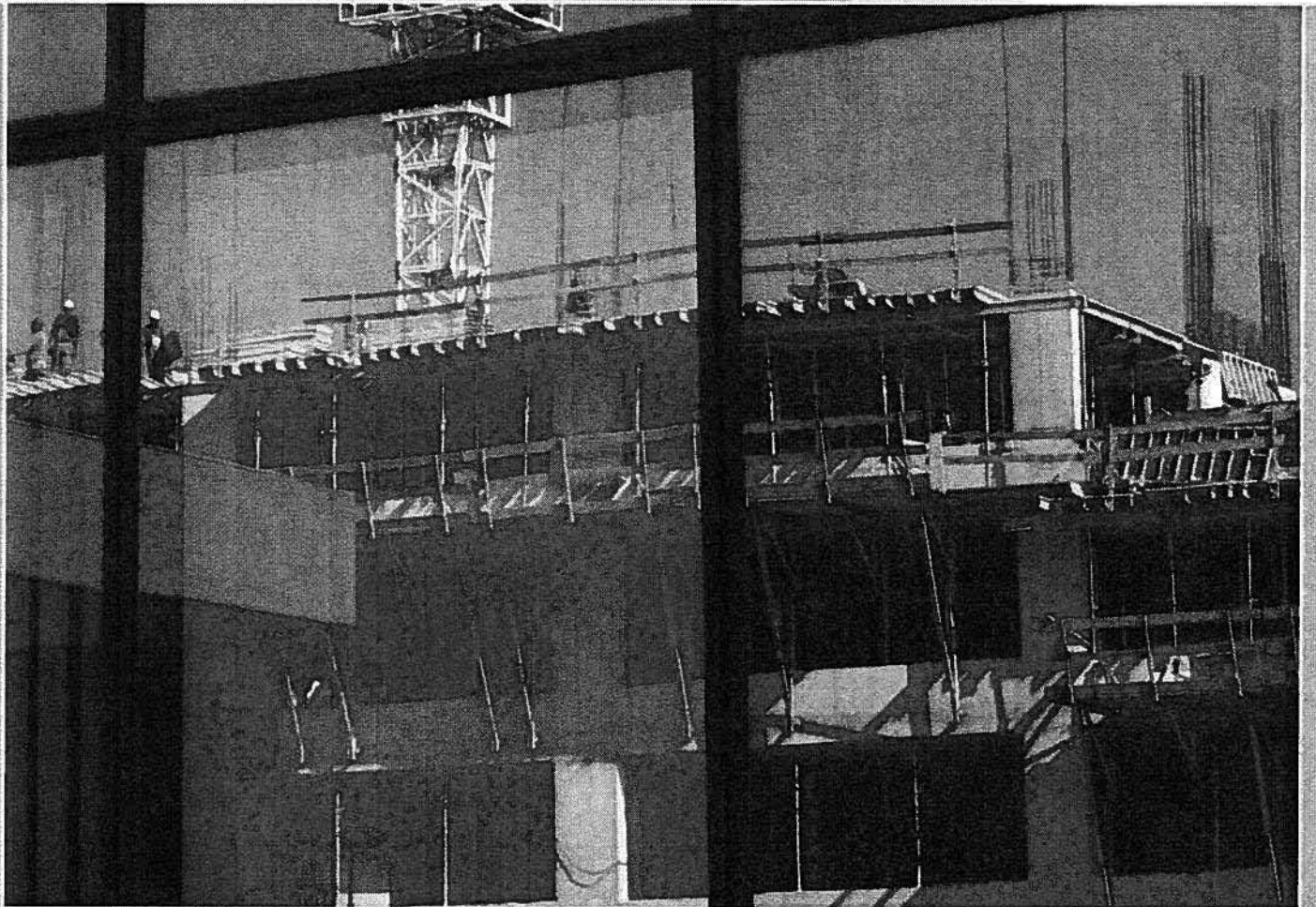
Footnote - This statement does not address the many ways that public and private contracting practices vary with respect to contractor selection rules and procedures generally and reverse auctions in particular. In the main, Federal, state, and local open competition/sealed bidding rules prohibit reverse auctions for construction. The Federal procurement policy is to continue to use sealed bidding/competitive negotiations without price disclosure for construction services, even though one agency has Congressional authorization to test pilot reverse auctions. Another agency is attempting to categorize some construction/repair/alteration projects as "commercial items" to avoid construction procurement rules. At the state level, a growing number of states are amending procurement laws to permit reverse auctions for commodities, but are careful to rule out reverse auctions for construction services.

Approved by the MCAA Board of Directors, February 28, 2004



GUIDELINES

FOR A SUCCESSFUL CONSTRUCTION PROJECT



Guidelines For A Successful Construction Project

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Mission Statement

The Associated General Contractors of America, the American Subcontractors Association, and the Associated Specialty Contractors have agreed to work together to develop, maintain and promote *Guidelines for a Successful Construction Project*. The Guidelines represent the joint efforts and approval of these organizations who will continue to address industry concerns as the need arises.

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B.4

Guideline on Bid Shopping and Bid Peddling

Bid shopping and bid peddling are abhorrent business practices that threaten the integrity of the competitive bidding system that serves the construction industry and the economy so well.

The bid amount of one competitor should not be divulged to another before the award of the subcontract or order, nor should it be used by the contractor to secure a lower proposal from another bidder on that project (bid shopping). Neither should the subcontractor or supplier request information from the contractor regarding any subbid in order to submit a lower proposal on that project (bid peddling).

An important, but often unrecognized, business asset of the construction contractor is its proprietary information.

Proprietary information includes the price, the design or novel technique, or an innovative approach used in preparing a proposal.

The preparation of bids, proposals, submissions or design-build documents is the result of professional consideration which is the intellectual property of the preparer, and so any such information should be considered proprietary.

It is unethical to disclose to others, any information that is provided with an expectation that such information will be kept confidential.

The American Society of Professional Estimators Code of Ethics

Introduction

The ethical principles presented are intended as a broad guideline for professional estimators and estimators in training. The philosophical foundation upon which the rules of conduct are based is not intended to impede independent thinking processes, but is a foundation upon which professional opinions may be based in theory and in practice.

Please recognize that membership in and certification by the American Society of Professional Estimators are not the sole claims to professional competence but support the canons of this code.

The distinguishing mark of a truly professional estimator is acceptance of the responsibility for the trust of client, employer and the public. Professionals with integrity have therefore deemed it essential to promulgate codes of ethics and to establish means of insuring their compliance.

Preamble


The objective of the American Society of Professional Estimators is to promote the development and application of education, professional judgment and skills within the industry we serve. Estimators must perform under the highest principles of ethical conduct as it relates to the protection of the public, clients, employers and others in this industry and in related professions.

The professional estimator must fully utilize education, years of experience, acquired skills and professional ethics in the preparation of a fully detailed and accurate estimate for work in a specific discipline. This is paramount to the development of credibility by estimators in our professional service.

Estimating is a highly technical and learned profession and the members of this society should understand their work is of vital importance to the clients and to the employers they serve. Accordingly, the service provided by the estimator should exhibit honesty, fairness, trust, impartiality and equity to all parties involved.

Canon #1

Professional estimators and those in training shall perform services in areas of their discipline and competence.

1. Estimators shall to the best of their ability represent truthfully and clearly to a prospective client or employer their qualifications and capabilities to perform services.
 2. The estimator shall undertake to perform estimating assignments only when qualified by education or years of experience in the technical field involved in any given assignment.
 3. The estimator may accept assignments in other disciplines based on education or years of experience as long as qualified associate, consultant or employer attests to the accuracy of their work in that assignment.
- 

Canon #4

Professional estimators and those in training shall safeguard and keep in confidence all knowledge of the business affairs and technical procedures of an employer or client.

- 1) Privileged information or facts pertaining to methods used in estimating procedures prescribed by an employer, except as authorized or required by laws, shall not be revealed.
- 2) Treat in strict confidence all information concerning a client's affairs acquired during the fulfillment of an engagement and completion of an estimating procedure.
- 3) Serve clients and employers with professional concern for their best interests, provided this obligation does not endanger personal integrity or independence.

Canon #5

Professional estimators and those in training shall conduct themselves with integrity at all times and not knowingly or willingly enter into agreements that violate the laws of the United States of America or of the states in which they practice. They shall establish guidelines for setting forth prices and receiving quotations that are fair and equitable to all parties.

- 1) By not participating in bid shopping. Bid shopping occurs when a contractor contacts several subcontractors of the same discipline in an effort to reduce the previously quoted prices. This practice is unethical, unfair and is in direct violation of this Code of Ethics.
- 2) By not accepting quotations from unqualified companies or suppliers. Every effort should be made to pre-qualify any bidder to be used.
- 3) By not divulging quotes from subcontractors and suppliers to competitors prior to bid time in efforts to drive down the prices of either. Should quotes be received from subcontractors or suppliers that are excessively low or appear to be in error, the firm should be asked to review its' price. When making this request the quotes of others shall not be divulged.
- 4) By not padding or inflating quoted bid prices. An unethical practice for professional estimator is to pad or inflate quotes when bidding with firms known for bid shopping. If not a violation of applicable laws, a professional estimator should not provide quotes to known bid shoppers. However, it is not unethical to submit quotes with different values to different contractors, provided there are sound business reasons to justify the differences in the quotes.
- 5) Professional estimators shall not enter into the unethical practice of complimentary bids (also known as comp bids). Complimentary bidding is a violation of this Code of Ethics.

Canon #6

Professional estimators and those in training shall utilize their education, years of experience and acquired skills in the preparation of each estimate or assignment with full commitment to make each estimate or assignment as detailed and accurate as their talents and abilities allow.

- 1) To formulate an accurate estimate in any discipline, a full review must be made of all related documents. Any other approach could cause errors or omissions that may endanger professional integrity and reliability.

Jeremiah W. (Jay) Nixon
Governor



Catherine F. Brown
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March 5, 2012

John McNerney
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RE: Construction contracting low-bid award subcontract bid listing procedure; how H.R. 1778 relating to Federal low-bid construction contract bid listing proposal compares favorably with Missouri state agency procurement practices.

Dear Mr. McNerney:

In response to your questions concerning how low-bid construction contract selection procedures work in practice where the prime contract bidder is required to list major subcontractors, I hereby submit the very positive report of Missouri state procurement practice using bid subcontractor listing very similar to that required by H.R. 1778.

As part of my duties with the State of Missouri Division of Facilities Management, Design and Construction, I supervise and provide day to day legal counsel for operations in the Division's Contracts Unit. Though the current economy has slowed new construction and maintenance of state facilities, the State of Missouri has typically had significant sums of construction under contract at any given time, and lets contracts on a daily basis to procure and maintain the necessary facilities for its government-related operations.

The State of Missouri, as a matter of policy and custom, has for many years required contractors bidding on construction projects to disclose the names of their larger subcontractors, as well as subcontractors that are relied upon the contractor to meet state statutory/regulatory/policy goals pertaining to contracting with minority, women, and service-connected disabled veteran business enterprises. The State has required contractors to list major subcontractors for many years as a matter of sound proprietary business discretion. The State adopted this policy as a matter of sound agency purchasing discretion.

The State considers these contractual requirements to be significant and does not in any instance deviate from this requirement— a bidding contractor that fails to disclose its subcontractors as required will be deemed to be non-responsive and its bid will not be considered by the State.

Furthermore, state construction contracts awarded incorporate provisions identifying the subcontractors relied upon by the contractor in submitting its successful bid; and prohibit the contractor from substituting subcontractors without the acquiescence of the State. The subcontractor is not required to enter into or execute the contract, and there is no privity of contract between the subcontractor and the State— however, the contractor cannot unilaterally substitute subcontractors subsequent to entering into the original contract without acquiescence by the State.

The State of Missouri's bidding and contractual requirements regarding subcontractor disclosure, participation and substitution further significant state interests, including the following:

- 1) The State is able to assess and determine the responsiveness and the ability of the contractor to satisfy its contractual obligations it proposes to assume. Missouri law requires that a contract be awarded to the lowest responsible responsive bidder. Subcontractor identification and disclosure allows the State to assess and determine the contractor's ability and proposed plan to complete its contractual obligations, and whether the contractor has the necessary business and professional relationships in order to successfully complete the contractual obligations it proposes to assume.
- 2) Subcontractor identification and disclosure requirements, as well as contractual restrictions on subcontractor substitution, avoid adverse consequences that result from post-award bid shopping and bid peddling. These contractual provisions and restrictions allow the State to avoid post-award bid shopping auctions, with the successful prime contractor selling the project to a subcontractor willing to undercut its costs and prices after the prime contract has been awarded, and avoid problems associated with substitution of substandard materials and poor performance; contract disputes and defensive contract administration, and claims and litigation associated with underbidding construction projects and procurement.
- 3) Subcontractor identification and disclosure requirements, and contractual restrictions on subcontractor substitution, allow the State to ensure that the State meets its goals of ensuring that certain proportions of its construction to minority-owned, women-owned, and service-connected disabled veteran-owned, business enterprises. The State of Missouri requires bidding contractors to disclose as part of its bid the identities of the contractors/subcontractors it intends to rely upon in achieving these goals in order to responsibly bid in response to a request for proposals; and further does not allow the successful bidder to potentially avoid these goals by later substituting participation of these contractors/subcontractors that the State relied upon in awarding the contract, without acquiescence by the State.

In its periodic review of its contracting practices, the State has consistently chosen to retain the requirement that contractors list major subcontractors because of the many advantages for successful project delivery, improving the competitiveness of State projects in the construction market, and the enhanced value return to Missouri taxpayers by following sound and responsible contracting policies. The State does not believe that Missouri taxpayers would benefit if prime contractors were allowed to conduct post-award subcontract bid shopping or peddling that would not return any value to the State's construction programs and Missouri taxpayers. From the

State's perspective, permitting post-award bid shopping allows unscrupulous contractors to exploit and force subcontractors to perform at the contractor's price. Subcontractor disclosure and listing improves competitiveness in the market overall by requiring best business practices and thereby attracts more highly qualified firms to compete for State jobs and promotes top-flight performance by those firms.

The construction industry accepts the validity of requiring listing of major subcontractors as a sound requirement of overall project planning and administration. As project owner, the State is vitally concerned with all participants on State construction projects. Contractors bidding for State projects have accepted the practice without challenge or dispute. The State has not encountered legal challenges resulting from its policies requiring bidder to disclose major subcontractors and successful bidders to use named subcontractors. In fact, subcontractor listing and disclosure does not interfere with the contractor's privity of issue with its subcontractors, but allows the contractor to select its subcontractors while ruling out post-bid exploitation of subcontractors and the attendant risks to the State project and taxpayers.

The use of major subcontract bid listing presents no administrative burdens, either; and in fact helps avoid many more problems than it causes. The State administers the requirement efficiently, and applies sound business judgment in allowing substitutions for named subcontractors when required by the facts and circumstances (similar to the provisions of H.R. 1778 that set out specific reasons for allowing substitutions of named subcontractors). The State of Missouri can attest that the use of subcontractor disclosure and listing has avoided many problems and has caused few if any administrative burdens whatsoever.

Thank you for the opportunity to discuss the benefits of beneficial public contracting requirements such as subcontractor listing and disclosure. If I can provide any further information regarding this issue, please feel free to contact me.

Sincerely,



Lawrence A. Weber

Deputy Director of Administration-Chief Counsel

July 30, 2012

John McNerney, General Counsel
Mechanical Contractors Association of America
1385 Piccard Drive
Rockville, MD 20850

H. R. 1778 the Construction Quality Assurance Act of 2011

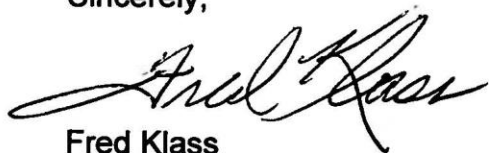
Dear Mr. McNerney:

Since 1963, the State of California, under Public Contract Code Section 4100 et. seq., known as the Subletting and Subcontracting Fair Practices Act (Act), has required contractors bidding on low bid public works projects to list the names of all subcontractors performing in excess of one half of one percent of the contract value. In addition, recent California Law requires listing of all Disabled Veteran Business Enterprises as well. The California Legislature enacted these laws for the express purpose of preventing bid shopping, bid peddling, fostering fair competition and improved quality of materials and workmanship among contractors and subcontractors competing for state public works contracts.

The Department of General Services administers subcontractor listings and substitutions pursuant to the statutory scheme set forth in the Act. An important element of the Act is the ability of the listed subcontractor to formally contest a contractor's request for substitution. This provision provides due process avoiding capricious substitutions on the part of contractors and further ensuring that listed subcontractors are dealt with in a fair and reasonable fashion.

H. R. 1778 is modeled after the California Public Contract Code cited above and as such the Federal Government should expect similar results in the preventing of bid shopping, bid peddling, improved competition, and improved value for the taxpayers.

Sincerely,



Fred Klass
Director

cc: Anna M. Caballero, Secretary, State and Consumer Services Agency
Richard Sawhill, Executive Vice President, ARCA/MCA Southern California

LOS ANGELES UNIFIED SCHOOL DISTRICT
Office of Governmental Relations

John E. Deasy, Ph.D.
Superintendent of Schools



Edgar Zazueta
Director

March 19, 2012

John McNerney
General Counsel
Mechanical Contractors Association of America
1385 Piccard drive
Rockville, MD 20850

RE: The California Subletting and Subcontracting Fair Practices Act

Dear Mr. McNerney:

The Los Angeles Unified School District (District) has been asked to comment on how California's "Subletting and Subcontracting Fair Practices Act" (Act) works, specifically its listing requirements. The District is pleased to report the Act has been good for public works construction projects in California and has been good for the Los Angeles Unified School District.

California has operated in compliance with the Act since before 1963. Specifically, 4104 (a) (1) of California's Public Contract Code states that:

"(a) (1) The name and the location of the place of business of each subcontractor who will perform work or labor or render service to the prime contractor in or about the construction of the work or improvement, or a subcontractor licensed by the State of California who, under subcontract to the prime contractor, specially fabricates and installs a portion of the work or improvement according to detailed drawings contained in the plans and specifications, in an amount in excess of one-half of 1 percent of the prime contractor's total bid or, in the case of bids or offers for the construction of streets or highways, including bridges, in excess of one-half of 1 percent of the prime contractor's total bid or ten thousand dollars (\$10,000), whichever is greater."

The Los Angeles Unified School District is winding down a \$20 billion school construction program considered the largest current public works project in the United States. At the conclusion of our construction program, the District will have provided new classroom seats for 159,000 children in 129 new schools, while also completing 22,000 renovation and repair projects throughout our existing schools. The District believes the Act has contributed to the success of our program in a number of ways including:

- We know before we award a contract that our prime is using quality subs that meet our prequalification requirements;
- We have an owner controller insurance program and can make sure the named subs have safety records that make them eligible to participate in our program;
- We can check to make sure the named subs are appropriately licensed to perform the work for which they are named;

Mr. John McNerney
March 19, 2012
Page 2

- We can make sure that our prime contractor fully understands the scope for which he is to perform and is hiring the appropriate expertise with the appropriate qualifications to do that work;
- We have assurances that a prime has had communications with a named sub and understands the requirements and the costs associated with performing the named work and has provided us with a responsible bid under which he can perform our contracts.

We understand and agree that you would share our convictions on this matter with lawmakers in Congress in support of the industry's efforts to establish a comparable change in direct Federal public construction practices for Federal agencies. We submit that using California's subcontractor listing law as a model and amending Federal law would be a very constructive change and would serve agencies and the taxpayers well.

Sincerely,

A handwritten signature in black ink, appearing to read "E. Bakke", written over the printed name.

Eric Bakke
Legislative Advocate
Los Angeles Unified School District



SINGLE-PRIME BIDDING BUDGET PROPOSAL

Governor Walker has proposed a modification to how the state procures construction projects that will ensure competitive transparent bidding, as well as a streamlined, more efficient management of these projects.

The organizations and companies listed above, including subcontractors, general contractors and a construction-management firm, support the Governor's proposal.

BACKGROUND AND PRIORITIES

Wisconsin's current system of contracting for state building projects is broken. While the Department of Administration (DOA) under Governor Walker has greatly improved the process, permanent statutory changes are necessary to help maximize taxpayers' money and avoid the inefficient, costly and unfair bidding practices.

By adopting the proposed method of single-prime contracting as the default delivery method for state building projects, Wisconsin will have a system that will:

Guarantee Transparency with taxpayer dollars – By selecting the lowest-responsible qualified bidders in the five major categories of construction. The Governor's proposal takes the politics out of the state building process by focusing on contractor experience and pricing rather than backroom deals. Low-bid and qualifications should be the basis for awarding taxpayer-funded projects.

Eliminate Bid Shopping - An open and competitive bid process ensures the lowest cost for the taxpayer and prevents illegal practices like bid shopping. Bid shopping is a practice in which a contractor discloses the bid price of one subcontractor to another in attempt to obtain a lower bid price. Subcontractors also may offer to undercut the known bid of another subcontractor. These practices can occur both before and after a general contractor is selected.

Save Taxpayer Money – In addition to reducing the costs of administering its building program, the Governor's proposal is designed to attract the largest possible pool of qualified, pre-certified bidders in each major category of construction. This helps ensure the state is paying the lowest cost for work performed by qualified and responsible contractors.

SINGLE PRIME CONTRACTING AS DEFAULT DELIVERY METHOD

Major mechanicals (referred to as MEPF, or mechanical, electrical, plumbing and fire protection contractors) make up the majority of the work on a construction project.

Under Governor Walker's proposal, the MEPF contractors bid to the state seven (7) days in advance of the general contractors (GC's), thus ensuring a competitive and transparent selection of subcontractors as well as giving the GC's advance notice on which subcontractor companies won the lowest responsible bid.

The GC's then package their bid with the lowest-responsible MEPF contractors in each category and must win overall lowest responsible, qualified bid to the state. This ensures all competitive and transparent bidding for the GC's and MEPF contractors and prevents illegal and unfair practices.

A BALANCED APPROACH TO MANAGEMENT AND RISK

The GC gains controls of schedule, change orders, and other management of the project, and serves as the single point of contact with the owner. Whether it's the DFD or the University System, a single point of contact will be available to simplify the process. Risk and insurance coverage is addressed by requiring subcontractors to provide separate 100% payment and 100% performance bond. Insurance risk is made clear by ensuring everyone is responsible for their own risk.

COMPETITIVE BIDDING AND ELIMINATION OF BID-SHOPPING

A bottom line for taxpayer funded construction projects is transparency. In addition to increased costs being paid by the state, bid shopping frequently leads to errors, discrepancies and future disputes between a general contractor and subcontractor.

In a system where \$1 billion worth of construction projects are procured by government and funded by taxpayers, our collective position is that no private business should be allowed to pick winners and losers of other private businesses.

We urge your support of Governor Walker's budget provision on single prime bidding.



Michael F. Fabishak
Chief Executive Officer

Associated General Contractors of Greater Milwaukee
Leading the Construction Industry Forward

May 1, 2013

The Honorable Alberta Darling, Co-Chair
Joint Committee on Finance
Room 317 East, State Capitol
P.O. Box 7882
Madison, WI 53707-7882

The Honorable John Nygren, Co-Chair
Joint Committee on Finance
Room 309 East, State Capitol
P.O. Box 8953
Madison, WI 53708

Dear Senator Darling and Representative Nygren:

On behalf of the Associated General Contractors of Greater Milwaukee, I would like to take this opportunity to urge your support for the Governor's single-prime bidding provisions within the 2013-15 state budget, as modified by Secretary Huebsch's April 23rd letter to the Co-Chairs of the Joint Committee on Finance. The Governor's proposal will reduce unnecessary administrative overhead and ensure a more competitive and transparent bidding process.

Eliminating the state's long-ago antiquated multiple-prime project delivery method and replacing it with a single-prime process will provide the following benefits:

1. **The general contractor** – rather than the state – will serve as a single point of contact with the state. This will simplify the contracting process and eliminate significant Department of Administration and University System overhead.
2. **Ensure Competition** by attracting the largest possible pool of qualified, pre-certified bidders in each major category of construction. This competition will ultimately *save taxpayer dollars* by lowering costs through a more robust bidding process.
3. **Requiring a transparent** bidding process and a more definitive bidding timeline will provide certainty to the state building process, providing all parties with knowledge and certainty when seeking to partner with the State of Wisconsin to deliver projects.

We urge your support of the Governor's proposal to adopt a single-prime contracting process as the state's default delivery method for state building projects.

Please feel free to let me know if you have any questions.

Yours very truly,

Mike Fabishak
Chief Executive Officer



AMENDMENT TO BUDGET BILL (ASSEMBLY BILL 40)

#1 AMEND SECTION 144:

16.855(9m)(b)2.

c. The bidder is bondable for the term of the proposed contract and can obtain a separate 100% performance and separate 100% payment bond.

k. In any jurisdiction, in the previous 10 years, the bidder has not been disciplined under a professional license and none of the bidder's employees and no member of the bidder's organization has been disciplined under a professional license currently in use.

#2 AMEND SECTION 146:

16.855 (13) (a) In any project under this section let under single prime contracting, the department shall identify, as provided under par. (cb), neccessary the mechanical, electrical, or plumbing subcontractors who have submitted the lowest bids and are qualified responsible bidders, and a A general prime contractor who is submitting a bid under sub. (14) shall include the selected subcontractors identified under this subsection.

(b) In any project under this section let under s. 13.48(19), the department shall identify, as provided under par. (c), the mechanical, electrical, or plumbing subcontractors who have submitted the lowest bids and are qualified responsible bidders. As directed by the department, the contractor selected by the state and awarded a contract under s. 13.48(19) shall then contract with the mechanical, electrical, or plumbing subcontractors identified as the lowest bidders who are qualified responsible bidders for the mechanical, electrical, or plumbing work under par. (c).

(cb) For purposes of selecting subcontractors under par. (a) or (b), the department shall develop and administer an open and public bidding process and follow the requirements and procedures under sub. (2). Within 48 hours of the bid deadline under par. (a) or (b) submission, the department shall make available on the department Internet site the names of the bidders and the amount of the each bid. No more than 5 7 days after the bid deadline for bid submission, the department shall post on its website and provide public notice of the lowest bidders who are qualified responsible bidders. The department shall make available on its Internet site the bids, including the bid documents, identified under this paragraph as the lowest bidders and they shall be open to public inspection in accordance with ss. 19.35-19.36. No other bids under this paragraph may be on the Internet site or open to public inspection.

#3 AMEND SECTION 148:

16.855 (14) (am) Except as provided in s. 13.48 (19), the department shall let all construction projects that exceed \$185,000 through single prime contracting. The department shall not request or accept any bid alternates when letting a construction project through single prime contracting.

#4 AMEND SECTION 149:

16.855 (14) (b) (2) is created to read:

16.855(14) (b) (2) ~~Except as otherwise provided by law,~~ The state shall not be liable for any damages to a subcontractor selected under s.16.855 (13) (a) that enters into a contract with a general prime contractor under s. 16.855 (14) (e).

#5 AMEND SECTION 150:

16.855 (14) (bm) If the bid is being let through single prime contracting, bidders for the general prime contractor who are responsible qualified bidders shall submit their bids to the department no later than 5 7 days after the successful subcontractor bids become available to the public under sub. (13) (b). Within 48 hours after the bid deadline for general prime contractors, the department shall make the bid tabs identifying the names of the general prime contractors who bid and their bid amounts publicly available on the department's website and, in the event that they are unavailable on the department's website, at the department's offices.

#6 STRIKE AND REPLACE SECTION 153:

(14m) Contracting with MEP Subcontractors.

(a) Any subcontract entered into between a general prime contractor and subcontractor under sub. (14)(e) or a contract entered into with a MEP subcontractor under sub. 13(b) is void unless it contains all four of the following clauses:

1. Prompt Payment

[General prime contractor] shall pay [MEP subcontractor] in accordance with s. 16.855(19)(b) for work that has been satisfactorily completed and properly invoiced by [MEP subcontractor]. A payment is timely if it is mailed, delivered or transferred to [MEP subcontractor] by the deadline set forth in s. 16.855(19)(b).

If [MEP subcontractor] is not paid by the deadline set forth in this subcontract, [general prime contractor] shall pay interest on the balance due from the eighth day after [general prime contractor's] receipt of payment from the Department of

Administration for the work for which payment is due and owing to [MEP subcontractor], at the rate specified in Wis. Stat. § 71.82(1)(a) compounded monthly.

[MEP subcontractor] receiving payment under this section shall pay lower-tier subcontractors, and be liable for interest on late payments, in the same manner as [general prime contractor] is required to pay [MEP subcontractor].

2. Insurance and Bonds

[MEP subcontractor] shall not commence work under this contract until it has obtained all necessary insurance required of [MEP subcontractor] in [general prime contractor's] contract with the Department of Administration.

[MEP subcontractor] shall provide a separate 100% performance bond and a separate 100% payment bond to the benefit of the general prime contractor as the sole named obligee. Original bonds shall be given to the general prime contractor and a copy shall be given to the department no later than 10 days after execution of this subcontract.

3. Indemnification

To the fullest extent permitted by law, [MEP subcontractor] shall defend, indemnify and hold harmless [general prime contractor] and its officers, directors, agents, and any others whom [general prime contractor] is required to indemnify under its contract with the department, and the employees of any of them, from and against claims, damages, fines, penalties, losses and expenses, including but not limited to attorneys' fees, arising in any way out of or resulting from the performance of the work under this agreement, but only to the extent such claim, damage, fine, penalty, loss or expense: (1) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of property, including but not limited to loss of use resulting therefrom and is caused by the negligence of or acts or omissions of [MEP subcontractor], its sub-subcontractors, any of their employees and anyone directly or indirectly employed by them or anyone for whose acts they may be liable, or (2) as related to such claims, damages, fines, penalties, losses and expense of or against the [general prime contractor], results from or arises out of [general prime contractor]'s negligence or other fault in providing general supervision or oversight of [MEP subcontractor]'s work, or (3) as related to such claims, damages, fines, penalties, losses and expense against the department, arises out of the department's status as owner of the project or project site.

In addition, [MEP subcontractor] shall defend, indemnify and hold harmless [general prime contractor] and its officers, directors, agents, and any others whom [general prime contractor] is required to indemnify under its contract with the department, and the employees of any of them, from any liability (including

liability resulting from a violation of any applicable safe place act) that [general prime contractor] or the state incurs to any employee of [MEP subcontractor] or any third party where the liability arises from a derivative claim from said employee, when such liability arises out of the [general prime contractor's] or the state's failure to properly supervise, inspect, or approve [MEP's subcontractor's] work or work area, but only to the extent that such liability arises out of the acts or omissions of [MEP subcontractor], its employees, or anyone for whom [MEP subcontractor] may be liable, or from [MEP subcontractor's] breach of its contractual responsibilities or arises out of [general prime contractor]'s negligence or other fault in providing general supervision or oversight of [MEP subcontractor]'s work or arises out of the department's status as owner of the project or project site. In claims against [general prime contractor] or the state by an employee of the [MEP subcontractor] or its subcontractors or anyone for whose acts [MEP subcontractor] may be liable, the indemnification obligation of this paragraph shall not be limited by a limitation on amount or type of damage, compensation, or other benefits payable by or for the [MEP subcontractor] or its subcontractors under workers' compensation act.

Except as identified above in this section, the obligations of [MEP subcontractor] under this indemnification shall not extend to the liability of [general prime contractor] and its agents or employees thereof arising out of (1) preparation or approval of maps, drawings, opinions, reports, surveys, change orders, designs or specifications; (2) the giving of or failure to give directions or instructions by the [general prime contractor] or the department or their agents or employees thereof provided such giving or failure to give is the cause of the injury or damage; or (3) the acts or omissions of other subcontractors.

4. Retainage

Retainage shall occur and be in amounts and on a schedule equal to that in [general prime contractor's] contract with the Department of Administration.

(b) Any subcontract entered into between a general prime contractor and subcontractor under sub. (14)(e) must include a scope of work clause that is identical to that on which the subcontractor bid under sub. (13).

(c) A general prime contractor and subcontractor under sub. (13)(a) are prohibited from entering into any other agreements in connection with bids submitted under subs. (13) or (14) that would somehow alter or affect the scope or price of the contract or subcontract except for 1.) any change orders by the department that result in changes to the plans or specifications or 2.) any backcharges allowed by the subcontract.

(d) When the building commission approves an alternative delivery method under s. 13.48(19), a contractor shall be subject to the requirements in this section except for sub. par. (14m)(e) when working with any mechanical, electrical, or plumbing subcontractors.

(e) Unless otherwise agreed to by the mechanical, electrical and plumbing subcontractors, the general prime contractor shall base its project schedule on the duration set forth in the project specifications or bid instructions.

#7 AMEND SECTION 152:

16.855 (14) (e) Within 30 days after the deadline under par. (bm), the department shall ~~notify~~ identify the successful general prime contractor who was selected consistent with 16.855 (14) (d) and then notify this successful general prime contractor of its selection. The contractor who is awarded the contract shall enter into contracts with the mechanical, electrical, or plumbing subcontractors selected under par. (13) (a) and shall comply with the requirements under sub. (14m). The department shall make the final bid results available on its Internet site at the time it provides the written, official notice to the successful general prime contractor bidder notifying the contractor that the contract is fully executed and that the contractor is authorized to begin work on the project.

#8 AMEND SECTION 155:

16.855 (19) (b) As the work progresses under any subcontract under sub. (14) (e) for construction of a project, the general prime contractor shall, upon request of a subcontractor, pay to the subcontractor an amount equal to the proportionate value of the subcontractor's work properly completed ~~done~~, less retainage. The retainage shall be an amount equal to not more than 5 percent of the subcontractor's work completed until 50 percent of the subcontractor's work has been completed. At 50 percent completion, no additional amounts may be retained, and partial payments shall be made in full to the subcontractor unless the department certifies that the subcontractor's work is not proceeding satisfactorily. At 50 percent completion or any time thereafter when the progress of the subcontractor's work is not satisfactory, additional amounts may be retained but the total retainage may not be more than 10 percent of the value of the work completed. Upon substantial completion of the subcontractor's work, any amount retained shall be paid to the subcontractor, less the value of any required corrective work or uncompleted work. All payments the general prime contractor makes under this paragraph shall be within 7 calendar days after the date on which the general prime contractor receives payment from the department for the same work performed.

#9 STRIKE SECTION 9101.