Bidding in Construction

An Improperly Executed Bid Can Put a Contractor Behind Early

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Cost control starts with accurate estimating which is the blueprint for the control of labor, materials and indirect costs of a contract. The science and art of estimating a construction contract is the first step in the construction process.

The skill and preparation put into an estimate will have a tremendous effect on the performance of the work. The financial position of the contractor depends on his estimate, which is the blueprint for the control of costs and flow of cash through the performance of the contract. Carelessly underbidding puts the contractor in a financial bind for the entire project and creates fertile ground for the growth of disputes.

Contractors should not rely solely on their estimators but should check the bids personally before sending them out. However, if a contractor makes a mistake in his bid, the contractor has a right to withdraw his bid for an honest mistake if the other party knew or should have known that a mistake had been made.

Contractors must know the legal doctrines which dictate when their bids are responsive and when they have a legal right to revoke their bids. General contractors must be particularly aware of the procedures for bidding to owners, which may be either governmental or nongovernmental. Subcontractors who sometimes bid directly as specialty contractors to the owner must also be aware of the procedures for bidding directly.

In addition, subcontractors must have a working knowledge of the treacherous legal framework of bidding as a subcontractor to general contractors in the construction industry.

The key element of a bid on a prime construction contract is that it must be “responsive” to the invitation for bids. When a public contract must be made by competitive bidding, the award will be made to the lowest responsible, responsive bidder. An owner who must select the lowest responsible bid need not even consider a responsible bidder whose bid is nonresponsive.

A bid is nonresponsive if it places qualifications or conditions in the contract different from those in the invitation for bids. When a public contract must be made by competitive bidding, the award will be made to the lowest responsible, responsive bidder. An owner who must select the lowest responsible bid need not even consider a responsible bidder whose bid is not responsive.

In private negotiated work, the proposal form is normally the blueprint for the offer to enter into a contract. Taking time to complete the proposal form completely and accurately is a must for a specialty contractor. The description of the scope of the work in the proposal should be precise as to the work that the subcontractor is proposing to perform.

The description of the scope of work should state the plans and specifications by sheet numbers, date of last revisions and addendum. If the contractor does not describe the work in detail, he may find that he bid on a version of the plans which included a later revision that has materially changed the work.

The proposal form should contain very important financial stipulations that monthly progress payments will be made on or before the 10th of each month; final payment is to be made within thirty days after substantial completion; no backcharges will be valid without the contractor’s agreement and all payments which are not paid when due will accrue 1 1/2 percent interest per month plus reasonable attorney’s fees. It should also provide that the contractor has the right to stop work for nonpayment.

If the contractor’s proposal is signed, then a binding contract comes into existence. The goal is to make sure that the terms and conditions in the contractor’s proposal are incorporated by reference into any contract so that the terms and conditions of the proposal should take precedence. The terms and conditions of the proposal should be incorporated in any contract that is subsequently signed, by adding the words: “The scope of the work and terms and conditions which are stated in contractor’s proposal dated , are incorporated by reference which shall take precedence.” The contractor may not always accomplish this goal, but starting with a proposal form that protects the contractor’s interest is a good starting point.

(Editor’s Note: This article is condensed from the author’s book, Construction Law in Contractors’ Language, published by McGraw-Hill Book Company and Engineering News-Record.)