Bidding: Bid Mistakes, Bid Responsiveness, Bid Bonds and Bid Protests

What can you do when you make a mistake when you submit a bid that you know will make the job unprofitable before you even start the job? Can you withdraw your bid? Are you bound to your bid when no contract has been signed? What is meant by a nonresponsive bid or a nonresponsible bidder? Can you object to a bid submitted by another contractor? These are some of the questions to be answered during this session, which will address the issues that frequently arise in bid situations.

Stephen Phillips
What Contractors Can Do When They Make A Bid Mistake On Public Construction Projects

by Stephen M. Phillips

Bids on public projects are subject to the firm bid rule. This rule requires that a contractor’s bid remain open and irrevocable for a specified period of time. The time period is set in a statute or in the bid documents and is typically 30 to 60 days after the bid opening. During this period, the bid is irrevocable. The contractor is not entitled to withdraw its bid, absent a legal excuse, even though the owner has not yet accepted the bid or awarded a contract. In this manner, public bidding and contracting differs from the normal principles regarding contract formation. Normally, contracts are not created and binding upon the parties until an offer has been accepted, and offers can be withdrawn at any time prior to acceptance unless the bid solicitation explicitly states that bids are to be irrevocable for a designated time period. However, for public work, the bidder is only entitled to withdraw its bid without recourse against the bid bond if the public owner does not award a contract during the firm bid period.

But what if the contractor has made a mistake and wants to withdraw or correct his bid after the bid opening, but prior to an award or signing of a contract? Can he do so? Under what circumstances?

There is no one set of laws, rules or procedures that applies to bid mistakes. For bids submitted to U. S. government agencies, there are specific regulations governing bid protests and bid mistakes. However, the federal regulations do not apply to state and local agencies. Several states have enacted statutes and/or regulations applicable to construction projects administered by state agencies. However, these statutes and regulations may apply only to certain state agencies and may not apply to bids submitted to cities, towns, school districts, regional authorities and other local public agencies. In other states, the law governing bid mistakes may have been developed solely through past court decisions.

Although there are clearly common principles found in statutes, regulations and court decisions concerning bid mistakes, a contractor who fears he has made a blunder in putting a bid together will need to check the statute, regulations and policies and applicable case law followed by the public agency to whom the mistaken bid has been submitted.
Contracts with Federal Government Agencies

For contracts with U.S. government agencies, a specific federal acquisition regulation, FAR 14.407, governs bid mistakes. FAR 14.407-1 requires contracting officers to examine bids for mistakes and to request from the bidder verification if the contracting officer has reason to believe a mistake may have been made, including calling attention to the suspected mistake. Per FAR 14.402-2, if there is a clerical mistake apparent on the face of the bid, such as an obvious misplacement of a decimal point or obvious mistake in designation of a unit, the contracting officer may correct the mistake after obtaining verification from the bidder of the intended bid.

But what if the mistake is not obvious on the face of the bid, but occurred during the estimating process?

The federal acquisition regulations allow a bidder to withdraw and even correct a mistake in certain circumstances. The first step is to submit a written request to the contracting officer requesting permission to withdraw or modify the bid. When there is clear and convincing evidence showing both the existence of the mistake and the bid actually intended, an agency may allow correction of a bid so long as the correction does not displace a lower bid.¹ A request to correct a bid must be supported by statements and include all pertinent evidence, including original worksheets and other data used to prepare the bid, subcontractors’ quotations, if any, published price lists, and any other evidence that establishes the existence of the error, the manner in which it occurred, and the bid actually intended.²

Bid mistake cases concerning federal government agencies are often appealed to the Government Accountability Office (GAO) if a bidder is not satisfied with the agency’s decision. GAO decisions indicate that, in order for a bid to be withdrawn or modified, the mistake is to be the result of a clear cut clerical or arithmetic error, or misreading of the specifications and not a mistake of judgment. GAO has ruled that, as long as there is no contravening evidence, a bid can be corrected and awarded to the low bidder when there are worksheets that constitute clear and convincing evidence and they are in good order and indicate the intended bid price.

Three cases decided by the GAO illustrate the circumstances that will allow a low bidder on a federal project to withdraw and possibly correct a mistake.

**Reliable Mechanical, Inc.**

In the 1999 case of *Reliable Mechanical, Inc.*,³ the U.S. Environmental Protection Agency (EPA) issued an invitation for bids for construction work for renovations at several EPA laboratories. Bidders were to submit separate fixed prices for five line items, entitled Base Bid Phase II, Add Option 1, Add Option 2, Add Option 3 and Add
Option 4. The base bid covered work at six (6) designated labs. Add Option 1 added three (3) additional labs. Add Option 2 added two (2) other labs. Add Option 3 was for stair renovations at the labs covered in the base bid and Add Option 4 was for restroom renovations at the labs covered in the base bid.

Four bids were submitted. The bid results for the two lowest bidders were:

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<tr>
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<th>Cooper Construction</th>
<th>Reliable Mechanical</th>
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<tr>
<td>Base Bid</td>
<td>$1,247,000</td>
<td>$1,995,000</td>
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<tr>
<td>Add Option 1</td>
<td>391,000</td>
<td>297,000</td>
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<tr>
<td>Add Option 2</td>
<td>217,000</td>
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<td>Add Option 3</td>
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<td>61,000</td>
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<tr>
<td>Add Option 4</td>
<td>396,000</td>
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<td><strong>Total</strong></td>
<td><strong>$2,313,000</strong></td>
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The total bids of the two other bidders were $2,789,400 and $2,802,615. EPA requested Cooper to verify its bid because its total bid was substantially lower and its bid on Option 4 was significantly higher than the bids of the three other bidders. Cooper responded that a mistake had been made and requested an upward adjustment of its total bid of $217,000 due to the mistake on its base bid and its Option 4 bid.

Cooper furnished EPA with documentation that included copies of its original handwritten bid worksheets and an affidavit from its estimator explaining the nature of the mistake. In preparing its bid for Option 4, Cooper mistakenly used a page from its base bid worksheet that showed a total of $396,000, which it had failed to include in its base bid. Although the estimator’s worksheet for Option 4 showed $217,000, $396,000 was mistakenly shown on the bid for Option 4. After reviewing the documentation submitted by Cooper, EPA approved Cooper’s request for correction, increasing the base bid by $396,000 and reducing Option 4 from $396,000 to $217,000. The net effect of Cooper’s correction was a $217,000 increase in its total bid. The contracting officer awarded the contract to Cooper at the increased amount. Reliable Mechanical protested the award to Cooper at the higher price.

In its bid protest, Reliable did not question Cooper’s estimating worksheets or Cooper’s explanation as to how the mistake occurred. Reliable argued that Cooper did not make the mistake claimed, but rather was trying to recover costs that it had failed to include in its bid. Based upon the prices it had received from a key supplier, Reliable felt that Cooper had underbid an item.
After the EPA did not accept Reliable’s protest, Reliable appealed to the GAO, which upheld EPAs’ award. The GAO relied upon the Federal Acquisition Regulation, FAR 14.407-3(a), and past precedent that allows a federal government agency to permit correction of a bid where clear and convincing evidence establishes both the existence of the mistake and the bid actually intended. Work papers and handwritten worksheets may constitute clear and convincing evidence if they are in good order and indicate the intended bid price and there is no contravening evidence. The GAO did not reverse EPA’s decision to allow Cooper to revise its bid, adhering to GAO’s standard position that an agency’s decision on whether the evidence meets the clear and convincing standard will not be reversed by the GAO unless the agency’s decision is found to lack a reasonable basis.

Cooper Construction, Inc.

In another case in 2000, the GAO again found that Cooper Construction was entitled to correct its bid and be awarded the contract at the corrected price.\(^4\) Cooper submitted the low bid of $444,000 to the Federal Bureau of Prisons. The other bids were $594,000 and $614,000. After the bids were opened, Cooper informed the contracting officer that it had made a bid mistake and submitted handwritten worksheets and a sworn affidavit from its president. Cooper stated that it made a mistake in its base bid as a result of carrying over an incorrect total from a breakout page. The error was due to misalignment of some dollar amounts in the summary column: $13,000 should have been $130,000. The worksheet submitted showed the misalignment, resulting in a wrong subtotal of $29,000, which should have been $146,000. After applying mark-up for overhead and profit, Cooper’s total bid should have been $573,000 rather than $444,000.

After the Federal Bureau of Prisons rejected Cooper’s request to correct the bid, Cooper appealed to the GAO, which sustained the appeal. The GAO recommended that the agency permit Cooper to correct its mistake, award the contract to Cooper and reimburse Cooper for the costs of pursuing its bid protest, including attorney’s fees per federal regulations allowing recovery of bid protest costs in certain circumstances.\(^5\) In its opinion, the GAO said that it was readily apparent that there was a mathematical error due to the misalignment of figures in a column on one of the breakout pages, and that an erroneous sum was carried over to the summary worksheet. The GAO found the worksheets to constitute clear and convincing evidence of the existence of a mistake and the intended bid. The mathematical error in the worksheets was readily susceptible to correction, allowing a straightforward, mechanical recalculation of the bid.

Dawson Construction and Electric

While federal acquisition regulations allow a bidder to correct as mistake when the mistake and the amount of the correct bid can be ascertained from clear and convincing evidence shown on the bidder’s worksheets, a bid cannot be corrected if
additional information, not shown on the original worksheets, must be obtained to calculate the correct amount of the bid. For instance, an erroneous bid cannot be corrected if a work item was inadvertently omitted from the worksheets used to prepare the bid. In *Dawson Construction and Electric*, the low bidder omitted the cost of the sprinkler system in his bid as a result of having used figures taken from an adding machine tape listing the costs of a similar job which did not require sprinklers. The second low bidder protested the contracting officer’s decision to allow the low bidder to increase its bid by $8,625. The protest was sustained because the original bid worksheets did not show the intended amount of the bid.

**State and Local Public Agencies**

The legal criteria and procedures concerning withdrawal and correction of erroneous bids on state and local public construction projects vary from state-to-state and potentially from agency to agency. Although federal acquisition regulations apply only to bid mistakes on projects with agencies of the federal government, the basic principles incorporated in the federal acquisition regulations are commonly seen in state statutes and court cases dealing with bid mistakes. These same principles may also be included in administrative regulations and agency policies.

For instance, the distinction between a "clerical mistake" versus a "mistake of judgment" is a theme that has historically been critical in the law applicable to bid mistakes. If the contractor’s bid mistake was due to a mathematical or clerical error, the contractor will most likely be able to withdraw its bid. On the other hand, if the contractor’s error was due to his failure to consider what would be required to perform the job, the error is considered a mistake of judgment and the contractor is unlikely to be excused, unless perhaps the owner had constructive knowledge of the mistake.

If the owner knew or should have known that there was a mistake in a bid, the contractor is more likely to be able to withdraw the bid. Typically, a substantial difference between the lowest bid and the other bids puts an owner on notice that there may be a mistake and the owner should at the least ask the low bidder to check or verify its bid. Such a disparity gives the owner *constructive knowledge* of the bid mistake. Constructive knowledge prevents the owner from holding the contractor to the bid, unless the owner first notified the contractor of the disparity. Although there is no hard-and-fast rule as to the amount of the gap that triggers the owner’s duty to inquire, a 20% disparity is often sufficient.

Timing is also an important factor. Most bid mistake bid cases arise because the contractor realized the mistake after bid opening and prior to either award or signing of a contract. The bidder must give notice of the mistake promptly after the bid opening; several states have established statutory time limits of 48 or 72 hours or two or three days after bid opening. A bidder who recognizes a mistake prior to the opening of bids is almost always allowed to withdraw its bid, while a bidder who does not notify the public
agency of a mistake until after a contract is executed or work commenced will find it much more difficult to obtain relief.

**Rescission**

A contractor is likely to be able to rescind or withdraw a bid when the contractor has made a unilateral mistake if the following four conditions are met:

1. The mistake is of such consequence that to enforce the contract in accordance with the terms of the bid would be unconscionable.

2. The mistake relates to a material feature of the contract.

3. The mistake is not the result of culpable or gross negligence, absence of good faith or the violation of a positive legal duty.

4. Relief to the bidder does not cause the owner any serious prejudice other than the loss of his bargain.

**Reformation**

Most commonly, the best a contractor can hope for when he has made a bid mistake is to be allowed to withdraw his bid during the firm bid period. However, in certain circumstances in some states, similar to the federal acquisition regulation, a contractor may be allowed to correct his bid if the contractor can prove by clear and convincing evidence both the existence of a clerical or mathematical mistake and what the bid should have been. In order to be able to correct the bid, the mistake and the intended amount of the bid will most likely need to be obvious on the face of the bid. However, some states, such as Oregon, allow a public agency to award a contract at the intended bid amount if the intended corrected bid can be substantiated from accompanying documents when the intended amount is not clearly evident on the face of the bid form.

Despite a statute in New York, which states that withdrawal of an erroneous bid is the only option and correction of the mistake is prohibited, an agency may be able to award the contract to the low bidder at the intended amount when there is an obvious clerical mistake on the face of the bid. In a 2001 case, *Picone/McCullagh v. Miele*, a New York appellate court allowed the City of New York to award the contract to a bidder who had made an error on one line item, but correctly stated the total bid price. The New York City Department of Environmental Protection (DEP) required bidders to submit a bid total and price quotes on individual items. The low bid submitted by A. J. Pegno Construction Corp./Tully Construction Company was for $304,490,749. However, for one item, Pegno’s handwritten quote was $294,8499.49. DEP checked the arithmetic and conferred with Pegno and determined that Pegno’s intended bid for this item was
$294,849,949. The corrected figure, when added to the other items, equaled Pegno’s total bid of $304,490,749.

After DEP awarded the contract to Pegno, the second lowest bidder challenged the award. He argued that the price quote of $294,8499.49 was an indecipherable error that required the bid to be disregarded and that DEP did not have the authority to reform the bid. The court considered the error here to be a correctable mistake. Because the total amount of Pegno’s bid was $304,490,749 and this did not change, the court did not consider that the agency had reformed or renegotiated Pegno’s bid or that there was a violation of the New York statute making withdraw of a mistaken bid the bidder’s sole remedy.

**State Statutes and Cases Concerning Bid Mistakes**

Many states have enacted statutes and regulations governing bid mistakes. Typically, these statutes allow a bidder to withdraw an erroneous bid prior to award of a contract when (1) the mistake was arithmetic or clerical rather than a mistake of judgment; (2) the bid was submitted in good faith; (3) the bidder provides prompt notice of the mistake bid; (4) the mistake is substantial; and (5) there is clear written evidence of the mistake. These statutes may apply only to contracts with state agencies or may apply to municipalities and other local agencies. Even if a state statute does not apply, a court may well apply these same principles if a bidder is forced to file suit to obtain relief.

Several states, including Louisiana, New York, North Carolina, Ohio, Pennsylvania and Virginia, have enacted statutes which will allow a bidder to withdraw a bid even if the error is due to an unintentional omission of a substantial quantity of work that should have been included in the bid. The New York statute,\(^{12}\) enacted in 1991, gives a bidder who has made a mistake on a public bid a statutory right to withdraw the bid when:

- the mistake is made known to the public agency prior to the award of the contract or within three (3) days after the opening of the bid, whichever period is shorter; and

- the bid was based on an error of such magnitude that enforcement would be unconscionable; and

- the bid was submitted in good faith and the bidder submits credible evidence that the mistake was a clerical error as opposed to a judgment error; and

- the error in the bid is actually due to an unintentional and substantial arithmetic error or an unintentional omission of a substantial quantity of work, labor, material or services made directly in the compilation of the bid and the
error or omission can be clearly shown by objective evidence from inspection of the original documents used to prepare the bid; and

- it is possible to place the public agency in the same position as it would have been if the mistaken bid had not been submitted.

Louisiana, North Carolina and Virginia have adopted statutes containing similar requirements with slight modifications. The Louisiana statute\textsuperscript{13} requires that requests for withdrawal be accompanied by a clear and convincing, sworn, written statement explaining the excusable error; the statement must be submitted within 48 hours of the bid opening, excluding weekends and legal holidays. The North Carolina statute\textsuperscript{14} provides that a public agency may allow a bidder to withdraw a bid if the bid price is based upon a mistake which constituted a substantial error and the contractor submits its withdrawal request no later than 72 hours after the bid opening. Virginia\textsuperscript{15} (except for road building) and Ohio\textsuperscript{16} allow a bidder on public construction contracts to withdraw a bid if the contractor meets the statutory conditions and gives written notice within two (2) business days after the bid opening that its bid was substantially lower due solely to a mistake and submits original supporting papers.

In Pennsylvania and Ohio, if the public agency decides to re-bid the project due to the error, the withdrawing bidder is required to pay the costs associated with the re-bidding. In Alabama\textsuperscript{17}, Georgia\textsuperscript{18}, Louisiana\textsuperscript{19} and Pennsylvania\textsuperscript{20}, the withdrawing bidder may not be permitted to submit a new bid or work on the project as a subcontractor. In Kentucky,\textsuperscript{21} a bidder will not be able to be excused from a mistaken bid if the bidder was involved in a similar situation or granted a release from a prior bid within the past year.

The Colorado Construction Bidding for Public Projects Act\textsuperscript{22} allows a bid on a state project to be withdrawn if the bidder submits proof which clearly and convincingly demonstrates that an inadvertent error was made. The Colorado statute does not apply to mistakes in bids submitted to school districts and cities. However, the Colorado Supreme Court has ruled\textsuperscript{23} that a contractor may be relieved of his bid mistake if the bid was the result of a clerical error and the public agency was notified of the mistake prior to award of the contract, provided the contractor can prove by a preponderance of evidence that:

1. The mistake is of a clerical or mathematical nature;
2. The mistake is made in good faith;
3. The mistake relates to a material feature of the contract;
4. The public authority did not rely to its detriment on the mistaken bid.

Connecticut, Mississippi and Minnesota are examples of states that historically have had no statute governing bid mistakes, but nevertheless provide relief to bidders who have made a mistake. Connecticut court decisions have allowed the withdrawal of mistaken bids. Case decisions indicate that an agency will not be allowed to take unfair
advantage of a non-judgmental bid mistake if the mistake has caused no real prejudice. The court will weigh a variety of factors such as the nature of the mistake, the obviousness of the mistake, and timeliness of notice.

Florida is not as receptive to bid mistakes as other states. There is no statute and no absolute right to withdraw an erroneous bid in Florida. However, in a 1962 decision, a Florida District Court of Appeal\textsuperscript{24} identified factors permitting withdrawal of an erroneously prepared bid:

1. if the bid is submitted in good faith;
2. if the magnitude of the error is so substantial that enforcement would be unconscionable;
3. if the miscalculation is not the result of gross negligence; and
4. if the error is immediately reported to the public entity.

In Illinois, the Standard Procurement Rules, promulgated by the Department of Central Management Services and applicable to Capitol Development Board projects, requires procuring agencies to examine all bids for mistakes after bids are opened prior to award.\textsuperscript{25} If the agency believes a bid mistake has been made, the bidder must verify the bid. If the mistake is obviously clerical, the agency may permit the bidder to correct the mistake. The standard procurement rules do not allow a bidder to withdraw its bid due to a non-clerical error unless clear and convincing evidence establishes the existence of the mistake. If there is clear and convincing evidence of the intended bid, in addition to evidence of the non-clerical mistake, and the bid is the lowest received, the bid may be corrected, but may not be withdrawn. Similar to the federal regulation, if the corrected bid would displace a lower acceptable bid, then the mistaken bid cannot be corrected unless the mistake and the intended bid can be ascertained from the bid itself.

Kansas may be the harshest state in the nation when dealing with bid mistakes. The courts in Kansas\textsuperscript{26} have refused to allow a bidder who has made a unilateral mistake to avoid bid bond liability on a public project in circumstances that would allow the bidder to withdraw an erroneous bid in other states. The Kansas Supreme Court has refused to draw a distinction between clerical and judgmental errors. The Kansas Supreme Court's view has been that the very purpose of the bid bond is to require the bidder either to go forward with the construction contract or forfeit the bid bond penalty. The court has reasoned that the bidder is not required to go forward at a terrific loss if he has made a large mistake, but will be liable for the bid bond penalty as contemplated in the bid procedures.

Maryland's procurement regulations, applicable to the state and not counties and municipalities which may have their own rules, allow a bid to be corrected or withdrawn after bid opening and prior to contract award under certain circumstances.\textsuperscript{27} If the bid error is obvious on its face, the bid is to be corrected and cannot be withdrawn. The mistake must be clearly evident.
A bidder or sub-bidder in Massachusetts may withdraw its bid up to the time of signing of the contract if the bidder has made a "bona fide clerical or mechanical error of a substantial nature" or if "other unforeseen circumstances" occur after the bid has been made.\textsuperscript{28}

Michigan court decisions allow a contractor to be excused from an erroneous bid even after the bid has been accepted if (1) the mistake is so fundamental in character that the contractor is unconscionably disadvantaged and acceptance of the erroneous bid would enable the government to have the work performed for a price that the government could not have obtained but for the mistake; (2) the contractor was not grossly negligent; and (3) the parties may still be placed in the status quo.

Many public entities have adopted policies governing bid mistakes. For example, the University of California has adopted a policy applicable to the withdrawal of a bid that contains an "excusable" mistake if:

- written notice of the mistake, specifying in detail how the mistake occurred, is received within five (5) days after the bid opening; and

- the mistake makes the bid materially different from what the bidder intended it to be; and

- the mistake was made in filling out the bid and is not due to an error in judgment, carelessness in inspecting the site of the work, or carelessness in reading drawings or specifications

**Discretion Afforded to Public Agencies**

As long as there is no indication of favoritism, collusion, or an abuse of discretion, public agencies generally are entitled to exercise reasonable discretion, consistent with statutory requirements, in determining what remedial action to take when there has been an excusable bid mistake. A review of three case decisions illustrates the different manner local government entities have handled bid mistakes and courts' review of their actions.

In *Hemphill Construction Co. v. City of Laurel, Mississippi*\textsuperscript{29}, the low bidder, West Contractors failed to include a $330,823 line item for sitework in its submitted $1,579,400 bid. West Contractors promptly notified the City of Laurel of the mistake. The City attorney and engineer studied West Contractors' worksheets and determined that West Contractors had indeed made the claimed error and that the error occurred as an inadvertent nonjudgmental mistake by a clerk failing to add an entire section for site work. The City then awarded a $1,880,223 contract to West Contractors, adding the
originally omitted $300,823. West Contractors' intended correct bid of $1,880,223 was still $119,767 below the bid of Hemphill Construction, the new lowest bidder.

When the City awarded the $1,880,223 contract to West Contractors, Hemphill filed a protest and suit, arguing that West Contractors’ only remedy was withdrawal of its bid. In response to Hemphill’s suit, the Mississippi Court of Appeals in a 1999 case allowed the City to award the contract to West Contractors at the increased amount. The Mississippi Court of Appeals ruled that the City had the discretion and authority to allow a change when the mistake was inadvertent, nonjudgmental and not contrary to the public interest or the fair treatment of other bidders. The court noted that West Contractor’s bid remained the lowest bid after correction and found that the City had properly exercised its discretion. In such circumstances, the court said that it would not interfere with the judgment of a public board.

Even though West Contractors proceeded with the work, Hemphill appealed the Mississippi Court of Appeals’ decision to the Mississippi Supreme Court, which reversed the decision. In the absence of statute giving the City such authority, the Mississippi Supreme Court ruled that the City of Laurel did not have the authority to correct West Contractors’ bid, especially when the intended correct bid was not apparent on the bid itself.

In a 1986 New Hampshire case, Midway Excavators, Inc. v. New Hampshire Department of Public Works, the chief estimator for the low bidder, Midway Excavators, Inc., submitted a total bid price of $7,846,067, but failed to write in $525,000 next to the item entitled mobilization, leaving the line blank. As a result, the sum of the itemized prices was $7,321,067, not the stated $7,846,067 total bid amount. The second low bid was $7,955,455. Midway promptly notified the New Hampshire Department of Public Works of the mistake. The Department’s standard specifications provided that in case of a discrepancy between the total shown in a proposal and that obtained by adding the products of the quantities of items and the unit bid prices, the latter shall govern.

The Department of Public Works gave Midway the option of either doing the job for the erroneous low price or withdrawing its bid. In contrast to the approach taken by the City of Laurel, Mississippi, the New Hampshire Department of Public Works did not allow the contractor to proceed with the work at the higher, correct total bid, even though the total bid was correctly stated on the bid form and was lower that the next lowest bid. Midway went to court to try to compel the Department to pay the intended higher price for the full scope of work and presented testimony that the Department had, years earlier, waived a similar error involving a blank item in a bid and accepted the total bid. The New Hampshire Supreme Court ruled that the Department had not abused its discretion and that the contractor’s remedy for his unilateral mistake was rescission, not reformation.
In the 1993 Massachusetts case of *Sciaba Construction Corporation v. City of Boston*, the City of Boston solicited bids for repairs of a bridge. Just as in the *Midway Excavators* case, the bid specifications required that separate prices be listed for various items of work in the bid form. The low bidder, Modern Continental Construction Corporation, mistakenly listed, in numbers and words, its unit bid price for a 4" reflectorized white line painting at $15 per foot rather than $.15 per foot, but the extended line item price and the total price of the bid were based on $.15 per foot. From the bid itself, it was readily apparent that Modern had made an error in its stated unit price for this one item and that the correct, intended price for this work was $.15 per lineal foot, as indicated in the extended price. The other bidders had bid $.12 and $.25 for this painting and the city engineer’s estimate was $.10. However, the bid solicitations said that in the event of a discrepancy between a unit price and an extended line item total, the unit price governed.

The City chose to delete the line painting work (which comprised .03 per cent of the work), perform the painting work itself, and awarded the job to Modern who was still the low bidder after the line painting work was deleted. The second low bidder, Sciaba Construction Corporation, filed suit, claiming that the low bid should be rejected in its entirety. The Appeals Court of Massachusetts ruled against Sciaba, stating that "absent other considerations, an obvious clerical error that deceives no one does not require rejection of a bid." The court ruled that when there is an obvious clerical error and the intended bid price is apparent, the error is subject to correction notwithstanding the provision in the bid solicitation. The court said that it considered this case “to fall within the narrow class of cases permitting the correction of obvious clerical errors.” The court pointed out, however, that the City should have corrected Modern’s bid to reflect the intended unit bid price of 15 cents per foot rather than deleting the line painting and then awarding Modern the contract. [T]o change the scope of the work after the completion of the competitive bidding process, would, in our view, open the door for manipulation of bids,” according to the court’s opinion.

**Bids Submitted to General Contractors - The Doctrine of Promissory Estoppel**

The principles pertaining to a bid mistake made by a prime contractor when submitting a bid to an owner frequently do not apply to a subcontractor who submits an erroneous bid to a general contractor and the general contractor uses the subcontractor’s bid in submitting its bid to the owner. When the general contractor has reasonably relied upon the subcontractor’s price, courts in most states will apply a legal doctrine, known as *promissory estoppel*, so that the general contractor is entitled to hold the subcontractor to its bid price as long as the general contractor’s reliance is reasonable, even if the subcontractor made a mistake that might otherwise be excused.

Promissory estoppel has been defined as "a promise which the promisor should reasonably expect to cause the promisee to change his position and which does cause the
promisee to change his position justifiably relying upon the promise, in such a manner that injustice can be avoided only by enforcement of the promise."

The precedent-setting case applying the doctrine of promissory estoppel to a construction case involving a subcontractor’s bid was the 1958 decision by the California Supreme Court of California in *Drennan v. Star Paving*. Drennan, a general contractor, was bidding a job to a school district. On the afternoon the bid was due, an estimator for Star Paving telephoned a subcontract bid of $7,131 to Drennan, who included Star Paving’s $7,131 in its bid to the school district. Bids were opened and awarded at 8 p.m. that evening. Drennan’s bid was low and accepted by the school district. The next morning Star Paving contacted Drennan and reported that there was a mistake in Star Paving’s bid and Star Paving could not perform the subcontract work for less than $15,000. Drennan employed another subcontractor to perform the work at a price of $10,946.60 and brought suit against Star Paving to recover the $3,817 difference between Star Paving’s $7,131 bid and the $10,946 Drennan paid to another contractor.

Because no contract had yet been entered into by Drennan and Star Paving, Drennan could not recover from Star Paving based upon a breach of contract. Nevertheless, the California Supreme Court allowed Drennan to recover from Star Paving because Star Paving’s bid constituted a promise that Star Paving knew Drennan might act upon (i.e. by including Star Paving’s price in Drennan’s bid) and upon which Drennan was entitled to rely. The court ruled that Star Paving’s bid should be considered an *irrevocable* offer until the general contractor had an opportunity to accept the bid after being awarded the prime contract.

In order for a general contractor to invoke the doctrine of promissory estoppel and hold the subcontractor to its bid, the general contractor will need to prove:

- The subcontractor submitted a clear and definite bid to the general contractor to perform work for a certain price;
- The subcontractor knew or reasonably expected that the general contractor might well rely on the subcontractor’s bid in submitting its bid to the owner; and
- The general contractor did reasonably and justifiably rely on the subcontractor’s bid to its detriment.

In order to rely upon the promissory estoppel doctrine, the general contractor must in fact treat the subcontractor’s bid as a proposal from the subcontractor that the general contractor accepted when the general contractor submitted its bid to the owner. The general contractor must show that it relied upon the subcontractor’s bid. If the general contractor takes some action that is inconsistent with his having accepted the subcontractor’s bid, the general contractor will probably not be able to hold the
subcontractor to the bid and the subcontractor will be able to withdraw a mistaken bid prior to execution of a subcontract. Delays in communicating back to the subcontractor that its bid has been accepted, obtaining prices from other subcontractors prior to executing a subcontract at the bid price, or even undertaking negotiations with the subcontractor are examples of actions that would tend to show that the general contractor did not necessarily intend to rely upon the subcontractor’s bid as submitted and preclude the general contractor from invoking the promissory estoppel doctrine.

In order to hold a subcontractor to its bid, the general contractor’s reliance must be reasonable and justifiable. If the general contractor knew or had reason to know that the subcontractor had made a mistake, then the general contractor’s reliance is not reasonable or justifiable. If, for instance, the subcontractor’s bid was markedly lower than the bids received by the general contractor from other subcontractors or the general contractor was aware that the value of the subcontractor’s work was substantially higher than the bid price, the general contractor cannot simply use and hold the subcontractor to the mistaken bid.

Although courts will generally look at the differences based upon percentages rather than absolute dollars, there is no mathematical formula for determining what constitutes a disparity of such proportion that the general contractor was at least put on notice that the subcontractor’s bid may contain an error and cannot reasonably be relied upon. There are cases where courts have refused to apply promissory estoppel when the differences between the low bid and the next bid were 35%, 50% and 290%. There are other cases where the general contractor’s reliance was found to be reasonable and promissory estoppel was applied where the bid disparities were 20%, 35%, and 50%. The court will examine the facts of each case. When a subcontractor is asked by a general contractor or a prime contractor is asked by an owner to verify its bid, the request to verify should be considered a warning to the bidder that his bid may be significantly lower than other bids. A bidder would be well advised to check and double-check its entire bid prior to verifying or confirming its bid. Once the bidder has verified its bid, the bidder is less likely to obtain relief if some time in the future a bid mistake is discovered.

**Arango Construction Co. v. Success Roofing, Inc.**

The doctrine of promissory estoppel was applied by the Court of Appeals of the State of Washington in the 1986 case of *Arango Construction Co. v. Success Roofing, Inc.* Success Roofing submitted a bid of $34,659 to Arango Construction Co. for built-up roofing on two sections of a project at Fort Lewis, WA that was being handled by the U.S. Army Corps of Engineers. Success Roofing’s bid covered sections 7A and 7B of the roof and was submitted by telephone on December 6th. Arango included Success price in its bid, which was also due to the Corps on December 6th. However, the Corps postponed the bid opening until December 21st. On December 8th, Arango asked Success Roofing to confirm its bid as accurate and current.
Arango had received another bid of $38,500 for sections 7A and 7B from another roofing contractor, Tin Benders, but Tin Benders’ bid was expressly conditioned upon also performing sections 7C, 7E and 7F. In order to gain the benefit of the lowest overall price, Arango chose to use Success’ bid for sections 7A and 7B and a bid from Cleo Roofing for sections 7C, 7E and 7F. On January 24th, the Corps of Engineers awarded the Fort Lewis contract to Arango and Arango, in turn, forwarded its standard subcontractor form to Success Roofing for sections 7A and 7B. Upon then reviewing the plans, Success discovered that its bid was 50% less than what it should have been because the estimator had failed to notice that the drawings used to compute the bid were reduced by 50%. Success informed Arango of the mistake on February 13th prior to executing a subcontract and stated that it could not perform the work for $38,500. Arango then awarded the roofing contract for sections 7A and 7B to Cleo Roofing for $54,733 and filed suit against Success Roofing for the difference.

The Washington Court of Appeals ruled that Arango was entitled to summary judgment in its favor based upon the doctrine of promissory estoppel. Success’ bid was considered a promise that Success should have reasonably expected Arango to rely upon and Arango did in fact rely upon Success’ price in submitting its own bid to the Corps of Engineers. To allow Success to withdraw its bid in these circumstances would be unfair to Arango given that the mistake had been made by Success. Success contended that Arango’s reliance upon the mistakenly low price of $34,659 was not justified. Success pointed to the $54,733 paid to Cleo Roofing for the work and argued that, as a prudent and experienced general contractor, Arango should have known that Success’ bid was too low for the job. However, the price paid to Cleo Roofing after Success Roofing informed Arango of the mistake was not evidence relevant to Arango’s knowledge at the time Arango included Success’ bid in Arango’s bid to the Corps of Engineers. The only other bid for sections 7A and 7B was Tin Benders bid of $38,500. In the absence of evidence showing that Arango knew or should have known of Success’ mistake, the court applied the doctrine of promissory estoppel and ruled that Success was liable for the $20,074 additional amount paid by Arango to Cleo Roofing.

States that allow general contractors to rely upon the doctrine of promissory estoppel to hold a subcontractor to its bid include Alaska, California, Colorado, Florida, Illinois, Kentucky, Missouri, New Jersey, South Carolina, Texas, and Washington. Although the promissory estoppel doctrine has been adopted in many states, several states, such as Virginia and North Carolina, have expressly rejected the doctrine.

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ENDNOTES
1. FAR ' 14.407-3(a). In order to displace a lower bid, the regulation requires that the mistake and the intended amount must be ascertainable substantially from the invitation and the bid itself. If correction of the mistake results in an increase in the bid, the bidder can submit worksheets and other information to show the mistake and the intended bid amount.

2. FAR ' 14.407-3(g)(2)


5. 4 C.F.R. ' 21.8(d)(1)(2000)

6. P.S. Protest No. 87-26

7. See e.g. Georgia

8. See e.g. North Carolina

9. E.g. Pennsylvania, Ohio, Virginia

10. E.g. Alabama, New York


12. Section 103, subparagraph 11 of the General Municipal Law


14. North Carolina General Statute ' 143-129.1

15. Virginia Code ' 11-54

16. Ohio R.C. ' 9.31


20. 73 Pa. Cons. ' 1603

21. KRS 45 A. 080 administered by the Kentucky Division of Contracting and Administration


24. State Board of Control v. Clutter Construction Corporation, 139 So. 2d 153 (Fla. Dist. Ct. App.), cert. denied, 146 So. 2d 374 (Fla. 1962)


28. Mass. Gen. L. c. 149, ' 44B(3) and 44(b)(4)

29. 760 So.2d 720 (Miss. App. 1999)

30. Hemphill Construction Company v. City of Laurel, Mississippi, 760 So. 2d 720 (Mississippi 2000)


33. 51 Cal. 2d 409, 333 P. 2d 757 (Cal. 1958)

34. 730 P. 2d 720 (Wash. App. 1986)

35. See e.g. Litchfield-Massan, Inc. v. R. J. Manteudel Co., Inc. 806 S.W.42 (Ky App. 1991). In this case, the roofing subcontractor asserted that its oral bid to the general contractor was based upon substituting isocyanurate insulation for fiberglass insulation that had been specified. After the general contractor was awarded the contract, the subcontractor refused to sign a subcontract unless the architect would approve the insulation substitution which the architect was unwilling to do. The general contractor then contracted with another roofing subcontractor and sued the original subcontractor bidder for the difference.

36. See e.g. Sipco Services Marine, Inc. v. Wyatt Field Services Co., 8 S.W.2d 602 (Tex. App. 1993). In this case, the general contractor was able to hold the subcontractor to its original bid and obtain a $40,488 recovery from the subcontractor even though the subcontractor=s original bid was not the lowest bid received by the general contractor and the general contractor, after the job had been awarded to the general contractor, sent final drawings to several subcontractors and asked then for a confirmation@ of their bids.
Bidder Responsibility and Bid Responsiveness
by Stephen M. Phillips

Virtually all public construction contracts are awarded based on competitive bidding. Although bids are often solicited for private work, a private owner is free to award a contract to whomever the owner chooses using whatever criteria the owner desires. However, for public work, a public owner will commonly be required to award the contract to the responsible bidder who submitted the lowest responsive bid.

If a contractor believes that a public agency has erred in making an award, the contractor can initiate a bid protest. A bid protest may be filed by the low bidder who was not awarded the contract or another bidder who believes that the contractor to whom the award was made did not submit a responsive bid or was not a responsible bidder.

For federal government contracts, if a bidder is not satisfied with the agency's response to the bidder's complaint, a bid protest can be filed with the General Accounting Office (GAO). Alternatively, a suit can be filed with the U.S. Court of Federal Claims or in a U.S. District Court. For more than 75 years, GAO has served as the primary forum to resolve bid protests in federal government contracts. Decisions are prepared by the GAO's office of general counsel. Per the terms of the Competition in Contracting Act of 1984, the GAO has 100 calendar days to resolve protests. Filing a protest generally triggers an automatic stay of the agency's award of a contract, unless the agency takes steps to override the stay.

For state and local construction projects, bid protest procedures vary. Typically, a disappointed bidder would first seek to persuade the agency of the merits of the contractor's position. If unsuccessful, the contractor will typically need to initiate promptly a suit with a local court seeking an injunction, requesting the court to enjoin the agency from proceeding while the contractor's bid protest is considered by the court. If the contractor's bid protest is ultimately upheld, but the construction contract is already underway, the successful bid protestor will be able to recover only its bid preparation costs. Therefore, a disappointed bidder needs to file suit promptly and obtain an injunction in order to cause the contract to be awarded to him.

**Responsible Bidders**

Historically, more attention has been directed to whether a bid was responsive to a solicitation than whether the low bidder was responsible. However, public agencies now seem to be exercising more discretion in disqualifying contractors whom the agency deems not to be responsible. Pre-qualification of contractors is becoming more common and agencies that have had bad construction experiences are taking more steps to evaluate the competency of contractors.
A responsible bidder is a contractor who meets the criteria to be awarded the contract. Generally, a responsible bidder is one who has the necessary technical, managerial and financial capability to perform the work. The responsibility criteria are a tool that can be used by a public owner to try to select a contractor who is competent to perform the solicited work. The public body will have a fair degree, but not unlimited, discretion in determining if a bidder is responsible.

The factors that public agencies consider in determining responsibility of a bidder include:

- prior experience;
- financial capability based upon demonstrated financial stability, adequate capitalization in proportion to the size of the project, credit and payment history;
- management skills and organizational ability to perform the solicited work;
- has the bidder been debarred or suspended from eligibility to do state or federal work;
- has the bidder failed to complete any work awarded to it;
- present workload and contracts;
- adequacy of plant and equipment;
- timeliness;
- quality of workmanship

In the 2002 case of *L. P. Cavett Co. v. Board of Township Trustees*, the Township Trustees awarded a construction contractor to the second low bidder after reading newspaper accounts and speaking informally with council members of another municipality regarding alleged workmanship problems by the low bidder on a prior project. The Township did not check with any of the low bidder's listed references, talk with engineers on past projects or conduct a formal hearing. The low bidder sought to enjoin the Township from disregarding his low bid and awarding the contract to the second lowest bidder.

The contractor claimed that an investigation consisting of reading newspaper accounts and conversations was improper and complained that the Township had refused to consider that the problems on the previous job were due to defective specifications rather than poor workmanship. The Ohio trial and appellate courts ruled against the contractor. The Ohio Court of Appeals ruled that the Township could find the low bidder "non-responsible" without conducting a formal investigation and its determination could be based upon personal knowledge of purported problems from prior projects even though a formal investigation might indicate that the prior problems were not due to the contractor.

An appearance of impropriety may be sufficient to justify an owner's finding that the bidder does not meet the public agency's responsibility criteria. For instance, in the 2001 case of *Joseph J. Henderson and
Son, Inc. v. City of Crystal Lake, an Illinois Court of Appeal ruled that a business relationship between the lower bidder and the project consultant was sufficient to allow the owner to disqualify the low bidder, even though there may not have been an actual impropriety.

A public agency cannot, however, use its authority to select a "responsible" contractor, as a means to disqualify contractors who meet the agency's established criteria or as a facade to select a preferred contractor. In the 2001 case of Engineering Contractors Association of South Florida, Inc. v. Broward County, a Florida District Court of Appeal struck down a pre-qualification procedure in which the County did not pre-qualify contractors who satisfied all the listed pre-qualification criteria.

In 1999, Broward County amended its procurement code and procedures so that only contractors who made the County's "short list" were eligible to submit sealed bids. In order to be considered for the short list, contractors who wanted to submit bids were required to submit letters of interest, describing their

(1) prior experience on similar projects; (2) staff and equipment dedicated to the project; (3) bonding capacity; (4) current construction projects; (5) affirmative action goals; (6) references; and (7) project claims and litigation history for the past five years.

County staff would review the letters and assign each contractor an "acceptable" or "unacceptable" rating on each of the factors. Spreadsheets were then sent to a selection committee composed of county commissioners and management level personnel. The selection committee decided which contractors were on the short list and allowed to engage in traditional competitive bidding.

Five contractors and two professional organizations filed suit challenging the Broward County procedure as violative of Florida's statute requiring the award of contracts "to the lowest competent bidder." Several of the plaintiffs alleged that they received "acceptable" scores, but were nevertheless excluded from the short list.

The Florida District Court of Appeals recognized that a public agency is not required to accept the lowest bid, but rather has the discretion to consider such items as the bidder's past history, its honesty, the quality of its prior work, its skill and business judgment, and the like.

Here, the Court found that the County's implementation of its new procurement code violated state law because the evidence was that contractors who were found "acceptable" were still not allowed to bid. The selection committee could not articulate why numerous contractors were excluded from the short list. Some commissioners voted based upon their personal experience. There were no consistently applied criteria. Instead of contracts being awarded to the lowest competent bidder, the effect of the county's program was to award the contract to the lowest bidder among those contractors preferred by the selection committee. This allowed for subjectivity and personal preferences, which the competitive bidding statute is intended to eliminate.

**Responsive Bids**

Bid documents commonly include a provision stating that the owner reserves the right to waive bid irregularities. Disputes frequently arise concerning whether a deviation from the exact bid requirements
makes the bid non-responsive or is a minor irregularity that can be waived by the owner. When considering filing a bid protest in this type of situation, keep in mind that the courts have ruled that the statutes governing public bidding have been enacted for the benefit of the public interest and not for the benefit of individual bidders. In state and local bid matters, courts are more likely than not to afford some latitude to the public agency unless the court feels that there has been an abuse of discretion or the integrity of the bid process has been compromised.

In determining whether a deviation from the bid requirements makes the bid non-responsive or is a minor irregularity that can be waived, two factors are generally controlling. These are: whether the deviation gave the bidder an advantage over other bidders and whether, as a result of the discrepancy, the public owner would not have been able to bind the bidder and its surety to execute the contract if the contractor chose not to do so. If the bidder could not be compelled to execute a contract in accordance with the bid requirements because of the discrepancy, then the deviation is not a minor irregularity. For instance, a bidder failing to bid on all items or a defect related to the performance bond to be furnished would be considered non-waivable defects because the bidder would not be legally compelled to satisfy the contract requirements based upon its bid. On the other hand, a bid bond that did not include the date of execution by the contractor or the submission of a bid bond rather than a certified check as bid security have been considered waivable irregularities respectively by the General Accounting Office and a New Jersey appellate court.

Disputes concerning bid responsiveness focus upon whether the deviation from the solicitation requirements is "material" versus a "mere informality" that had no substantive effect on the competitive bid process. For federal government contracts, federal acquisition regulations state that to be considered for award, a bid must comply in all material respects with the invitation for bids so that bidders stand on an equal footing. If a bid fails to conform to the invitation for bids, it will be rejected if it is nonconforming in a material respect. If the defect is immaterial, the bid will still be responsive.

Federal regulations define a minor informality or irregularity as one "that is merely a matter of form" or has some immaterial variation from the exact requirements of the invitation for bid, "having no effect or merely a trivial or negligible effect on price, quality, quantity or delivery of the supplies or performance of the services being procured, and the Y waiver of which would not affect the relative standing of, or be otherwise prejudicial to, bidders." An immaterial defect or variation from the exact requirements of the invitation is a defect that can be corrected or waived without being prejudicial to other bidders. When there is a minor informality or irregularity, the federal agency can either give the bidder an opportunity to cure the deficiency or waive the deficiency, whichever is to the advantage of the Government.

Matters relating to price and scope of work are almost always considered material. In the 1997 case of Loving-Johnson, Inc. v. City of Prior Lake, the City of Prior Lake issued an invitation for bids that contained the following common provision:

The [City] shall have the right to waive informalities or irregularities in the Bid received and to accept the Bid which, in the [City's] judgment, is in the [City's]
best interest.

The bid form required contractors to provide a base bid and eleven (11) alternative bids, which were intended to allow the City to select more or less work to fit within budget. Alternatives 1 through 4 would be "ADD" alternatives and alternatives 5 through 11 would be "DEDUCTS." The pre-printed bid form labeled the alternatives as such. The City chose to make an award based upon alternate 11.

The bid form submitted by one bidder, Rochon Corporation, had plus signs written in front of alternatives 9 through 11, even though the pre-printed bid form identified these alternatives as deducts. For alternate 11, Rochon's bid stated +$21,500. At the reading of the bids, Rochon's representative recognized his error and informed the official reading the bids that the bid was intended to be a deduct. Rochon then submitted its bid worksheet showing that alternative 11 was intended to be a deduct and said that the mistake was the result of human error. The City decided to accept Rochon's explanation and allowed Rochon to change alternative 11 by omitting the plus sign, leaving Rochon's bid a "deduct" as pre-printed on the bid form. The effect of the City's decision was to lower Rochon's bid from $2,625,601 to $2,582,601. Lovering-Johnson, Inc.'s bid was $2,589,700. Lovering-Johnson, Inc. (LJI) protested, but the city council voted to award the contract to Rochon. LJI filed suit, seeking an injunction, which was denied. The trial court concluded that the City did not violate Minnesota's competitive bidding law because Rochon's bid for alternate 11 was a minor clerical error or irregularity that the city was permitted to waive, as provided in the bid instructions. LJI appealed.

LJI argued that the city had no authority to change Rochon's bid after it had been opened; because the modification affected price, it was a material and substantive change. The Minnesota Court of Appeals agreed, relying upon a prior decision of the Supreme Court of Minnesota that stated:

A fundamental purpose of competitive bidding is to deprive or limit the discretion of contract-making officials in the areas which are susceptible to such abuses as fraud, favoritism, improvidence, and extravagance. Any competitive bidding procedure which defeats this fundamental purpose, even though it be set forth in the initial proposal to all bidders, invalidates the construction contract although subsequent events establish . . . that no actual fraud was present. It is for this reason that no material change may be made in any bid after the bids have been received and opened since to permit such change would be to open the door to fraud and collusion.

The Minnesota Supreme Court's view was that a public agency must determine bid responsiveness at the time the bid is opened. Once a bid has been opened, the public entity has no authority to make any material changes or modifications to the bid. The rule prohibiting material changes once a bid has been opened applies despite provisions in the bid instructions that allow the public entity to waive irregularities. The issue becomes whether a change or modification to the bid is "substantial" or "material." The test for determining whether a change or variance is material is whether the change gives a bidder a substantial advantage or benefit not enjoyed by other bidders.

Here, the Minnesota Court of Appeals found that the city materially modified Rochon's bid by
ignoring the plus sign after it had been read as +$21,500. Once the bids were opened, Rochon had a substantial advantage over the other bidders because Rochon knew the bid so Rochon could lower its price. Price "or other things that go into the actual determination of the amount of the bid" are material and involve the substance of a competitive bid. Therefore, despite the language in the bid solicitation allowing the city to waive irregularities and award the contract as the city determined was in its best interest, the city did not did not have the authority to revise Rochon's bid.

In finding against Rochon and the city, the Minnesota Court of Appeals said that "it is precisely this type of inquiry or supplementation of a bid after bids have been opened that undermines the competitive bidding process." The city's action violated Minnesota's competitive bid law. Because Rochon had already performed the contract, LPJ was entitled to recover its bid preparation costs.

What if a bidder fails to acknowledge an addendum? In 1987, a roofing contractor, Harold J. Becker Co., protested the award by the Postal Service to the low bidder for the re-roofing of the main post office facility in Dayton, Ohio as non-responsive because the low bidder failed to acknowledge receipt of an addendum. The bid of the low bidder, who failed to acknowledge the addendum, was $371,420. Harold J. Becker Company's bid was $372,776.

The addendum in question required the contractor (1) to provide temporary sanitary facilities for construction personnel; (2) mechanically clean all roof drains on both buildings that were to be re-roofed; and (3) conduct a water test to assure the integrity of the drain system. The USPS contracting office rejected Becker's bid protest on the grounds that the low bidder's failure to acknowledge the addendum was a minor informality because the addendum had a negligible effect on price, quality, quantity or delivery of services.

While there was precedent to reject a low bid as non-responsive when a bidder fails to acknowledge a material amendment, here the failure to acknowledge the addendum was considered immaterial because the work referenced in the addendum was required in the original specifications. The addendum provided clarification, but did not impose legal obligations different from what was required in the original solicitation. An addendum is considered nonmaterial when no substantial additional or different requirements are imposed from that in the original invitation to bid.

**Alternative Bids**

In the 2001 case of *J.F. White Contracting Co. v. Massachusetts Port Authority*, the Massachusetts Port Authority (Massport) solicited bids for phase 5 of renovation of Tobin Memorial Bridge in Boston. Massport requested all interested bidders to submit alternative bids: one based upon using type 5 cement concrete and the other using silica fume concrete.

J. F. White Contracting Co's bid using type 5 cement concrete was the lowest overall bid. M. DeMatteo Construction Company submitted a bid that was $11,262 higher (on a $6.4 million contract) using silica fume cement. Massport awarded the bid to DeMatteo because it preferred to use silica fume
cement, which it believed was more resistant to water, salt and other corrosive substances. Massport had taken alternative bids on the previous 4 phases and had installed the silica fume cement because its increased cost was acceptable.

J. F. White sought to enjoin the award of a contract by Massport to DeMatteo on the grounds that such an award violated Massachusetts' public bid statute which requires that public contracts be awarded to the lowest responsible and eligible bidder on the basis of competitive bids publicly opened and read. White argued that allowing Massport to award to DeMatteo on the basis that DeMatteo was the low bidder for the silica fume alternative opened the door to favoritism because it allowed the decision to be made after the bids were known. Although there was no evidence of favoritism in this case, the argument was that the alternative bid approach could be used as a subterfuge for favoritism. The court refused to disallow Massport from using the alternative bid approach because this approach could provide useful cost/benefit information. There was no prohibition in the public bid statute concerning obtaining alternative bids. As long as the government agency accepts the lowest bid pertaining to the alternative of its choice, the agency is acting within its authority.

In Fratello Construction Corporation v. Tuxedo Union Free School District, the School District's bid solicitation called for a base bid and two alternative bids. However, the bid form included within the bid package did not contain a line for the second alternative. Fratello Construction Company added an addendum to its bid submittal to state its price for the second alternative. Another bidder, Building Matrix, Inc. submitted a bid for the first alternative, but no price for the second alternative was apparent on its bid submittal. Within an hour of the bid opening, Building Matrix told the School District's architect that it intended the same bid for alternatives one and two and did not include a separate price for the second alternative because there was no line for a bid for the second alternative. The School District awarded the contract to Building Matrix as the lowest bidder. Fratello filed a bid protest.

The New York appellate court considering the case found that the School District acted improperly by conferring privately with Building Matrix to allow it to correct its bid. "When essential information is missing from a bid at the time of opening, it may not later be supplied by a private understanding between the bidder and the municipality or otherwise." Because Building Matrix did not give a price for the second alternative, its bid should have been found non-responsive. The court considered the School District's solicitation to be defective because of the omission of a price line for the second alternative. The proper remedy was to reject all bids and reopen the bidding.

Bid Bonds

Problems with bid bonds that fail to comply in some respect with solicitation requirements have often been the subject of bid protests. On public construction projects, bidders are required to furnish a bid bond or guarantee with their bids. Failure to do so generally requires that the bid be disregarded on grounds of non-responsiveness. The penal sum of the bid bond may be a percentage of the bid -typically 10% or 20%- or the difference between the contractor's bid and the next highest bid.
In the 2002 Pennsylvania case of *Gaeta v. Ridley School District*, the School District's bid package required that contractors' bids be accompanied by a bid bond issued by a surety with a minimum Best Rating of A- or better. The bid package expressly reserved the school district's right to waive bid irregularities.

IBE Construction, Inc. submitted the lowest bid. However, the surety on its bid bond, Commonwealth Insurance Company, had a Best Rating of B. The School District notified IBE of the discrepancy and requested a compliant bond. The next day IBE submitted a new bond from another surety, American Manufacturers Mutual Insurance Company, which had an A rating. The School District subsequently awarded the contract to IBE. Both sureties were owned by the same parent. The award was challenged.

The School District argued that it was allowed to waive the irregularity in the surety's rating. The trial court allowed the School District to proceed. The intermediate appellate court enjoined the School District. The Pennsylvania Supreme Court reversed, ruling that the improper surety rating was a minor irregularity that could be waived. The Pennsylvania Supreme Court engaged in a two-prong analysis to come to this conclusion:

1. Would the waiver deprive the School District of its assurance that the contract will be entered into and performed?

2. Would the waiver place the bidder in a position of advantage over other bidders?

Because the irregularity pertained to a bid bond which served a limited purpose of short duration (i.e. to ensure that the contractor will enter into a contract), the Pennsylvania Supreme Court was inclined to allow the School District some latitude rather than demand absolute responsiveness. Because there was evidence that there was no cost difference associated with the lower rated bond and the surety's rating had no bearing on the amount of IBE's bid, the Court found there was no advantage given to IBE in allowing the waiver unlike cases where there was a price discrepancy, failure to bid on all necessary items, omission of cost or performance items, or a defect in a performance bond.

In another state case involving a defect in a bid bond, *Smith & Johnson Construction Co. v. Ohio Department of Transportation*, the Ohio Court of Appeals ruled that award of a contract and execution of the performance bond rendered moot the defect in the bid bond.

In federal cases, defects in bid bonds are frequently grounds for finding a bid non-responsive and awarding the contract to the next lowest bidder. The federal acquisition regulations state explicitly that the bid of a contractor who does not include a valid bid bond at the time of the bid opening must be rejected.

The test to determine whether the bid bond is adequate is whether the bid bond would be enforceable against the contractor and surety issuing the bid bond. If the government could not enforce a claim against the surety and contractor for some reason relating to the bond itself, then the contractor's bid must be considered non-responsive.
In a 1987 case, Keehn Brothers was the low bidder for the re-roofing of the main post office in Minneapolis. The second low bidder submitted a protest on the grounds that Keehn's bid bond did not identify the project or solicitation number and identified the project only as "re-roofing of main post office." The protest was upheld by the Postal Service Contracting Officer who determined that the bond's failure to identify the solicitation number or the location of the work rendered Keehn's bid nonresponsive.

Keehn protested. Keehn asserted that the deficiencies in the bid bond should be waived as a minor irregularity. Keenan pointed out that the bid bond was submitted in the same envelope as the bid and that when its bid and bid were read together it was clear that the bid bond referred to the job in question.

The test to determine whether a deficiency in the bid bond should be waived as a minor informality or a valid basis to find the bid non-responsive is whether the Government could successfully make a claim under the bid bond. Stated otherwise, the question is "whether the Government obtains the same protection in all material respects under the bond actually submitted as it would have under a bond complying completely with the instructions" in the solicitation.

Here, Keehn's bid was viewed as non-responsive because there was some uncertainty as to whether the surety could be held liable under the bond. Because the bid bond did not include the solicitation number and identified the job only as "re-roofing of the main post office," the Postal Service found that the surety did not expressly agree to be bound by Keehn's bid. The Postal Service rejected the low bidder's argument that acceptance of its low bid was in the best interest of the Postal Service, stating that "the integrity of the competitive bidding system is of far greater significance to the Postal Service than any financial savings that might result from acceptance of a non-responsive bid."

In the 2001 case of Interstate Rock Products, Inc. v. United States, U.S. Court of Federal Claims considered whether the failure of the submitted bid bond to include a penal sum was grounds to reject the contractor's bid as non-responsive. The bid of the contractor who submitted the lowest bid on a federal government contract was accompanied by a bid bond that failed to state the penal sum. On April 25, 2002, the contractor had received a USF&G bid bond from his bonding agent that included the 20% penal sum. The bid was due on May 10, 2001. The contractor's $10.4 million bid was low by approximately $600,000. Because part of the original bid bond were illegible due to facsimile transmission, the contractor had his bonding agent obtain another bid bond which inadvertently left blank the line to state the amount of the penal sum. The bid bond without the penal sum was submitted with the contractor's bid.

Following the bid opening, the agency declared that the contractor's bid was non-responsive due to the omission of the penal sum on the bid bond. The contractor promptly furnished the original bid bond that contained no omissions but was partially illegible. The contractor argued that its surety was legally bound and that the omission of the penal sum on the second bond was a clerical error that should be viewed as a minor informality. Relying upon prior decisions by the GAO, both the agency and the federal court of claims rejected the contractor's argument. Finding that there was a rational basis for the agency's determining that the contractor's bid was non-responsive, the agency's decision was affirmed by the federal court of claims.

In the event of default by the bidder, the surety could challenge the blank bond and the purpose of the bid bond would be defeated. The question presented in cases where bonds do not comply with
invitation requirements is whether the government obtains the same protection in all material respects under the bond actually submitted as it would under a bond complying with the requirement. A bid bond lacking a penal sum is a material defect because it would provide the contractor and surety with a defense to enforcement. The absence of the penal sum creates an ambiguity.

In two recent federal government cases, low bids have been found non-responsive because the power of attorney form accompanying the bid bonds was a faxed document. In Kemper Construction Co., the fourth low bidder on a U.S. Army Corps of Engineers construction project was able to persuade the Corps to reject the three lower bids because the power of attorney forms attached to the bid bonds were faxed documents. The Corps concluded that the faxed signatures on the power of attorney forms were insufficient to show that the bond bound the surety. The low bidder, Kemper Construction, protested the Corps' decision to reject its bid to the General Accounting Office. Upholding the Corps of Engineers' decision, the GAO ruled that, without having an original power of attorney, the Corps could not be certain that alterations had not been made to the faxed document to which the surety had not given its consent. Therefore, the Corps could not be certain that Kemper's surety was obligated on the bid bond in the event that Kemper failed to enter into a contract.

In Schrepfer Industries, Inc., the Corps of Engineers rejected the low bid of Schrepfer as non-responsive on the grounds that the power of attorney form accompanying the bid bond was a photocopy. When Schrepfer filed a bid protest, the GAO again ruled that the Corps had reasonably concluded that the photocopied power of attorney did not unequivocally show that the bond would be enforceable against the surety.

In order to avoid the possibility of having a bid thrown out based on some perceived problem with the bid bond, contractors should submit an original bid bond with an original power of attorney.

**Summing Up**

When there is a reduction in private construction work, more contractors bid on public construction projects and bids may be more competitive than ever. Just as contractors should check to be sure that the dollar amount of a bid is accurate prior to submittal, a contractor should implement procedures to make sure that its bid is fully responsive to the solicitation requirements and that all bid forms and the bid bond are completed fully and accurately and do not contain inadvertent errors or omissions. If the contractor detects a technical problem, ambiguity or discrepancy with the specifications or bid documents, the contractor should make a written pre-bid inquiry or raise the issue at a pre-bid meeting rather than as part of a bid submittal. If a contractor believes that a public agency has improperly awarded a contract to another contractor, there are procedures available for the contractor to have the bid award evaluated. While public agencies have some discretion in awarding contracts, competitive bid statutes require that the contract be awarded to the lowest responsible bidder who submits a responsive bid.

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Be Prepared for Bid Protests

by Stephen M. Phillips

If a major portion of your work is public bid construction, you know that jobs are hard to get and are going for low prices that squeeze contractors’ margins and cause some contractors to question how the job could possibly be performed for the low bid. The sheer number of bidding contractors on many jobs is itself discouraging.

Particularly given current economic conditions, when a solicitation comes out for re-roofing a portion of your local high school, you’re thinking you have a real good chance of landing the job at a decent price because the job is in your backyard, you’re very familiar with the school and you have some ideas how the job can be done efficiently.

On bid day, you submit your sealed bid for $265,500, which is a tight price, but a price you believe can result in a profitable job for you. Much to your dismay, you learn at the bid opening that you were #2 of 9 bidders and the low bid, from an out-of-state contractor, was $252,000. You are not familiar with the low bidder and don’t recall seeing any representative of the low bidder at the mandatory pre-bid conference and walk-through held at the high school two weeks earlier. You ask to review the bid form and bid bond submitted by the low bidder and see that the bid bond was signed by a representative of the surety, but not signed by the contractor.

What can you do?

You can submit a bid protest, requesting that the low bid not be accepted by the school district because the bid does not comply with the bid requirements.

Public construction bids are to be awarded to the responsible bidder who submits the lowest responsive bid. A responsible bidder is one who meets the qualifications set forth in the bid documents and has the capability and resources, including experience, qualifications, management, manpower, equipment and capital to perform the job.

A responsive bid is one that meets the requirements in the bid documents. Qualifying a bid, taking exception to something in the specifications, not fully completing the bid form or not submitting and signing all the documents that are to accompany the bid make a bid non-responsive. Not meeting MBE or WBE requirements that are included in the bid solicitation is another example of a bid deviation that could be grounds for disqualifying a bid.
If the low bidder is deemed by the public entity not to be a responsible bidder or if the low bid is nonresponsive in some manner, the low bid may be thrown out and the contract awarded to the contractor who submitted the next lowest responsive bid and is considered a responsible bidder.

**Discretion Afforded to Public Agencies**

Public entities are afforded substantial discretion in awarding public contracts. The purpose of public bid laws is to avoid favoritism, fraud and corruption in the award of public contracts. As court decisions have said many times, public bid laws exist for the benefit of the public, not to protect the financial interests of bidders. As long as there is no evidence of favoritism, fraud or corruption, the decision of a school district or other public entity awarding a contract or granting or rejecting a bid protest will normally be upheld by a court unless the court finds that the public entity acted arbitrarily or capriciously or abused its discretion.

The abuse of discretion standard gives the public agency substantial leeway. When courts are asked to review an agency's decision on a bid protest, judges routinely express the view that they are not to second guess the public agency or substitute their opinion for that of the public entity in regard to whether the agency's decision was right or wrong, but rather the court's role is limited to determining whether the public agency abused its discretion.

**Need to Act Quickly**

A disappointed bidder who wants to protest a bid must act quickly after the bid opening. The protesting bidder may be a bidder who believes that a lower bid should be disregarded because the bid is non-responsive or the low bidder is not a responsible contractor, or the protesting bidder may be a contractor who has been told by a procurement official that his bid is non-responsive or that he is not deemed to be a responsible bidder. An irregularity in the bid process when there is a clear-cut violation of a public bidding statute, administrative regulations or procedures set forth in the bid documents could also be the basis for a successful bid protest.

Some states and local government units have established bid protest procedures that include strict deadlines for submitting a bid protest and some state statutes and administrative regulations may apply to local government units. Contrary to bid protests on federal government contracts where there are well-established and detailed regulations and procedures governing the bid protest process, local public agencies and school districts rarely have adopted ordinances or administrative regulations governing bid protests.

If you want to protest a bid, you will normally want to act prior to the public entity's award of a contract. Once the public entity has awarded a contract, the proverbial horse is out of the barn and your likelihood of obtaining the job is all but eliminated, even if your bid protest is subsequently found to be well justified. The objective of your bid protest is to affect who is awarded the contract or perhaps prompt a new bid solicitation. A successful bid protest after the contract has been awarded and the job is being performed by another
contractor is a hollow victory because you will only be able to recover your bid preparation costs. You will not be able to recover the profits you had hoped to realize if the contract had been awarded to your company.

Because relatively few school districts and other local public agencies have established formal procedures governing bid protests, your bid protest is likely to be in the form of a letter to the public entity that you will submit prior to a formal vote or award of the contract. Your letter should explain as thoroughly and persuasively as you can the reasons your bid should be accepted or the lower bid of another contractor should be disregarded and should be accompanied by as much documentation and support for your arguments as you can gather.

In addition to meeting with the appropriate staff and other representatives of the agency to gain an understanding of their views and present your arguments, you might request the opportunity to be heard at the public meeting where the contract is scheduled to be awarded. While you can prepare and present your own bid protest, it is certainly advisable to work closely with an experienced construction attorney, who is familiar with the laws applicable to public bidding if you want to maximize your chances of success. Because of the discretion afforded to the public agency, your best chance of prevailing on your protest is at the initial public agency level.

Minor Informality or Material Deviation?

Public bids invariably include a statement that the public agency has the right to waive minor informalities or not make any award. Even if the right to waive minor informalities is not explicitly stated in the bid documents, public agencies have the authority to waive minor informalities. Most commonly, the issue that arises in bid protests is whether a deviation from the bid requirements is an informality that can be waived or is a deviation from a requirement that affords one bidder an unfair advantage over another or would preclude the public agency from binding the bidder to a bid requirement pertaining to performance of the contract. Stated otherwise, is the deviation material or inconsequential?

If the deviation pertains to price or scope of the work, the deviation will be material. A discrepancy concerning price, quality, quantity or delivery is generally considered a material term and cannot be waived. A material error is one that gives one bidder a substantial advantage over others. If the public entity cannot legally bind the bidder to a bid or contract requirement because of the deviation or discrepancy in the bid, the bid would normally be considered non-responsive. If the bidder who submitted the low bid, for instance, failed to sign or submit a required bid bond so that the bidder and his surety could not be held liable to the public entity on a bid bond, the deviation would be material and the bid should be disregarded.

The failure of a contractor to attend a mandatory pre-bid conference could be valid grounds to discard the contractor’s bid. If minutes were distributed to the pre-bid attendees and the minutes clarified various points and were made part of the bid documents in the same manner that pre-bid addenda are sometimes issued prior to receipt of bids, the failure to attend the pre-bid meeting should undoubtedly be classified as a material deviation, making
the bid non-responsive. Having not attended the pre-bid meeting and having not received the pre-bid minutes, the contractor would not be bound to the clarifications in the pre-bid minutes. Similarly, a bidder who failed to acknowledge pre-bid addenda in his bid would not be bound by the addenda and his bid should be thrown out as non-responsive.

Even if there were no minutes issued or sent to attendees following a pre-bid meeting, a public agency could disregard the bid submitted by a contractor who failed to attend a mandatory pre-bid meeting. Whenever a mandatory pre-bid conference is included in the bid documents, all those attending should be sure to check that their names and company affiliations are properly recorded on the sign-in sheet. If the records of the public entity do not reflect the attendance of a representative of a contractor at a mandatory pre-bid conference, that contractor's bid might be considered non-responsive by the public entity. If you were the second low bidder for the re-roofing of the local high school described above, you would be on firm ground to protest the school district's potential award to the low bidder who forgot to sign the bid bond (even though the bid bond had been signed by his surety), and did not attend the mandatory pre-bid meeting. Each of those deviations would make the low bid non-responsive.

But what if, despite your protestations, the public agency did not promptly throw out the low bid and your feared that the public entity might waive the deficiencies to obtain the benefit of the lower bid?

Again, you need to act promptly.

In some states that have a formal bid protest procedure, you may have to exhaust administrative remedies before filing a lawsuit. In most states your next step is to file a lawsuit in which you ask the court to issue immediately a temporary restraining order to be followed by an injunction, barring the agency from awarding the contract to the low bidder whose bid you believe is non-responsive. In some jurisdictions and circumstances, you will file what is called a mandamus action in which you ask the court to order that the public agency take particular action to comply with the law. You will need to prove that the bid you are seeking to disqualify deviates in a material way from the bid requirements and that it would be an abuse of discretion for the public agency to waive the deficiencies. If the bid you are challenging is non-responsive in a material way that gave the low bidder an advantage over other bidders who fully complied with the bid requirements and the contract has not yet been awarded, you stand a good chance of having your bid protest being sustained and the court will order the non-responsive bid to be discarded.

Your chances of prevailing in court when you are challenging a low bid that you believe to be non-responsive are better than in most situations where the protesting bidder claims that the low bidder is not a responsible bidder or the public agency considers you to be a non-responsible bidder. Unless the bidder fails to satisfy an objective standard such as if the low bidder was not a licensed contractor in a state that requires licensing, judges rarely override an agency decision or make their own determination whether the bidder is a responsible bidder. Cases arise from time to time when a public agency has heard of a complaint, problem or alleged poor performance on a prior project for a different owner by the apparent low
bidders. Courts will almost always defer to the agency's determination of whether the contractor's past performance or present capabilities make the contractor a non-responsible bidder.

**Contractor Found Not To Be Responsible**

In the 2002 Ohio case of *Monarch Construction Company v. Ohio School Facilities Commission*, Monarch Construction Company, Cincinnati, OH, was the apparent low bidder for the renovation and expansion of a school building for the Tri-Village Local School District, New Madison, OH. Peterson Construction Company, Wapakoneta, OH, was second. Turner Construction Company had been retained to serve as construction manager for the project. Per the terms of its construction manager agreement, Turner was to investigate the responsibility of bidders and make a recommendation to Tri-Village. Turner learned that Monarch had had problems on one job with another school district and recommended that the Tri-Village project not be awarded to Monarch. Though there had been problems on one job, Monarch had properly performed four other school construction projects. Based on Turner's recommendation, the Tri-Village School District considered Monarch not to be a responsible bidder and awarded the contract to Peterson.

Monarch filed suit seeking a declaratory judgment that the school district's award to Peterson was contrary to law and requested an injunction be issued to prevent awarding the award to Peterson and any payment to Peterson. The trial court found that the school district's rejection of Monarch's bid because of problems involving only one contract was arbitrary because the school district did not weigh the four properly performed contracts against the one that was poorly performed; therefore, the trial court concluded the school district had abused its discretion in finding that Monarch was not a responsible bidder. The trial court enjoined the school district from awarding the contract to Peterson and ruled that the contract had to be awarded to Monarch or re-bid.

The school district and Peterson appealed.

The Ohio Court of Appeals, Tenth District, reversed the decision, ruling that the trial court was entitled to considerable discretion in determining whether the low bidder was the lowest responsible bidder and said the school district was not required to weigh the low bidder's four properly performed contracts against one that was poorly performed. Finding that the trial court had improperly substituted its judgment for that of Tri-Village and did not afford sufficient discretion to the school district, the Ohio appellate court said that because the school district investigated Monarch through Turner and based its decision on the information it received from Turner, the school district's decision to reject Monarch was not arbitrary.

**Non-Responsive Bids**

When dealing with a bid protest based on an alleged non-responsive low bid, courts may be more rigorous in their evaluation and less deferential to the public agency than in cases where there is some evidence to support the public agency's determination that the low
bidder is not a responsible contractor. In a 2004 case, Broadmoor, LLC v. Ernest N. Morial New Orleans Exhibition Hall Authority, concerning bids for construction of Phase IV of the New Orleans Convention Center, the Louisiana Supreme Court ruled on the issue of whether the Authority could waive a mandatory pre-bid meeting requirement and other issues regarding bid responsiveness.

The Authority wanted to award the job to the low bidder who had submitted a bid of $268,445,500. The low bidder was a joint venture consisting of W. G. Yates Construction Company, Philadelphia, MS, and Landis Construction Company, L.L.C., New Orleans, LA, that was formed shortly prior to the submittal of bids. The Yates/Landis low bid was challenged by second lowest bidder, Broadmoor, L.L.C., Metairie, LA, who had submitted a bid of $275,000.00.

Broadmoor submitted its protest to the Authority based on alleged “irregularities, deviations and omissions” in the Yates/Landis low bid. Specifically, Broadmoor asserted that the Yates/Landis joint venture bid was non-compliant with the bid requirements due to three items: (1) failure to include a certificate of insurance covering builder’s risk insurance or a letter of insurability regarding builder’s risk insurance; (2) failure to attend two mandatory pre-bid meetings and failure to purchase a full set of bidding documents; and (3) failure to submit a corporate resolution. Yates/Landis denied there were any bid irregularities and asserted that the alleged deficiencies were “minor and technical in nature.”

The instructions to bidders required bidders to deliver certificates of insurance or statement of insurability acceptable to the Owner with their bids to show compliance with the insurance requirements in the Supplementary Conditions. The instructions to bidders went on to say that failure of the successful bidder to deliver the certificates of insurance or statement of insurability with the bid may result in the bid being deemed incomplete and non-responsive.

The insurance requirements in the Supplementary Conditions required the contractor to purchase and maintain builder’s risk insurance. Apparently, Yates/Landis submitted a standard certificate of insurance, which customarily lists commercial general liability, auto liability, umbrella or excess coverage and workers compensation and employer’s liability insurance, as no questions were raised regarding these insurance coverages.

On the insurance issue, the sole focus of the bid protest was Yates/Landis’ failure to attach to its bid a certificate of insurance covering builders risk insurance or an affidavit or statement of insurability acceptable to the Owner pertaining to builders risk insurance. In support of the Authority’s position that it could accept the Yates/Landis low bid, the Authority’s Architect said that “it is pretty much an industry standard, that a contractor is not required to present a builder’s risk insurance [certificate] at the time of the bid. It’s standard practice that within ten days after the bids are received that the contractor has that time to present a builders risk insurance policy to the owner.”

The advertisement for bids for the Convention Center project stated that two pre-bid conferences would be held at the offices of the architect on August 22, 2003 at 10:00 AM and
on September 5, 2003 at 10:00 AM and that attendance was mandatory. As of the date of the pre-bid conferences, the Yates/Landis joint venture was not formally in existence as the joint venture agreement between Yates and Landis was formally executed on September 12, 2003. Because the joint venture was not in existence, Broadmoor argued that no representative of Yates/Landis could have attended the pre-bid conferences. Yates/Landis contended that the joint venture was formed prior to the date of execution of the written joint venture agreement. Attendance records showed that an individual attending the August 22nd pre-bid conference signed in as a representative of Yates Construction. No one signed in as a representative of the joint venture. Consistent with Yates/Landis' argument that the joint venture was formed prior to execution of the written joint venture agreement, the attendance roster for the September 5th pre-bid conference showed that an individual signed in as a representative of Yates/Landis.

In response to pre-bid questions, the Authority's Architect issued an addendum to the contract documents addressed to all holders of the bid documents. The addendum contained pre-bid questions that had been posed to the architect and the architect's response, included a question asking how bids were to be executed by a joint venture and what documentation would be required by the owner to verify the authority of the person executing the document on behalf of the joint venture. The answer was that if the joint venture was in the form of an entity separate from either of the venture partners, a resolution from that entity was required. If the joint venture was not a separate entity, the bidder must provide a resolution from all joint venturers authorizing the signature on the bid forms. The Yates/Landis joint venture was formed as a separate entity. The Yates/Landis bid contained two separate corporate resolutions, one from Yates Construction and one from Landis Construction. Neither resolution mentioned the joint venture and no resolution was submitted by the joint venture and there was no documentation submitted to verify who was authorized to act on behalf of the joint venture.

Shortly after submitting its bid protest to the Exhibition Authority, Broadmoor filed a lawsuit seeking a temporary restraining order, preliminary injunction and permanent injunction, seeking to restrain the Authority from awarding the contract to Yates/Landis. The trial court permitted the Authority to proceed with the award to Yates/Landis. On the insurance issue, the trial court found that a decision by the Authority's not to insist upon strict compliance with the bid requirement to submit a certificate of insurance or statement of insurability pertaining to builders risk with the bid was not arbitrary. The trial court judge considered all the other arguments to disregard the Yates/Landis low bid to be "non-substantial."

Broadmoor appealed to the court of appeal, which reversed the trial court's ruling. The court of appeal concluded that the Authority acted arbitrarily and capriciously in accepting the bid from Yates/Landis due to the failure to provide a certificate of insurance or letter of insurability regarding builder's risk insurance, which the court of appeal said was a non-waivable substantive deviation from the bid requirements. The court of appeal also ruled that Yates/Landis' failure to attend the mandatory pre-bid conferences precluded Yates/Landis from being considered a qualified responsive bidder and that Yates/Landis' bid was not responsive due to the failure to submit a resolution of authority for the joint venture.
Now, both Yates/Landis and the Authority appealed the court of appeals’ decision to the Louisiana Supreme Court. With several justices dissenting, the Louisiana Supreme Court affirmed the court of appeals’ decision on each of the three grounds cited in support of the bid protest. The Louisiana Supreme Court ruled that the Authority abused its discretion when it selected Yates/Landis as the lowest responsive bid because the Authority had impermissively waived the requirements regarding builder’s risk insurance, attendance at pre-bid conferences and submission of a resolution concerning the joint venture.

In reaching its decision, the Louisiana Supreme Court relied on the Louisiana public bidding statute and particularly amendments enacted by the state legislature disallowing public agencies from waiving requirements in advertisements for bids and bid forms. As enacted in 1977, the Louisiana public bidding statute required that all public work in excess of $5,000 be advertised and let by contract to the lowest responsible bidder who had bid according to the contract, plans and specifications as advertised. In 1984, 1986 and 1987, the statute was amended to state that the provisions and requirements of the statute and those stated in the advertisement for bids and on the bid form shall not be waived by any public entity.

In its decision in the Broadmoor, L.L.C v. Ernest N. Morial New Orleans Exhibition Hall Authority case, the Louisiana Supreme Court recognized that a public entity has wide discretion in determining bidder responsibility, but that the amendments required a public entity to be bound by the requirements stated in its advertisements for bids and bids forms and prohibited the entity from choosing to waive them at a later date. The dissenting judge said that the Supreme Court and the court of appeal had substituted their judgment for that of the trial court and the Authority and that a public agency’s reasonable, good faith interpretation of its own specifications should not be upheld. Here, he said the Authority had interpreted its specifications and bid requirements and had concluded that a certificate of insurance or statement of insurability with regard to builder’s risk insurance was not required by the specifications and that decision should not be disturbed absent a showing that the Authority had abused its discretion.

In states that do not have a statute similar to the Louisiana statute stating that the bid requirements shall not be waived by any public entity, a public entity's decision to award the bid to the lowest bidder is likely to be upheld based on the discretion afforded to public agencies.

Wrapping-Up

Being familiar with the legal principles applicable to bid protests can be a valuable tool for contractors who engage in public bid work, enabling you to be better prepared to defend a bid protest that may be directed at you or to submit your own bid protest when you believe a competitor has gained an advantage resulting from a deviation from the bid requirements. Prior to submitting your bid, you will want to check and be certain that your bid is fully responsive and all required documents that are to accompany the bid have been properly completed and executed.
Immediately after the opening of public bids, if you are a disappointed bidder, you may want to examine the bid submission of the apparent low bidder. In the usual frenzy that characterizes finalization of bids on the day bids are due, it is not uncommon that there is some omission or discrepancy in the bid submittal. A low bid may not be fully responsive to all the requirements in the advertisements for bids or the bidder may fail to properly complete or submit all the required bid forms. You might find that the low bidder (or a proposed subcontractor in a state that requires subcontract listing) fails to meet the qualifications stated in the specifications in regard to experience or approval from a manufacturer or might not hold a required license or you may determine, after performing some research, that the low bidder's surety does not meet the rating referenced in the bid documents.

If there is some discrepancy, you will need to act quickly to submit your protest and perhaps file a suit to enjoin the public agency from acting in a manner that you believe to be contrary to proper bid procedure.