

Complaint

107 F.T.C.

## IN THE MATTER OF

THE ELECTRICAL BID REGISTRATION SERVICE OF  
MEMPHIS, INC., ET AL.FINAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF  
THE FEDERAL TRADE COMMISSION ACT*Docket 9183. Complaint, Aug. 6, 1984—Final Order, Feb. 12, 1986*

This final order requires a Memphis, Tenn. bid depository set up by electrical subcontractors, among other things, to cease taking disciplinary action against firms that negotiate prices after bidding is closed or that accept a contract at a price other than that filed with the registry. Additionally, respondents may not require firms using the registry to deal only with other registry participants and cannot restrict in any way negotiations between electrical subcontractors and general contractors. Further, respondents are required to reinstate any firm it suspended for violation of the illegal rules and remove the illegal provisions from its by-laws or other rules.

*Appearances*

For the Commission: *Truett M. Honeycutt, Douglas B. Brown and Harold E. Kirtz.*

For the respondents: *Carl H. Langschmidt, Jr., Boone, Wellford, Clark, Langschmidt & Apperton, Memphis, Tenn., for respondents The Electrical Bid Registration Service of Memphis, Inc., C.H. Dennis, Jr., James L. Overton, Wayne A. Allen and Jack Gross. James W. Watson and G. Patrick Arnoult, Watson, Arnoult & Quinn, Memphis, Tenn. for respondent The National Electrical Contractors Association, Memphis Chapter.*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Electrical Bid Registration Service of Memphis, Inc., a corporation, and C. H. Dennis, Jr., individually and as an officer and director of said corporation, and James L. Overton, Wayne A. Allen, and Jack Gross, individually and as directors of said corporation, and The National Electrical Contractors Association, Memphis Chapter, a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public

interest, hereby issues its complaint stating its charges in that respect as follows:

#### *Definitions*

(1) For the purposes of this complaint, the following definitions shall apply:

(a) The *greater Memphis area* consists of Memphis, Tennessee and some or all of the following twenty-three counties in Tennessee, Arkansas, and Mississippi: Shelby, Fayette, Lauderdale, and Tipton counties, Tennessee; Crittenden, Phillips, [2] St. Francis, Lee, Cross, and Mississippi counties, Arkansas; and DeSoto, Marshall, Benton, Tunica, Tate, Loachoma, Quitman, Panola, Lafayette, Tallahatchie, Yalobusha, Calhoun, and Granada counties, Mississippi; and

(b) The term *substantial* as applied to building construction contracts or projects means those contracts or projects for which the electrical subcontract is expected to be in excess of \$5,000.

#### *Parties*

(2) Respondent the National Electrical Contractors Association, Memphis Chapter (hereinafter referred to as the Memphis Chapter) is a nonprofit corporation organized and existing under the laws of the State of Tennessee, with its principal office and place of business located at 2600 Poplar Avenue, Suite 101, Memphis, Tennessee. The Memphis Chapter was organized and is operated in substantial part for the pecuniary benefit of its members, who are electrical subcontractors.

(3) Respondent the Electrical Bid Registration Service of Memphis, Inc, (hereinafter referred to as the Registry) is a nonprofit corporation organized and existing under the laws of the State of Tennessee, with its principal office and place of business located at 2600 Poplar Avenue, Suite 101, Memphis, Tennessee. As set forth below, the Registry was founded by the Memphis Chapter and its members, who (a) established the Registry as a corporation with a self-perpetuating board of directors, (b) appointed all of the members of the Registry's first board of directors, and (c) selected electrical subcontractors who were Memphis Chapter members to fill a majority of the seats on the Registry's board. A majority of the Registry's board has always consisted of electrical subcontractors who are Memphis Chapter members. The Registry was organized and is operated in substantial part for the benefit of the Memphis Chapter's members, who are de facto members of the Registry.

(4) Respondent C. H. Dennis, Jr. is an officer and director of the Registry, and respondents James L. Overton, Wayne A. Allen, and

Jack Gross are directors of the Registry. These individuals are sometimes referred to collectively as the individual respondents. They formulate, direct, and control the acts and practices of the Registry, including the acts and practices hereinafter set forth. Their address is the same as that of the Registry. Each individual respondent represents an electrical subcontractor that is a member of the Memphis Chapter.

*Commerce*

(5) Respondents maintain, and have maintained, substantial courses of business, including the acts and practices as [3] hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

*Factual Allegations*

(6) Firms and government entities often engage independent contractors to perform building construction work, and they often use competitive bidding to select a general contractor for construction of a project and enter into a prime contract with the general contractor for such work. When competitive bidding is used, the firm or government entity (commonly referred to as the awarding authority) frequently requests prime bids from general contractors based on plans and specifications depicting the work to be done and the materials to be furnished. The awarding authority also sets a date for submissions and opening of the prime bids made by the general contractors.

(7) In preparing a prime bid on a building construction project, a general contractor usually calculates the approximate cost of the work to be done by examining the specifications and estimating labor, materials, overhead, and profit. General contractors often do not perform specialty work, such as electrical work, and in order to prepare their prime bids general contractors generally obtain sub-bids from subcontractors relating to their particular specialties.

(8) Absent a bid depository or other mechanism that restricts the submission of bids by subcontractors to general contractors, the process of competitive bidding for building construction contracts can operate in the following manner. Each general contractor can obtain sub-bids from a variety of competing subcontractors in order to obtain what he considers the best proposal in terms of price and quality. Similarly, each subcontractor can submit sub-bids to a variety of competing general contractors. Until the deadline for the submission of prime bids to the awarding authority, general contractors and electrical subcontractors can engage in negotiations during which the subcontractors have an opportunity to revise their sub-bids. (Such negotiations are commonly referred to as pre-award bid shopping and

bid peddling.) After a general contractor has been awarded the prime contract, the winning general contractor and all interested subcontractors can engage in further negotiations, during which the general contractor may seek the most favorable price for the type and quality of the specialty work to be done, and subcontractors may attempt to win a subcontract by submitting lower acceptable bids. (Such further negotiations are commonly referred to as post-award bid shopping and bid peddling.)

(9) In the greater Memphis area, the process of competitive bidding for building construction contracts generally operates in the manner described in Paragraph Eight, except with respect to the submission of sub-bids by electrical subcontractors to general [4] contractors for substantial building construction contracts. The process by which electrical subcontractors submit bids and otherwise compete to be selected to work on substantial building construction projects in the greater Memphis area operates in a different manner because it is and has been governed by the rules of bid depositories established and maintained by electrical subcontractors, as set forth in Paragraphs Ten-Thirteen.

(10) Since approximately 1956, electrical subcontractors in the greater Memphis area have been engaged in a combination or conspiracy to restrict the manner in which they compete to be selected to work on substantial building construction contracts. The combination or conspiracy has been carried out by eliminating the open competitive process described in Paragraph Eight, which the electrical subcontractors believe puts unfair pressure on them to lower their bid prices, and instead establishing and operating bid depositories whose rules, policies, and practices place unreasonable restrictions on competition among electrical subcontractors. The Memphis Chapter and the Registry have participated in this combination or conspiracy, both as combinations of electrical subcontractors and as co-conspirators. Each of the individual respondents has participated in this conspiracy as a co-conspirator in his actions as an officer and/or director of the Registry.

(11) In furtherance of this combination or conspiracy, the Memphis Chapter has engaged in the following acts or practices, among others:

(a) In approximately 1956 the Memphis Chapter formed an in-house bid depository, and the Memphis Chapter operated this bid depository until 1976. The Memphis Chapter's depository established a deadline for electrical subcontractors' filing of bids and prohibited electrical subcontractors from offering a lower price or otherwise amending their bids after the deadline. In addition, Memphis Chapter members

were required to use the depository on all jobs handled by the depository;

(b) In 1976, the Memphis Chapter discontinued its in-house bid depository and formed a new bid depository, the Registry, which would be a separate corporation; and

(c) Since 1976, the Memphis Chapter and its members have supported and/or controlled the Registry.

(12) In furtherance of this combination or conspiracy, the Registry and the individual respondents have engaged in the following acts or practices, among others:

(a) The Registry has operated in accordance with the following rules, policies, and practices:

(i) The Registry has a deadline for electrical subcontractors' registering of bids and prohibits electrical [5] subcontractors from offering a lower price after the deadline. This prohibition on negotiations over price applies both before and after the award of the prime contract;

(ii) The Registry requires general contractors who accept the delivery of registered bids to agree that they will not award an electrical subcontract to any firm that did not have a bid registered with the Registry, and that all such awards must be at the price contained in the registered bid. This prohibition on negotiations over price applies both before and after the award of the prime contract;

(iii) An electrical subcontractor who uses the Registry on any particular job may not submit any bids for that job to any general contractor who is not using the Registry for that job; and

(iv) A general contractor who uses the Registry on any particular job may not accept a bid for that job from any electrical subcontractor who did not use the Registry on that same job unless the general contractor registers the non-participating electrical subcontractor's bid with the Registry before the Registry's deadline for registering bids.

(b) The Registry has implemented and enforced these rules, policies, and practices in the following manner:

(i) The Registry has imposed or threatened to impose sanctions, including suspension from the Registry and imposition of fines or liquidated damages; and

(ii) The Registry has notified all general and electrical contractors who regularly use the Registry of the identity of parties that have been sanctioned by the Registry.

(13) Most electrical subcontractors in the greater Memphis area are members of the Memphis Chapter. The Registry staff, which is also the staff of the Memphis Chapter, chooses what jobs will be on the

Registry, and most competitively bid substantial building construction jobs in the greater Memphis area are selected to be on the Registry. When a job is on the Registry, electrical subcontractors generally use the Registry if they desire to bid on the job. Because the Registry's rules prohibit electrical subcontractors using the Registry from dealing with general contractors who are not using the Registry, general contractors in the greater Memphis area are as a practical matter required to use the Registry, whether or not they would prefer to use the Registry or believe the Registry provides any benefits, if they want to receive bids from the electrical subcontractors who desire to bid on the job. [6]

#### *Purposes and Effects*

(14) The actual or probable purposes or effects of the combination or conspiracy alleged in Paragraph Ten and the acts and practices alleged in Paragraphs Eleven-Thirteen are or have been to restrict competition for electrical subcontracting for substantial building construction contracts in the greater Memphis area in the following ways, among others:

(a) General contractors have been restrained from seeking, negotiating for, and obtaining bids lower than those submitted by electrical subcontractors through the Registry;

(b) Electrical subcontractors have been restrained from offering lower prices or otherwise amending the bids that they have submitted through the Registry;

(c) Price negotiations and contractual relationships between willing general contractors and electrical subcontractors have been prevented by rules against dealing with firms not using the Registry;

(d) There is pressure on general contractors to use the Registry whether or not they would prefer to use the Registry or believe that the Registry provides any benefits;

(e) Firms that have been suspended from the Registry for engaging in price competition prohibited by the Registry's rules have been prevented from submitting bids to or obtaining bids from other firms using the Registry on particular jobs;

(f) There is an increased likelihood that electrical subcontractors may engage in bid rigging or otherwise agree not to compete on the basis of price; and

(g) The cost of electrical subcontracting services has been increased.

#### *Violations*

(15) Respondents' combination or conspiracy, and the acts or practices in furtherance thereof, have had or are having the purpose or

effect of restraining competition for electrical subcontracting for substantial building construction contracts in the greater Memphis area. These restraints on competition are unreasonable, because their anticompetitive effects are not outweighed by any procompetitive effects. Thus, respondents have violated Section 5 of the Federal Trade Commission Act by engaging in unfair methods of competition. Respondents' combination or conspiracy, or the effects thereof, are continuing and will continue in the absence of the relief herein requested. [7]

Commissioners Miller and Calvani voted in the negative.

INITIAL DECISION BY

MORTON NEEDELMAN, ADMINISTRATIVE LAW JUDGE

NOVEMBER 21, 1985

I

STATEMENT OF THE CASE

The complaint in this proceeding was issued on August 6, 1984. It charges that in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, the electrical subcontractors in the Memphis, Tennessee area have conspired or combined to restrain competition by means of a bid depository operated from 1956 until 1976 by the Memphis Chapter of the National Electrical Contractors Association ("Memphis Chapter"), and thereafter by the Electrical Bid Registration Service ("Registry"), which allegedly was organized by the Memphis Chapter for the purpose of continuing and refining the Memphis Chapter's earlier bid depository activities. According to the complaint, the Registry's rules relating to the bidding process between general contractors and electrical subcontractors has restrained price competition by:

Holding electrical subcontractors to their submitted bids, which means that they cannot be changed by negotiation either before or after the Registry's deadline for submitting electrical bids;

Requiring general contractors to agree that if they use the Registry on a particular job, they must use one of the registered bids;

Preventing electrical subcontractors who use the Registry on any particular job from submitting bids for that job to general contractors who are not using the Registry. [2]

The complaint alleges that these rules are enforced by imposing fines

and other sanctions, mainly suspension from the Registry's bidding system. The actual or probable effect of the alleged restraints is said to be that prices for electrical subcontractor services are raised without any countervailing efficiency justifications. The complaint further charges that the operation of the Registry is conducive to bid rigging or other forms of agreements not to compete on the basis of price.

While the Registry's answer denies most of the substantive allegations of the complaint, it admits that the Registry (1) establishes a deadline for submitting electrical subcontracting bids, (2) requires general contractors who accept registered bids to agree that they will not award a subcontract to any firm that did not have a bid filed with the registry, (3) prohibits an electrical subcontractor using the registry from submitting bids to any general contractor not using the registry, and (4) limits the discretion of a general contractor in using nonparticipating electrical subcontractors. The answer filed by the Memphis Chapter puts into issue the same points raised by the Registry, and also denies the complaint allegations respecting the role of the Memphis Chapter in forming or controlling the Registry.

In the prehearing stage both sides were allowed discovery including depositions or interviews with all prospective witnesses. Proposed exhibits were exchanged, and prior to the formal hearings, the parties were given an opportunity to file objections to all exhibits that were to be offered without supporting testimony. Complaint counsel's case-in-chief was heard between June 4 and June 18, 1985. The defense case was presented during the week of July 15. Rebuttal testimony was offered by complaint counsel on August 14, and the record was closed for the receipt of evidence on August 23. During the hearings, counsel for both sides were given full opportunity to be heard and to cross-examine the witnesses. The parties filed their main briefs and proposed findings on September 23. Reply briefs were filed on October 7. [3]

After reviewing all the evidence, as well as the proposed findings and briefs submitted by the parties, and based on the entire record, including my observation of the demeanor of witnesses, I make the following findings of fact:<sup>1</sup> [4]

<sup>1</sup> Proposed findings not adopted in the form or substance proposed are rejected, as either not supported by the entire record or as involving immaterial or irrelevant matters.

The following abbreviations are used throughout in citing to the record:

CX - (Complaint counsel's exhibits)

RX - (Respondents' exhibits)

Joint Exhibit 1A-Z is the Tennessee Contractors Licensing Act. Testimony is cited by the name of the witness, followed by transcript page, as in Birrell 1196. Complaint counsel's Exhibit 1 and respondents' Exhibit 4 are the indices required by § 3.46(b) of the Commission's Rules.

The appearances of the witnesses were as follows:

(footnote cont'd)

## II

## FINDINGS OF FACT

A. *Introduction: Construction Job Bidding*

1. Private firms and governmental units, commonly referred to in the construction industry as "awarding authorities", may use com-

<u>Name</u>	<u>Called By</u>	<u>Tr. Pages</u>
William K. Arnold (General Contractor)	Complaint counsel ("C.C.")	53-202
Frank Inman, Jr. (General Contractor)	C.C.	205-272
Cheryl Lynn Mann (Electrical Subcontractor)	C.C.	272-317
Roger James Peters (General Counsel of a General Contractor)	C.C.	327-415
Fred Talmoth Baker (Electrical Subcontractor)	C.C.	419-541
Robert E. Morrison (General Contractor)	C.C.	553-666
Cecil Raymond Boucher, Jr. (General Contractor)	C.C.	671-717
Joe Rayburn Hales (Senior Electrical Inspector, Shelby County)	C.C.	720-748
Irvin McGroom (General Contractor)	C.C.	759-805
Jesse M. Zellner (General Contractor)	C.C.	809-882
Roosevelt "Curley" Morgan (General Contractor)	C.C.	885-957
Russell H. Clark (Electrical Subcontractor)	C.C.	958-1048
Waylon R. Naylor (General Contractor)	C.C.	1051-1093
Frederick Ellsworth Wade (General Contractor)	C.C.	1100-1167
George S. Birrell (Associate Professor of Civil Engineering, Case Western Reserve University, Expert)	C.C.	1168-1300
John Frederick Stewart (Associate Professor of Economics, University of North Carolina, Expert)	C.C.	1307-1504, 2042-2099
Thomas Cooper Barnett (General Contractor and President of the Registry)	Respondents ("resp.")	1571-1622
David Bronson Martin (General Contractor)	resp.	1626-1702
Johnny Chester (Electrical Engineer, member of the board of directors of the Registry)	resp.	1703-1747
Gene Strong (Architect, member of the board of directors of the Registry)	resp.	1751-1845
Charles Dennis, Jr. (Electrical Subcontractor, Vice President and member of the board of directors of the Registry)	resp.	1845-1936
Earl Scurlock (Secretary-Manager of the Memphis Chapter and Manager of the Registry) [5]	resp.	1949-2028

petitive bidding to select a general or prime contractor for an institutional or industrial project. When competitive bidding is being used, the awarding authority requests that general contractors submit what is known as a "prime bid" for the overall project.<sup>2</sup> Since these general contractors normally do not perform specialty functions such as electrical work (installation of conduits, wiring, fixtures), they must obtain sub-bids from electrical and other subcontractors in order to prepare their prime bids.<sup>3</sup> At issue here are the efforts of the Memphis Chapter and the Registry to establish a bid depository designed to control the electrical sub-bidding process, especially the elimination of "bid peddling",<sup>4</sup> the practice whereby the general contractor discloses one electrical subcontractor's bid to another electrical subcontractor for the purpose of obtaining a lower bid.

### B. Identity of Respondents

2. The National Electrical Contractors Association, Memphis Chapter ("Memphis Chapter"), is a nonprofit corporation organized and existing under the laws of [6] Tennessee, with its principal office and place of business located at 2600 Poplar Avenue, Suite 101, Memphis, Tennessee.<sup>5</sup> The Memphis Chapter is engaged in various activities for the financial benefit of its 21 electrical subcontractor members, including counseling on price and profits, and the negotiation of a Memphis area labor contract.<sup>6</sup>

3. The Electrical Bid Registration Service of Memphis, Inc. ("Registry") is a nonprofit corporation organized and existing under the laws of Tennessee with its principal office and place of business located at 2600 Poplar Avenue, Suite 101, Memphis, Tennessee.<sup>7</sup> The Registry operates a bid depository designed to serve the economic well-being of Memphis area electrical contractors by eliminating bid peddling.<sup>8</sup>

4. The individuals named as respondents, C. H. Dennis, Jr., James L. Overton, Wayne A. Allen, and Jack Gross, are either officers or owners of electrical subcontracting firms. All currently serve on the board of directors of the Registry; in addition, respondent Dennis is

<sup>2</sup> CX 2C, CX 3K, CX 4H; Birrell 1196.

<sup>3</sup> Wade 1119, Birrell 1196.

<sup>4</sup> During the course of the hearings, the witnesses generally drew no distinction between "bid peddling" and "bid shopping". But see Strong 1764 for a distinction based on whether the general contractor simply makes a survey of electrical prices (i.e., "shops") or actually uses (i.e., "peddles") the specific bid of one electrical subcontractor to drive down the price of another. For recognition by respondents of interchangeable use of the terms see CX 2D, CX 3K-L. Accordingly, throughout this initial decision I have used the terms interchangeably to refer to the negotiation for prices that are lower than those originally quoted in sub-bids submitted to a general contractor. A distinction is drawn, however, in several findings between pre-award and post-award bid peddling based on when the negotiations took place.

<sup>5</sup> Memphis Chapter Answer, ¶ (2).

<sup>6</sup> Memphis Chapter Answer, ¶ (2); Baker 500, Dennis 1895, Scurlock 1951-52.

<sup>7</sup> Registry Answer, ¶¶ (2-3).

<sup>8</sup> Barnett 1579-80, 1599; see also Finding 13.

vice president of the Registry.<sup>9</sup>

5. The record contains no evidence relating to the direct responsibility of the named individual respondents for the practices challenged in the complaint.<sup>10</sup> But as complaint counsel would have it, an inference of control by them over the Registry's practices should be drawn from the fact that these four individuals, who are all identified [7] with electrical subcontracting firms, currently make up a majority of the Registry's board of seven, and included in the board's general power to manage the Registry's affairs, is the right to appoint the Registry's manager and to fill vacancies on the board itself.<sup>11</sup> There is no evidence, however, that the named individuals have collaborated to use this latent power in order to dictate to the three nonelectrical board members.<sup>12</sup> On the contrary, all that the record will allow on control of the Registry is that Earl Scurlock, acting on behalf of the Memphis Chapter, picked the members of the first board,<sup>13</sup> that the first board picked the succeeding board and so on,<sup>14</sup> and that Scurlock would probably designate their successors if the four named respondents were removed.<sup>15</sup> And while the board also has the power to approve sanctions for violations of the Registry rules—this is the function of the board that is most relevant to this proceeding, see Findings 25, 45-54—the record shows that all disciplinary actions were imposed by a unanimous vote of all board members present, as required by Registry rules.<sup>16</sup> As for the day-to-day business of the Registry—running a bid depository for electrical subcontracting jobs—this is carried out exclusively by Scurlock and his assistant (Juanita McClain), and there is no evidence that the named individual respondents in any way participate in this activity.<sup>17</sup> [8]

### C. Commerce

6. The Memphis Chapter and the Registry are engaged in "commerce," as "commerce" is defined in the Federal Trade Commission

<sup>9</sup> Registry Answer, ¶ (4); Memphis Chapter Answer, ¶ (4); CX 2"O"-T, CX 3D, K; Dennis 1849-50.

<sup>10</sup> While Dennis was named in the complaint in his capacity as a director and an officer, there was no evidence introduced respecting his duties as vice president except that he presides at board meetings when Barnett, the president of the Registry, is absent. Barnett, who also serves on the board of the Registry, was not named as an individual respondent in any capacity.

<sup>11</sup> See CX 3C, K, CX 4A-D.

<sup>12</sup> See Strong 1756, Dennis 1867. Since its formation, the Registry board has consisted of four electrical subcontractors, an architect, an electrical engineer, and a general contractor. The president of the Registry has always been Cooper Barnett, a general contractor. Registry Answer, ¶ (3); Barnett 1573.

<sup>13</sup> CX 2F; Barnett 1572, Strong 1755, Scurlock 1953-54, 1999, 2009.

<sup>14</sup> CX 4B.

<sup>15</sup> See Scurlock 1952-54.

<sup>16</sup> Registry Answer, ¶ (12)(b)(i); CX 3F, M, CX 4S. No Registry business, including the imposition of sanctions, can be transacted without a quorum of five directors. This means that a sanction cannot be approved without the vote of at least one nonelectrical board member. CX 4S; Barnett 1575, 1589, Dennis 1867.

<sup>17</sup> See Findings 12, 14-15; see also Chester 1733, Scurlock 1955, 2000.

Act as amended.<sup>18</sup>

*D. The Role Of The Memphis Chapter In The Evolution Of The Memphis Area Electrical Bid Depositories*

7. The Memphis Chapter operated a bid depository from January 1956 until August 1976.<sup>19</sup> While the bid depository operated by the Memphis Chapter was intended to bind all members of the chapter to rules eliminating bid peddling,<sup>20</sup> these rules were not rigorously enforced, and this earlier depository was widely regarded as ineffectual.<sup>21</sup>

8. In 1976, the board of the Memphis Chapter directed their manager, Earl Scurlock, to explore the feasibility of organizing a bid depository modeled after The Bid Registration Service of Memphis, Inc., a depository operated by the mechanical subcontractors in the Memphis area which had effectively eliminated bid peddling in the mechanical sub-trade.<sup>22</sup> Scurlock contacted B.V. Stevens, manager of the mechanical [9] subcontractors' bid depository, and Carl Langschmidt, counsel for respondent Registry herein, and in 1976 counsel for the mechanical subcontractors' bid depository. Stevens and Langschmidt advised Scurlock about the technical and legal requirements for setting up a bid depository patterned on the mechanical subcontractors' model.<sup>23</sup>

9. Stevens' and Langschmidt's advice was reported back to the Memphis Chapter by Scurlock, who was then authorized by Memphis Chapter to inform Langschmidt to draw up the necessary legal documents incorporating the Registry on September 7, 1976.<sup>24</sup>

10. In October 1976, the board of directors of the Memphis Chapter approved a \$2,000 loan to the Registry, which was intended to enable the Registry to begin its operations.<sup>25</sup> This unsecured loan was paid

<sup>18</sup> CX 2C, CX 3B, J, CX 4J. The Registry operates in the following 23 Memphis area counties in Tennessee, and neighboring Mississippi and Arkansas: Shelby, Fayette, Lauderdale, and Tipton Counties, Tennessee; DeSoto, Marshall, Benton, Tunica, Tate, Coachoma, Quitman, Panola, Lafayette, Tallahatchie, Yalobusha, Calhoun, and Grenada Counties, Mississippi; and in Crittenden, Phillips, St. Francis, Lee, Cross, and the southern half of Mississippi County, Arkansas. CX 3B, J, CX 4A. The geographic jurisdiction of the Memphis Chapter is essentially the same as the area served by the Registry. CX 2" T".

<sup>19</sup> Memphis Chapter Answer, ¶¶ (11)(a-b); CX 2A, CX 6B.

<sup>20</sup> Scurlock 2012.

<sup>21</sup> Dennis 1905-08. Essentially, the rules of the Memphis Chapter's bid depository provided that sealed bids had to be submitted by electrical subcontractors to designated branches of a commercial bank on all jobs valued in excess of \$3,000. These sealed bids, which had to be submitted four hours prior to the deadline for the general contractors, could not be changed. The Memphis Chapter bid depository obtained no agreements from general contractors to use the bids submitted through the depository and, in practice, there were many instances when electrical contractors orally changed bids after the deadline. CX 2A-C, CX 15A—CX 17B; Dennis 1908-10, Scurlock 1995-97, 2011-12.

<sup>22</sup> CX 2E-F, CX 6B; Dennis 1907-08, Scurlock 1952-54, 2010.

<sup>23</sup> CX 2E-F, CX 6B; Scurlock 1952-54.

<sup>24</sup> CX 2F, CX 6B, CX 7A-D; Scurlock 1952-54.

<sup>25</sup> CX 2F, CX 6B, CX 8D-H; Scurlock 2014.

back within a few months,<sup>26</sup> and since 1976, the Registry has received no other loans from the Memphis Chapter.<sup>27</sup>

11. Of the seven members of the first board of directors of the Registry picked by Scurlock, four were officers or owners of electrical subcontracting firms that were members of the Memphis Chapter.<sup>28</sup> Subsequent Registry boards during the period 1977-1983 included four representatives of electrical firms that were members of the Memphis Chapter.<sup>29</sup> In 1984, three of the directors of the Registry were similarly affiliated with members of the Memphis Chapter,<sup>30</sup> and in 1985, of the seven Registry [10] board members, two—C.H. Dennis and James Overton—were connected with firms belonging to the Memphis Chapter.<sup>31</sup> Since the Registry's inception, at least one officer or director of the Memphis Chapter has been on the Registry's board.<sup>32</sup>

12. Scurlock, the manager of the Memphis Chapter, is also the only manager the Registry has ever had.<sup>33</sup> Scurlock, who is paid a salary and bonuses by the Memphis Chapter but receives no separate compensation as manager of the Registry,<sup>34</sup> is responsible for the day-to-day operations of both the Memphis Chapter and the Registry.<sup>35</sup> Since its inception (and to this day) the Registry operates out of the office of the Memphis Chapter.<sup>36</sup>

#### *E. The Operation Of The Bid Depository By The Registry*

13. Since its creation in 1976 by the Memphis Chapter, the Registry has established and enforced rules designed to eliminate bid peddling in the Memphis area electrical trade.<sup>37</sup>

14. Scurlock and his assistant, Juanita McClain, gather information from trade publications ("Builders Exchange Weekly Bulletin" and "Associated General Contractors [11] Weekly Bulletin"), news sources, as well as from subcontractors and general contractors, about

<sup>26</sup> CX 2F, CX 8D-H, CX 9—CX 10; Scurlock 2014.

<sup>27</sup> CX 8E.

<sup>28</sup> Vernon G. Goldecke, one of the members of the Registry's first board, was a director of the Memphis Chapter in 1976. Others who served on the first Registry board and who were also members of the Memphis Chapter were Jack Gross, David Haines, and Frank Pitt. CX 2F-G, K, CX 3R.

<sup>29</sup> CX 2"O" T, CX 3R-W.

<sup>30</sup> CX 2S, CX 3V.

<sup>31</sup> Dennis, vice president of the Registry and a current member of the Memphis Chapter, was president of Memphis Chapter in 1976 when the Registry was organized. Dennis was also governor of Memphis Chapter in 1978-1979, 1982-1985. Dennis' firm, Byrd Electric, has been a member of the Memphis Chapter from 1967 to the present. CX 2G-H, P-T, CX 3D, K, CX 11A-S; Dennis 1848. Overton is a current member of the Memphis Chapter. CX 2H.

<sup>32</sup> CX 2" T".

<sup>33</sup> CX 2G.

<sup>34</sup> Scurlock 2009.

<sup>35</sup> Chester 1733, Strong 1796, Scurlock 1955.

<sup>36</sup> CX 2G. The Registry pays the Memphis Chapter a negotiated monthly fee for use of office space and secretarial services. CX 2G, CX 26C; Barnett 1591-92, Scurlock 2001-02.

<sup>37</sup> CX 3L-N, CX 160B-C; Arnold 122, Mann 287, Baker 498, Boucher 679, Barnett 1579-80, 1599, 1603-04, Chester 1712.

projects that might trigger the use of the Registry.<sup>38</sup>

15. Having made a determination that a particular job is one on which there is to be competitive bidding and that the electrical work is likely to exceed \$5,000 in value,<sup>39</sup> Scurlock and McClain poll all the general contractors who might conceivably be interested in bidding on the job to determine whether they are willing to accept bids through the Registry.<sup>40</sup> Scurlock and McClain attempt to poll the general contractors several days in advance of the generals' bidding deadline; in actual practice, however, most of the generals are contacted on the day before the generals' deadline.<sup>41</sup> Scurlock or McClain enter on a Registry work sheet the name of every general contacted, the general's telephone number, the name of the job, the bid date, the bid time, the name of the general's architect, the name of the general's engineer, and a notation as to whether the general has indicated a willingness to accept Registry bids.<sup>42</sup>

16. The Registry requires general contractors, who have indicated a willingness to accept Registry bids, to agree that they will award the electrical subcontract to a firm that has a bid registered with the Registry and at the price filed with the Registry. [12] The winning general, however, need not select the low Registry bidder so long as it confines its selection to an electrical firm bidding through the Registry.<sup>43</sup>

17. Since the Registry has no membership rolls, any licensed electrical subcontractor may submit a bid to a general who has previously indicated its willingness to accept Registry bids. The electrical subcontractors in the Memphis area apparently learn the identity of generals willing to accept Registry bids from either Scurlock or McClain who encourage electricals to bid through the Registry.<sup>44</sup>

18. An electrical subcontractor using the Registry on any particular job may not submit bids for that job to a general contractor not using

<sup>38</sup> Scurlock 1956-57.

<sup>39</sup> CX 3B, J; Scurlock 1981-82. The \$5,000 limit is not an important restriction on the operation of the Registry since significant electrical jobs are valued in the area of \$50,000. See, e.g., Zellner 824-26, Morgan 926. In addition to the monetary limitation, the Registry does not operate when subcontractors bid directly to awarding authorities for projects on which the bids are sealed and opened publicly. CX 4J.

<sup>40</sup> Inman 225, Zellner 826, Martin 1634-35, Scurlock 1956-57.

<sup>41</sup> Arnold 99, Boucher 688-89, McGroom 766, Barnett 1578.

<sup>42</sup> Scurlock 1956-59.

<sup>43</sup> The Registry's bid forms give the following notice to general contractors who have indicated a willingness to accept Registry bids: "He [General Contractor] agrees not to award the contract for the work covered by these bids on the said project to any party other than a subcontractor who has duly and timely deposited and registered his bid with the Electrical Bid Registration Service and at the price so bid by the subcontractor, it being acknowledged that as prime contractor he had the right to register with the Registry any outside subcontractor bids which he received that were not registered with the Registry and thereby be free to award the contract for such work to any such subcontractor submitting an outside bid." CX 4P. See also CX 3G, N; Zellner 838. In recent years the Registry has made an intensive effort to inform Memphis area general contractors about the Registry's rules, and to receive from these contractors an acknowledgement that they would abide by the rules when using the Registry. CX 3H, N, CX 12B-Z19. See also Dennis 1878-79.

<sup>44</sup> Barnett 1618-19, Scurlock 1987-88.

the Registry.<sup>45</sup>

19. The Registry imposes on electrical subcontractors a strict deadline for submitting sub-bids. The deadline is three hours prior to the deadline for the general [13] contractors.<sup>46</sup> In the Memphis area, prime bids of general contractors are usually due at 2:00 p.m.,<sup>47</sup> which means that the Registry has an effective deadline of 11:00 a.m.

20. Bids of electrical subcontractors may be amended or withdrawn before the Registry's deadline by the subcontractors' compliance with the same procedures as would have applied had the amended or withdrawn bids been original bids.<sup>48</sup> [14]

21. After the Registry's bid submission deadline has tolled, those using the Registry cannot negotiate over price. The Registry requires that all awards made by general contractors must be at the price contained in the registered subcontractor bids. This prohibition against negotiation over price applies both before and after the award of the prime contract.<sup>49</sup>

22. The Registry bids of electrical subcontractors must be submitted to the Registry on special forms provided by the Registry. The electrical subcontractor fills out a separate form for each general to whom

<sup>45</sup> Registry Answer, ¶ (12)(a)(iii). See also CX 3G, N. The Registry's rules provide:

When a subcontractor registers a bid or bids with the Registry, he shall not submit any non-registered bids to any prime contractor, or to the awarding authority in the case of direct bidding. CX 4M.

<sup>46</sup> The Registry's rules provide:

The deadline for delivery of the copies of bids to the depository for registration (said deadline being herein referred to as the "deadline for registration of bids" for ease of reference) shall be three hours prior to the deadline established for delivery of bids by prime contractors to the awarding authority. If the subcontractor bids are submitted directly to the awarding authority, the deadline for subcontractor bid registration shall be the same deadline as established for delivery of bids to the awarding authority.

When no deadline has been established for the delivery of the prime contractor bids to the awarding authority, or for the delivery of subcontractor bids to the awarding authority in the case of direct bidding, the Registry shall establish a deadline for the registration of subcontractors' bids and for the delivery of bids to the prime contractors or the awarding authority, as the case may be, after consultation with the prime contractors and/or awarding authority. CX 4M-N. See also Registry Answer, ¶ (12)(a)(i).

<sup>47</sup> Arnold 134-35.

<sup>48</sup> The Registry's rules provides:

Any bid registered with the Registry may be amended or withdrawn *before the deadline for registering of bids* by complying with the same procedure as if the amendment or withdrawal were an original bid: e.g., (1) the original amendment or withdrawal signed by an authorized representative of the subcontractor and the duplicate copy being placed in the appropriate sealed envelopes for each prime contractor, or the awarding authority if bid directly, (2) the envelopes containing same bearing on their face the specified information, except being captioned "AMENDMENT OF ORIGINAL BID" or "WITHDRAWAL OF ORIGINAL BID" and "COPY OF AMENDMENT OF BID FOR REGISTRATION" or "COPY OF WITHDRAWAL OF BID FOR REGISTRATION", respectively, (3) the envelopes being delivered by subcontractor (a) to the depository, time stamped and deposited in the locked container for original bids to be delivered and the locked container for copies of the bids to be registered, and (b) in the case of direct bidding, to the awarding authority. Upon opening the container of original bids, the amendment or withdrawal shall be placed with the original bid to the prime contractor in the large envelope and delivered to the addressee as provided for original bids. Upon opening the container of copies of bids for registration, the information as to amendment or withdrawal of a bid to the successful prime contractor, or the awarding authority in the case of direct bidding, will be tabulated with the information about the original bid as provided above.

This provision is not intended to foreclose, waive or otherwise limit any right a subcontractor may have to withdraw a bid after the deadline for deposit and registration of bids on the ground of mistake, what rights a subcontractor may have being determined by the applicable law of the jurisdiction. CX 4R-S.

<sup>49</sup> Registry Answer ¶ (12)(a)(i); Barnett 1582-87

it wishes to bid. The electricals may elect to bid different prices to different generals. The bid form for each general must be placed in a sealed envelope for transmission to the Registry.<sup>50</sup>

23. When the sealed envelopes containing the electrical bids arrive at the Registry office, they are placed in large envelopes designated for each general who has [15] agreed to accept Registry bids. The large envelopes are delivered to these generals near 12 noon, approximately two hours before the generals' own deadline.<sup>51</sup>

24. While a general contractor is permitted under the Registry rules to register late bids it has received from electrical subcontractors who have not filed sealed envelopes directly with the Registry, time constraints faced by general contractors in receiving and compiling bids on bid day make it impractical to do so, since any bid, by the terms of the Registry's rules, can only be considered if physically filed with the Registry prior to the Registry's deadline.<sup>52</sup> Should a general contractor use its office staff to register these late bids (and the record shows that most general contractors do not consider this a viable way to expand on the number of firms bidding through the Registry), it would have the effect of diverting the general's personnel at the crucial [16] point in time near the general's own bidding deadline when they could be negotiating over the terms of bids with trades that do not have bid depositories.<sup>53</sup>

25. The Registry's rules are enforced by sanctions, mainly suspension from use of the Registry.<sup>54</sup> Suspension necessarily means that on future jobs, the general contractor will not have available Registry bids with the result that it will have fewer competitive prices to work with in making up its prime bid.<sup>55</sup> As for the electrical subs, suspension is detrimental to their businesses since it means that they cannot

<sup>50</sup> CX 4L-Q; Mann 285-86, Scurlock 1965-67.

<sup>51</sup> Scurlock 1965-68. After the identity of the winning general has been determined, the Registry lists the bids to that general, and this tabulation is sent to all electricals who had bid on the job. Scurlock 1968-69.

<sup>52</sup> The Registry's rules provide:

*By Prime Contractor or Awarding Authority (Outside Bids):* Each prime contractor, and the awarding authority in the case of direct bidding, shall have the right to register any outside bids he receives which have not been registered with the Registry by timely delivery of exact copies of all outside bids he desires to register, placed in a single, sealed envelope, furnished by the Registry, to an appropriate representative of the depository with the same information appearing on the face of the envelope as provided above for use by subcontractors in registering their own bids.

Upon receipt of the sealed envelope containing the copies of outside bids from the prime contractor, or awarding authority, the representative of the depository (not the prime contractor or awarding authority) shall time stamp and deposit the envelope in the locked container designated for the deposit of the copies of subcontractors' bids for registration.

The deadline for registration of outside bids by a prime contractor or awarding authority shall be the same as that provided below for registration by subcontractors of their bids. CX 4M. See also text of bid form, Note 43.

<sup>53</sup> Arnold 96, 101-02, 110, 170-71, Inman 218-19, Boucher 685-90, Zellner 816-17, Morgan 923, Naylor 1072-73, Birrell 1264-65, Stewart 1336-37, Barnett 1600-01, Martin 1679-80. See also Finding 36.

<sup>54</sup> Registry Answer, ¶ (12)(b)(i); CX 3F-H, M-N, CX 4S; Strong 1768-69. See Findings 45-54.

<sup>55</sup> Arnold 92-93, Peters 343-47, 358-64, Zellner 819-20, Martin 1675-76.

effectively bid to generals using the Registry.<sup>56</sup>

26. Compliance with Registry rules is also secured by the Registry's policy of notifying all general contractors and electrical subcontractors who regularly use the Registry of the identity of suspended firms.<sup>57</sup> The Registry's notification policy, which ostensibly has the purpose of simply informing contractors and subs of the names of firms that will not be bidding through the Registry,<sup>58</sup> tends to make adherence to Registry rules more certain since suspension may harm the reputation of a firm and make it more difficult for it to get jobs in the future.<sup>59</sup>

27. The Registry operates on the basis of a fee paid by the electrical subcontractor who has bid successfully on a particular job. The Registry's charge is 1-½ percent of the contract price, but in no event less than \$25 or more than \$2,000.<sup>60</sup> [17]

*F. The Market Setting Of The Bid Depository  
Operated By The Registry*

28. In recent years there has been a drop in both the number and dollar value of jobs bid through the Registry. While complaint counsel do not dispute the fact that such a decline has occurred, it claims that precise market figures are simply unavailable, and it is sharply critical of respondents' attempt to fill in this lacuna by applying to total nonresidential construction figures (as provided by the authoritative F.W. Dodge survey) a factor of 10 percent, which is widely accepted as representing the portion of total construction fairly attributed to electrical work.<sup>61</sup> Even if respondents' evidence is somewhat flawed,<sup>62</sup> it is at least useful for showing that the general trend has been in the direction of the Registry handling an increasingly diminished percentage of total Memphis area electrical subcontracting jobs, as shown in Table 1, below:

<sup>56</sup> CX 92; Baker 425-26.

<sup>57</sup> Registry Answer, ¶ (12)(b)(ii); CX 3H, N, CX 8K-L.

<sup>58</sup> CX 8K-L, CX 158F-"T".

<sup>59</sup> Boucher 691-92.

<sup>60</sup> CX 4S-T.

<sup>61</sup> Morgan 926.

<sup>62</sup> Respondents' evidence is questioned because (a) it includes jobs under \$5,000 that are not eligible for Registry consideration, and (b) it includes negotiated work that has been entirely removed from the competitive bidding process. See Stewart 1405-20, 1432-33.

Table 1  
Registry Jobs As A Percentage Of Total Memphis Area Electrical Subcontracting Jobs

Year	(1) Number of Electrical Jobs in the Memphis Area	(2) Number of Electrical Jobs Processed Through Registry	(3) Column 2 as % of Column 1	(4) Dollar Value of Elec- trical Jobs in the Memphis Area	(5) Dollar Value of Electrical Jobs Awarded Through Registry	(6) Column 5 as % of Column 4
1984	514	28	5.44	\$33,460,000	\$3,588,000	10.72
1983	559	48	8.58	24,460,000	4,245,000	17.35
1982	401	45	11.22	20,880,000	4,687,000	22.44
1981	489	69	14.11	20,510,000	6,132,345	29.89
1980	432	56	12.96	22,550,000	9,255,619	41.04
1979	452	76	16.81	30,045,800	7,506,749	24.98
1978	384	155	40.36	11,740,800	8,412,000	71.64
1977	472	123	26.05	13,590,200	6,878,000	50.60
1976	430	18	0.04	12,637,100	2,916,127	23.07

Sources: CX 14A-"T", CX 154; RX 1.

29. The record suggests several reasons for the decline shown in Table 1. There has been a marked trend in recent years away from bid work, and toward the use of prices negotiated between owner and an individual general contractor or owner and a [18] preselected group of general contractors.<sup>63</sup> Moreover, even on jobs on which there is competitive bidding for the prime contract, the winning general may bypass subcontractor bidding because it is accustomed to working with a previously selected team of specialty tradesmen.<sup>64</sup> It should also be noted that ordinarily the Registry will not be used unless the particular job is well-defined, complete, and assured of adequate financing.<sup>65</sup> Finally, the Registry does not operate at all if the general has been preselected even if the electrical work is open to competitive bidding.<sup>66</sup>

30. Notwithstanding the decline in the total number of jobs going through the Registry, the Registry nevertheless affects an important segment of electrical subcontracting work done in the Memphis area. On most significant electrical jobs in which bidding is involved, the Registry operates.<sup>67</sup> Moreover, the volume of electrical subcontracting that passes through the Registry is cyclical, to the point that Scurlock testified that the machinery of the Registry must be preserved in anticipation of a shift from negotiated to bid work.<sup>68</sup>

31. The claim was made by several witnesses that the Registry is simply an option open to general contractors who elect to use a sealed bid system.<sup>69</sup> The weight of the evidence is to the contrary. For while it is true that general contractors are [19] theoretically free to choose to go through the Registry or to bypass it,<sup>70</sup> as a practical matter when the Registry is in operation, contractors are under pressure to use it since they want all the bids that they can possibly get, including the bids that can only be had by going through the Registry. It is the perception of generals that without such a full array of electrical bids they cannot prepare truly competitive prime bids.<sup>71</sup> Moreover, general contractors are especially interested in obtaining the bids of the dependable and financially stable electrical firms which regularly use the Registry, and generals believe that they would be at a competitive disadvantage if other generals had access to these well-established firms (by agreeing to take Registry bids) while they remained outside

<sup>63</sup> Arnold 58-59, Inman 208-09, Scurlock 1976-81.

<sup>64</sup> Strong 1829-32, Dennis 1852.

<sup>65</sup> Strong 1829-30, Dennis 1852; *see also* Martin 1674-75.

<sup>66</sup> Dennis 1899-1900.

<sup>67</sup> Baker 482, Zellner 826, Barnett 1620, Martin 1700-01.

<sup>68</sup> Scurlock 2003-04.

<sup>69</sup> Strong 1759-60, Scurlock 1959-60.

<sup>70</sup> Morgan 937, Naylor 1092, Wade 1144-45, Martin 1633-34.

<sup>71</sup> Inman 213, Boucher 678, Zellner 832, 843, Naylor 1067-68, Wade 1139, Martin 1673-75.

of the Registry.<sup>72</sup> It should also be noted that the Registry rule prohibiting subcontractors from bidding both inside and outside of the Registry is specifically designed to force generals to use the Registry.<sup>73</sup>

32. There is no credible evidence that the use of the Registry on any job was instigated by general contractors.<sup>74</sup> To the contrary, notwithstanding the pressure to use it in order to obtain a complete array of bids, the record shows that general contractors perceive of no other significant advantage to them from the use of the Registry; indeed, they would prefer not to use it, and would rather rely on the last [20] minute give-and-take over the telephone that prevails in their dealings with other sub-trades.<sup>75</sup>

33. According to complaint counsel, the market significance of the Registry is somehow enhanced by entry conditions in the Memphis area. While there is some evidence in the record that licensing,<sup>76</sup> bonding,<sup>77</sup> and other requirements<sup>78</sup> may operate to restrict the number of electrical subcontractors, there was no testimony that the existing electrical firms constitute an inordinately small pool of competitors, or that Memphis area general contractors are typically confronted with a meager selection of electrical subcontractors from whom to pick.<sup>79</sup> All that the record will allow on this [21] point is that the general contractors prefer to obtain the bids of all firms interested

<sup>72</sup> CX 161E-F; Arnold 65, 73, 92-93, 112-14, 118, Inman 213, 224, 226-27, Zellner 832-34, 843, Morgan 924, 926-28, 945, Wade 1144, Barnett 1601, Martin 1670, 1675. Members of this class of subcontractors, which includes the membership of the Memphis Chapter, may not bid through the Registry on a particular job for one or more of the following reasons: general distaste for federal jobs because of record-keeping requirements, the size of the job, the kind of work involved, or commitment to other work. Zellner 830-31, Morgan 951-52, Clark 966, Martin 1639-40, Dennis 1895-96.

<sup>73</sup> CX 160F-G; Dennis 1930-33.

<sup>74</sup> See Inman 225, Peters 393, Boucher 695.

<sup>75</sup> Arnold 64-65, 120-22, Inman 224, Peters 363, Morrison 598, Boucher 695, Zellner 818, Morgan 923-24, Naylor 1065-67, Wade 1138-39.

<sup>76</sup> Under Tennessee law, all electrical work in excess of \$50,000 must be done by firms holding a state license. A key requirement for obtaining a state license is that the firm employ at least one master electrician. Only persons who have graduated with a degree in electrical engineering from a recognized university and who have two years of industry experience or, alternatively, persons with four years experience as journeyman electricians are eligible for the master electrician examination. The master electrician examination, which may be taken only once every six months, is administered by county or municipal authorities. In recent years, the administration of the licensing examination in Shelby County has operated to exclude persons who have been qualified as master electricians in other municipalities and counties in Tennessee and elsewhere. Approximately 25 applicants were examined by the Shelby County Electrical Licensing Board in February 1985. None of those persons passed the examination. The passing rate for prior examinations during the last several years has averaged less than 33 percent. Joint Exhibit 1A-Z; CX 116A-Z137, CX 117, CX 118; Mann 283-84, Hales 742, Dennis 1883. Note, however, that at least one experienced electrician took the exam although he acknowledged that he was not familiar with the code, and would have to "bluff" his way through. RX 3.

<sup>77</sup> Memphis and Shelby County law requires that all subcontractors be bonded and insured. Some firms are qualified and bonded to perform work on smaller jobs only, and therefore may not work on larger projects. CX 116A-Z137.

<sup>78</sup> There is some evidence that Memphis (or for that matter any other metropolitan area) is somewhat insulated from outside competition. Electrical subcontractors from outside of the Memphis area would have to assume transportation and subsistence costs that may make it difficult for them to compete against Memphis electrical subcontractors. See Clark 981, Wade 1110. Outside subcontractors also face the risk of having to deal with contractors whose ability is not known. Clark 981-85. In addition, local firms may have the advantage of established relationships with local labor unions and material suppliers. CX 161C-D; Wade 1117-18. Notwithstanding these difficulties, attractive Memphis area jobs attract outside subcontractors. See Clark 981.

<sup>79</sup> See, e.g., Morgan 953-54, Wade 1119.

in a project, including bids of electrical firms who use the Registry as well as those who are bidding outside of the Registry.<sup>80</sup>

### G. *The Effects Of The Registry*

34. The effects of the Registry were analyzed in depth by two academic experts called as witnesses by complaint counsel—George S. Birrell, a civil engineer,<sup>81</sup> and John F. Stewart, an economist.<sup>82</sup> The qualifications of these experts were not challenged by respondents, and no significant aspect of their testimony was disturbed by cross-examination. Moreover, their testimony was not only fully consistent with and supported by the testimony of respondents' own witnesses who testified that the Registry eliminates price cutting pressures, but it was also supported by the exhibits introduced into the record respecting the sanction incidents. *See* Findings 43–55. Accordingly, the contrast between the economic significance of bidding through the Registry and bidding without a bid registry that follows (Findings 35–42), draws heavily on this highly credible expert testimony.

35. By its terms, the Registry segments the bidding process by forcing general contractors to choose between taking bids from firms bidding inside or outside of the Registry, but not both.<sup>83</sup> If the Registry did not exist, a general contractor would be free to obtain sub-bids from any subcontractor who might be interested in bidding on a [22] particular job.<sup>84</sup> This segmentation of electrical subcontractors between those bidding inside and outside of the Registry, which is designed to prevent the bids received through the Registry from being undercut by outside bids,<sup>85</sup> is perceived by general contractors as depriving them of access to part of the universe of bidders that they need in order to make up a competitive prime bid.<sup>86</sup> The perception of these general contractors is fully consistent with the expert testimony, grounded on bidding theory, to the effect that because segmentation of a market reduces the total number of bids received by a general, it tends to increase prices.<sup>87</sup>

36. In addition to segmenting the market, the Registry imposes an artificial time limit on price negotiation. When the Registry is not in

<sup>80</sup> Equally unimpressive is respondents' claim that the Registry facilitates entry of new firms by protecting them from the price-cutting pressures of bid peddling. *See, e.g.,* Dennis 1883–85. Protecting a new entrant from price competition is not a cognizable economic justification. Stewart 2072–73.

<sup>81</sup> Birrell, an associate professor at Case Western University, is an expert in the management of construction projects including the contracting process, the formation of the construction team consisting of generals and subs, estimating costs, bidding, and planning construction work. CX 128A-S; Birrell 1168–90.

<sup>82</sup> Stewart, an associate professor at the University of North Carolina, specializes in industrial organization. CX 129A-E; Stewart 1307–14.

<sup>83</sup> Findings 16, 18; CX 133, CX 155T-X; Stewart 1333–39.

<sup>84</sup> Naylor 1061–62.

<sup>85</sup> Strong 1806.

<sup>86</sup> Arnold 95–101, 123–27, 196–97, Inmann 227, 233, 241–44, Boucher 688, Zellner 832, 836–38, Morgan 923, 941–42, Wade 1139.

<sup>87</sup> CX 131B, CX 155T, V-X; Birrell 1271–75, Stewart 1327–39.

use, or where a particular trade has no bid depository to turn to, the bidding process is subject to increasingly vigorous price pressures as telephone negotiations intensify near the general contractors' prime bid deadline.<sup>88</sup> Such last-minute telephone negotiations may be initiated either by general contractors or by subcontractors. During the course of these telephone negotiations, generals or subcontractors may employ various bidding strategies and pressures.<sup>89</sup> To begin with, a general may simply shop by informing a subcontractor that its bid is too high without specifying the exact bid of any other subcontractor.<sup>90</sup> Another strategy that may be employed is outright bid peddling, whereby the general [23] uses the specific bid of one subcontractor to drive down the bid of another.<sup>91</sup> Still another ploy, is for a subcontractor to volunteer a last-minute telephone change, perhaps citing a sudden concession from a supplier or the savings that arise when the subcontractor finds an acceptable alternative material under the specification provision allowing for the substitution of "or equals".<sup>92</sup> Irrespective of the exact bidding strategy used, and who has initiated the last-minute telephone contact, the record evidence is that pre-award price concessions are almost universally incorporated into the general contractor's prime bid with the result that the awarding party receives a lower price.<sup>93</sup>

37. The pre-award bargaining in the absence of a bid depository (again, usually in the form of last-minute telephone conversations) may touch on price indirectly as general contractors and electrical subcontractors negotiate over such matters as "or equals", work scope, and possible redundancies or overlaps.<sup>94</sup> See Findings 38-40.

38. Commonly used in the construction industry is the concept of "or equals", that is, the substitution of material called for by a specification with a material of equal quality.<sup>95</sup> It has been the experience of firms in the construction industry that some of the best price reductions for these "equals" come just before the generals' deadline as suppliers maneuver in an effort to have their customers—the subcontractors—submit winning sub-bids.<sup>96</sup> By cutting off the electrical subcontractors' bidding three hours before the generals' deadline, the Registry tends to inhibit the use of such late price [24] concessions from suppliers to electricals, which might, in turn, lower the prime

<sup>88</sup> Morrison 568-69, 593-96, 603, Boucher 676-77, Zellner 844-45, Naylor 1065-67, Wade 1113-15, 1122-26, 1138, Birrell 1211-14.

<sup>89</sup> See CX Physical Exhibit A.

<sup>90</sup> Arnold 183-84, Peters 365-67, Zellner 849, Wade 1127-29.

<sup>91</sup> See Mann 287, Boucher 679.

<sup>92</sup> Baker 490-91, Zellner 840, Wade 1135-37, Birrell 1238-40. See also Finding 38.

<sup>93</sup> CX 155P; Arnold 91-92, 194, Morrison 575, 593-94, Boucher 681, McGroom 784-85, Zellner 834-35, Birrell 1213-14, 1259-60, Dennis 1919.

<sup>94</sup> Birrell 1206-13.

<sup>95</sup> Birrell 1238-39.

<sup>96</sup> Morrison 604-06, Zellner 854, Wade 1122-23.

bids of the generals.<sup>97</sup>

39. Work scope is the subcontractor's perception, derived from an examination of drawings and specifications, of the service to be provided on a project. On the basis of this examination, the subcontractor typically makes a "quantity take-off" of work units to be provided, and then based on his projection of costs and targeted margin, a bid price is worked up. Different subcontractors, however, have different perceptions of work scope on any given job, and one subcontractor may have included what another has omitted.<sup>98</sup> When such differences become apparent to the general contractor after a bid is filed, the usual procedure (in the absence of a bid depository) is for the general and subcontractors to engage in telephone negotiations clarifying and, if necessary, adjusting price to reflect any new understanding about work scope.<sup>99</sup> The Registry's rules do not allow for such post-filing price negotiation over work scope.<sup>100</sup>

40. Still another area affected by Registry rules is negotiation over redundancies. Should the general contractor discover a redundancy or overlap, say, control wiring that may be done by mechanicals or electricals, or scaffolding which may be done by the general itself or by one of the sub-trademen, the procedure followed in the absence of a bid depository is for the general to contact the subsidiary trades bidding on the job, inquire about the possible redundancy, and negotiate a price adjustment.<sup>101</sup> [25] While Registry rules do not prohibit the first step in this procedure—the inquiry about a possible redundancy<sup>102</sup>—there is an absolute prohibition against the post-filing negotiation of a price concession, the most direct way of eliminating the redundancy.<sup>103</sup> Under the Registry rules all that a general confronted with a redundancy problem may do is wait until after the generals' bidding deadline has passed, and assuming it has been awarded the prime contract, it could then negotiate a "change order".<sup>104</sup> A post-award change order, however, is an option that is only available to the winning general; moreover, the post-bidding negotiation of change orders may slow down the construction process, cause the renegotia-

<sup>97</sup> Wade 1122-23. See also Wade 1163-64.

<sup>98</sup> Birrell 1206-08.

<sup>99</sup> Wade 1113-15, Birrell 1212-13, 1218-19.

<sup>100</sup> Zellner 844-45, Birrell 1227-28.

<sup>101</sup> CX Physical Exhibit A; Arnold 121-23, 153, 172-74, Inman 214-15, 253-60, Zellner 854-55, Naylor 1066-69, Birrell 1209-13. As Birrell put it,

I perceive that relationship [between discussions and price changes] as intimate; that the purpose of the discussion is to establish if changes need to be made in price to enable the minimization of overlaps and omissions across competing bidders in one trade and across the bidders in all trades. For these people to discuss something about the project without it being related to the price of the project, you would have to think maybe pretty hard to find some topic to discuss, if it didn't have a relationship to price. Birrell 1232. See also Wade 1123-26.

<sup>102</sup> Barnett 1585.

<sup>103</sup> Arnold 122, 162-65, 173, Inman 257, 267-68, Birrell 1227-28, Dennis 1910.

<sup>104</sup> Arnold 167-68, Inman 269-70, Chester 1721-22.

tion of related subcontracts, and are generally regarded as tending to increase costs.<sup>105</sup>

41. If the Registry did not exist, even after a general contractor has been awarded the prime contract, the successful general and all interested subcontractors could engage in further negotiations. Thus in trades which do not have a registry, or when the Registry is not operating on an electrical job in the Memphis area, the winning general is likely to be courted in the post-award period by subcontractors who are now [26] prepared to lower their pre-award bid in recognition of the added leverage enjoyed by the successful general contractor.<sup>106</sup> In addition, there may be post-award negotiations about work scopes and the substitution of materials ("or equals") that could change the subcontractor's bid.<sup>107</sup> While lower subcontracting bids received in the post-award period may be passed on to the awarding authority, there is little incentive to do so, and most post-award reductions in price only result in improved margins for general contractors.<sup>108</sup>

42. Complaint counsel's experts concluded that the Registry's rules limiting price negotiation and segmenting the market, as described in Findings 35-41, are likely to raise the cost of electrical subcontracting services.<sup>109</sup>

43. Respondents argue that the Registry has no impact on price because subcontractors submit their lowest possible price to the Registry, confident that their sealed bids will not be subject to peddling.<sup>110</sup> As a corollary of this "best price" argument, the claim is made that in the absence of the Registry, subcontractors may anticipate bid peddling by inflating their bids in order to leave room for negotiation. The notion of "best price" as one determined subjectively by businessmen was sharply criticized by complaint counsel's experts. Professors Stewart and Birrell testified that [27] all businessmen view their offers as the "best price". The function of the market is to test whether this so-called "best price" can be lowered still further.<sup>111</sup> Moreover, if in fact the Registry was the source of the "best price", or if in the absence of a bid depository experience showed that margins are inflated in anticipation of bid peddling, one would expect to see generals replicating the Registry in bid depositories for other trades. No such

<sup>105</sup> Arnold 169-70, Inman 253-61, 266-68, 272, Birrell 1235-38.

<sup>106</sup> Wade 1126-27, Birrell 1204, 1258-59. Post-award peddling may take place over an extensive period of time since some sub-trades are not required to be on the job site until other work is completed. Birrell 1259.

<sup>107</sup> Naylor 1073-74, Birrell 1257.

<sup>108</sup> Inman 248, Morrison 594, McGroom 784. A benefit does accrue to the owner, of course, if the general's bid had included an allowance for expected savings resulting from post-award bid peddling. CX 155P-Q; Wade 1156, Birrell 1240.

<sup>109</sup> CX 131A—CX 134, CX 155P-Q, S-X; Birrell 1213-14, 1261-63, 1271-74, 1291-93, Stewart 1319-21, 1333-47.

<sup>110</sup> The "best price" argument was supported by several witnesses called by respondents (Barnett 1574, Martin 1630-31, Chester 1712, Dennis 1850-51, Scurlock 2004-06) as well as by the testimony of witnesses called by complaint counsel who said that the Registry was a source of good or low prices. See, e.g., Arnold 140, Inman 243-44, Peters 401-02, Boucher 707-08, Zellner 861, Morgan 937, Wade 1145-46, 1149.

<sup>111</sup> Birrell 1287-88, 1294-96, Stewart 1350-51.

trend exists, and the Registry itself is essentially a product of electrical subcontractor initiative rather than general contractor demand.<sup>112</sup> In addition, there is impressive direct proof that the Registry does not in fact produce the "best price". In the first place, as the sanction incidents (see Findings 45-54) demonstrate, the disciplinary machinery of the Registry itself is more often than not invoked for the very reason that the general was offered (and accepted) a better price outside of the Registry.<sup>113</sup> Second, the whole notion of the Registry as the source of the "best price" was substantially demolished by the testimony of respondents' own witnesses to the effect that the purpose of the Registry is to reduce price-cutting pressures. Note, for example, the following testimony of Registry board member and president Barnett:

My particular interest in the Registry is that it promotes ethical bidding practices. It tends to discourage and if not—I can't say eliminate, but the aim would be to eliminate unethical practices such as bid shopping, bid peddling, price cutting, things of this nature that go on when there are not bids provided or recorded and open to public review, and this is—this is the primary reason for the establishment of the Registry, and this has been the aim of the Registry ever since it was established and went into operation.<sup>114</sup> [28]

Barnett further testified:

Q: Why do you think the price cutting and bid peddling, why do you think that's a bad practice in the industry? What does it do when it's there?

A: Well, the only thing I can say is that it provides second opportunities for people to bid the job when we as general contractors are not provided that opportunity. It is—ever since I've been in the business, it's been considered as unethical practices. I was taught to believe this. I do believe it, and therefore, I don't subscribe to the theory of bid peddling or price cutting, and I personally try to discourage it anywhere I can, and I feel our Registry also does so.<sup>115</sup>

As for the prospect of inflated bids in the absence of a bid depository, Professor Birrell testified that the very purpose of the intensive telephone negotiations that characterize non-bid depository markets is to test for such inflation.<sup>116</sup>

44. The adverse impact on price attributed by complaint counsel's experts to the Registry's limitation on price negotiation and its segmentation of the market is confirmed by the sanction incidents. See Findings 45-54.

45. *Maler Construction Co.* Maler, a general contractor, was sus-

<sup>112</sup> See Findings 7-8, 31-32. See also CX 159G; Inman 225, Peters 393.

<sup>113</sup> Stewart 1342.

<sup>114</sup> Barnett 1579-80.

<sup>115</sup> Barnett 1580. See also, CX 158B-C, CX 160B-C, CX 161"O"-Q; Barnett 1603-05, Martin 1691, 1699-1700, Chester 1712, 1726, Strong 1792-93, Dennis 1851.

<sup>116</sup> Birrell 1275-77, 1286-90.

pendent from use of the Registry for the period July 27, 1977, to January 26, 1978. On the Lipsey's Seafood Restaurant job, Maler had agreed to accept Registry bids, but awarded the electrical work to a subcontractor who had not bid through the Registry. The unregistered electrical bid was some \$300 lower than the lowest Registry bid. Maler claimed that it had to go outside of the registry when the architect of the job redesigned the specifications in order to reduce costs, but Allen Electric, the low Registry bidder, refused to rework its bid. Allen later filed the complaint against Maler which eventually led to Maler's suspension. While Maler's claim respecting the change in specifications [29] was not well established on the record, there is no question that a lower bid was made outside of the registry.<sup>117</sup>

46. *Inland Construction Co.* Inland, a general contractor, was suspended from use of the Registry during the period September 18, 1980, to March 17, 1981. On the Hickory Ridge Mall job, Inland permitted Haines Electric Co., which had bid through the Registry, to modify its bid after the Registry's filing deadline had passed. The modification consisted of Haines lowering its original bid by changing the "alternates" appearing on its bid sheet from additions to deductions. Haines' base bid was \$749,120, and before the modification, its bid for Alternate 1 was \$756,970 (\$749,120 base bid + \$7,850), \$777,636 for Alternate 4 (\$749,120 base bid + \$28,516), and \$778,320 for Alternate 5 (\$749,120 base bid + \$29,200). By changing each of these alternates from an addition to a deduction, Haines lowered its bid to \$741,270 for Alternate 1, to \$720,604 for Alternate 4, and to \$719,920 for Alternate 5. The Registry charged Inland with violating its rules by accepting these price reductions from Haines.<sup>118</sup> In commenting on this incident, the Registry said—

The Registry Office received several verbal complaints stating they believed Haines Electric Company violated the rules and regulations in that they changed their alternates from an add to a deduct. The rules and regulations of the Registry Service would not permit a firm to change a price or an alternate period. After an electrical contractor registers his bid he then has two options: (a) that it is to remain in the registry as bid or (b) to withdraw.<sup>119</sup> [30]

For its part in the Hickory Ridge Mall incident, Haines was suspended from use of the Registry between September 18, 1980, and March 17, 1981.<sup>120</sup>

<sup>117</sup> CX 18A—CX 24, CX 137, CX 147A.

<sup>118</sup> CX 25A—CX 30, CX 138, CX 147B.

<sup>119</sup> CX 25B-C.

<sup>120</sup> CX 28B. In addition to being suspended for the Hickory Ridge Mall job, Haines was suspended from the Registry between May 28, 1982, and May 28, 1983, (subsequently changed to February 15, 1983, after an appeal) because of its actions on the V.A. Hospital-Ambulatory Care Addition job. This suspension came about after the Registry received a complaint letter from Anderson Electrical alleging that Haines had submitted Registry bids and then bid outside the Registry to a general contractor who was not using the Registry. Haines was suspended

(footnote cont'd)

