



Bid Acceptance Blues

by Perry Safran and Brannon Burroughs

Many subs submit their bids on proposal forms that also serve as a sub-contract after both parties have signed. If you fail to accept the proposal, however, or somehow qualify your acceptance, you may end up without a contract and without a remedy when the subcontractor fails to perform.

Yes, No, or Maybe?

The North Carolina Court of Appeals emphasized the established rule of definitive acceptances in the case of *Henderson & Corbin, Inc. v. West Carteret Water Corporation*. Henderson & Corbin (HCI) submitted a bid for the construction of West Carteret's water treatment plant. In exchange for the privilege of submitting a bid, HCI agreed to keep its bid open for 60 days. In the meantime, however, HCI discovered that it had inadvertently omitted the cost of electrical work. As a result, HCI's bid was low. When informed of the error, West Carteret refused to allow HCI to withdraw its defective bid.

Before the 60-day waiting period expired, however, West Carteret learned that it needed additional funding to pay for construction of the water treatment plant. As the deadline for bid acceptance drew near, West Carteret sent a notice of award to HCI. But the notice contained the following language typed onto the preprinted form: "Please take notice that these are tentative Award Notices, subject to final review and approval by Farmer's Home Administration." When construction began and HCI refused to honor its bid, West Carteret sued HCI for non-performance.

Offer and Acceptance

One of the guiding principles of contract formation is the principle of offer and acceptance. No amount of bar-

gaining — to set price, for example, or terms of performance — constitutes a contract unless one party makes a clear offer and the other party accepts it. Unless there is a "meeting of the minds" as to essential terms, no contract is formed. Any acceptance that changes the terms of an offer becomes a counteroffer.

Though HCI's bid constituted an "offer," irrevocable for 60 days, West Carteret never accepted it. In ruling that no contract existed between the parties, the court reasoned that acceptance of an offer must be "unequivocal and unqualified." Because West Carteret conditioned its acceptance upon the receipt of additional funding, the acceptance failed the "unqualified standard." As a result, HCI escaped the consequences of its defective bid.

One test for evaluating the effectiveness of a purported offer and acceptance is to ask whether both parties are bound to a clear obligation. While HCI's bid was definite and enforceable against it, West Carteret changed the terms of its own obligations by making its acceptance of HCI's bid dependent upon additional construction financing. West Carteret's "acceptance" was really a counteroffer, which HCI could accept or reject. Because HCI did not agree to this added provision, there was no contract.

North Carolina's courts have made it clear that when a contractor accepts a subcontractor's bid, it must do so in terms that are clear and unconditional. Without this "unequivocal and unqualified" acceptance, the contractor has nothing to enforce. ■

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