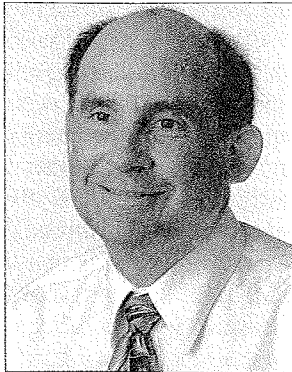
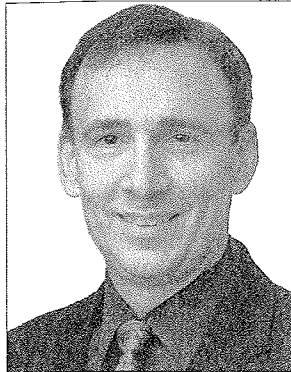


Ethical Challenges of Bid Shopping

By Donald W. Gregory and Eric B. Travers



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“Bid shopping” occurs when a general contractor discloses the bid price of one subcontractor (or suppliers) to its competitors in an attempt to obtain a lower bid than the one on which the general contractor based *its* bid to the owner. Put another way, bid shopping occurs when a “general contractor uses the lowest bid received to pressure other subcontractors to submit even lower bids.”¹ A close relative of bid shopping is “bid peddling.” Bid peddling occurs “when a subcontractor, whose sub-bid was *not* selected for the contractor’s bid, offers to reduce its price in order to induce the contractor to substitute it after award of the contract.”² The only real difference between bid shopping and bid peddling is the party that initiates the disclosure of the original low bid price. A general contractor will “shop” a low bid whereas a subcontractor will “peddle” its bid.

The Associated General Contractors of America (AGC) calls the practice of bid shopping “abhorrent” and proclaims that it is “resolutely opposed” to it.³ The American Subcontractors Association (ASA) views bid shopping (and its cousin bid peddling) with even more opprobrium than does the AGC, calling these practices not only “abhorrent” but also “*unethical*” and anticompetitive.⁴ Other contractor trade associations share such strident opposition (the AGC, ASA, and ASC have issued Joint Guidelines decrying the practice), and the courts that have opined on bid shopping tend to agree with the prevailing sentiment.

Perhaps nothing is more widely condemned in the construction industry than bid shopping. But, regardless of the stated consensus against bid shopping and bid peddling, the practices remain common.

And legal.

A 2008 survey of U.S. and Canadian construction

contractors found that 80 percent of respondents said they “know of others who have engaged in bid shopping or peddling,” with an amazing 32 percent admitting that “they have bid shopped or peddled themselves.”⁵ By all reports, bid shopping is increasingly prevalent in the current economic downturn as contractors scramble to try to obtain minimal profit out of bids with little or no markup, and subcontractors desperate for work agree to otherwise unacceptable terms.

This article discusses the problems posed by bid shopping and peddling; the various ways that legislatures, courts, and trade associations have struggled with the legal issues posed by the practices; and some of the more promising ways to reduce the frequency of the practices.

Background

For construction contractors it all starts with the bid.

Most projects large and small—public and private—require that the parties performing the work or supplying the materials prepare and submit a bid or quote that outlines their “offer” to perform a certain scope of work for a certain price. In theory, if the project or work is competitively bid and the owner or general contractor is soliciting prices from more than one bidder, the bids submitted by the various tiers of contractors represent their best prices (i.e., the lowest price at which the bidder believes it can win the job, perform the work, and still make a profit that will keep it in business).

Under traditional contract law, once a party accepts another’s offer a contract is formed, at least as to the material terms outlined in the accepted offer. But upon notice of award by an owner, the “winning” general contractor typically has not yet accepted any subcontract bids. It must then notify the subcontractors on whom it will rely to perform the subcontract work that it intends to award each a subcontract.

In the United States, a body of law has evolved to protect the legitimate interests of a bid recipient to hold the sub-bidders to their bids. That law is premised on principles of “promissory estoppel” and “detrimental reliance.”⁶ Promissory estoppel allows a party (the promisee) to legally enforce another’s promise (the promisor) if the promisee reasonably relied on the promise to the promisee’s detriment. In construction bidding, with some narrow exceptions, a subcontractor or supplier must honor its bid price offer once the general contractor has “reasonably relied” on that sub-bid to develop and submit its own winning bid.

How the Bid Process Works

In practice, the construction bid process generally works as follows.

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Owners publish construction plans and solicit bids from general contractors. General contractors, in turn, solicit or receive bids from subcontractors for subcontract work. The general contractor then reviews the subcontract bids and may use those bids to compute its total bid to the owner. Owners typically receive and review bids from competing general contractors and award the contract to the general contractor with the lowest responsive bid from a qualified bidder. What determines a “responsive” or “best” bid may vary according to the owner and applicable procurement regulations; but the one factor that always plays a role is the ultimate price of the bid—i.e., the “lowest” bid.

Because the general contractor submits a prime bid to the owner for *all* the project construction work, it necessarily must subcontract for work that it does not self-perform. As a result, when preparing and submitting a project bid, a general contractor may typically solicit, from a number of different subcontractors, sub-bids for such work. Thus the general contractor relies on the subcontractor’s bid when preparing its own bid by relying on the lowest responsive sub-bid it receives. Indeed, many contractors perform very little of the actual construction work themselves, and their bids are predominantly based on bids from subcontractors.

Promissory estoppel allows a party (the promisee) to legally enforce another’s promise (the promisor) if the promisee reasonably relied on the promise to the promisee’s detriment.

If the owner awards the project to the general contractor, and a subcontractor on whom the general contractor relied backs out of its bid, the general contractor is forced to retain a replacement subcontractor, that likely is more expensive than the original subcontractor. Hence, if the general contractor’s reliance on the subcontractor’s original bid was reasonable (for example, there were no obvious errors in the sub-bid; the sub-bid was not unusually low compared to the other such bids; etc.), and the general is compelled to obtain a more expensive replacement subcontractor, the general contractor has suffered a “detriment” sufficient to invoke promissory estoppel (or detrimental reliance, which is an element of promissory estoppel) and can enforce the subcontractor’s bid.⁷ The rationale for applying promissory estoppel or detrimental reliance in such bidding situations is that it would be unjust for a party that reasonably relies on another (here, the

general contractor) to be financially damaged if it could not then “hold” the bidding party (here, the withdrawing subcontractor) to its bid.

In the classic promissory estoppel case we all learned in law school, *Drennan v. Star Paving Co.*, the California Supreme Court upheld an award against a paving subcontractor that balked at honoring its bid, and explained:

When [general contractor] used [subcontractor]’s offer in computing his own bid, he bound himself to perform in reliance on [subcontractor]’s terms. Though [subcontractor] did not bargain for this use of its bid neither did [subcontractor] make it idly, indifferent to whether it would be used or not. On the contrary it is reasonable to suppose that [subcontractor] submitted its bid to obtain the subcontract. It was bound to realize the substantial possibility that its bid would be the lowest, and that it would be included by [general contractor] in his bid. It was to its own interest that the contractor be awarded the general contract; the lower the subcontract bid, the lower the general contractor’s bid was likely to be and the greater its chance of acceptance and hence the greater [subcontractor]’s chance of getting the paving subcontract. [Subcontractor] had reason not only to expect [general contractor] to rely on its bid but to want him to. Clearly [subcontractor] had a stake in [general contractor]’s reliance on its bid. Given this interest and the fact that [the general contractor] is bound by his own bid, it is only fair that [general contractor] should have at least an opportunity to accept [subcontractor]’s bid after the general contract has been awarded to him.⁸

But the principles of promissory estoppel do not generally run “upstream.” In other words, under promissory estoppel, although a general contractor may compel a subcontractor to honor its sub-bid, a subcontractor that promises the lowest bid may not typically compel the general contractor to accept it.

In *Home Electric Co. v. Hall & Underdown Heating & Air Conditioning Co.*, for example, the North Carolina Court of Appeals noted the potential injustice of applying promissory estoppel to construction bidding because the doctrine “forces the subcontractor to be bound if the general contractor uses his bid, *even though the general contractor is not obligated to award the job to that subcontractor.*”⁹ But that potentially unjust result is common, and many jurisdictions have held that a general contractor’s use of a sub-bid is not an “acceptance” that creates a contractual relationship between the general contractor and subcontractor if the general contractor is the successful bidder.¹⁰

The reason for this disparity arises from contract law: in the typical bidding situation the subcontractor must wait for the general contractor to accept its offer (the bid). According to the *Restatement (Second) of Contracts*, acceptance of an offer requires a “manifestation of assent to

the terms thereof made by the offeree in a manner invited or required by the offer.”¹¹ Because construction contracts contain mutual promises, there generally cannot be an acceptance until there is a “return promise” by the offeree.¹² When these legal principles are put in the typical construction bidding context, the result is that a general contractor has no contract to award unless and until it knows that *its* offer has been accepted by the owner, and thus typically the general contractor has not made any “return promise” of a contract to the bidder. These theoretical considerations create real-world problems for subcontractors.

The Role of Promissory Estoppel in Facilitating Bid Shopping

Though principles of promissory estoppel and detrimental reliance undoubtedly have their place, and solid reasoning behind them, in construction bidding contexts, their protections to a bid recipient have a dark side: their generally one-sided application creates opportunities to engage in bid shopping and peddling. A general contractor that is awarded a project now has the (a) incentive, (b) time, and (c) dominant bargaining power to see if it can improve its profit margin by obtaining a sub-bid price (whether on its own or by responding favorably to a peddler) after it has been awarded the general contract.

The incentive exists because the owner has accepted the general contractor’s price, which was based on a series of prices, including those provided to the general contractor by the low-bid subcontractors. Because most large construction projects require performance of a wide variety of specialty trade work (e.g., site demolition, HVAC work, and carpeting), the opportunities to bid shop and peddle abound. After award, if a general contractor can obtain a lower bid for such subcontract work, the difference in the cost is pure profit that need not be shared with the owner. The time to shop for or peddle lower bids is the reasonable time after the award from the owner that the law grants the general contractor to accept subcontractor bids. As a result, less than honorable general contractors and subcontractors have a “reasonable” amount of time after the award of the general contract to shop or peddle a bid before the original low sub-bid can be said to expire.

And finally, a general contractor’s unequal bargaining power arises from essentially three factors: First, the general contractor has won the award using the subcontractor’s bid so it can compel the subcontractor to perform at that bid price. Second, the winning general contractor has no corresponding legal obligation to “accept” that offer and retain the original low bidder. And third, now that the general contractor has the award, it can pressure subcontractors to trim their bids, so the general contractor can pocket the discount as a windfall.

The Pernicious Effects of Bid Shopping and Peddling

Bid shopping is widely condemned as having a number of detrimental results, including:

- defeating the purpose of the competitive bid system;

- promoting lower-quality work;
- incentivizing corner-cutting;
- increasing claims and change orders;
- delaying project completion; and
- generally worsening the business environment.¹³

The case *Conduit & Foundation Corp. v. Philadelphia* provides a good judicial analysis of why the integrity of the bid process is undermined by bid shopping.¹⁴ In that case, the City of Philadelphia had requested bids for work at a storm water pumping station. The city’s bid form, governed by procurement regulations, required the bidding general contractor to list the supplier of any equipment and material it intended to use for the work. With the exception of one bidder, all the bidders for the work listed only one supplier (and make and model of the equipment). One bidder, however, listed two alternative suppliers for required pumps and motors. That bidder was the low bidder.

When bids were opened, the city requested the low bidder to designate the supplier that it intended to use. Though the low bidder complied relatively quickly (first verbally and then in writing two days later), the second low bidder sought to enjoin the city from awarding the contract to the low bidder. The city and the low bidder objected, arguing that the multiple listings did not violate applicable bidding requirements or, if they did, that they were a “mere informality” that the city could waive. In response, the second low bidder argued that the multiple listing violated the integrity and competitiveness of the bid process. The second low bidder further urged the court to prohibit the city from awarding the contract to the low bidder because it unfairly allowed it to pit its two listed suppliers against each other and thus bid shop after award. The trial court agreed, and permanently enjoined the city from awarding to anyone except the second low bidder.

The city and the low bidder appealed to the Commonwealth Court of Pennsylvania. Though that court stated that there was “no evidence” that the low bidder had engaged in bid shopping, it upheld the injunction, explaining that allowing a bidder to list multiple suppliers would create a lasting problem contrary to the intent and purpose of the applicable procurement regulations (i.e., that allowing such multiple listings would promote bid shopping).

The court wrote that “where only one bidder, the lowest, has been left the potential to reap the benefits of bid-shopping, then it cannot be said that all the bidders competed on a fair and open basis,” adding:

It is clear that the statutory requirements for competitive bidding, and the ordinances enacted thereunder, do not exist solely to secure work or supplies at the lowest possible price, but also have the “purpose of inviting competition, to guard against favoritism, improvidence, extravagance, fraud and corruption in the awarding of municipal contracts . . . and are enacted . . . not for the benefits or enrichment of bidders.”¹⁵

These observations of the Commonwealth Court of Pennsylvania on the evils of bid shopping and peddling are shared by other courts.¹⁶

As noted above, major trade associations, including those that represent general contractors, also decry the practice and its harmful effects. For example, the Associated General Contractors posts the following statement on its website:

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. AGC strongly believes that bid shopping and bid peddling cannot sustain long-term working relationships between prime and subcontractors.¹⁷

Courts and trade associations alike condemn the practice for degrading the business environment. The American Subcontractors Association argued such in an amicus curiae brief filed in a 2009 Maryland case called *Questar Builders, Inc. v. CB Flooring, LLC*,¹⁸ which considered the propriety of a termination of a subcontractor *after* it had signed its subcontract but before starting work. The general contractor argued that its termination for convenience clause allowed it to terminate after finding a replacement subcontractor willing to do the work for a lower price (the replacement subcontractor had been the second low bidder for the original bid). In its amicus brief in support of the aggrieved subcontractor, ASA noted that subcontractors incur substantial costs well before any labor or materials are furnished to the job site. Many of those costs are incurred in preparing the bid, such as costs of extensive review of plans and specifications by employees, detailed preparation of internal estimates, and submission of the bid. ASA noted that to do all this, full-time estimators and support staff are needed, and reproduction and document delivery costs are incurred, along with other home office overhead expenses. Only the successful low bidder will recover these costs, and even then, under most contracts, it is only once the visible on-site work commences that any of these up-front costs will finally be recovered through the first pay application. The appellate court remanded the case for further fact-finding, including whether the general contractor exercised "its right to terminate for convenience in bad faith, or, stated otherwise, by not exercising its discretion to terminate in accordance with the implied obligation of good faith and fair dealing."¹⁹

As the Court of Common Pleas of Cuyahoga County, Ohio, noted in *Sheet Metal Employers' Ass'n v. Giordano*, "[m]any 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. The temptation of the [ultimate subcontractor] to do inferior work and to cheat is strong."²⁰

Bid shopping almost necessarily forces subcontractors into postaward negotiations. A subcontractor that is approached by a general contractor with a competitor's lower bid naturally assumes that it won't get the job unless it reduces its price. It now knows that it stands to lose the subcontract and the recovery of its initial costs, so there is strong incentive for it to reduce its bid and cut corners, to avoid losing the subcontract.²¹ The subcontractor also may believe that if it gets the work and the job goes smoothly, it will have established a favorable relationship with the general contractor that will lead to more profitable work in the future.

Particularly in times when business is slow, many subcontractors are willing to do work for less or even *no* profit, if it means they can keep crews busy and cover their overhead costs. Subcontractors that initially "sharpened the pencil" on their original bid, and are asked to trim even more, are thus forced to look for other ways to reduce their costs. The net result is that a subcontractor may rely on poor-quality methods and materials, or less-skilled labor, to save money. Kept in the dark, the unwitting owner may end up paying for poor- or lower-quality workmanship without any corresponding cost savings.²² The subcontractor may encounter this process repeatedly, job after job, until finally the lack of profit drives it to bankruptcy.²³

Another negative consequence of bid shopping and peddling is that the practices interfere with how the free market fairly sets prices. This may occur where a subcontractor artificially inflates its bid to compensate for expected bid shopping or peddling.²⁴ Inflating a bid in this fashion enables subcontractors to make further reductions if postaward "negotiations" are commenced.²⁵ Once again, the owner is harmed because its costs will have been artificially inflated. Any deflation of a subcontractor's price inures solely to the benefit of the bid-shopping general contractor, not to the owner or taxpayer footing the bill for the project. The general business environment is again poisoned.

Another way bid shopping interferes with the free setting of competitive prices is to discourage otherwise interested subcontractors from even spending the time and resources to prepare and submit competitive bids. This reduces overall competition, with the potential effect of increasing construction prices. This benefits only the general contractor, to the detriment of both the subcontractor and the owner.²⁶ On public projects that must comply with elaborate bid procurement procedures developed over the course of many years, bid shopping undermines the public trust those regulations are intended to achieve.

Are There Benefits to Bid Shopping?

Yet clearly someone benefits from bid shopping; if not, the practice wouldn't exist.

Few persons are likely to go on record openly supporting bid shopping. However, if there is a justification, it would likely be that it *promotes* (rather than inhibits) free market competition. In other words, bid shopping and its variants *increase* competition in the same way that one

shops for a car—by playing one dealer against another. Viewed in a vacuum, the primary benefit is that when subcontractors “sharpen their pencils” by reducing their bid price, the cost of *their* work is reduced to the general contractor (though not to the owner or subcontractor). As one confidential respondent to the bid-shopping survey referenced above stated:

I leverage one supplier against another. Who hasn't gone to a car dealer and said there is a better deal down the street? Should we be surprised if a G.C. accepts a lower price after a tender closes? This is free money to the [general contractor] and anyone who doesn't think it will happen is naïve.²⁷

But any benefits of a lower price that occur when a general contractor accepts a lower price *after* award are benefits that accrue *solely* to the general contractor. Offsetting that benefit to the general contractor alone are all of widely recognized detriments of bid shopping and peddling, including distortions of the open market, reductions in construction quality, and harmful effects on subcontractors that lose work or are put on a path to financial distress, even bankruptcy.

Some owners have turned to “reverse-auctions” so that they, too, stand to benefit from lower prices that general contractors may obtain when they bid shop. In a reverse auction the owner invites multiple contractors or vendors to bid on work. Bidders can see what the others are bidding (though the identity of the individual bidders is not typically disclosed) and can trim their prices until the close of bidding.²⁸ Reverse auctions generate considerable controversy. The construction contractor community tends to view them as nothing more than an owner-favored variant of bid shopping. Even trade groups that traditionally align with owner's interests, like the Construction Management Association of America (CMAA), have issued statements opposing reverse auctions for the procurement of construction services.²⁹

Current Solutions Designed to Frustrate Bid Shopping

Due to the negative consequences of bid shopping, a number of state legislatures have attempted to control postaward bid shopping.

Bid Listing Statutes

A handful of states have successfully enacted “bid listing” legislation requiring a general contractor to supply a list of the subcontractors that it intends to use for subcontract work when bidding on public construction contracts.³⁰

Bid listing statutes seek to eliminate postaward bid shopping by allowing the awarding authority to hold (or “force”) the general contractor to use the subcontractors listed on its bid, unless valid statutory grounds for substitution exist. The overwhelming majority of courts that have interpreted bid listing statutes—whether state or local versions—have upheld and enforced the statutes in order to protect both the

public and subcontractors from bid shopping.³¹

Courts also have held that these bid listing statutes confer the right on the listed subcontractor to perform the contract unless statutory grounds for valid substitution apply. In *Southern California Acoustics Co., Inc. v. C.V. Holder, Inc.*, the Supreme Court of California interpreted its then-current bid listing statute as—subject to only a narrow exception—entitling the listed subcontractor to compel the general contractor to award it the subcontract.³² The court explained that, “[s]ince the purpose of the statute is to protect both the public and subcontractors from the evils of . . . bid shopping (Gov. Code, §§ 4100, 4101) we hold that it *confers the right on the listed subcontractor to perform the subcontract* unless statutory grounds for a valid substitution exist. Moreover, that right may be enforced by an action for damages against the prime contractor to recover the benefit of the bargain the listed subcontractor would have realized had he not wrongfully been deprived of the subcontract.”³³

A minority of courts, however, have not been so willing to broadly interpret the protections afforded by the applicable bid listing statutes. In *Finney Co., Inc. v. Monarch Construction Co., Inc.*, for example, the Supreme Court of Kentucky found that under Kentucky law the mere act of listing a subcontractor did not constitute the general contractor's “acceptance” of an offer, if the general contractor was awarded the prime contract.³⁴

Bid Depositories

The result of one of the first attempts to mitigate the effect of bid shopping was the creation of “bid depositories.”³⁵ Usually created and operated by subcontractor trade associations, bid depositories collect subcontract bids for a short time prior to the date set by the general contractor to open bids.³⁶ The subcontract bids are kept closed and confidential until opened by the general contractor.

Under the rules of most such depositories, subcontractors generally submit their bids by a set date, and it is only after that date when bids are allowed to be opened. This eliminates haggling and discourages the common practice of submitting a bid at the last minute to reduce the chance of it being shopped before the general contractor's bid is submitted. In advance, participating general contractors and subcontractors agree that after opening, the general contractor may not solicit further sub-bids.³⁷ While bid depositories may control bid shopping, they have antitrust implications.³⁸ Under the broad sanction of the Sherman Act, bid depositories may impermissibly constrain bidding.³⁹

Although bid depositories are intended to eliminate some unfair bidding practices, courts have nonetheless held that certain depositories violate antitrust laws through price fixing, group boycotting, and restraint on the freedom of competition.⁴⁰

Unfair Trade Practices

Bid shopping also may violate unfair trade practices laws. In *Johnson Electric Co., Inc. v. Salce Contracting*

Associates, Inc.,⁴¹ for example, the Appellate Court of Connecticut found that a general contractor's bid shopping gave a subcontractor standing to bring a claim under the Connecticut Unfair Trade Practices Act (CUPTA). Like many Unfair Trade Practices Acts, CUPTA provides a remedy for any person who has sustained an ascertainable loss as a result of immoral, unethical, oppressive, or unscrupulous conduct.⁴² In that case, the general contractor had engaged in postaward bid shopping among non-listed subcontractors. Finding that it was industry practice that the listed subcontractors receive the work, the court held that the general contractor's bid shopping was unethical, unfair, and inconsistent with normal industry practice.⁴³

Major trade associations, including those that represent general contractors, also decry the practice and its harmful effects.

Industry and Trade Associations

Industry groups like ASA, AGC, and ASC have all taken a leading role—to varying degrees—in decrying bid shopping and peddling, and reverse auctions.

Proposed Legislation

On July 31, 2009, Congress introduced a proposed bill called the Construction Quality Assurance Act of 2009 (Act or H.R. 3492). The goal of the Act, which as of this writing is still pending before the House Oversight and Government Reform Committee, is “to ensure that bid shopping is eliminated from the federal construction contracting process.”⁴⁴ On federal projects worth over \$1 million, the Act would require contractors to list all subcontractors performing subcontract work for more than \$100,000, thus establishing an enforceable federal bid listing to discourage bid shopping and bid peddling. For more than a decade, similar legislative efforts in Congress have failed.

Subcontractor trade associations, like ASA, have strongly supported the Act, while other trade associations, particularly those supporting general contractors' interests, have remained neutral or have actively opposed it. AGC, for example, has reaffirmed its opposition to bid shopping and peddling but opposes the Act, claiming it to be “unnecessary” because there is “no evidence . . . that the practice [of bid shopping] is widespread.”⁴⁵ Specifically, the AGC objects to the Act's mandatory bid listing, stating that it “undermines the government's attempts to streamline procurement, removes the flexibility of the prime contractor to manage projects, and does not improve the quality or decrease the cost of construction projects.”⁴⁶

Judicial Responses

As discussed above, while courts have readily identified the many problems with bid shopping, they have struggled with finding solutions to restrict or ameliorate the consequences of the practice. Courts that have considered bid shopping have rarely addressed it directly.

One court that took the issue head-on is the Ohio 10th District Court of Appeals, which in 2009 found that a general contractor that bid shops releases subcontractors from a mistaken bid or inequitable subcontract language. In *Complete General Construction Co. v. Kard Welding, Inc.*, a subcontractor submitted a written structural steel quote to the contractor on an Ohio Department of Transportation project.⁴⁷ The subcontractor expressly conditioned its bid on the use of its standard terms and conditions. After award, however, the general contractor sent the subcontractor the general contractor's own purchase order to execute. The parties engaged in negotiations over the terms and conditions applicable to their agreement. Negotiations stalled over particular disputes relating to two primary issues: (1) payment terms and (2) which party bore the risk of a professional engineer's review of the subcontractor shop drawings.⁴⁸ When the general contractor held firm, the subcontractor prepared a new bid that increased its price to cover the additional risk of the terms the general contractor was attempting to impose and to correct a mistake in its original bid.⁴⁹ The general contractor then promptly retained a different subcontractor and sued the original subcontractor to recover the “excess costs” it incurred above the amount of the original quote.

At trial, the subcontractor noted that after the prime contract award, the general contractor had continued to “negotiate” bids submitted by other structural steel subcontractors in the hope that those subcontractors would reduce their bids. The evidence at trial showed that this activity was the contractor's customary practice. The court found that the general contractor had engaged in “bid shopping,” which it (quoting *Black's Law Dictionary*) defined 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.”⁵⁰

The court then held that the general contractor's decision to bid shop was a rejection of the subcontractor's low bid and constituted a counteroffer. The court quoted the *Restatement (Second) of Contracts* to note that under traditional contracts law, a “reply to an offer which purports to accept but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counteroffer.”⁵¹ Consequently, the court held that the general contractor's request for contract terms at odds with the express condition of the bid and its subsequent bid shopping negated its claimed reliance on the bid of the low subcontractor. Promissory estoppel was thus unavailable to the general contractor, that could therefore not compel the subcontractor to its

bid. The court added that the general contractor also was obligated to timely accept the subcontractor's offer because delaying in hope of obtaining a better price would similarly release the low bid subcontractor from its bid.⁵²

This is consistent with the reasoning employed by a court of appeals, which has noted that while a general contractor is not required to accept a subcontractor's bid, it must "act promptly in exercising his 'opportunity to accept [the subcontractor's] bid after the general contract has been awarded to him.'"⁵³ The court of appeals quoted the Supreme Court of California's finding that once a sub-bid becomes irrevocable because of a general contractor's reliance upon it, the "general contractor is *not* free to delay acceptance [of the subcontractor's bid] after he has been awarded the general contract in the hope of getting a better price. Nor can he reopen bargaining with the subcontractor and at the same time claim a continuing right to accept the original offer."⁵⁴

Another decision, out of the U.S. Court of Appeals for the Ninth Circuit, illustrates that there are situations where subcontractors may be able to use promissory estoppel to force a general contractor to award them a subcontract. In *Electrical Construction & Maintenance Company v. Maeda Pacific Corporation*, the government of Guam awarded Maeda Pacific Corporation (the General Contractor) a contract to expand and modernize various port facilities.⁵⁵

The General Contractor solicited a bid for the electrical work from, among others, the Electrical Construction and Maintenance Company (ECM).⁵⁶ ECM, however, initially refused to prepare a proposal, telling the General Contractor that it was not willing to go through that cost and expense unless the General Contractor agreed it would award ECM the subcontract if ECM was the low bidder and the General Contractor was awarded the project. ECM testified that the General Contractor orally agreed to this condition, though the General Contractor disputed that it made any such promise.⁵⁷

Although ECM was the low bidder, the General Contractor (for reasons that are unclear) retained a different electrical subcontractor. ECM sued the General Contractor for breach of contract and asserted promissory estoppel as a theory to recover damages. The trial court dismissed the complaint, granting summary judgment to the General Contractor. The Appellate Division of the District Court of Guam affirmed. However, both courts were reversed by the U.S. Court of Appeals for the Ninth Circuit, which remanded the case with instructions that the subcontractor be allowed to pursue a claim for breach of contract and promissory estoppel.⁵⁸

In reaching its conclusion, the Ninth Circuit noted that ECM had alleged that it only undertook the cost and expense to prepare a bid after receiving the General Contractor's promise that it would award ECM the subcontract if it was the low bidder.⁵⁹ The Ninth Circuit explained:

While this is an issue of first impression, we believe

that where a subcontractor allegedly agreed to bid only after receiving the general contractor's promise to accept the bid if it were the low bid and if the general contractor were awarded the prime contract, *there is consideration for the general contractor's promise*. The consideration . . . was ECM's submission of a bid—an act for which [the General Contractor] bargained that ECM was not under a legal duty to perform.⁶⁰

These judicial holdings, and the legal reasoning unpinning the decisions, should serve as a warning to general contractors that may be inclined to shop a bid. Even absent curative legislation, these decisions show that courts are increasingly prepared to release subcontractors from their bids if general contractors engage in bid shopping.

Suggested Solutions

Though courts and legislatures have struggled with ways to reduce or discourage bid shopping and peddling, there are a number of tools that contractors, subcontractors, and their counsel may use to better manage the process and protect themselves.

- The legal reasoning given by the Ohio 10th District Court of Appeals in the *Complete General* case discussed above provides persuasive authority for courts in other states. Under traditional concepts of offer and acceptance, if a general contractor discloses a low subcontractor bid, requests a price reduction, insists on terms that contradict terms in a conditioned bid, or bid shops, it rejects the subcontractor's bid and loses any promissory estoppel protection to compel the subcontractor to its bid.

- To insulate themselves from bid shopping, subcontractors must thoroughly educate themselves about the effects of bid shopping and peddling. Although subcontractors may be under competitive pressures to lower a bid, they must be prepared to stop this unethical practice; otherwise the practice will continue.

- A bidder is in control of its own offer. A bidder is free to condition acceptance on its confidentiality, its prompt acceptance, or both. These conditions can significantly reduce bid shopping and give a subcontractor stronger immediate bargaining position with the general contractor and eventual legal arguments if litigation ensues. More specifically, subcontractors can apply some self-help by shortening the "life" of their bids. For example, where standard practice may be to hold a bid out for "30 days" from submission, this could be revised to provide that the bid is valid for "the earlier to occur of: (a) 30 days from the date of the bid; or (b) one business day after opening of the general contractor's bid and notification of the Award of the general contract."

- Another provision could clarify that the bid "is submitted and must be kept confidential except for disclosures required by law. Failure to keep that confidentiality, through disclosure of the attached bid or its material terms, will operate as general contractor's rejection of the

bid, and immediately release subcontractor from any obligations it may otherwise have.” Especially vigilant subcontractors may want to add that such disclosure, after reliance on the bid in preparing a general contractor’s bid, “entitles the subcontractor to recover as liquidated damages and not as a penalty a sum equal to two percent of the bid price.”


• Another step is adding a condition to a subcontractor’s bid (like the electrical subcontractor in the *Maeda Pacific* case discussed above) to create a presumption of acceptance by the general. Such a condition might be phrased as follows: “The general contractor irrevocably accepts in full the subcontractor’s bid if (1) the general contractor uses or relies on the subcontractor’s bid by incorporating any part of it into a bid to the owner and (2) the owner notifies the general contractor of the owner’s intent to award, or notifies the general contractor of the award.”

• Owners, like subcontractors, do not gain from bid shopping. Owners control the bidding process and therefore could insist that bidding general contractors provide with their bids a list of names of major subcontractors (those providing over a certain dollar amount or percentage of the work on each job), with language that precludes substitution of such subcontractors without good cause or prior approval from the owner. One such possibility would be to require sealed prebid price quotes from the subcontractors before the general contractors submit their bids.⁶¹

• Owners also could require that general contractors use standard subcontract agreements from a recognized industry family of documents (like the ConsensusDOCS or AIA form agreements) and prepare or use bid forms that require advance identification of intended subcontractors for each project. Such simple, and fair, steps could greatly reduce the temptation of a general contractor to change subcontractors after bid opening.⁶²

Discouraging Bid Shopping

As the construction industry becomes more specialized, competition among trade subcontractors will grow, particularly in a tight economy with few new projects. Left to itself, such competition would otherwise serve to keep construction costs down and have the work satisfactorily performed at the lowest possible price.

These market self-regulators are compromised through bid shopping and peddling. As discussed above, these practices have detrimental effects, unfairly pushing down subcontractor pricing, risking quality, and providing no savings to the owner. Although bid shopping is unlikely to disappear, legislation, recent court rulings, and self-help by owners and subcontractors in their bid and contract language can go a long way to discourage the practice and mitigate these adverse consequences. 

Endnotes

1. Valley Crest Landscape, Inc. v. City Council, 41 Cal. App. 4th 1432, 49 Cal. Rptr. 2d 184 (1996). See also Arnco Constr., Inc. v. Douglas E. Barnhart, Inc., 2006 Cal. App. Unpub.

LEXIS 7100, at *12 n.5 (Cal. Ct. App. 2006).

2. Am. Subcontractors Ass’n, *Bid Listing on Federal Construction Contracts* (Sept. 2009), www.asaonline.com/pdfs/Bid%20Listing%2009-09-01.pdf (emphasis added) [hereinafter *Bid Listing*].

3. See Associated Gen. Contractors of Am., Legislative Activity: Bid-Shopping, www.agc.org/cs/advocacy/legislative_activity/bidshopping [hereinafter Bid-Shopping].

4. See *Bid Listing*, *supra* note 2.

5. See Mark Buckshon, *Bid Shopping and Peddling: The Construction Industry’s Ethical Challenge*, www.constructionnrgroup.com/documents/Bid%20Shopping%20Survey.pdf.

6. Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757, 760 (1958).

7. *E.g.*, *id.*

8. *Id.*

9. 86 N.C. App. 540, 358 S.E.2d 539, 1987 N.C. App. LEXIS 2747 (1987) (emphasis added).

10. See, *e.g.*, Neshaminy Constructors, Inc. v. Concrete Bldg. Sys., 2007 U.S. Dist. LEXIS 69197, at *38 (E.D. Pa. Sept. 18, 2007) (“The fact that a general contractor informs a subcontractor that it was the lowest bidder does not create a binding contract between the parties.”); *Electro-Lab of Aiken, Inc. v. Sharp Constr. Co. of Sumter, Inc.*, 357 S.C. 363, 369, 593 S.E.2d 170 (S.C. Ct. App. 2004) (“a general contractor’s mere use of a subcontractor’s bid in a general contractor’s successful overall bid does not constitute acceptance of an offer”); *Finney Co. v. Monarch Constr. Co.*, 670 S.W.2d 857, 860 (Ky. 1984) (“No contractual relationship is created between the subcontractor and the general contractor even though the bid is used as a part of the general over-all bid by the general contractor and accepted by the awarding authority.”); *Merritt-Chapman & Scott Corp. v. Gunderson Bros. Eng’g Corp.*, 305 F.2d 659, 662–63 (9th Cir. 1962) (“it is clear that in Washington use of a bid by a prime contractor is not the legal equivalent of acceptance” and thus imposes no obligation on the general contractor to accept the subcontractor’s bid), *cert. denied*, 371 U.S. 935, 9 L. Ed. 2d 271, 83 S. Ct. 307 (1962); *Mitchell v. Siqueiros*, 582 P.2d 1074, 1077 (Idaho 1978); *K.L. House Constr. Co. v. Watson*, 508 P.2d 592, 593 (N.M. 1973); *Corbin-Dykes Elec. Co. v. Burr*, 500 P.2d 632, 634 (Ariz. Ct. App. 1972); *Neptune Gunitite Co. v. Monroe Enters., Inc.*, 40 Cal. Rptr. 367, 371 (Cal. Dist. Ct. App. 1964); *Milone & Tucci, Inc. v. Bona Fide Builders, Inc.*, 301 P.2d 759, 763 (Wash. 1956); *Williams v. Favret*, 161 F.2d 822, 824 (5th Cir. 1947).

11. RESTATEMENT (SECOND) OF CONTRACTS § 50 (1981).

12. See *id.* § 50 cmt. c.

13. See Eric Degn & Kevin R. Miller, *Bid Shopping*, J. CONSTR. EDUC., Spring 2003, at 47–55.

14. 41 Pa. Cmwlth. 641, 401 A.2d 376, 380 (Pa. Commw. Ct. 1979).

15. *Id.* at 646–47 (quoting *Yohe v. Lower Burrell*, 418 Pa. 23, 28, 208 A.2d 847, 850 (1965)).

16. See, *e.g.*, *Constructors Supply Co. v. Bostrom Sheet Metal Works, Inc.*, 190 N.W.2d 71, 76 (Minn. 1971) (expressing disapproval of bid shopping); *Pavel Enters., Inc. v. A.S. Johnson Co., Inc.*, 674 A.2d 521, 528 (Md. 1996) (explaining the problems bid shopping creates to the detriment of the subcontractors); *Valley Crest Landscape, Inc. v. City Council*, 41 Cal. App. 4th 1432, 49 Cal. Rptr. 2d 184, 188 (1996) (finding that bid shopping results in poor quality of materials and workmanship, deprives the public of the benefits of fair competition, and leads to insolvencies, loss of wages, and other harms).

17. See Bid-Shopping, *supra* note 3.

18. 410 Md. 241, 978 A.2d 651, 2009 Md. LEXIS 627 (2009). Eric B. Travers wrote the ASA’s amicus brief on this case.

19. *Id.*, 978 A.2d at 676.

(Continued on page 47)

ETHICAL CHALLENGES

(Continued from page 36)

20. 188 N.E.2d 329, 330 (Ohio Com. Pl. 1963).
21. See, e.g., Thomas P. Lambert, Comment, *Bid Shopping and Peddling in the Subcontract Construction Industry*, 18 U.C.L.A. L. REV. 389, 394-96 (1970).
22. *Id.* at 396 n.30.
23. See Cody Andreasen, Mark O. Lords & Kevin R. Miller, *Contrasting Bid Shopping and Project Buyout*, PROCEEDINGS OF THE 45TH ANNUAL ASC CONFERENCE (2009).
24. See Constructors Supply Co. v. Bostrom Sheet Metal Works, Inc., 190 N.W.2d 71, 76 (Minn. 1971) (where a subcontractor argued that bid shopping was such a common practice that subcontractors did not expect to be bound by their original bids).
25. See discussion at Lambert, *supra* note 21, at 394-96; see also Cullem Elec. & Mech., Inc. v. Mech. Contractors Ass'n of South Carolina, 436 F. Supp. 418, 427 (D.S.C.1976).
26. See Lambert, *supra* note 21, at 396-97.
27. See *Bid Listing*, *supra* note 2.
28. See Amy Florence Fischbach, *Bidders Beware: The Ins and Outs of Reverse Auction*, ELEC. CONSTR. & MAINT. MAG., Feb. 1, 2005.
29. See CMAA, Reverse Auctions Statement, http://cmaanet.org/reverse_auction.php.
30. See, e.g., CAL. PUB. CONT. CODE §§ 4100 to 4114; CONN. GEN. STAT. § 4B-95(b)(c); FLA. STAT. § 255.0515; HAW. REV. STAT. § 103D-302 (Supp. 1999); NEV. REV. STAT. § 388.141; N.J. STAT. ANN. §§ 52:32-2, 52:18A to 52:78.11, 52:32-2.3 et al.; N.C. GEN. STAT. ANN. § 143-128; R.I. GEN. LAWS §§ 37-13-3, 37-2-26; S.C. CODE § 11-35-3020(2); TENN. CODE § 62-6-119(b); UTAH CODE § 63A-5-208(3); WASH. REV. CODE ANN. § 39.30.060(1).
31. See C.R. Kirby Contractors, Inc. v. City of Lake Charles, 606 So. 2d 952 (La. Ct. App. 1992) (enforcing municipal listing requirements); Dynacon, Inc. v. D&S Contracting Inc., 899 P.2d 613 (N.M. Ct. App. 1995) (enforcing New Mexico's listing requirements); E.M. Watkins & Co., Inc. v. Bd. of Regents and Winchester Constr. & Eng'g, 414 So. 2d 583 (Fla. Dist. Ct. App. 1982) (enforcing Florida's listing requirements); George & Lynch, Inc. v. Div. of Parks & Recreation, 465 A.2d 345 (Del. 1983) (enforcing Delaware's listing requirements); Nelson & Sons, Inc. v. County of Fresno, 2007 U.S. Dist. LEXIS 38047 (D. Cal. 2007) (upholding California's bidding requirements under equal protection challenge, finding that it was rationally related to the legitimate governmental interest of promoting long-term lower contract prices); O'Shea v. New Jersey Schools Constr. Corp., 908 A.2d 237 (N.J. Super. Ct. App. Div. 2006) (enforcing New Jersey's listing and substitution requirements); Ray Bell Constr. Co. v. School Dist. of Greenville County, 331 S.C. 19 (S.C. 1998) (enforcing South Carolina's listing requirements and holding that a contractor's listing of multiple "alternative" subcontractors was a material violation of the bidding requirements and not waivable by the awarding authority); Romeo Excavation & Trucking, Inc. v. Bradley Constr., Inc., 913 P.2d 659 (N.M. 1996) (holding that New Mexico's listing requirements did not permit a general contractor to substitute itself for a listed subcontractor after successfully being awarded the contract).
32. 456 P.2d 975 (Cal. 1969).
33. *Id.* at 981 (emphasis added); see also Golden State Boring & Pipe Jacking, Inc. v. Orange County Water Dist., 49 Cal. Rptr. 3d 447 (Cal. Ct. App. 2006); Valley Crest Landscape, Inc. v. City Council, 41 Cal. App. 4th 1432, 49 Cal. Rptr. 2d 184 (1996).
34. 670 S.W.2d 857 (Ky. 1984); see also Hoel-Steffen Constr. Co. v. United States, 684 F.2d 843 (Ct. Cl. 1982) (bid-listing requirement affords subcontractors limited protection); McCandlish Elec., Inc. v. Will Constr. Co., Inc., 25 P.3d 1057 (Wash. Ct. App. 2001) (holding that the Washington state subcontractor bid-listing statute neither expressly nor impliedly gives subcontractors a legal cause of action against the general contractor); see also Holman Erection Co. v. Madsen & Sons, Inc., 330 N.W.2d 693 (Minn. 1983); Mitchell v. Siqueiros, 582 P.2d 1074 (Idaho 1978); Klose v. Sequoia Union High Sch. Dist., 258 P.2d 515, 517 (Cal. Dist. App. Ct. 1953) ("A subcontractor bidder merely makes an offer that is converted into a contract by a regularly communicated acceptance conveyed to him by the general contractor.").
35. See George H. Schueller, *Bid Depositories*, 58 MICH. L. REV. 497 (1960).
36. See Lambert, *supra* note 21, at 398-99.
37. See generally, Schueller, *supra* note 35, at 498-99.
38. Lambert, *supra* note 21, at 398-99; see also 1 PHILIP L. BRUNER & PATRICK J. O'CONNOR JR., BRUNER & O'CONNOR ON CONSTRUCTION LAW § 2:110 (2002).
39. Lambert, *supra* note 21, at 399.
40. See, e.g., Christiansen v. Mech. Contractors Bid Depository, 230 F. Supp. 186 (D. Utah 1964) (finding that depository's rules unreasonably restricted competition to an unreasonable degree and in an unreasonable manner); Oakland-Alameda County Builders' Exchange v. F.P. Lathrop Constr. Co., 482 P.2d 226 (Cal. 1971) (holding that rules of a builders' exchange bid depository promoted price tampering and group boycotts, and thus were per se violations of antitrust law).
41. 805 A.2d 735 (Conn. App. Ct. 2002).
42. *Id.* at 737.
43. *Id.*
44. See "Dear Colleague" letter from sponsors Rep. Kanjorski and Rep. Carolyn Maloney, urging members of Congress to support H.R. 3492 (Sept. 22, 2009).
45. See *Bid-Shopping*, *supra* note 3.
46. *Id.*
47. No. 2009-Ohio-1861, 2009 Ohio App. LEXIS 1579 (Ohio App. 10th Dist.).
48. *Id.* ¶ 7.
49. *Id.* ¶ 8.
50. *Id.* ¶ 30 (quoting BLACK'S LAW DICTIONARY (8th ed. 2004)).
51. *Id.* ¶ 36 (quoting RESTATEMENT (SECOND) OF CONTRACTS (1981), Formation of Contracts—Mutual Assent, § 59).
52. *Id.* ¶ 37, 2009 Ohio App. LEXIS 1579, at *28-30.
53. Saliba-Kringlen Corp. v. Allen Eng'g Co., 15 Cal. App. 3d 95, 106, 92 Cal. Rptr. 799 (Cal. App. 2d Dist. 1971).
54. *Id.* at 106 (emphasis added) (quoting Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958)).
55. See 764 F.2d 619, 620 (9th Cir. 1985).
56. *Id.*
57. *Id.*
58. *Id.* at 623.
59. *Id.* at 621.
60. *Id.* (emphasis added). See also AROK Constr. Co. v. Indian Constr. Servs. 174 Ariz. 291, 293, 848 P.2d 870, 872 (App. Div. 1993) (subcontractor's asserted decision to lower bid in reliance on contractor's promise to award subcontractor job raised triable issue of fact as to enforceability of contractor's promise).
61. See, e.g., Lattimer & Son Constr. Co, Inc. v. Township of Monroe Utilities Auth., 850 A.2d 601, 606 (N.J. 2004).
62. See, e.g., Degn & Miller, *supra* note 13, at 54.