WHAT TO DO IF YOU MAKE A BID MISTAKE

INTRODUCTION

There is no one set of laws, rules or procedures that apply when bid mistakes are made; however, there are common principles found in many statutes, regulations and court decisions. A roofing contractor who believes he has made a mistake justifying withdrawal or correction of a bid must comply with applicable statutes, regulations, policies and/or case law to obtain the relief sought. In bid mistake scenarios, timing is extremely important, and a roofing contractor must endeavor to provide notice of his mistake as quickly as possible.

CONTRACTS WITH STATE AGENCIES

Although the legal criteria and procedures concerning withdrawal and correction of erroneous bids on state and local projects vary from state to state and potentially from agency to agency, certain basic principles are commonly seen in state statutes, administrative regulations, agency policies and court cases dealing with bid mistakes. For example, the distinction between a “clerical mistake” and a “mistake of judgment” is often critical in a bid mistake analysis. Mathematical errors are the most common type of
clerical mistake. If a decimal point is placed incorrectly or a number is omitted, withdrawal or correction may be granted. Conversely, if a bidder failed to properly consider what would be required to perform the job, the error is a mistake of judgment and the contractor is unlikely to be excused from his bid.

In addition, a bidder is often required to show a bid was submitted in good faith, prompt notice of the mistake was provided, the mistake was substantial and there exists clear written evidence of the mistake. Depending on the particular statute or regulations at issue, some or all of these factors or others must be shown in a written notice of the mistake.

If an error is discovered or suspected before the bid opening, immediately notify the awarding agency in writing that the bid is withdrawn. If an error is discovered or suspected after the bid opening, first determine the discrepancy between your bid and the other bids. This information is publicly available if no representative attends the bid opening. In addition, many statutes require an agency that has reason to suspect a mistake has been made to call the winning contractor to confirm the bid. A large discrepancy between the bids should arouse just such a suspicion, requiring a call to confirm the bid. However, the agency typically does not have to reveal its suspicions in the telephone call. If you receive a call purporting to award the work and confirming the amount of your bid, go back and check the bid and the discrepancy with other bids before confirming its correctness.
Concurrently, as soon as a mistake is discovered or suspected, regardless of whether it is before or after the bid opening, you should immediately consult with legal counsel. Bid mistakes can impose substantial liability on the mistaken contractor, and it is important for communications with the awarding authority to be consistent with any applicable statutes, regulations or other criteria. Review with your attorney the terms and liability of the bid bond if any. In some scenarios, a withdrawing bidder must sacrifice his bid bond and the applicable terms and conditions of the bond may have a significant impact on future decisions, especially where the awarding authority denies the request to cancel or modify the bid.

Many agencies review bids and vote on whether to accept a given bid at a meeting. A roofing subcontractor seeking to withdraw or correct his bid should attend any such meeting and must be prepared to articulate the reasons withdrawal or correction of the bid should be allowed. These reasons must be consistent with the applicable statutes, case law and regulations and should be discussed with legal counsel in advance. In addition, copies of the written notice of mistake should be given to each board member at the meeting.

Prompt disclosure of a mistake is of the utmost importance. Most bid mistakes are realized after bid opening but prior to award, or at least execution, of the contract. Many states and agencies require notice of the mistake to be given quickly, often within two or three days after bid opening. A bidder who recognizes and reports a mistake
before the opening of bids is almost always allowed to withdraw its bid, but a bidder who does not notify the state or agency of a mistake until after a contract is executed, or after work has commenced, will find it difficult to obtain relief. In general, the earlier notice is given, the easier it is to obtain relief.

PRIVATE CONTRACTS

Generally, in a private setting, there is no contract until an offer is accepted. If a mistake is discovered before acceptance of a bid, simple notification of a mistake is typically effective to withdraw a bid. The exception is where the other party has already justifiably relied on a bid. If a roofing subcontractor submits a clear and definite bid to perform work for a certain price, the subcontractor knows or should reasonably expect the general contractor might rely on his bid, and the general contractor does in fact reasonably rely on the bid to its detriment—usually by incorporating the subcontract bid into its bid to the owner—the subcontractor must honor its bid under a legal doctrine known as “promissory estoppel”. This doctrine usually does not apply where a bid is submitted directly to an owner because though the owner might reasonably rely on a bid, an owner is rarely injured by such reliance.

Where a mistake is not discovered until after the general contractor has submitted its bid, a roofing subcontractor may still avoid the doctrine of promissory estoppel by proving that the general contractor did not actually rely on the bid or that such reliance

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was not reasonable. A general contractor may have not “actually relied” on a bid where he takes steps inconsistent with such reliance. Delays in communicating to the roofing subcontractor that his bid has been accepted, obtaining prices from other subcontractors before executing a subcontract at the bid price or even negotiating with the subcontractor are actions that may show the general contractor did not necessarily intend to rely on the submitted bid, precluding the general contractor from invoking the doctrine of promissory estoppel. Further, reliance may be found unreasonable where a mistake is blatant on the face of the bid or where the bid is significantly lower than other bids received.

WHAT TO DO IF A REQUEST TO CANCEL OR MODIFY A MISTAKEN BID IS DENIED

When timely notice was not given, proper procedures were not followed or the awarding authority determines, for whatever reason, to disallow the request for cancellation or modification of the bid and instead elects to enter into the contract, a roofing subcontractor’s options are limited. The subcontractor can simply refuse to perform the work, in which case he risks being held liable for the difference between his bid and the next lowest bid. Alternatively, the subcontractor can bring an action for declaratory relief or an injunction, seeking to prohibit the agency from awarding the contract at the mistaken price. The subcontractor also may execute the contract under protest, performing the work while pursuing legal action to increase the contract price.

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Legal counsel will assist in the making of an informed decision based on the discrepancy, bid bond, compliance with procedure and other relevant facts.

**CONTRACTS WITH FEDERAL AGENCIES**

For contracts with U.S. government agencies, Federal Acquisition Regulation (FAR) 14.407 allows the low bidder to withdraw or correct a mistaken bid in certain circumstances. Decisions by the General Accounting Office, which hears appeals of agency decisions, indicate that for a bid to be withdrawn or modified, the mistake must be the result of a clerical error, mathematical error or misreading of the specifications rather than a mistake of judgment. To withdraw or correct a bid, the mistaken bidder must first submit a written request to the contracting officer requesting permission to withdraw or modify the bid. To ensure some form of actual notice is transmitted as quickly as possible, the roofing subcontractor should also notify the awarding authority by phone. Legal counsel should review the written notification before it is transmitted and should be consulted before a telephone conversation with the awarding authority to ensure compliance with the authority’s procedures and ensure the proper facts are highlighted.

**CONCLUSION**

The best way to combat bid mistakes is to take affirmative steps to avoid them in the first place. Prevention of mistake is best achieved through rigorous adherence to
internal procedure. Regardless of whether a contract involves federal agencies, state agencies or a private project, a roofing subcontractor should provide written notification of the mistake at the earliest possible time. As more time passes, a subcontractor becomes less likely to obtain withdrawal or correction of its original bid. It is equally important that laws, rules and regulations governing bids are strictly followed as the failure to give proper notice may prevent realization of the desired remedy. It is important to involve an attorney early in the process.

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