

Bid Shopping: Contractors That 'Shop Till They Drop' Get What They Deserve

by Donald Gregory, Esq.

"Bid shopping" is a controversial but common practice in the construction industry that allows a general contractor to increase its profit after being awarded a contract by hiring a subcontractor with a lower price than the subcontractor that submitted its low bid on bid day when the general contractor submitted its bid to the owner. In sum, bid shopping occurs where "the general contractor uses the lowest bid received to pressure other subcontractors to submit even lower bids."¹

One court explained its sense of discomfort with the practice thus: "A troublesome problem of the ... industry is the practice of job shopping. Many hours are invested ... in preparing a bid to the ... contractor. The latter may then proceed to play one bidder against another, getting each in turn to shave its bid as much as it will. Estimated profit is drastically reduced and financial loss threatens. There is little satisfaction in such a contract."²

Having long been recognized as unethical by many courts, the practice of bid shopping has several detrimental results. Most obviously, bid shopping forces subcontractors into post-award negotiations and often results in them reducing their sub-bids in order to avoid losing the job. Consequently, subcontractors are faced with doing the job at a loss or not doing the job at all. Subcontractors that are forced to reduce their bids may rely on poor quality methods and materials in order to avoid losing money. As a result, the construction owner faces the possibility of poor workmanship. Subcontractors may also purposely bid high to compensate for bid shopping practices by general contractors so they are able to make further reductions during post-award negotiations. In addition, many subcontractors may refuse to submit bids for jobs on which post-award bid shopping may occur. Competition is thereby reduced and, consequently, construction prices are increased. Overall, bid shopping serves only to benefit the general contractor whose purpose is simply to drive down its own cost to the detriment of both the subcontractor and the owner.

Due to the negative results that arise, there have been varied attempts to control post-award bid shopping. Several states



have enacted legislation requiring a general contractor to supply a list of the subcontractors that will work on a project when bidding on public construction contracts. These bid-listing statutes seek to eliminate post-award bid shopping by allowing the awarding authority to ensure that the general contractor uses the subcontractors listed on its bid unless there are valid statutory grounds for substitution. The overwhelming majority of courts have upheld and enforced such statutes to protect both the public and subcontractors from the practices of bid shopping. Some courts have also held that these bid-listing statutes confer the right on a listed subcontractor to perform the contract unless statutory grounds for valid substitution apply; other courts have held to the contrary, finding that bid-listing statutes do not afford such strong protection to subcontractors.

Bid shopping may also result in affirmative claims for violation of unfair trade practices laws. In *Johnson Electric Co., Inc. v. Salce Contracting Associates, Inc.*, a Connecticut appellate court found that a general contractor's misconduct was sufficient for a subcontractor to bring a claim under the Connecticut Unfair Trade Practices Act, which provides a remedy for a person who has sustained an ascertainable loss because of immoral, unethical, oppressive or unscrupulous conduct.³ Evidence showed that the general contractor had engaged in bid shopping among non-listed subcontractors after successfully being awarded the contract. Finding that the industry practice was that the listed subcontractors should receive



¹ Valley Crest Landscape, Inc. v. City Council, 41 Cal. Rptr. 2d 184, 188 (Cal. Ct. App. 1996).

² Sheet Metal Employers' Ass'n v. Giordano, 188 N.E.2d 329, 330 (Ohio Com. Pl. 1963).



the work, the court held that the general contractor's engagement in bid shopping was unethical, unfair, and inconsistent with normal industry practice.

Another attempt to mitigate the effect of bid shopping has been the creation of bid depositories. Usually created and operated by trade associations, bid depositories collect subcontract bids for a short time prior to the date set by the general contractor to open bids. The subcontract bids are kept closed and confidential until opened by the general contractor. While considered an effective means

of controlling bid shopping, bid depositories have possible anti-trust implications. Because bid depositories regulate bidding practices, they are subject to the very broad sanctions of the Sherman Act. Although courts have recognized that bid depositories are organized to eliminate unfair bidding practices like bid shopping, they have nonetheless held such depositories as violating anti-trust laws due to practices involving price-fixing, group boycotting, and restraints on freedom of competition.

While courts have touched on the bid shopping issue, they have rarely addressed it directly. The Ohio 10th District Court of Appeals addressed this issue on April 21, 2009. In *Complete General Construction Co. v. Kard Welding, Inc.*, a subcontractor submitted a written structural steel quote to a contractor on an Ohio Department of Transportation project.⁴ After ODOT awarded the contract, disagreements arose between the contractor and subcontractor concerning the wording of the subcontract. The subcontractor revised its quote upward based upon a mistake in its original bid. After hiring a different subcontractor at a higher price, the contractor attempted to enforce the original bid price against the subcontractor and sought recovery of the excess costs associated with subcontracting the work to a higher bidder.

Evidence demonstrated that the contractor had continued to negotiate bids submitted by other structural steel subcontractors in the hope that those subcontractors would reduce their bids, and in fact, there was evidence that this was the contractor's "customary practice." The court found that this practice was a tactic commonly referred to as "bid shopping,"

and defined it "as a general contractor's effort — after being awarded a contract — to reduce its own costs by finding a subcontractor that will submit a lower bid than the one used in calculating the total contract price."



The court found that when a general contractor engages in bid shopping, it can no longer continue to rely on the quote submitted by the low-bid subcontractor because the contractor's actions are more akin to the proposal of a counter-offer rejecting the subcontractor's low bid. Nor is the general contractor free to delay acceptance after being awarded the contract in hopes of obtaining a better price. When the general contractor does that, the low-bid subcontractor can no longer be held to its bid. In light of this recent decision, general contractors may want to think twice before engaging in bid shopping, as doing so may cause



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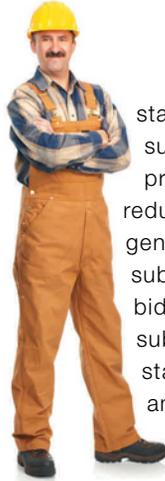
ASA needs your help to enact a prohibition of bid shopping and bid peddling on federal projects. You can help by visiting, calling or e-mailing your member of the U.S. House of Representatives to share why it is important for him or her to co-sponsor H.R. 3492, the Construction Quality Assurance Act of 2009 (H.R. 3492). ASA has made it easy to send an e-mail message to your representative: Log on to <http://capwiz.com/asaonline> and click on the alert entitled "Help ASA Improve Federal Construction." This bill, introduced by Rep. Paul Kanjorski, D-Pa., would require contractors bidding on federal agencies' construction projects valued over \$1 million to list each subcontractor they plan to use for \$100,000 or more of the work. A prime contractor that replaced listed subcontractors without good cause and the permission of the contracting officer would be subject to a penalty, and after the third violation, de-listing as a government contractor. ASA has prepared a fact sheet to help you talk about this issue with your representative, located on the "Bidding and Market Development" page of the ASA Web site under "Advocacy and Contracts" at www.asaonline.com. For more information, contact ASA at (703) 684-3450, Ext. 1333, or GovernmentRelations@asa-hq.com.

³ 805 A.2d 735, 737 (Conn. App. Ct. 2002).

⁴ 2009-Ohio-1861, 2009 Ohio App. LEXIS 1579 (Ohio App. 10 Dist.).

them to lose otherwise enforceable low bids.

Although Ohio's 10th District Court of Appeals' decision in *Complete General* may help deter general contractors in Ohio from engaging in bid shopping, the bid-shopping problem remains prevalent nationwide. To insulate themselves from bid shopping, subcontractors must first thoroughly educate themselves about the effects of bid shopping, and be principled enough to avoid this unethical practice. Second, prompt acceptance of subcontractor bids can also significantly reduce the possibility of bid shopping. Third, continuing efforts to enact protective legislation may mitigate the effects of bid shopping. Incorporating



standard bid forms and subcontracts for each project would greatly reduce the need for a general contractor to change subcontractors after the bid opening. In addition to subcontractor bid-listing, statutes could also be amended to require pre-bid price quotes from the subcontractors prior to the general contractors submitting their bids.

Bid shopping in the construction industry has extensive detrimental effects, as it unfairly pushes down subcontractor pricing at the risk of foregoing quality, while at the

same time providing no cost savings to owners. The recent holding in *Complete General*, along with statutory efforts to effectively control bid shopping, may help mitigate its effect and discourage the practice. And even if contractors take advantage of difficult economic times to pressure subcontractors to reduce post-bid pricing through bid shopping, those that engage in the practice could have the practical effect of releasing subcontractors from their bids (mistaken or otherwise), thereby giving contractors that engage in bid shopping what they deserve. ■



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