

Bid Issues—What Every Subcontractor Needs To Know

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Construction bidding is a complicated task, and unsurprisingly, the bid mistake is the most commonly litigated construction bidding issue. The first sign that a bid mistake has occurred is usually when a subcontractor submits a bid and later realizes that its bid was too low. When the subcontractor refuses to perform, or seeks a higher price or requests to withdraw its bid, the contractor typically sues. This article will explore the rights of the general contractor who relies on a subcontractor's bid to prepare its own bid, and several circumstances where the subcontractor can be excused for its bid mistake.

The Submission of a Bid Does Not Form a Legal Contract.

Under Texas law, the submission of a bid, and the subsequent reliance by the general contractor on that bid, do *not* combine to form a legal contract. However, Texas courts recognize a legal theory called promissory estoppel. Promissory estoppel can be claimed by the general contractor and applied by the court in circumstances where it would be unfair to let the bidder walk away from its bid. This legal theory requires that the general contractor prove the following elements:

1. The subcontractor made a promise [the bid];
2. The subcontractor should have reasonably expected that the bid would induce action or forbearance on the part of the general contractor; and
3. The general contractor did take such action or forbearance. The action is binding if injustice can be avoided only by enforcement of the promise.

The court's application of promissory estoppel against the subcontractor makes the subcontractor's bid incapable of being withdrawn for some reasonable period so that the general contractor may accept the bid. If the subcontractor refuses to, or is incapable of, performing in accordance with its bid, the general contractor may be entitled to the difference between the amount paid to the replacement subcontractor and the amount of the reneging subcontractor's bid.

When is the Subcontractor off of the hook?

The general contractor's conduct will often be a central factor in deciding whether the subcontractor is let off the hook.

1. **Bid Mistake.** A general contractor is not entitled to rely on the subcontractor's bid if it knew, or should have known, that the bid price was a mistake. A significant disparity between bidders should alert a general contractor that a mistake has been made. Some experienced construction lawyers suggest that a bid disparity of 50% would likely place the general contractor on notice that it should not be entitled to rely on the low bid.
2. **Bid-Chiseling.** A general contractor's attempt to negotiate a lower price than that bid by threatening to subcontract the work to another subcontractor may destroy the general contractor's ability to hold the subcontractor to its bid.
3. **Bid-Shopping.** Courts consistently reject claims where there is evidence that the general contractor sought bids from subcontractors other than the one whose bid amount the general contractor used in calculating its own bid.

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Suggestions to Subcontractors

Subcontractors can help protect themselves from the unwanted enforcement of a bid by putting the following suggestions into practice:

1. **Be clear as to what you are bidding on.** Seek clarification prior to submitting your bid if you are unclear or condition your bid on your understanding of the contract documents.
2. **Submit bids in writing.** Always follow up oral communications with a written communication.
3. **Condition the acceptance of your bid.** Specifically, make your bid contingent upon the acceptance of a written subcontract agreement. Also, consider specifying that your bid is valid for a specific period of time.
5. **Do not delay.** If a mistake is made, inform the general contractor of the mistake as soon as possible, in writing.

While construction bidding is often described as a one-way street benefiting only general contractors, subcontractors can protect themselves by conditioning their bids, papering up all communications, and reporting any mistakes as soon as possible.

The foregoing is provided for informational purposes only and is not intended to provide legal advice or to serve as an alternative to seeking legal counsel.

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