

Contract Bids Can Be A One=>Way Street

Who said life was fair? When a general contractor (“GC”) prepares a bid for a project, it will often call upon subcontractors to bid for select portions of the work. Then, in turn, the GC will utilize the subcontractor=s bids to calculate its total bid to the owner. Hence, there is an inherent reliance by the GC on the subcontractor=s bid, even though there is no oral or written contact between the subcontractor and the general contractor at this point.

As a general rule, courts will require a subcontractor to honor its bid for materials and labor if the GC is later awarded the contract. The subcontractor=s bid is viewed as a “binding promise,” implied in law, even though the subcontractor received no consideration in return. On the other hand, if the GC is awarded the job by the project owner, it has no obligation to use the subcontractor. After the contract is awarded, the GC can turn elsewhere or even try to negotiate a lower price from the subcontractor whose quote was relied upon.

Why does this anomaly exist? Because of the long established principle of **promissory estoppel**. Promissory estoppel is a legal theory that can apply to a person making a promise (the “promisor”). The promisor can be required to keep the promise he or she made, or face a damage claim from the person to whom the promise was made (“the promise”). However, certain conditions must exist before a court will hold the promisor liable to the promisee. First, the promisor must have expected the promisee to act on the promise, and as a result of that action, the promisee suffered damage or injury.

The application of this doctrine in the construction world may seem unfair, but the “one-way” street outcome is consistent with this legal theory. In the example above, only the GC is entitled to the benefit of promissory estoppel because it relied upon the bid (a promise) of the subcontractor in order to make its proposal. In essence, the subcontractor induces the GC to act in a certain way, namely, to put in its own bid at an amount which includes the subcontractor’s price in the calculation. Thus, the GC is relying on the subcontractor to hold its price in order to make its own bid.

Conversely, the subcontractor does not rely upon any “promise” by the general contractor. The GC makes no representation that the subcontractor can or will rely upon. Consequently, should the GC be awarded the project, but later decide to use another vendor, the erstwhile subcontractor is not afforded the benefit of promissory estoppel.

By way of example, New York law held this to be the case where a court permitted a GC to bring a cause of action against a subcontractor under this very promissory estoppel theory. However, in doing so, the court warned that in order to prevail, the GC must demonstrate that it relied, to its detriment, on a clear and unambiguous quote made by the subcontractor. Additionally, the court required proof that the subcontractor was aware that the GC intended to use the subcontractor’s bid to formulate its own bid to the owner.

Therefore, if the GC can prove to the court that it used a subcontractor’s bid in preparation of its own bid, and that all parties were aware of that fact, the GC may be entitled to damages from the subcontractor, should the subcontractor refuse to honor its original bid.

PRACTICE POINTER - If the GC intends to use a subcontractor or vendor price in its own bid, it should be sure to communicate that fact to the subcontractor or vendor. Then, if the GC is later awarded the contract, it will be able to hold the company to its original figure. But note: any efforts by the GC to shop the price elsewhere, or to negotiate with the subcontractor, may deprive it of the argument that it "relied" upon the subcontractor quote.

On the other hand, if price fluctuation or other variables concern the subcontractor, and the flexibility of an escape clause is desired, it should agree to hold its bid only for a limited period of time. This will protect the subcontractor should market prices change dramatically.

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