

Bid Mistakes

Contractor's Potential Liability for Bid Errors

It is typical in the construction industry for subcontractors to wait as long as possible before placing their bids with a general contractor in order to prevent the general contractor from having time to obtain a lower bid from another subcontractor. The subcontractor must obtain prices from its subcontractors and suppliers, many of which are also submitting bids at the last minute for the same reason. Under this time pressure, mistakes can be made in the last minute push to put a bid together.

A contractor should be relieved from a unilateral mistake in his bid under proper circumstances.²⁰

A number of factors determine whether a bid may be withdrawn.²¹

If a bid is obviously erroneous, such as when it is unreasonably low, courts will generally grant the contractor the right to withdraw his erroneous bid, at least where circumstances indicate that the owner should have realized that the bid was based on a mistake.

The mistake must be simply a clerical or mathematical error; if the mistake is one of judgment or lack of expertise in bidding, the mistake will not relieve the contractor from performance;

The contractor must have promptly notified the owner of its mistake and intent to withdraw;

The mistake is so large it would be unconscionable to force the contractor to perform the contract at the mistaken bid price; and

The owner must have not changed its position to its detriment in reliance on the bid.

If the bidding authority refuse to allow the withdrawal of the bid, the contractor is faced with two options:

- 1) perform the project at the mistaken bid price or;
- 2) refuse to sign the contract. If the contractor chooses the latter course, it runs the risk of forfeiting its bid bond.

Most public bid projects contain a clause in the bid invitation which provides that the contractor agrees to forfeit its bid bond if it is awarded the job and wrongfully refuses to enter into a contract. These provisions are designed to protect the bidding authority from damage caused by being forced to rebid the project and any delay caused by that process.

The public owner has several choices when faced with a putative low bidder who wishes to withdraw its bid:

- a.) Evaluate the putative low bidder's arguments under the above criteria and allow withdrawal and return the bid bond.
- b.) Attempt to forfeit the bid bond.
- c.) If the "low bidder" is allowed to withdraw, or if the owner decides to attempt to forfeit the bid bond, the owner may accept the next low bid or reject all bids and start the process over again.

Of course, once all of the bidders' bid amounts are made public and the bidders can see how their competitors priced the project, getting a fair price the next time around may be difficult unless there are modifications made to the plans and specifications so that the owner gets a "new look" at the project by the bidders.

²⁰ *M.J. McGough Co. v. Jane Lamb Mem. Hosp.*, 302 F. Supp. 482 (S.D. Iowa 1969).

²¹ *Id.*