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CURRENT PRACTICES TO DECREASE SUBCONTRACTOR BID SHOPPING
IN THE PUBLIC SECTOR

BY

JOHN R. STEVENSON IV

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A REPORT PRESENTED TO THE GRADUATE COMMITTEE
OF THE DEPARTMENT OF CIVIL ENGINEERING IN
PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF MASTER OF ENGINEERING

UNIVERSITY OF FLORIDA

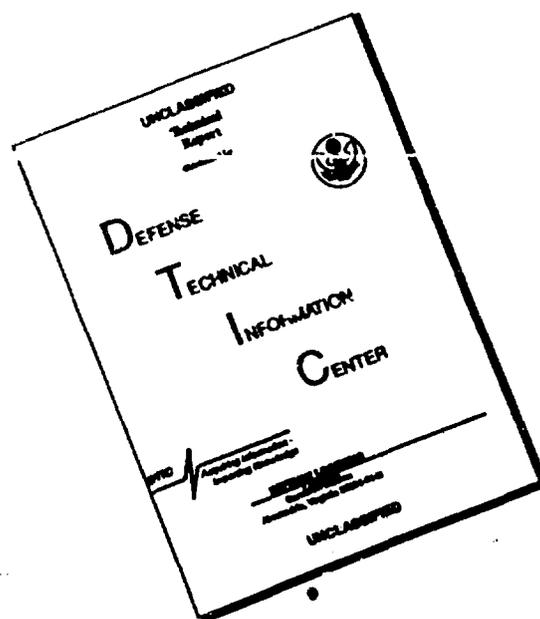
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TABLE OF CONTENTS

Chapter One - Bid Shopping in the Construction Industry	1
1.1 Introduction	1
1.2 What is Bid Shopping?	2
1.2.1 The Effects of Bid Shopping	2
1.2.2 Who are the Players?	4
1.2.2.1 The Subcontractor	4
1.2.2.2 The Prime Contractor	5
1.2.2.3 The Owner	6
1.2.2.4 The Courts	7
1.2.3 Why does Bid Shopping Flourish?	7
1.2.4 Views by Various Trade and Professional Organizations	11
Chapter Two - Bid Listing	16
2.1 How Bid Listing Works	16
2.2 The Pros and Cons of Bid Listing	16
2.3 A Comparison of 5 State's Legislations	19
2.3.1 Arkansas	19
2.3.2 California	20
2.3.3 Delaware	21
2.3.4 New Mexico	22
2.3.5 South Carolina	23
2.4 Current State Status	25
2.5 The Legalities of Bid Listing	26
Chapter Three - Bid Depositories	28
3.1 How Bid Depositories Work	28
3.2 The Legalities of Bid Depositories	30
Chapter Four - Separate Contracts	33
4.1 How Separate Contracts Work	33
4.2 The Pros and Cons of Separate Contracts	34
4.2.1 The New York City School Construction Authority Study	36
4.2.2 The Electrical Contracting Foundation Study	36
4.2.3 Comparing the Studies	37
4.3 The Legalities of Separate Contracts	39

Chapter Five - Bid Shopping and the Federal Government	40
5.1 General Services Administration	40
5.2 The Federal Trade Commission	43
Chapter Six - The Minnesota Plan	45
6.1 Minnesota Bidding History	45
6.2 How the Minnesota Plan Works	46
6.3 The Pros and Cons of the Minnesota Plan	47
Chapter Seven - Conclusion	48
Appendix A - Mississippi Senant Bill No. 2975	50
Appendix B - Model Bill	53
Appendix C - Bidding Methods Used by Various States	55
References	56

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CHAPTER ONE
BID SHOPPING IN THE CONSTRUCTION INDUSTRY

1.1 Introduction

The practice of bid shopping is as old as competitively bid contracts. Though technically not illegal, bid shopping is generally held as an unethical practice by the construction industry.

This report examines the various definitions of bid shopping and its impact on the construction industry. Each "player" in the bid shopping arena is identified and their roles to foster and/or minimize bid shopping are explored. Broad coverage is focused on the most common practices being used today to minimize bid shopping including bid listing, bid depositories, and separate contracts. The legal ramifications of each method are also reviewed.

Numerous states have adopted a variety of measures in an attempt to rid the industry of bid shopping and their efforts are highlighted in this report.

The reader quickly becomes aware that the bid shopping issue is steeped in legal murkiness and that efforts to minimize the problem can lead to violations of both Federal and State anti-trust laws. Strong arguments exist for and against each type of corrective action. The reader is left to draw their own conclusions.

1.2 What is bid shopping?

Legally, several definitions of bid shopping exist. The United States Comptroller General described bid shopping as "the efforts of a prime contractor to reduce his subcontract prices by shopping his lowest bid from sub to sub in an effort to gain a lower price from another subcontractor, this activity occurring after the prime contractor has been awarded the contract" (1:52). At least one state court has referred to shopping subcontractor bids after award as "bid chiseling". This court defined "bid shopping" as the act of shopping bids prior to award (1:52). For the purpose of this paper the term "bid shopping" refers to the practice of the prime contractor using another sub's bid to negotiate a lower price from other competing sub's, either before or after award of the contract to the prime contractor.

1.2.1 The Effects of Bid Shopping

There appear to be few, if any, attributes to bid shopping. Though it has been described as "the purest form of competition" it is a practice generally condemned by the majority of the construction industry (1:52). At the other end of the scale exists a long and sordid list of the harmful effects of bid shopping.

Opponents of bid shopping offer substantial reasons why the practice is harmful to the industry. On the surface both contractors and suppliers claim that bid

shopping promotes short cuts in quality, animosity, and cheap substitutions (2:26). Prime contractors have been accused of pocketing the additional profit gained through successful bid shopping after award instead of passing the savings on to the owner (3:1). This results in lost profits to the subcontractor that can upset industry stability over time (4:729). If bid shopping is prevalent in a particular area the profit margins of the effected subcontractors dwindles to the point that many will go out of business. Those subcontractors remaining are then able to raise there prices at will due to a decrease in competition (5:103). During this process the weaker subcontractors will slash their prices in an attempt to stay in business. These subcontractors, if awarded the contract, are forced to cut corners and sacrifice quality in an attempt not to lose money on the job (5:103). Those subcontractors unable to remain solvent in the course of the contract simply go out of business causing additional expenses and loss of time (5:103).

Bid shopping has created a phenomenon well known to prime contractors. This phenomena is the "just under the wire" submission of subcontractor bids to a prime only minutes prior to bid opening. This is practiced by subcontractors to avoid being shopped by the prime prior to award. While effective, the result is that the prime has no chance to examine the bids for mistakes. These errors

can easily lead to disputes over scope, increased costs, and a poor performance of work (6:15).

David G. Miller, former president of the American Subcontractors Association (ASA), points out another negative aspect of bid shopping. He states, "On a major job, you may spend 80, 100 man-hours estimating that job and putting off others. If you give the numbers to one person who's not honest, the competition has it in five seconds and you have wasted all your time" (2:26). The implication is that a dishonest subcontractor can use another subcontractor's quote as a ceiling price and simply submit a lower without going through the expense of preparing his own bid. Some subcontractors, to save the cost of preparing a bid, simply will not bid on a job if they anticipate bid shopping. The result is a further decrease in competition (4:729).

1.2.2 Who are the Players?

In the bid shopping arena four distinct parties are identified: the subcontractor, the prime contractor, the owner, and the courts. Each of these entities can provide either a positive or negative effect on the bidding process.

1.2.2.1 The Subcontractor

Of all parties, the subcontractor is the most adversely effected by bid shopping, simply by his

position in the contracting chain and the fact it is his bids that are being shopped. The subcontracting community is there own worst enemy. The subcontractor has the option to participate in bid shopping and those desperate for work often do. Through their participation they perpetuate the practice.

1.2.2.2 The Prime Contractor

On the surface it appears that the prime contractor benefits most from bid shopping. If he successfully bid shops prior to award he may receive the contract. Successful bid shopping after award may net the prime contractor an additional "windfall" profit (7:48).

These advantages are only temporary, however. As the prime contractor continues his bid shopping practice, some potential subcontractors will refuse to participate while those remaining subcontractors that do will inflate their bids knowing that the prime will eventually "shop them down". The end result is that the prime has less subcontractors to chose from. Those subcontractors that enter into a contract with the prime after being bid shopped can often lead to trouble because they can't deliver at the price they quoted (7:48).

Of the four parties involved in bid shopping, the prime contractor is the most culpable. If the prime

contractor did not initiate the bid shopping, there would be none. While the other parties may foster an atmosphere conducive to bid shopping, only the prime contractor can start the process.

1.2.2.3 The Owner

There is no doubt that some owners endorse pre-award bid shopping because it nets them a lower cost for the contract. For reasons discussed earlier the owner though may end up paying more as the subcontractors struggle with the actual costs of the job.

Post award bid shopping rarely benefits the owner and therefore they are likely not to encourage it. Every public contracts office has there own set of rules and regulations to be followed in the bidding process. If these rules are void of any sort of subcontractor protection in the bidding process, it is a subtle invitation for the prime contractor to shop his subcontractors. Lack of protective legislation for subcontractors does not happen by accident. Strong lobbying groups exist on both sides of the issue. Often, it is the lobbyist with the most influence that gets the scales tipped in his favor.

The owner must also decide how much control they want over the project. While some owners desire to leave the issue of subcontracts totally in the lap of the prime contractor, others like to have "some"

control over the subcontractor. Of course, from a legal standpoint, the owner does not usually want to incur any additional liability upon himself. This sort of partial control prompts such unique legislation as bid listing laws (4:732).

1.2.2.4 The Courts

While the courts do not have as defined of a role in the bid shopping arena as do the other parties, they do have a powerful impact. As mentioned previously, bid shopping is not illegal. But some methods to curb bid shopping can incur contractual obligations which previously did not exist. Additionally, some courts view any means to restrict free competition to be in violation of anti-trust laws. This coupled with the variety of opinions produced by the courts actually deter efforts to establish bid shopping restrictions.

1.2.3 Why does Bid Shopping Flourish?

The prevailing reason why bid shopping continues is due to the prime contractor attempting to maximize his profits. He is able to do this because he holds the superior bargaining position after being awarded the contract. He is able to demand favorable terms from the subcontractor desiring a contract with the prime contractor. The only thing the subcontractor can offer is

a lower price (4:726).

This action is substantiated by a prime contractor in the name of "good competition" (1:53). The prime feels that if this practice is conducted in an "auction" type atmosphere between the competing subcontractors, then it is ethical.

There are also several legal principles that encourage the use of bid shopping. Current contractual law dictates that no contract exists between the prime contractor and the subcontractor just because the prime has used the sub's bid to prepare the prime bid. Some subcontractors stipulate in their bid that use of it in the prime bid constitutes a contract if the prime is awarded the contract. However, this is rarely done because most contractors refuse to accept such a condition (6:15).

Those public agencies adhering to the doctrine of promissory estoppel also encourage bid shopping. The doctrine of promissory estoppel dictates that a subcontractor must stand by his bid quote if it is used by the prime contractor. On the other hand the prime contractor is under no obligation to enter into a contract with the subcontractor even if his bid is used and the prime is awarded the contract. This principle creates a legal "one way street" to the detriment of the subcontractor (6:15).

This legal principle is clearly illustrated in the case of Holman Erection Co. v. Orville E. Madsen & Sons.

Inc., 330 N.W. 2d 693 (Minn. 1983). The Minnesota state agency awarding the contract required that general contractors submitting bids list their subcontractors. The general contractor, Madsen, was awarded the contract. Holman was one of the subs listed but was not awarded the subcontract. Holman then sued Madsen for breaking the "contract" (8:5.4 (CR.2)).

The plaintiff (Holman) argued the following:

- (1) The listing of his name on the bid document constituted acceptance.
- (2) There was no reason offered why Holman was not awarded the subcontract.
- (3) It is unfair to bind the subcontractor under promissory estoppel without binding the general contractor.
- (4) The general contractor's bid was a matter of public record and therefore constituted acceptance of the subcontractor's offer (8:5.4(CR.2)).

In studying the case the court reviewed and summarized the views of commentators advancing the theory that the general contractor should be bound to the subcontractor. These views are as follows:

- (1) Bargaining of price quotes should be limited to the pre-award stage so that primes and subs are on equal footing after award as to any further negotiations.
- (2) Provide stability and certainty to the industry.
- (3) Prevent bid shopping.
- (4) To provide formality and let the commercial context provide the necessary fact basis.
- (5) To allow for necessary negotiations on open terms without any effect on the price or nature of the work.

Justice Yetka, on behalf of the Supreme Court of Minnesota

wrote the following opinion:

The bidding process puts the subcontractor and the general in very different positions as to the content of the subcontract. The subcontractors have the luxury of preparing their bids on their own timetable, subject only to the deadline for submitting their bids to the general contractors. The same bid goes to all the general contractors and covers the same work. The generals, on the other hand, are dealing with all the various construction aspects of the project and with numerous potential subcontractors. They compile their bids, as the various subcontractor bids are received, within a few hours of the deadline for submission of the prime bid. Specifics are necessarily given less than thorough consideration and are left for future negotiations. Finally, the lowest dollar amount bidder is not always the one chosen to do the work or the one listed as the potential subcontractor. Reliability, quality of work, and capability to handle the job are all considerations weighed by the general in choosing subcontractors. MBE regulations requiring an effort to use a percentage of minority contractors are another potential consideration.

Binding general contractors to subcontractors because the particular bid was listed in the general bid or was utilized in making the bid would remove a considerable degree of needed flexibility (8:5.4(CR.2)).

The implication of this and other similar cases is clear. The courts can virtually endorse the practice of bid shopping.

Then there is the issue of the greedy owner. For example, let us say a low bidder on a particular job has left five percent of a \$5,000,000 on the table due to an error. The smart owner will probably allow the unfortunate contractor to withdraw his bid without penalty. The greedy owner may force the contractor to either accept the contract at that price or suffer the penalty of the bid bond. Some contractors may not want to be "let off the hook" due to the bid bond penalty, pride, or cash flow

reasons. The contractor is then left to make up the difference by cutting corners, change orders and bid shopping (9:18).

1.2.4 Views by Various Trade and Professional Organizations

Several organizations have developed written policies that deplore the use of bid shopping. While all agree that bid shopping is bad for business, there is little agreement on how to solve the problem.

The American Subcontractors Association (ASA) is certainly the most active organization concerning anti bid shopping efforts. Founded in 1966, the ASA is a nonprofit trade association representing over 7000 companies across the nation. The purpose of the ASA is the improvement of general business conditions of both union and nonunion construction subcontractors (3:1).

Interestingly enough, the oldest written anti bid shopping policy written by a trade organization was developed by the Associated General Contractors of America (AGC) in 1947. The major provisions of the AGC's policy on ethical conduct with respect to subcontractors and those who supply material are as follows (1:53):

- (1) Proposals should not be invited from anyone who is known to be unqualified to perform the proposed work or to render the proper service.
- (2) The figures of one competitor shall not be made known to another before the award of the subcontract, nor should they be used by the contractor to secure a lower proposal from another bidder.

- (3) The contract should preferably be awarded to the lowest bidder if he is qualified to perform the contract, but if the award is made to another bidder, it should be at the amount of the latter's bid.
- (4) In no case should the low bidder be led to believe that a lower bid than his has been received (1:53).

In a show of unity against bid shopping, the ASA, AGC, and the Associated Specialty Contractors (ASC) have developed a joint guideline opposing bid shopping. The guideline is written as follows (3:35):

Bid shopping or 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 sub-bid in order to submit a lower proposal on that project (bid peddling).

The Associated General Contractors of America, the America Subcontractors Association, and the Associated Specialty Contractors oppose these practices (3:53).

Of all the trade organizations, the American Society of Professional Estimators (ASPE) have produced the most in-depth statement opposing bid shopping. Excerpts from their statement on bid shopping follows (3:37-39):

Bid Shopping

Bid shopping, defined in Canon 5 of the [ASPE] Code, occurs "when, after the award of the contract, a contractor contacts several subcontractors of the same

discipline in an effort to reduce the previously quoted price."

In other words, if a prime bidder attempts to compel a sub-bidder to lower a previously quoted bid price, that is bid shopping. Bid shopping may occur either on bid day or after bid day; either before or after the award of the contract.

In addition to price information, the status of a sub-bidder's competitive position or technical scope are equally sensitive. Legitimate practice precludes use of this information in haggling, trickery, or coercion of any kind. During contract negotiation, sub-bidders should not be advised, nor should they inquire, of other sub-bidders price or scope, nor of any changes that would be required to qualify them as the successful sub-bidder. After a commitment is made, sub-bidders should request and should be advised of their competitive position, both in price and scope.

Owners May Participate

Bid shopping is not confined to prime bidders and sub-bidders. Some owners also participate by encouraging prime bidders to bid shop and by bid shopping themselves. Ethical contractors will propose value engineering to lower their bid. They will not engage in bid shopping.

Why ASPE Prohibits These Activities

The contract (or subcontract, or purchase order) should go to the qualified prime bidder or sub-bidder determined on bid day at bid time, excluding prime bidders or sub-bidders who shopped or peddled bids prior to bid time. This does not preclude a prime bidder from using a bid higher than the low legitimate bid, but the prime contractor cannot ethically ask the sub-bidder to lower a price as quoted on bid day.

Ethical Dimension

The ethical basis for this stand is free competition and fair play. The competitive prime bidder assumes the low sub-bidder has carefully quantified the scope of work, has evaluated his risk and pricing options, has included a fee which will justify the risk, offering the best price in confidence. To shop such a prime is neither free competition nor fair to the legitimate sub-bidder.

Many construction firms fall prey to the practice of bid shopping and bid peddling in the belief they will

procure contracts not otherwise available to them. In the short run, this may indeed be true. But, in the long run, shoppers and peddlers gain reputations, and soon find it more and more difficult to obtain legitimate bids. This lack of legitimate bids causes the bidder to "discount" even more, because only those sub-bidders who put "shopping money" in their bids are available. This added risk may be disastrous for the bidder, should he be unable to "sell" the work for this discounted price. Skill and insight are replaced by gambling and often greed. Professionalism is replaced by rolling the dice, and bid shoppers are gradually isolated and change or perish.

Economic Dimension

In addition to the ethical dimension of bid peddling and bid shopping, there is an economic one. Simply stated it is this: Bid shopping and bid peddling reduce the total profit available to the construction team. When a bidder cuts a bid below the lowest legitimate bid, the bidder is admittedly taking the contract for less than originally desired and bid. The bidder is, in other words, reducing profit below what is really desired, and is doing so in order to obtain work.

No contractor enjoys the prospect of making less profit than desired. Therefore, the shopper has strong incentive to develop ways to recoup that lost profit. One of these ways is to cheapen quality. The shopper may not use the specified material and/or allow workmanship to suffer in order to gain back the profit lost.

Another way is to search for opportunities to increase the amount of one's contract through extras. The bidder is constantly motivated to seek change orders, often pricing them at substantial premiums above the actual cost of the work done. In either of the scenarios, conflict is sure to result, and legal issues arise. The original fee is lost or reduced by discounting, and the added burden of legal fees to resolve the ensuing conflict is inevitable.

Elimination of bid shopping and bid peddling is essential if the construction industry is to regain its rightful fee structure, and it must begin to eliminate these unethical practices now (3:37-39).

The American Institute of Architects (AIA) has found itself in the middle of the bid shopping issue. The issue

is not so much as a matter of endorsing an anti bid shopping policy but as a matter of what protection they should afford the subcontractor in their standard contract documents A101 and A201 (10:508).

The AIA finds itself between the two extremes of separate contracts for all subcontractors as opposed to the prime contractor having direct control over all subcontracting efforts. Naturally, the AGC supports the latter extreme while the ASA and the ASC push for additional protection under the AIA documents (10:508).

Prior to 1976 the AIA required that the architect had to approve all subcontractors. In an effort to minimize the architects role in the subcontracting effort and to avoid the likelihood of liability the AIA has softened their stance. Currently the AIA, in their document A201 para. 5.2.1, requires that the prime contractor "as soon as practical after the award" provided a list of all subcontractors to the owner and architect (4:733). This new wording now leaves the door wide open for those prime contractors desiring to practice bid shopping.

CHAPTER TWO BID LISTING

2.1 How Bid Listing Works

Listing of the subcontractor bids by the prime in his bid submission is a popular way to control bid shopping. This kind of control has become statute in several states including Arkansas, California, Delaware, New Mexico, and South Carolina. Each state has adopted their own parameters as to what type of subcontract must be listed, usually a monetary threshold. The justification for such law is quoted as being a way for the state to satisfy themselves that only competent subcontractors will perform on the project (4:732). The statutes are normally written so that substitution of the listed subcontractor will only be allowed under certain conditions (11:57).

A secondary justification often cited by state legislatures is to condemn both bid shopping and bid peddling because they adversely effect public projects through poor quality of workmanship and materials, deny the total benefits of free competition, and lead to insolvencies of subcontracting firms (4:733).

2.2 The Pros and Cons of Bid Listing

The two strongest arguments in defense of bid listing is that it reduces the possibility of bid shopping and

provides the owner some control over the selection of sub-contractors to be used on the project (9:21).

Another quoted advantage of bid listing is to the owner. With bid listing laws the owner is confident that the actual minimum price offered in a bid is the real low price. The prime contractor is unable to pocket any additional profit by "shopping" for a lower bid after award (3:2). Another plus is that subcontractors knowing that they are protected under a bid listing law are more likely to bid on a project. This increases competition and attracts highly qualified and reputable specialty subcontractors (3:2).

Up to this point bid listing seems like the solution to the bid shopping problem. Unfortunately, for each advantage of bid listing there is an equally strong disadvantage. For openers the Associated General Contractors (AGC) has denounced the policy (2:28). This is no doubt due to general contractors wanting to protect their profit margin and control over the subcontracting process (3:3). General contractors also argue that they have a difficult enough time as it is analyzing and comparing subcontractor bids prior to bid opening. The post award period grants them the extra time they require to determine the best subcontractor for the job (3:5). It is also argued by general contractors that bid listing is "injecting" the government "...into the private contractual

relationship between a prime contractor and a sub-contractor" (3:6).

Bid listing is not a foolproof method to prevent bid shopping. Unethical prime contractors have found loopholes in some bid listing laws.

One method is for a prime contractor to list a sub-contractor with the understanding that the sub has the option to accept a lower price if the prime can find one or to substituted by the subcontractor offering a lower price (11:57).

Another loophole that has been used by prime contractors is to intentionally list subcontractors that are not qualified to perform the work. After award the prime contractor brings this "error" to the attention of the contracting official and is then permitted a substitution (12:24).

Still another method used to beat the system is for the prime to list two or more subcontractors for each specialty trade. The prime contractor supports this action by stating that the subcontractors in question are limited by their expertise to only perform certain portions of the particular subcontract. In reality the prime contractor is giving the majority of the effort to the sub with the lowest price (12:24).

2.3 A Comparison of 5 State's Legislations

Presently only five states (Arkansas, California, Delaware, New Mexico, and South Carolina) have bid listing laws according to E. Colette Nelson, Vice President of the American Subcontractors Association (ASA). As the following comparisons show, each state's bid listing legislature is unique.

2.3.1 Arkansas

Arkansas law [ARK. STATS. 14-613] requires that all contractors submitting bids on public construction contracts with an estimated value of \$20,000 or more must list their subcontractors. Subcontractors to be listed must be licensed and qualified as either mechanical, electrical, roofing, and/or sheet metal contractors. The prime contractor must submit the subcontractors names and quotes in both his bid and in a separate sealed envelope (3:16).

In the event that a listed subcontractor refuses to enter into a contract, the prime contractor is allowed to substitute with another subcontractor provided that the replacement sub is approved by the architect, owner, and the State Building Services. A particularly harsh requirement is that the replacement subcontractor cost no more than the original quote. If the replacement sub's quote is less than the original bid the difference must be refunded to the state (3:17).

2.3.2 California

California bid listing laws are cited in Gov. Code, Title 1, Div. 5, Chap.2, entitled "Subletting and Subcontracting Fair Practices Act". California's bid listing laws are the most detailed of the five states.

The California law requires that the prime contractor list all subcontractors whose work is in excess of one half of one percent (0.5%) of the total contract amount on all state construction jobs. Construction, repair, and improvements on traffic signals, streets, highways, and bridges are excluded from this law (3:18).

All subcontractors must be licensed with the state and only one subcontractor can be listed for each portion of work. The law also provides a list of penalties that can be assessed against the prime contractor who has been awarded the contract and failed to list one or more subcontractors. These penalties include cancelling of the contract or a 10 percent fine of the subcontract involved (3:21).

The law also discusses the effects of bid shopping and bid peddling. Included in the law are penalties to be assessed against the prime contractor if he is caught circumventing the bid listing requirements (3:18).

The procedure for substituting a listed subcontractor after award is discussed in great detail. It is no doubt the intent of the law to scrutinize such substitutions to the satisfaction of the state agency.

2.3.3 Delaware

Delaware's bid listing laws are under statute 29, para. 6911, entitled "Contracts for Public Buildings; Listing of Subcontractors; Bidder as Subcontractor; Substitution of Subcontractor; Penalties" (3:22).

Delaware law requires that subcontractors must be listed on all public works contracts (except projects involving roads, streets or highways) that are in excess of \$10,000. Prime contractors listing themselves as subcontractors must be so licensed by the state to perform that type of work and must normally engage in that type of work. The agency administering the contract has the final say in allowing the prime to perform specialty work (3:22).

Substitution of any subcontractor after the prime has been awarded the contract will only be allowed if the subcontractor is proven to be incapable of performing the work, fails to execute a contract with the prime, has defaulted on the project, or is no longer in business. Again, approval is subject to agency review (3:23). The law also gives the awarding agency the power to assign penalties against the prime contractor if he does not use all of the subcontractors listed. The amount of the fine is up to agency discretion (3:23).

The Delaware state government states that the primary purpose of the bid listing law is to protect the public from the wasting of money. A secondary intent of the law is to avoid bid shopping (3:23).

2.3.4 New Mexico

The state of New Mexico has incorporated bid listing law into their "Subcontractors Fair Practices Act". The Act opens with the following statement:

LEGISLATIVE FINDINGS.--The legislature finds that the practices of bid shopping and bid peddling in connection with the construction, alteration and repair of public works projects often result in poor quality of material and workmanship to the detriment of the public, deprive the public of the full benefits of fair competition among contractors and subcontractors and lead to insolvencies and loss of wages to employees (3:24).

As in previously discussed state's legislation the bid listing law pertains to all public works construction projects with the exception of street lighting, traffic signals, and repairs or construction of roads, streets, and highways (3:26).

The law dictates a bid listing threshold of \$5000 or one half of one percent (0.5%). Any portion of the job that is not listed by the prime contractor implies that the prime contractor is doing that portion of the work himself (3:25).

New Mexico's bid listing law provides gives the greatest leeway in allowing the substitution of a listed subcontractor. These substitutions include:

- (1) The listed subcontractor fails to execute the contract.
- (2) The subcontractor goes bankrupt.
- (3) The subcontractor fails to perform his work.

- (4) The prime contractor can prove that the subcontractor was listed as a result of a clerical error.
- (5) When a bid alternate accepted by the using agency causes the original low subcontractor's bid not to be low.
- (6) When the prime contractor can prove that the listed subcontractor's bid is incomplete.
- (7) When the listed subcontractor fails or refuses to meet the bond requirements of the contractor.

The using agency has the right to approve any subcontractor substitution (3:27).

As in the California bid listing laws, a prime contractor will be penalized if he uses a subcontractor that was not listed and who is performing work over the amounts stipulated in the threshold. This penalty will either be cancellation of the contract or a ten percent (10%) fine based on the amount of work to be performed by the non listed subcontractor (3:31).

It is interesting to note the strong parallels between the California law and the New Mexico law. It is quite clear that New Mexico modeled their legislation after California's bid listing law.

2.3.5 South Carolina

Of the states discussed, South Carolina has the briefest bid listing law. The law is located in the "South

Carolina Consolidated Procurement Code", Subarticle 3;

Section 11-35-3020(2)(b). The law is shown in it's entirety as follows:

(b) Bid Acceptance, In lieu of Section 11-35-1520(7), the following provision shall apply. Bids shall be accepted unconditionally without alteration or correction, except as otherwise authorized in this code. The using agency's invitation for bids shall set forth all requirements of the bid including but not limited to the following:

(i) Any bidder or offeror in response to an invitation for bids shall set forth in his bid or offer the name and the location of the place of business of each subcontractor who will perform work or render service to the prime contractor to or about the construction or who will specially fabricate and install [a] portion of the work in an amount not to exceed the following percentages:

Prime contractor's total bid up to three million dollars	2 1/2 %
Prime contractor's total bid is three million to five million	2%
Prime contractor's total bid is over five million dollars	1 1/2 %

(ii) Failure to list subcontractors in accordance with this section and any regulation which may be promulgated by the board shall render the prime contractor's unresponsive.

(iii) No prime contractor whose bid is accepted shall substitute any person as subcontractor in place of the subcontractor listed in the original bid, except with the consent of the awarding authority, for good cause shown.

(iv) The using agency shall send all responsive bidders a copy of the bid tabulation within ten working days following the bid opening (3:33).

The intent of this law is clear. Though it does not mention bid shopping, the legislation is so written to decrease the chances that it will occur. By far the

briefest and most general of all state bid listing laws, the question comes to mind as to how it fairs in the courts. There was no information found to indicate that it has not been successfully defended in the courts.

2.4 Current State Status

The 1980's were relatively active on the state bid listing front. In 1983 the state of Arkansas adopted their current bid listing law while the Governor of Wisconsin vetoed a proposed bid listing bill for public construction (13:1). In 1988 New Mexico signed into law subcontractor bid listing on public projects.

Today, two states (Mississippi and Missouri), are entertaining the idea of adopting subcontractor bid listing rules (2:27). Opponents of bid listing laws in Mississippi successfully shelved the bill in a committee for fiscal year 1992. Backers of the bill intend to reintroduce it during the 1993 session (14:11). A copy of Mississippi's proposed law is contained in Appendix A of this report. For comparison purposes, a sample bill proposed by the American Subcontractors Association (ASA) is contained in Appendix B. It is interesting to note the striking similarity between the two documents. The ASA appears to have had a major part in the drafting of Mississippi's bill.

2.5 The Legalities of Bid Listing

The variety of bid listing laws used throughout public construction agencies has created some legal issues. Those states having highly detailed bid listing laws appear to have the best chance of not losing their case in court.

The first issue usually challenged is the validity to list subcontractors in the first place. At least one 1983 case in Minnesota found in favor of a prime contractor who did not use a listed subcontractor. The court's opinion was that since bid listing was not a state statute (only the agency required bid listing) that the prime could not be held to it (Holman Erection Co. vs. Orville E. Madsen & Sons, Inc., 330 N.W. 2d 693) (8:5.4(CR.2)).

During the twenty years the U.S. General Service Administration required bid listing, its validity was upheld by the Comptroller General on numerous cases (15:59). This is a contradiction to the Minnesota ruling since subcontractor bid listing never became federal law (1:59).

Other issues include when a prime contractor does not list one or more subcontractors either intentionally or by error. The question becomes is the bid responsive or not? Another grey area is on what grounds does the agency allow for substitution of a listed subcontractor. While many state statutes provide some instances where a sub can be replaced, all situations can not be covered (8:3.9-6). On one federal government contract, the courts found in favor

of the prime contractor who was not allowed to substitute a subcontractor. The courts felt that the prime contractor had just cause in desiring to replace the subcontractor and awarded him \$154,000 (11:58).

In the final analysis, the comprehensiveness of the agencies bid listing laws and legal precedence will determine the outcome of legal cases challenging the statute.

CHAPTER THREE BID DEPOSITORIES

3.1 How Bid Depositories Work

The use of bid depositories has been on the decline over the last ten years for reasons that will be discussed later. Originally established to curtail subcontractor bid shopping, bid depositories see only limited use today.

Bid depositories were established by the construction industry, specifically construction trade subcontractors who are engaged in submitting sub-bids to general contractors on large construction projects (11:57).

The general procedure is to use a "lock box" which is maintained by the bid depository organization. Subcontractors desiring to bid on a construction project submit their sealed bids to the depository addressed to the general contractors to whom they desire to work with. A second sealed bid is also prepared and addressed to the depository for their records. A cut-off time of four hours before the prime bid opening time is usually established. No sub-bids will be accepted by the depository after the cut-off time. At the depository closing time the lock box is opened and the sub-bids are distributed to the general contractors to whom addressed. The general contractor then completes his bidding documents using the subcontractor quotes that he has received (11:57).

The bid depository has as its option to publish all the sub-bids, just the lowest sub-bid, or none at all. Either way, the depository knows which bids were low and will monitor which subcontractors are chosen by the prime contractor who receives the award (4:730).

The use of a depository is normally open to all subcontractors of that particular trade, although membership is usually required if a subcontractor is to use the services of the bid depository. A prime contractor using the bid depository is only required to adhere to the rules of the depository (4:730). A typical bid depository rules are as follows:

- (1) Subcontractors belonging to the bid depository must use it exclusively.
- (2) Prime contractors using the bid depository must accept only those bids that are held by the depository.
- (3) If a prime contractor uses the depository he must accept the lowest bid.
- (4) The prime contractor is not allowed to split subcontractor bids in an attempt to combine them into a lower bid.
- (5) If either a prime contractor or a subcontractor violate the depository rules they can lose their filing fee and/or be fined (4:730).

Reading between the lines of these rules reveals that a bid depository is ripe for bid collusion which of course is illegal. Unfortunately, many depositories have resorted to such tactics which is the subject of the next section.

3.2 The Legalities of Bid Depositories

Bid depositories have run afoul of federal and state anti-trust laws more than any other bid shopping curtailment method. Bid depositories by their very nature are just one step away from the illegal restraint of free trade.

Members of bid depositories expose themselves to several types of legal proceedings. These include civil/criminal action by the Federal Trade Commission and/or the Anti-trust division of the Department of Justice, similar legal proceedings by state anti-trust agencies, and damage suits by competitors who have been harmed by actions of the depository (1:55).

In the period 1943 to 1968 the Federal Trade Commission initiated twenty-nine suits against bid depositories (1:55). As recently as 1986, a bid depository operated for over twenty years in Memphis, Tennessee was declared illegal by a federal administrative law judge (2:28).

Typical activities by bid depositories that have been found illegal include:

- (1) Intentionally fixing price quotes of subcontractors either by agreeing to specific prices or using formulas to establish uniform prices.
- (2) Members of a depository agreeing among themselves who will be the lowest bidder.
- (3) Eliminating the lowest bids.

- (4) Subcontractors belonging to a depository using a common estimator for their bids.
- (5) Subcontractors comparing prices prior to award.
- (6) Bid depositories boycotting prime contractors and subcontractors who did not buy into their service (1:55).

The leading legal case concerning the effect of anti-trust laws on "legal" bid depositories is Christiansen vs. Mechanical Contractors Bid Depository, 230 F.Supp. 186 (D.C. Utah, 1964) (1:57). The bid depository was formed by most of the mechanical contractors in the state of Utah and the depository received most of the state work. A member of the depository (Christiansen) became disenchanted with the depository and canceled his membership. Soon thereafter, Christiansen lost the award of a subcontract to a member of the depository who had a higher bid. Christiansen filed suit against the depository under the Sherman Anti Trust Act for damages due to lost profits in the amount of \$20,000.00 (1:56)

The court in their review recognized that the bid depository was "... created to cope with the evils of bid shopping and bid peddling". The court also noted that the avowed purpose of the depository was "to promote the principles of competitive free enterprise and to eliminate as far as possible unfair bidding practices" (1:56).

The court though attacked several of the depositories rules. The rule stating that prime contractors using the bid depository could only use sub-bids from the depository

was a major issue for the court. Other rules including not allowing the prime and the subs to negotiate prior to award, no splitting of subcontractor bids, and not allowing subcontractors to submit any further bids on a project after award if they did not bid on it in the first place were all at issue with the court (1:56).

Even though the rules and actions of this bid depository were consistent with standard operating rules the court however found for the plaintiff and awarded him damages in the amount of \$60,000.00, three times what he had asked for. This decision was upheld by the 10th Circuit Court of Appeals and the Supreme Court declined to review (1:56).

What actions can a bid depository take to protect itself against legal proceedings? Commentators on bid depositories have developed the following suggestions:

- (1) Bid depositories should be administered by a third party.
- (2) The use of a bid depository should be open to all contractors, i.e. no exclusive membership.
- (3) No requirement for users of the depository to deal only with the depository.
- (4) No penalties for rule violations.
- (5) The depository activities be made public (1:59).

CHAPTER FOUR SEPARATE CONTRACTS

4.1 How Separate Contracts Work

Separate contracts is the opposite of the ever popular single contract method that uses a prime contractor who directly contracts with subcontractors. The separate contract method uses multiple prime contractors by trade and generally no subcontractors. This process can generate upwards of forty separate contracts for the agency to deal with. Two approaches can be used to coordinate the contractors. One method is to designate one contractor as the general and use him to coordinate the other contractors. The other method is for the owner to use the services of a construction manager (CM) to coordinate the contracts (16:116).

Separate contracts are normally reserved for large and complex projects. Examples include high-rise buildings, nuclear power plants, oil refineries, convention centers, and hospitals (10:532).

Numerous reasons have contributed to the use of separate contracts. On large projects, it is felt by some that a single contract was too inflexible to deliver timely and efficient construction services (10:532). Separate contracts were also developed to put more of the contracting process out in the open and to avoid corrupt

bidding practices such as bid shopping (17:3). Ideally it is hoped that separate contracts will bring about increased competition with its corresponding reduction in construction costs.

The key parts of a separate contract process include:

- (1) Developing distinct divisions of work.
- (2) Properly prepared front end documents.
- (3) Work descriptions spelled out in the contract.
- (4) Establishing a list of qualified potential bidders.
- (5) The soliciting of bidders.
- (6) Pre-bid meetings with prospective bidders.
- (7) Bid opening.
- (8) Award of contracts (16:116).

4.2 The Pros and Cons of Separate Contracts

The year 1875 marks the first major public sanctioning of separate contracts. That year the state of Ohio established the mandatory use of separate contracts for most state and local construction. In 1912 New York adopted a similar rule known as the "Wicks Law". The Wicks Law requires separate contracts for major specialty contractors including electrical, HVAC, plumbing, and a general contractor (17:3). Since then, only two other states (Illinois and Pennsylvania) have developed mandatory separate contracts for public construction (17:17).

Of these four states, the debates for and against the New York law have been highly publicized and serve as the basis for this report.

In the eighty years following the establishing of the Wicks Law, it has been the source of constant debates and attempts to have it repealed. Those desiring the law to remain in effect are naturally the specialty contractors and their related craft unions. Opponents of the law include general contractors, state and local construction authorities, local school districts, and unions not associated with specialty contractors (17:3).

In a nutshell, the opponents of the Wicks Law say that repealing it would save the state \$30 million a year in construction costs, put coordination problems on the shoulders of the prime contractor, and mitigate the cities liability for cost overruns. The proponents argue that repealing the law would actually increase construction costs, decrease competition, and result in poorer quality (18:1). Two separate studies of the Wicks law were concluded in 1992. One study was conducted by the New York City School Construction Authority (NYCSCA) and the other study was commissioned by the Electrical Contracting Foundation (ECF). The results of these studies are summarized in the following sections.

4.2.1 The New York City School Construction Authority Study

The NYCSCA study was contracted out to the consulting firm of Ashenfelter & Ashmore. According to the consultants, all variables were carefully isolated and studied. The study reviewed 160 public works projects performed by New York City in the 1980s (19:27).

The results of the study are rather startling. Comparing projects performed under the Wicks Law with those projects exempt from the statute found that projects performed under the law cost 13% more and took 60% longer to complete (19:27). In real numbers this translates to projects performed under the law took 15.6 months longer to complete and cost \$14 per square foot more for projects of the same size, scope, complexity, and time period (19:28). The consultants found the largest single square foot cost increase to be the cost of government management of separate bid contracts. The cost increase equated to \$7 per square foot over management costs associated with single bid contracts (19:28).

There is no doubt that this report will be heavily quoted by Wicks Law opponents during the next legislative battle to repeal the Wicks Law.

4.2.2 The Electrical Contracting Foundation Study

The Electrical Contracting Foundation study entitled Single vs. Separate Bidding is much broader in scope than the previously discussed study. The study, performed by

Professor Brian Becker, School of Management, State University of New York at Buffalo, is the first installment of a report that will eventually cover every state that administers mandatory or optional separate contracting methods. The present study provides heavy coverage to the Wicks Law in New York and reviews twelve other state's contracting methods. The purpose of the report is to present both sides of the argument for and against separate contracts and then to present facts backing up either position. The report also discusses separate contracts in the private sector.

The study reviewed construction projects in three New York state agencies from 1980 to 1992. Using statistical analysis, the bid and actual direct costs were compared. The results show that separate contracts have a 2.9% lower cost than do single bid contracts, with 90% of that cost reduction being in the lower bid amounts of the separate-prime contractors. The author makes it clear that the cost of administering the contract was not included in his study. In the previous study, administrative costs made up half of the price increase of separate contracts over single bid contracts.

4.2.3 Comparing the Studies

The two studies results clearly contradict each other. While the NYCSCA study showed a cost increase of 13% on Wicks Law projects over non Wicks Law projects, the ECF

study determined that Wicks Law jobs actually were 2.9% lower in direct construction costs over non Wicks Law projects.

The NYCSCA study also determined that half of the price increase (6.5%) was due to the extra cost of managing a separate contract project over that of a single bid. The ECF acknowledges that they were unable to provide data for the public management of separate contracts simply because the agencies were unable to provide such data when asked.

If the 6.5% administrative cost increase is added to the 2.9% construction cost decrease quoted by the ECF study, then Wicks Law projects would reflect an overall cost increase of 3.6%. Still, a long way off from the 13% quoted by the NYCSCA study.

Both studies concur that administration costs of a the separate contract method are much higher over that of a single bid, prime contractor managed project. In the eyes of public officials, this is possibly the largest negative factor of separate contracts. To make matters worse, New York has a unique way of handling project management. Public administration officials are not allowed to contract out for construction management services. This puts construction management of separate contracts squarely on the shoulders of city officials (17:18).

4.3 The Legalities of Separate Contracts

By their very nature, separate contracts require a high level of coordination. This level of coordination takes experience, skill, and technical/administrative expertise. A failure to properly coordinate the contractors can lead to disastrous delay claims (10:532).

When delays on the job happen and additional costs are incurred by the separate contractors it is reasonable to assume claims will follow shortly. The owner will, no doubt, be the subject of some of these claims (10:534).

There are three possible outcomes when either the owner, (through a contractor, construction manager, or architect), coordinates a project and delays occur:

- (1) The owner is held blameless.
- (2) The owner is liable for the contractor's failure to coordinate if he did not take reasonable steps to coordinate the issue.
- (3) The owner is strictly liable if the coordination was not properly accomplished (10:534).

Many owners feeling the pinch of a additional liabilities have sought relief through the contract wording. As one writer states:

Because each contractor is solely in privity with the owner, there is an expectation to look to the owner for damages when a site coordination breakdown occurs. In the face of this exposure, some owners have sought to transfer this risk back on to the contractors performing the work. Representative contract clauses to effect this transfer are:

The Contractor agrees that he will be responsible to any other contractor performing work related to the Project for any loss, injury, damage or delay caused by the Contractor. The Contractor and his Performance

Bond Surety shall indemnify and hold harmless the COMMISSION, the Construction Manager and the Engineer from and against any claim brought against any of them by another contractor as a result of the Contractor's alleged acts or omissions (10:535).

CHAPTER FIVE
BID SHOPPING AND THE FEDERAL GOVERNMENT

5.1 General Services Administration

In a time where numerous states not only recognize the detrimental effects of bid shopping but have some form of legislation to inhibit it, the Federal Government has no such policy. Even more interesting, as section 5.2 will reveal, one branch of the Federal Government actually endorses bid shopping.

According to Colette Nelson, Vice President of the ASA, the last federal agency utilizing any sort of anti-bid shopping regulation was the General Services Administration (GSA). From approximately 1963 through 1983, the GSA had a strong bid listing law that prevailed in many court cases (1:61).

In a case that challenged GSA's bid listing law shortly after it is was enacted, the Comptroller General wrote:

"The . . . provision for listing subcontractors was aimed primarily at the practice of 'bid shopping,' which is reported to have been a matter of growing concern to the General Services Administration (GSA) and to the construction industry over a period of years." 43 Comp. Gen. 206,207 (1:61).

The Comptroller General further wrote:

". . . to end such bid shopping would create a true competitive market with resultant savings to the Government." 43 Comp. Gen. 207 (1:61).

GSA's bid listing laws were contained in part 41 of the Combined Federal Regulations. The law called for listing of all plumbing, heating, air conditioning, ventilation, electrical, and elevator subcontractors. Additionally, any individual category of work that exceeded 3.5% of the total contract amount must also be listed. The bid listing laws were required on all new construction projects over \$150,000 and on all alteration projects over \$500,000. The regulation also stated that a prime contractor's bid would be held non responsive if he failed to list a subcontractor that he was required to (1:60).

In late 1983, GSA announced that it was considering elimination of their bid listing regulation. Strong opposition was fielded by the ASA but on January 03, 1984, GSA formally dropped their bid listing requirement (20:1).

My research failed to locate any reason for this action by GSA. Telephone calls to GSA requesting information on this decision were met with ignorance. The following statement found in a trade journal provides one possible reason:

"Initial contacts with GSA seem to indicate that the agency is not prepared to consider the impact of its proposal on small businesses." (20:1).

From a political standpoint, the law was enacted in 1963 during the term of a very strong Democratic President, whose administration was no doubt pro small business. The law was repealed during the term of an equally strong Republican President whose alliances were tied to big

business. Being an educated guess, politics might not have had a part in GSA's decision. On the other hand, an agency as big as GSA must bend with the political winds.

5.2 The Federal Trade Commission

The Federal Trade Commission (FTC) among other duties are the watchdogs enforcing the Sherman Anti-Trust Law. The FTC has been active for years investigating the various methods that have been and are used to prohibit bid shopping. As recently as late 1990, investigators and lawyers of the FTC conducted a sweeping investigation of the ASA, AGC, and the ASPE in search of evidence of bid collusion (2:28).

Mr. Michael McNeeley, assistant director of the FTC's Bureau of Competition states:

"Federal anti-trust law prohibits concerted or coerced pricing action, and trade groups that try to prohibit their members from bid-shopping run the risk of engaging in an illegal restraint of trade." (2:28).

Anti-trust lawyers working for the FTC go one step further and state that they view bid shopping as a form of auction and that there is nothing wrong with it (2:28).

The law that McNeely refers to is located in 48 CFR Ch.1, subpart 3.3 - Reports of Suspected Antitrust Violations. The following two paragraphs apply:

3.301 (a) Practices that eliminate competition or restrain trade usually lead to excessive prices and may warrant criminal, civil, or administrative action against the participants. Examples of anticompetitive practices are collusive bidding, follow-the-leader

pricing, rotated low bids, collusive price estimating systems, and sharing of the business.

3.303 (b) The antitrust laws are intended to ensure that markets operate competitively. Any agreement or mutual understanding among competing firms that restrains the natural operation of market forces is suspect (21:42).

Reading between the lines of the FAR regulations would indicate, at a minimum, a passive acceptance of bid shopping. Any agency attempting to limit bid shopping could be intimidated by the FAR's wording.

The FTC in its statements virtually endorse bid shopping in the name of free and open competition. The contradiction in beliefs between the federal and state governments concerning bid shopping is interesting and merits further research.

**CHAPTER SIX
THE MINNESOTA PLAN**

6.1 Minnesota Bidding History

The state of Minnesota has developed a unique approach in their public construction bidding practices. Because of its uniqueness and success, the Minnesota plan warrants its own chapter in this report.

Prior to the late 1980's, Minnesota did not have a legally mandated bidding method. State construction agencies used a mix of both separate contracts and single prime contracts (17:18).

Minnesota experienced the worst of both bidding methods. The single prime contracts created problems of bid shopping and bid pedalling while the separate contracts method suffered coordination and litigation problems (17:18).

State contracting officials, namely the Building Construction Division (BCD) and the Materials Management Division (MMD), witnessed the continued deterioration of the bidding system and decided to fix it permanently (17:19).

Instead of following the lead of other states by legally mandating separate contracts or single prime contracts the state officials decided to take a new approach to the problem. Using what is popularly today

called "partnering techniques", the BCD and MMD got together with the Minnesota Associated General Contractors and several specialty contractors including the Minnesota Mechanical Contractors Association and the Minnesota Electrical Association to hammer out a solution. After nearly one year of discussions and negotiations, the parties reached agreement on a new bidding and contract plan (17:19).

6.2 How the Minnesota Plan Works

The Minnesota plan is both simple yet effective. The bidding portion of this plan includes the following seven elements:

- (1) The state will use only single prime contracts for public construction.
- (2) Mechanical and electrical contracts are bid separately. These bids are due to the MMD two (2) days prior to the prime bid opening date.
- (3) General contractors desiring to submit a bid then have the two days to review the scope of work with those subcontractors submitting bids. The general contractors can then choose which subcontractors they intend to use.
- (4) The bid amount as originally submitted by the subcontractor can not be changed by either the prime or the subcontractor.
- (5) The subcontractor must submit a joint bid bond to both the state and the prime contractor. Along with the bid bond the contractor can also state which general contractors he will not work for.
- (6) The state agency will award the contract to the prime with the lowest responsive bid.
- (7) This bidding law applies to all contracts with an estimated value exceeding \$100,000 (17:19).

6.3 The Pros and Cons of the Minnesota Plan

The Minnesota plan is the best bidding plan researched for this report. The state agency is free from the coordination and litigation problems they faced under their previous policy. Additional competition benefits are realized by the quasi separate bid aspect of this plan. The issue of bid shopping and bid peddling are for all practical purposes eliminated yet both prime and subcontractors have the right to refuse to work with the other (17:19).

Testimony from state officials indicates that prime contractors are offering lower prices under this plan. This is because primes have two days to review bids and discuss work scope with the subcontractors instead of a few hours or even minutes under the old policy (17:21).

All participants in this plan including prime and subcontractors remain positive about this plan. In fact, no negative aspects of this plan have been voiced by the parties involved. This is due in part to meetings held every six months between state officials and contractors to further refine the policy. Also, with bid shopping and bid peddling eradicated, a feeling of mutual trust now exists between the general contractors and subcontractors (17:20).

The brilliance of this plan should not be overlooked by industry. It is a true success story in the bidding arena.

CHAPTER SEVEN CONCLUSION

Bid shopping is an unethical practice that has been in existence for over 100 years. The results of bid shopping are poor relations between contractors, shoddy work, and an increase in costs.

Bid shopping's tenacity is due to the fact that providing a law making bid shopping illegal would be ineffective. There would be no way to enforce such a law. This has left public agencies with the task of developing their own methods in dealing with the problem. As the chart on Appendix C illustrates, no one method is used by the majority of the states. The methods use by the states to minimize bid shopping, i.e. bid listing, bid filing, and separate contracts are all "band-aid" efforts. Each method attempts to stop bid shopping through some procedure that makes bid shopping more difficult to accomplish. But these methods have loop holes that an unscrupulous contractor will take advantage of.

Bid shopping proponents have a strong ally in the federal government. When the largest public building owner in the country accepts bid shopping as a normal feature of doing business, it is not something to take lightly.

Until recently, there was no hope of developing a system that would end bid shopping for good and be agreed

to by all parties. Then along came the "Minnesota Plan". The Minnesota plan works and works well, period. One of the successes of this initiative is that it gets to the heart of the matter of bid shopping. The plan was developed by owners, contractors, and subcontractors in an atmosphere of mutual trust. The Minnesota plan is just another example of people getting tired of the fighting and litigation problems effecting the construction industry. Like partnering, the Minnesota plan puts the handshake back into the bidding process.

APPENDIX A
MISSISSIPPI SENATE BILL NO. 2975

AN ACT TO REQUIRE THAT BIDS FOR THE CONSTRUCTION ALTERATION OR REPAIR OF ANY PUBLIC BUILDING OR PUBLIC WORK WHICH IS EXPECTED TO COST IN EXCESS OF \$100,000.00 SHALL INCLUDE THE NAMES OF CERTAIN SUBCONTRACTORS WITH WHOM THE BIDDER WILL CONTRACT IF AWARDED THE CONTRACT; TO REQUIRE THE CONTRACTOR WHO IS AWARDED THE CONTRACT TO USE THE SUBCONTRACTORS LISTED IN THE BID; TO PROHIBIT A BIDDER FOR A CONTRACT TO LIST HIMSELF AS A SUBCONTRACTOR AND TO PROVIDE CERTAIN EXCEPTIONS TO THIS REQUIREMENT; TO PROVIDE THAT THE FAILURE TO SUBMIT THE REQUIRED LIST OF SUBCONTRACTORS WITH BID SHALL RESULT IN REJECTION OF THE BID; TO ALLOW SUBSTITUTIONS OF SUBCONTRACTORS UNDER CERTAIN CIRCUMSTANCES; TO PROVIDE THE CATEGORIES OF WORK FOR WHICH SUBCONTRACTORS MUST BE NAMED; TO PROVIDE PENALTIES FOR VIOLATIONS OF THIS ACT; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. (1) In addition to all other requirements imposed by law, every invitation to bid on a contract for the construction, alteration or repair of any public building or public work of the state or any political subdivision thereof, which is expected to cost in excess of One Hundred Thousand Dollars (\$100,000.00) shall require each bidder to submit as part of his bid the names of the subcontractors for the categories of work for which subcontractors are required to be listed pursuant to subsection (7) of this section, with whom the bidder, if awarded the contract, will subcontract for performance of the categories of work designated on the list to be submitted with the bid or to indicated by naming himself that a category of work on the list shall not be subcontracted.

(2) The invitation shall further require each bidder to agree, if awarded the contract, not to have any of the designated categories of work performed by an individual or firm other than those named in the bid.

(3) No bidder for such a contract shall list himself as the subcontractor of any part of the public building or public work unless the bidder, in addition to holding a valid certificate of responsibility issued by the State Board of Contractors, shall also be recognized in the industry not only as a prime contractor but also as a subcontractor or contractor in and for any such part or parts of such work so listed. Neither the state, nor any political subdivision thereof, shall accept any bid for such a contract, or award any such contract to any bidder

APPENDIX A (continued)

as the prime contractor, if the bidder has listed himself as the subcontractor for any subcontractor category unless it has been established to the satisfaction of the awarding agency that the bidder has customarily performed the specialty work of such subcontractor category by artisans regularly employed by the bidder in his organization, and that the bidder is recognized in the industry as a bona fide subcontractor or contractor in such specialty work and subcontractor category. Typical subcontractor categories involving their own respective types of specialty work shall include but not be limited to plumbing, electrical wiring, heating, roofing, insulation, weather stripping, masonry, bricklaying and plastering. The decision of the awarding agency as to whether a bidder who lists himself as the subcontractor for a subcontractor category shall be final and binding upon all bidders, and no action of any nature shall lie against any awarding agency because of its decision in this regard.

(4) A bidder's failure to submit as part of his bid the names of the subcontractors with whom the bidder, if awarded the contract, will subcontract performance of the work shall result in rejection of the bidder's bid as nonresponsive.

(5) Substitutions for the subcontractors named in the bid, including substitution for the bidder when the bidder has listed himself as a subcontractor, may be authorized by the contracting officer only in compelling circumstances, including, but not limited to, a named subcontractor death or physical disability, dissolution of the subcontractor's corporation or partnership, bankruptcy, inability to obtain or the loss of a license necessary for the performance of the category of the work for which named, failure or inability to comply with a requirement of law applicable to contractors, subcontractors, or construction, or failure to meet qualifications specified in the invitation to bid and the resulting contract. The bidder or the contractor shall submit to the contracting officer such supporting evidence as the contracting officer may deem relevant and necessary for consideration of the request, substitution for a subcontractor shall be allowed only upon receipt of the contracting officer's written approval.

(6) The term "subcontractor" for purposes of this section means the individual or firm with whom the bidder proposes to enter into a subcontract for manufacturing, fabricating, installing or otherwise performing work in accordance with the specifications applicable to any category included on the list, whether the work is to be

APPENDIX A (continued)

performed by the subcontractor at the construction site or away from the site.

(7) The contracting officer for each project to which this section is applicable shall determine the categories of work for which subcontractors to be included in each such invitation shall include all categories of work expected to cost more than Fifty Thousand Dollars (\$50,000.00). Other categories may be included on the list when, in the judgment of the contracting officer, the inclusion is necessary to effectuate the purpose of this section.

(8) Any subcontractor agreement actually executed by the contractor and each subcontractor shall not impose upon the subcontractor terms and conditions more onerous to the subcontractor than those contained in the agreement between the owner and contractor.

(9)(a) A contractor who violates the provisions of this act violates his own contract and the contracting officer shall:

(i) Cancel the contract; or

(ii) Assess the contractor a penalty in an amount of not more than ten percent (10%) of the amount bid by the listed subcontractor, but in no case less than the difference of the amount between the listed subcontractor and the subcontractor used. Such penalty shall be deposited into the fund out of which the contract is awarded. In any proceeding under this section, the contractor shall be entitled to a hearing after notice.

(b) A violation of the provisions of this act constitutes grounds to revoke a certificate of responsibility issued by the State Board of Contractors.

(c) Any listed subcontractor removed in violation of this act may bring an action in the circuit court for damages, injunctive or other relief.

APPENDIX B

Model Bill - Bid Listing on State Construction (American Subcontractors Association)

1. Every invitation to bid on a contract for the construction, alteration, or repair of any public building or public work of the state (or commonwealth) which is expected to cost in excess of \$100,000 shall require each bidder to submit as part of its bid the names of the subcontractors with which the bidder, if awarded the contract, will subcontract for performance of work in excess of .5 percent of the total price of its bid, the categories of work designated on the list to be submitted with the bid, or to indicate by naming itself that a category of work on the list shall not be subcontracted.
2. The invitation shall further require each bidder to agree, if awarded the contract, not to have any of the designated categories of work performed by an individual or firm other than those named in the bid.
3. Substitutions for the subcontractors named in the bid may be authorized by the contracting officer only in compelling circumstances (including, but not limited to, a named subcontractor's death or physical disability (if an individual); dissolution (if a corporation or partnership); bankruptcy; failure to provide acceptable performance and payment bonds if specified in the invitation to bid; inability to comply with a requirement of law applicable to contractors, subcontractors, or construction; failure to meet qualifications specified in the invitation to bid and the resulting contract), but only upon submission by the bidder or the contractor, as the case may be, to the contracting officer of justification, such supporting evidence as the contracting officer may deem relevant and necessary for consideration of the request, and receipt of the contracting officer's written approval.
4. The term "subcontractor" for purposes of this Act shall be deemed to mean the individual or firm with whom the bidder proposes to enter into a subcontract for manufacturing, fabricating, installing, or otherwise performing work in accordance with the specifications applicable to any category included on the list, whether the work is to be performed by the subcontractor at the construction site or away from the site.
5. The contracting officer for each project to which this Act is applicable shall determine the categories of work for which subcontractors are to be named by the

APPENDIX B (continued)

bidders. The listing of subcontractors to be included in each such invitation shall include all categories of work comprising more than .5 percent of the total estimated cost of the contract. Other categories may be included on the list when, in the judgment of the contracting officer, the inclusion is necessary to effectuate the purpose of this Act.

6. This Act shall be effective at the beginning of the next fiscal year and shall apply to all invitations to bid issued after that date (3:9).

**APPENDIX C
BIDDING METHODS USED BY VARIOUS STATES**

	<u>BIDDING METHOD</u>			
	BID LISTING	BID FILING	SEPARATE CONTRACT REQUIRED	SEPARATE CONTRACTS OPTIONAL
ARKANSAS	X			
CALIFORNIA	X			X
CONNECTICUT		X		
DELAWARE	X			
FLORIDA				X
GEORGIA				X
ILLINOIS			X	
INDIANA				X
MASSACHUSETTS		X		
MICHIGAN				X
MINNESOTA		X		
MISSISSIPPI	?			
MISSOURI	?			
NEW JERSEY				X
NEW MEXICO	X			
NEW YORK			X	
NORTH CAROLINA				X
OHIO			X	
PENNSYLVANIA			X	
SOUTH CAROLINA	X			
TEXAS				X
WISCONSIN				X

X = LAW IS IN EFFECT

? = LEGISLATION IS PENDING

References used to construct this table are:
2:27, 3:33, 5:105, 17:16-19, and 22:1.

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