

Contracts BULLETIN

a SMACNA publication



Volume 0, Issue Number 0

May 8, 2008

Contracts Bulletin # 101 WITHDRAWN BIDS—WHEN IS A BID A BINDING CONTRACT?

Subcontractors invest significant time and effort in the bidding process. Their focus is necessarily on winning a contract. However, there are times when a subcontractor may want to withdraw its bid. Common reasons for withdrawing bids include: an unforeseen increase in material costs, an inability to comply under the terms of the bid (e.g. the subcontractor is already working at full capacity), and mistakes. In these cases, a subcontractor may question whether it can withdraw its bid.

Generally speaking, a bid can be withdrawn without penalty at any time before it is accepted. However, as is often the case, there are exceptions to the general rule. For example, a bid cannot be withdrawn if the general contractor detrimentally relies on the bid. There may also be parameters imposed on the bidding process that would prohibit a subcontractor from withdrawing its bid. As a result, it is important to understand when a bid is binding and when it can be withdrawn without penalty.

When Is A Contract Formed?

The submission of a bid does not automatically form a binding contract. In other words, when a subcontractor submits a bid to a contractor, the subcontractor is simply offering to enter into a contract. A bid becomes binding contract once it is sufficiently detailed, is accepted by the contractor, and something of value is exchanged.

“Essential Terms” – How Much Detail Is Needed?

A valid, binding contract requires that all parties agree on the essential terms of the contract. That does not mean the parties must agree on all the terms, but the parties must understand their responsibilities and obligations. For example, a bid that specifies the services that will be performed, the time for performance, the price, and the payment terms, will be sufficient to form a binding agreement if accepted by the contractor.

On the other hand, a bid that lacks one or more of those terms is less likely to be specific enough to form a binding agreement. If a bid does not contain enough detail, no binding contract can be formed and the subcontractor will likely be able to withdraw its bid without penalty.

Consideration

In order for an bid to become binding, something of value must be exchanged. If both parties do not exchange something of value, the subcontractor is generally able to withdraw its bid without penalty. This does not necessarily mean that money needs to change hands in order to form a binding contract.

For instance, when a contractor accepts a subcontractor's bid, the contractor agrees to use the subcontractor's services and a binding contract has been formed. Even though no money is exchanged, the contractor has given up its right to use a different subcontractor which constitutes sufficient "value" to create a binding contract.

My Bid Has Not Been Accepted – Can I Withdraw It?

There is an inherent time gap in the bidding process between when a subcontractor issues a bid and when the contractor has the ability to accept bids which would normally allow a bid to be withdrawn. However, in some circumstances, a bid becomes binding before the bid has been accepted even though the contractor has not yet given anything of value to the subcontractor. Consider the following situation:

Subcontractor A offers to provide sheet metal services for \$50,000. Subcontractor B submits a bid to provide the same services for \$65,000. The contractor relies on the low bid of \$50,000 in compiling its bid for the general contract. The contractor wins the general contract; however, before being able to accept subcontractor A's bid, subcontractor A withdraws its bid. The general contractor is still obligated to provide the sheet metal services for \$50,000 under the terms of the general contract, but now is faced with an additional \$15,000 expense using subcontractor B.

In this example, the contractor detrimentally relied on Subcontractor A's bid. Once a contractor detrimentally relies on a subcontractor's bid (e.g. will be financially harmed if the subcontractor withdraws its bid), the subcontractor's bid usually cannot be withdrawn without penalty.

A subcontractor is not bound, however, if the contractor's reliance is not reasonable. In the above example, if Subcontractor A's bid had been only \$5,000 and the next lowest bid was \$65,000, the contractor would not be able to reasonably rely on Subcontractor A's bid because it is apparent that Subcontractor A's bid was a mistake.

A contractor will also have a difficult time proving detrimental reliance until the contractor's bid for the general contract has been submitted. In other words, the subcontractor's bid will generally not be binding until the contractor submits its bid for the general contract to the owner. Once a contractor submits its bid for the general contract, a subcontractor must hold its bid open for a reasonable period of time to allow the contractor's acceptance.

Contractor Must Have "Clean Hands" If Claiming Detrimental Reliance

There are other limits to a contractor claiming detrimental reliance on a subcontractor's bid. A contractor attempting to bind a subcontractor must have "clean hands." This means the contractor must act in good faith and cannot engage in bid shopping or chopping after being awarded the general contract.

Specifically, if a contractor solicits bids from subcontractors, wins the general contract, and then reopens the bidding process or attempts to coerce subcontractors into reducing their bids, the contractor cannot claim detrimental reliance in order to bind the subcontractors to their bids. In fact, subcontractors are generally within their rights to withdraw their bids if a contractor attempts to bid shop or chop after the award of the general contract.

Contractual Conditions May Make A Bid Immediately Binding

Some contractual circumstances can cause a subcontractor's bid to be binding immediately upon the bid's submission to the contractor. For example, some contractors may have contingencies for submitting bids, such as requiring a subcontractor to warrant that its bid be valid for a certain period of time (e.g. 30 days). These provisions are generally valid, and a subcontractor cannot withdraw or amend its bid during this time period.

Alternatively, a contractor may provide the subcontractor with a conditional contract. Under a conditional contract, the contractor guarantees a subcontract as long as the contractor wins the general contract. Assuming both parties agree to a conditional contract, both the parties are immediately bound and neither party can withdraw without breaching the contract.

In some cases, a bid may be primarily for supplying goods rather than labor. In these bids, the Uniform Commercial Code (“UCC”) may apply. The UCC places further restrictions on a subcontractor’s ability to withdraw or amend its bid. Under the UCC, an offer to sell goods must remain open for a reasonable period of time (not to exceed three months) unless a specific time period is explicitly written into the bid.

For additional information on the UCC, see the following Contracts Bulletins:

- Bulletin #43: "We Paid For This?" Contractors and the UCC (Part I) (February 2001)
- Bulletin #44: "We Paid For This?" Contractors and the UCC (Part II) (March 2001)
- Bulletin #83: Before You Cash That Check (February 2005)

CONCLUSION

A subcontractor’s bid can generally be withdrawn without penalty anytime before a contractor submits its bid for the general contract. However, once the contractor submits its bid for the general contract, the subcontractor must provide a reasonable period of time to allow the contractor to accept the bid.

RECOMMENDATIONS

The following recommendations may allow contractors and subcontractors to avoid bidding process pitfalls:

1. Contractors

- ◆ Define clearly the scope of work required to be performed in the bid.
- ◆ Provide subcontractors the criteria for awarding bids, before bids are due.
- ◆ Document all essential aspects of the bidding process.
- ◆ Maintain open lines of communication with subcontractors.
- ◆ Consider setting terms on bids submissions (e.g. stating in writing to subcontractors that their bids must be valid for 30 days).
- ◆ Confirm all bids in writing.
- ◆ Verify in writing bids that seem unusually low.
- ◆ Send a letter to a subcontractor explaining your intent to accept their bids if you win the general contract.
- ◆ Avoid renegotiating bids after the award of the general contract. This will allow the subcontractors to back out of their bids.

2. Subcontractors

- ◆ Ensure the bid contains a detailed description of the work to be performed and that the bid is contingent on that description.
- ◆ Document all essential aspects of the bidding process with the general contractor.
- ◆ Maintain open lines of communication with contractor.
- ◆ Consider placing contingencies in the bid, which include the ability to amend or withdraw the bid:
 - ◇ If there are unforeseen circumstances (i.e. natural disaster creates a spikes in material costs), and/or
 - ◇ If a certain amount of time passes (e.g. bid is valid for 30 days).

- ◆ Submit the bid in writing.
- ◆ Review the bid carefully prior to submission (i.e. typographical errors, correct price, etc.)
- ◆ Consider submitting a bid that is contingent upon using a standardized contract form (e.g. AIA or ConsensusDocs contract).
- ◆ If not intending to submit a bid being subject to a binding contract (e.g. if you are just providing a price estimate), make this clear in writing so that the contractor cannot later claim detrimental reliance.

SMACNA wants the Contracts Bulletin to serve our members. Your feedback or topic suggestions are welcomed by contacting Mike McCullion at 703-995-4027 or mmccullion@smacna.org.

Sheet Metal and Air Conditioning Contractors' National Association
4201 Lafayette Center Drive Chantilly, Virginia 20151-1209
Tel (703) 803-2980 Fax (703) 803-3732 info@smacna.org



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