

Is My Bid Proposal Enforceable? How Can ADSC Subcontractors Protect Themselves at Bid Time?

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The second most popular question that I receive when presenting a construction law seminar to an ADSC Chapter or to an ADSC contractor member at its office is "Is my bid enforceable?" The answer in many instances is yes, which can potentially expose an ADSC subcontractor to a great deal of liability in the form of inflated replacement subcontractor costs if it is unable to honor its bid for any reason including causes that are potentially beyond its control. However, this dangerous situation can be avoided by the implementation of effective internal controls through the creation of proper documentation.

A recent opinion issued by the Supreme Court of Wyoming in the case of Jackman Constr., Inc. v. Rock Springs Winnelson Co., 385 P. 3d 311 (Wy. 2016) on December 13, 2016 vividly illustrates the steps that a subcontractor or material supplier should take to avoid the enforceability of its bid under undesirable circumstances. In this case, the subcontractor was sued due to a failure to supply plumbing materials for the amount that was stated in its bid which resulted in the contractor spending amounts in excess of the subcontractor's bid proposal to obtain the same performance. The Court denied the claim for excess costs against the Subcontractor because a written contract was never entered into between the parties and because the contractor could not prove that the subcontractor had provided it with a

clear and definite promise that the subcontractor should have reasonably expected would be relied upon by the contractor when submitting its bid.

The Supreme Court of Wyoming reached its

decision based upon the critical legal principle that a bid is only a promise to perform under the conditions that are expressly stated in the bid. If a general contractor does not ultimately agree to all of the conditions set forth in the bid, it cannot rely upon or enforce the bid against the subcontractor. For example, in the Wyoming lawsuit, a bid expiration date was clearly printed at the top of each submitted bid schedule. This bid expiration date did not violate the applicable project specifications in any

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way, and therefore, was completely enforceable. The contractor also failed to comply with the requirement to provide a complete list of items or quantities as required by the subcontractor's bid form and failed to notify the subcontractor that it intended to use the subcontractor prior to the expiration of the bid by providing the required notice of intent to accept the bid, or a subcontract. Therefore, when the contractor did not make any attempt to comply with the terms and conditions of the bid prior to its expiration date, the bid could not be enforced against the subcontractor.

A bid proposal is your first opportunity to properly negotiate a subcontract in a manner that preserves your

ability to make a profit on a project. When preparing your next bid proposal, in addition to attaching your company's well thought out and properly drafted exclusions and standard terms and conditions, include language regarding the obligations of the contractor who receives such a bid proposal, including a bid expiration date to protect you against escalating costs of labor, materials, and equipment and which will also allow you to quickly move on to the next project if your bid is not timely accepted by your potential client. I also ask that you, like the subcontractor in the case discussed above, include the confirmation of scope requirements in your bid as another device to protect your profit margin and to shield your company against unnecessary risk.

Finally, for those of you still wondering what the most popular question is that I receive while publically speaking with ADSC members, it is... "Is an email or text that I send just as admissible in court as a letter?" The answer to this question is yes, so please prepare all electronic communications with as much diligence and contemplation as a letter that you would work on for a more extended period of time or hopefully, your future bid proposals.

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