

the subcontract insurance requirements to its insurance brokers so that the broker can cause the proper endorsements to issue.

“Disarming A Dozen Dangerous Subcontract Clauses — Part 2” will appear in the April 2015 edition of *The Contractor’s Compass*, covering negotiation tips for clauses on warranties, builder’s risk insurance, consequential damages, pay-if-paid, retention, and schedule cooperation.

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## Can Anything Be Done About Bid Shopping?

by Donald Gregory, Esq.

“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.

The Associated General Contractors of America calls the practice of bid shopping “abhorrent” and proclaims that it is “resolutely opposed” to it. ASA calls these practices not only “abhorrent” but also “unethical” and anticompetitive. 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, the practice remains common.

Bid shopping almost necessarily forces subcontractors into post-award 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. The subcontractor 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.

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.”

Another negative consequence of bid shopping is that the practice interferes with how the free market fairly sets prices. This may occur where a subcontractor artificially inflates its bid to compensate for expected bid shopping. 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.

Another way bid shopping interferes with the free setting of competitive prices is to discourage otherwise interested subcontractors from spending the time and resources to prepare and submit competitive bids when bid shopping is expected. This reduces overall