



**Statement of Adam Snavely
President/CEO Poole & Kent Corp.**

Representing:

Mechanical Contractors Association of America (MCAA)

Finishing Contractors Association (FCA)

**International Council of Employers of Bricklayers and Allied
Craftworkers (ICE-BAC)**

**Sheet Metal and Air Conditioning Contractors' National Association
(SMACNA)**

The Association of Union Constructors (TAUC)

Internal Revenue Service public hearing on proposed regulations

26 Code of Federal Regulations Part 31

Withholding under Internal Revenue Code Section 3402(t)

[REG-158747-06]

1545-BG45

April 16, 2009

Internal Revenue Service

1111 Constitution Avenue, NW

Auditorium

Washington, DC 20224

Government panelists:

IRS:

Catherine E. Livingstone

Deputy Division Counsel/Deputy Associate Chief Counsel

Marie Cashman

Special Counsel

A.G Kelly

General Attorney

Moises C. Medina

Director, Government Entities

Treasury:

Jeanne Ross

GOOD MORNING. MY NAME IS ADAM SNAVELY.

I AM PRESIDENT AND CEO OF POOLE & KENT CORP., A NATIONAL MECHANICAL CONSTRUCTION FIRM BASED IN BALTIMORE, MD.

POOLE & KENT EARNS ANNUAL REVEUNE OF SOME \$180 MILLION, AND IS A WHOLLY-OWNED SUBSIDIARY OF EMCOR CORP, A LEADING MECHANICAL AND ELECTRICAL CONSTRUCTION SERVICES FIRM NATIONWIDE.

EMCOR IS COMPRISED OF OVER 70 OPERATING COMPANIES IN THE US AND CANADA, WITH OVER 140 LOCATIONS AND 26,000 EMPLOYEES.

POOLE & KENT PERFORMS A BROAD RANGE OF MECHANICAL AND ELECTRICAL CONSTRUCTION SERVICES, INCLUDING NEW CONSTRUCTION, BUILDING RETROFITS AND FACILITIES SERVICES ON PUBLIC AND PRIVATE SECTOR PROJECTS OF ALL TYPES, OPERATING VARIOUSLY AS PRIME CONTRACTOR OR SPECIALTY SUBCONTRACTOR.

I AM REPRESENTING FIVE SPECIALTY CONSTRUCTION EMPLOYER ASSOCIATIONS –

THE MECHANICAL CONTRACTORS ASSOCIATION OF AMERICA,

THE SHEET METAL CONTRACTORS ASSOCIATION,

THE FINISHING CONTRACTORS ASSOCIATION,

THE BRICLAYER EMPLOYERS ASSOCIATION,

AND, THE ASSOCIATION OF UNION CONSTRUCTORS

TOGETHER WE REPRESENT THE MAJORITY OF THE SPECIALTY CONSTRUCTION INDUSTRY, WHICH COMPRISES OVER 64% ON OVERAL CONSTRUCTION EMPLOYMENT.

WE REPRESENT UNION-SIGNATORY EMPLOYERS, WHOSE HIGH-SKILL, HIGH-VALUE WAGE AND BENEFITS SYSTEM RELIES HEAVILY ON PROMPT CASH FLOW TO MAKE OUR MONTHLY HEALTH, PENSION, AND JOINT APPRENTICESHIP TRAINING PAYMENTS -- ALL OF WHICH MAINTAIN HIGH WORKFORCE STANDARDS AND PROJECT PERFORMANCE IN THE UNION SECTOR OF THE CONSTRUCTION INDUSTRY.

OUR GROUPS ALSO ARE MEMBERS OF THE GOVERNMENT WITHHOLDING RELIEF COALITION AND SHARE THE CONSENSUS OF INDUSTRY AND PUBLIC INTEREST GROUPS IN CONTINUING TO PRESS FOR REPEAL OF SECTION 511 OF THE 2005 TAX RECONCILIATION ACT BEFORE ANY GREATER IMPLEMENTATION COSTS ARE INCURRED.

WE THINK SECTION 511 WAS HASTILY CONCEIVED AND NARROWLY ASSESSED AS TO ITS COST/BENEFIT ANALYSIS AND SUPPOSED REVENUE GAIN.

SECTION 511 IS NOW RECOGNIZED AS PROFOUNDLY FLAWED FISCAL AND PROCUREMENT POLICY.

IT IS WASTEFUL OVERALL, AND WILL RESULT IN AN UNFUNDED MANDATE TRANSFERRING INEFFICIENT TAX COMPLIANCE ADMINISTRATIVE COSTS TO PUBLIC AGENCY PROCUREMENT PROGRAMS.

IT WILL DIMINISH COMPETITION FOR THOSE PROJECTS, AND INCREASE CONTRACT FINANCING AND ADMINISTRATIVE COSTS FOR THOSE COVERED AGENCIES – ALL TO THE DETRIMENT OF THE AGENCY MISSION AND PROCUREMENT PROGRAMS.

HAVING SAID THAT, WE ARE SYMPATHETIC TO IRS'S JOB OF PREPARING TO IMPLEMENT THE LAW, ASSUMING IT

**DOESN'T COME UNDER CLOSER REEXAMINATION BY
LAWMAKERS ON CAPITOL HILL BEFORE 2012.**

**OUR COMMENTS TO IRS ON THE MEASURE HAVE BEEN
SIMPLE – THAT IS -- THE WITHHOLDING CAN APPLY ONLY
TO PAYMENTS MADE TO PRIME CONTRACTORS, AND CAN BE
LEVIED ONLY ON AMOUNTS PAYABLE TO THE PRIME
CONTRACTOR - AND THAT WITHHOLDING CAN NOT FLOW-
DOWN TO SUBCONTRACTORS.**

**WE ARE GRATEFUL THAT IRS ACCEPTED THAT VIEW AND
RESTATED IT IN THE DECEMBER REGULATORY NOTICE, IN
WHICH IRS SAID: -- THE 3% WITHHOLDING “APPLIES TO
PAYMENTS BY THE GOVERNMENT ENTITY OR ITS PAYMENT
ADMINISTRATOR TO THE PRIME CONTRACTOR, AND DOES
NOT APPLY TO SUCCESSIVE PAYMENTS BY THE PRIME
CONTRACTOR TO ITS SUBCONTRACTORS.’**

**WE ARE HERE TODAY TO SAY THAT WE COULDN'T AGREE
MORE, BUT THAT THE IRS REGULATIONS NEED TO BE MADE
CLEARER ON THIS POINT.**

**THE WORD “SUCCESSIVE” IS THE PROBLEM. WE THINK THE
REGULATIONS SHOULD SAY – “APPLIES TO PAYMENTS BY
THE GOVERNMENT ENTITY OR ITS PAYMENT
ADMINISTRATOR TO THE PRIME CONTRACTOR, AND
APPLIES ONLY TO AMOUNS PAYABLE TO THE PRIME
CONTRACTOR FOR ITS SERVICES – AND NOT TO ANY
AMOUNTS PAYABLE TO SUBCONTRACTORS, AND DOES NOT
APPLY TO SUCCESSIVE PAYMENTS BY THE PRIME
CONTRACTOR TO ITS SUBCONTRACTORS.”**

**SO, FOR EXAMPLE: A \$10,000 INVOICE, WITH \$1,000 PAYABLE
TO THE PRIME AND \$9,000 PAYABLE TO SUBCONTRACTORS,
WOULD BE SUBJECT TO 3% LEVY ON ONLY \$1000, NOT THE
OTHER \$9,000.**

**ALSO, OTHER FEDERAL REGULATORY AGENCIES – THE
FEDERAL ACQUISITION REGULATORY COUNCIL FOR DIRECT
FEDERAL CONTRACT PAYMENT ADMINISTRATION –**

AND THE OFFICE OF MANAGEMENT AND BUDGET FOR ITS RULES GOVERNING FEDERAL GRANT ADMINISTRATION –

WILL HAVE TO BE CHANGED TO PREVENT PAYMENT ABUSES STEMMING FROM THE NEW LAW AND REGULATIONS.

UNLESS THE CONTRACTING AGENCIES ARE CAREFUL TO MAKE SURE THAT THE PAYMENT WITHHOLDING IS CLEARLY OUTSIDE THE SCOPE OF ORDINARY RETAINAGE PASS THROUGHs ON COVERED PROJECTS, THE NEW LAW AND REGULATIONS WILL LEAD TO WIDESPREAD ABUSE, AND ULTIMATELY IMPAIR PROJECT SUCCESS.

OUR COMPANY EXPERIENCE IS THAT NOTHING CAN THREATEN PROJECT SUCCESS MORE THAN PAYMENT DELAYS AND DISPUTES.

IN FACT, THE US CONGRESS HAS RECOGNIZED THE BENEFICIAL ASPECTS OF FAIR PAYMENT ADMINISTRATION IN TWO FEDERAL PROMPT PAYMENT ACTS.

UNLESS IRS, FAR AND OMB ARE VERY EXPLICIT IN THEIR REGULATIONS, THIS NEW WITHHOLDING WILL LIKELY LEAD MANY PRIME CONTRACTORS AFOUL OF SUCH PROMPT PAYMENT LAWS, WHICH ONLY PERMIT WITHHOLDING OF PAYMENT TO SUBCONTRACTORS FOR PERFORMANCE-RELATED CAUSES.

UNLESS THIS COMPREHENSIVE REGULATORY REFORM IS MADE, THE ORDINARY APPLICATION OF STANDARD FORM SUBCONTRACT PAYMENT TERMS MAY BE INTERPRETED TO ALLOW THE PASS-THROUGH OF THE TAX WITHHOLDING TO SUBCONTRACTORS.

IRS MUST MAKE CLEAR THAT THE \$10,000 INVOICE THRESHHOLD APPLIES ONLY TO AMOUNTS PAYABLE TO THE PRIME CONTRACTOR.

AND THEN, MAKE JUST AS CLEAR, THAT THE USE OF PRIVATE FORM SUBCONTRACT PAYMENT CLAUSES THAT ALLOW PRIMES TO PASS-THROUGH RETAINAGE TO SUBCONTRACTORS DO NOT APPLY TO THIS TYPE OF WITHHOLDING.

WE SUBMIT THAT THAT IS A BIG REGULATORY JOB, IN ITSELF HIGHLY EXPENSIVE.

ALSO, WE SUBMIT THAT OTHER INTERVENING EVENTS ARE COMBINING TO MAKE THE NEW WITHHOLDING EVEN MORE COUNTERPRODUCTIVE.

LATE LAST YEAR, CONGRESS PASSED THE FEDERAL CONTRACTOR AND FEDERAL SPENDING ACCOUNTABILITY ACT, WHICH CALLS FOR DEVELOPMENT OF A LEGAL COMPLIANCE DATABASE THAT CONTRACTING OFFICERS MUST CONSULT BEFORE AWARDING A PUBLIC CONTRACT – SO THAT TAX SCOFFLAWS ARE NOT AWARDED PUBLIC CONTRACTS IN THE FIRST PLACE.

THIS IS A MORE EFFICIENT AND EFFECTIVE WAY TO STEM THE ABUSES THAT SECTION 511 ATTEMPTS TO ADDRESS.

FURTHERMORE, THE BIGGEST TAX AVOIDANCE PROBLEM IN THIS AREA RELATES TO MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS, A HUGE TAX DRAIN ON THE TREASURY.

AGAIN HERE, THE 111TH CONGRESS MAY BE POISED TO PASS WORKER MISCLASSIFICATION REFORM , FINALLY STEMMING THE HUGE TAX DRAIN CAUSED BY TAX AVOIDANCE BY INDEPENDENT CONTRACTORS.

WE SUBMIT THAT BOTH THESE MEASURES ARE MORE DIRECT AND EFFICIENT WAYS TO ADDRESS THE TAX AVOIDANCE ABUSES SECTION 511 IS ATTEMPTING TO ADDRESS.

**THANK YOU FOR THE OPPOSRTUNITY TO MAKE THESE
POINTS TODAY. IF YOU HAVE QUESTIONS, I'LL DO MY BEST
TO ANSWER THEM.**

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