THE WITHDRAWN SUB-BID: WHEN WILL THE SUBCONTRACTOR BE BOUND?

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You are a general contractor preparing to bid for the contract to construct a large, Class A office building. If you are the successful bidder, you expect a highly lucrative project, one that is likely to greatly increase your visibility in the market, and to turn a reasonable profit. After obtaining bids from numerous prospective subcontractors, you submit your bid and the Owner selects you for award of the contract. You send out the subcontracts and purchase orders to the subcontractors and suppliers whose bids you used when formulating your own bid.

Unfortunately, severe shortages have caused the cost of materials to increase dramatically since you submitted your bid, and your drywall subcontractor now refuses to perform for anything less than 30% above the price he quoted you. The job is in danger of running a large loss, and ground has yet to be broken on the project. After scrambling to find another drywall subcontractor (who agrees to perform the work for 25% above the original subcontractor’s bid price), one question is foremost on your mind: can I recover the extra 25% from the original subcontractor?

Theories of Recovery

As a general matter, there are two primary theories of recovery for contractors who wish to enforce the terms of a sub-bid: breach of contract and promissory estoppel.

Under the breach-of-contract theory, the general contractor must show: (1) the existence of a valid contract; (2) the subcontractor materially breached the contract; and (3) the contractor suffered damages as a result of the breach. In order to show that a valid contract existed, the contractor must show, among other circumstances, mutual assent to be bound. Stated differently, the contractor must show that both the contractor and the subcontractor intended to be bound to the sub-bid.

The theory of promissory estoppel is far more widely used to protect a contractor from subcontractors changing or withdrawing their bids. Under the so-called “firm bid” rule of promissory estoppel, a subcontractor is bound to hold its bid open for acceptance for a certain period of time, even though no formal contract may yet exist. (Note, however, some states, including Virginia and Pennsylvania, do not judicially recognize the concept of promissory estoppel. Instead, these states typically rely on more traditional principles associated with breach of contract.) Courts that endorse this rule do so because, “though [the subcontractor] did not bargain for this use of its bid, neither did [the subcontractor] make it idly, indifferent to whether it would be used or not. On the contrary, it is reasonable to suppose that [the subcontractor] submitted its bid to obtain the subcontract. It was bound to realize the substantial possibility that
its bid would be lowest, and that it would be included by plaintiff in its bid.”  Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757, 760 (1958).

Courts that apply the “firm bid” rule of promissory estoppel generally require the aggrieved contractor to make most, if not all, of the following showings:

- the sub-bid was unequivocal;
- the sub-bid was unambiguous;
- the contractor reasonably relied on the sub-bid in submitting its own bid (this is usually established by showing that the general contractor included the subcontractor’s price in its own bid price);
- the contractor’s reliance upon the sub-bid caused the contractor to incur damages;
- the contractor accepted the sub-bid timely (i.e., within the time stated in the sub-bid; if no time is set forth, within a “reasonable” time);
- the sub-bid did not contain a material mistake; and
- the contractor did not engage in post-bid negotiations.  Such “bid-shopping,” “bid-chopping,” or “bid-chiseling” will usually be held to vitiate the “reasonable reliance” element of the rule, freeing the subcontractor to walk away from its earlier bid.

The Words Matter

Recent cases have shown that, regardless of the theory of recovery, the language set forth in the sub-bid makes a big difference.

For example, in Double AA Builders, Ltd. v. Grand State Construction L.L.C., 210 Ariz. 503, 114 P.3d 835 (2005), the general contractor solicited bids from a number of subcontractors in anticipation of submitting a bid to construct a retail store.  In response to the solicitation, a subcontractor faxed a bid to install the exterior finish on the project.  The unsigned bid proposal set forth the scope of work to be performed and the price; with the further statement that the price would be “good for 30 days.”

The contractor incorporated the subcontractor’s proposal into its own bid and was subsequently awarded the contract.  During the 30-day period in which the subcontractor had stated that its price would remain “good,” the contractor sent the subcontractor a subcontract to be signed and returned.  The subcontractor, however, responded that it would not sign the subcontract or perform the work because it had signed four other subcontracts in the time since it had submitted its sub-bid to the contractor.  Consequently, the contractor had to procure the work from another source at a higher cost than the original subcontractor’s bid.  The contractor sued the original subcontractor, based on promissory estoppel, for the difference between the sub-bid price and the actual cost.
The Arizona state trial court held in favor of the contractor, and the Arizona Court of Appeals affirmed. In so ruling, the court rejected the subcontractor’s argument that promissory estoppel should not be applied to sub-bids submitted to general contractors. Specifically, the Court rejected the subcontractor’s argument that its bid was not a promise, but rather an indication of intent to perform the work. The Court noted that the subcontractor had included specific information regarding the project, including the subcontractor’s name, the scope of work, the price, and certain payment terms. As a result, “[t]he quote therefore constitutes an unequivocal commitment to perform certain work at a certain price.” Clearly, the specificity of the sub-bid’s language was an important factor to the court.

In another recent case, a federal court applying New Jersey law, reached the opposite result (i.e., the subcontractor was not bound to its quote), but for a similar reason. In Fletcher-Harlee Corp. v. Pote Concrete Contractors, Inc., 421 F.Supp.2d 831 (D.N.J. 2006), the general contractor solicited sub-bids to perform the concrete work at a college construction project. The subcontractor-defendant responded to the solicitation by faxing a written bid to the contractor. The bid contained the following terms:

This is provided for informational purposes and no reliance should be placed thereon. [Subcontractor] will not be responsible or liable in any manner pending execution of a written agreement covering the work in question. The submission of this information should not be regarded as a firm offer.

Shortly thereafter, the contractor, having been awarded the prime contract, informed the subcontractor that it had used the subcontractor’s bid and intended to award it the subcontract. The subcontractor, however, responded that the cost of material had significantly increased, and that it could not perform at the original quote price. The contractor was then forced to procure the concrete work from another source at a price much higher than the original quote. The contractor later sued the original subcontractor under the alternative theories of breach of contract and promissory estoppel.

The federal court dismissed both counts based on the language contained within the subcontractor’s bid. With regard to the breach-of-contract claim, the court stated that the bid clearly indicated that the subcontractor did not intend to be bound to its bid. As a result, there was no mutual assent, a necessary element of a valid breach-of-contract claim. Regarding the contractor’s promissory estoppel count, the same paragraph of the bid made clear that the contractor’s reliance upon the bid was not reasonable, thus nullifying that required element of the claim.

Conclusion

In short, the language contained in a subcontractor’s bid proposal matters. If you are a subcontractor and you are wary of being held to your proposal price, you may consider adding language to your bids indicating that you do not intend to be bound absent a formal agreement. Of course, you run the risk of a general contractor not using your bid. If you are a general contractor, and timing permits, you may want to send written pre-bid confirmation to the
subcontractors you want to use on the project that you are relying on their bids. This confirmation should indicate that you will be relying on their bids when formulating your own bid. Upon contract award, a general contractor should consider notifying subcontractors and suppliers of the award, the general contractor’s reliance on their bid(s) and intent to enter into a subcontract or purchase order. It is important to keep in mind that some courts view contractors’ post-award renegotiation with a subcontractor as a counteroffer to the subcontractor’s/supplier’s bid, thereby freeing the subcontractor/supplier to withdraw its earlier bid without consequence.

In the end, the issue of holding a subcontractor or supplier to its bid is highly fact-specific. Added to this is the complication that different jurisdictions can reach different conclusions despite a similarity in facts. Consequently, the fact that one subcontractor is held to its bid does not guarantee the same result in other cases.

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