Introduced in the House of Representatives on November 19, 2009 as the “Subcontractor Fairness Act of 2009,” H.R. 4134 should be a litmus test for certain members of Congress. Hold that thought for a minute.

The Federal Government’s procurement system is marked by bureaucratic complexity and defined by a set of overlapping and interlocking statutes and regulations. Reform effort after reform effort has attempted to address the inefficient and expensive system, with limited success. Congress, the Government Accountability Office, and the military services of the Pentagon have each tried various fixes, but nothing has seemed to work. More recently, the Obama Administration has made several **attempts** to get tough with Federal contractors; but so far there has been little progress to show for the efforts.

Retired Air Force Lt. General Robert Kadish was recently quoted as saying, ""In an effort to improve the system, we have made it almost unintelligibly complex. And, this complexity is an albatross around our neck."

Very few individuals understand the details of the complex acquisition system. Those that do are valuable subject matter experts who help stakeholders find and exploit the system's loopholes. Former Defense Comptroller Dr. Dov Zakheim recently described the U.S. government's acquisition system "as one that is based on end-running the system." That's right. To make the system work, one must work around it, not within it—according to one of those few experts who ought to know.

There are many on the outside of the system who complain and posture and bloviate on what ought to be done, from gadflies to bloggers to lawmakers. Even fewer of this group have any understanding about how the system works; they only know that contractors charge too much and deliver too little, too late—without understanding *why*, let alone what to do about it.

Individuals of this latter group self-identify by clearly incorrect pontifications designed to attract attention rather than to fix any serious problems. Lawmakers of this latter group self-identify by introducing legislation that addresses a problem that doesn't exist, or addresses the wrong problem, or which will obviously create problems more severe than the "problem" the proposed legislation purports to address.

So when we say H.R. 4134 is a litmus test for certain members of Congress, what we mean to say is that those members who have sponsored the bill are self-identifying themselves into that latter group of cluelessness—dubbed PWACs by certain seasoned acquisition professionals. (PWAC = Persons Without A Clue.)

What makes this bill stand out for its cluelessness?

Simply put: each competitive solicitation issued by the Federal government (both civilian and defense) valued at more than $550,000 ($1,000,000 for construction) must require that each offeror submitting a proposal must:

(a) Identify all of its subcontractors at the time it submits its proposal for evaluation

(b) Negotiate subcontract agreements including prices with each of its subcontractors

(c) Include with its proposal a list of each of its subcontractors, including the subcontract scope of work and the prices to be paid

(d) Agree that, should the offeror be awarded a contract from the government, each subcontracting agreement will become a valid subcontract “upon award of the prime contract.”

See the entire bill **here** . You can also see those members of Congress who've sponsored the legislation, who have thusly self-identified into the PWAC group.

There are so many problems with the proposed bill that we hardly know where to start.

1. This bill, if approved and signed into law, wouldn't ensure prime contractors treat subcontractors fairly. Instead, primes will enter into long-term agreements with certain subcontractors and the others will be left out in the cold. This is because the process for preparing a competitive proposal to the Federal government doesn't have sufficient time to negotiate subcontracts. (We've written about this **before** .) So this bill will reduce subcontract awards and hurt small businesses.

2. At the very least, imposition of this requirement would delay the proposals and thus delay contract awards. Consequently, the delivery of goods and services to those that need them will be delayed as well.

3. Speaking of small businesses, since all subcontracts will be identified and negotiated prior to award and become effective on the date of the prime contract award, you can forget socioeconomic reporting or preparation of "small business subcontracting plans." Subcontracting plans and the reporting thereof are about what happens after award of the prime contract; since nothing will be allowed to happen after award, there will be no need for them.

4. By linking this requirement to the proposal preparation effort as opposed to the contract execution effort, the PWACs have just converted direct labor into B&P labor. I.e., watch contractor's indirect cost rates climb up and up, making everything more expensive for the buying commands and other Federal stakeholders.

5. No mention as to whether this requirement will flow down from the primes to the lower-tier subcontractors. The PWACs apparently don't understand that the first-tier subcontractors also award subcontracts themselves, and so on. That's why we call it a "supply chain." Wouldn't it be perfect to say that each subcontractor must also identify its subcontracts, and so on, before submitting a competitive proposal? That would be just about the best way to freeze the entire Federal acquisition system we could conceive of.

6. No mention as to what the contracting officers and source selection teams evaluating the offerors are supposed to do with the subcontracting information provided by the prime contractors. Do they read it? If so, what for? Do they throw the paper away?

We could go on. But we think the point's been made. This is bad legislation and, if signed into law as written, will do much more harm than good. We hope it dies in Committee. And we hope those PWAC members of Congress stay far away from any further legislation that could similarly affect the Federal acquisition system.