When the Bid Is Bad

by Quenda Behler Story

It probably happens more often than contractors will admit: You write up a bid, the customer accepts it and signs a contract, then you discover that you made a big blooper on your estimate. If you are held to this contract, you will lose money.

Are you stuck with this contract, or can you get it rescinded (the contractual equivalent of an annulment)? The answer is a resounding "That all depends."

There is no universal rule here that applies across the country. But the cases and laws involving contract mistakes have a guiding theme: Make the outcome as fair as possible given the situation. Two factors usually determine what is fair. The first is, What kind of mistake was it? The second, Will the customer be harmed if the contract is rescinded?

An Obvious Mistake

Courts don't like customers who play the "gotcha" game. They hold very little sympathy for customers who knew, or could have easily realized, that there was a math error on the face of a bid, or that something obvious had been left out. Say, for example, you made a mistake because you added up the figures on pages one and three, but left page two out of the computation. That's a technical error that anyone can see on the face of the document, and for which the court will very likely forgive you.

As a rough rule of thumb, if the bid was just plain too good to be true, the courts will usually decide that the customer should have known (and probably did know) that there was a mistake. As another example, if your final total didn't include the cost of materials, and your bid was therefore less than half of what any reasonable person would have expected to pay for the job, you can probably get that contract rescinded.

Customer harm. Courts are generally reluctant to grant rescission, however, in situations where the customer will be harmed by it. As a legal concept, "harm" in this case includes situations where the customer pays substantially more than he would have if he had accepted someone else's bid for the same job. A situation in which the customer pays fair market price is not usually considered to be legal harm, because a fair price is what the customer should expect to pay.

Obviously, much will depend on whether the customer suffers harm from any mistake you make in bidding. If the customer can demonstrate that he will be harmed by rescinding a bid, you will probably be stuck with the contract. The best you can hope for in such a situation is an adjustment by the court toward "reasonable expectations" — that is, toward doing the job for an amount that an informed, reasonable customer might have expected to pay.

Good Old-Fashioned Mistakes

Let's say you just plain blew it. You were, for example, excessively optimistic about how much time the project would actually take. This is a stickier area, and a court's decision would probably depend on whether a customer can be assumed to have recognized that you blew it. Unless you can show that the customer actually knew there was an error in the bid, you're probably stuck with the bid price. And even if you can, you may not get much sympathy from the courts. After all, you're the contractor, and you should have done the bid right in the first place. That's your job. The customer is entitled to expect you to know what you're doing.

Unforeseeable conditions. Sometimes a bid is off not because you

made a mistake but because of something you didn't know about. You contracted for a second-floor bathroom remodel, and when you tore open the floor, you found the plumbing stack needed replacement top to bottom. You can't just finish the bathroom and tell the customer you'll connect the toilet after he gets the plumbing stack repaired, because the law imposes a warranty of usability on you, and unconnected toilets are not usable. However, you will probably be able to charge for the additional cost to repair the hidden defect, depending on the jurisdiction you're in and just how hidden this defect was. It will help immensely if you've protected yourself with contract language stating that hidden defects will add to the contract price (See *The Legal Column*, 11/93).

Price changes. A mistake in the cost of materials is a pretty common problem, as those of us who have been burned by wide, unexpected swings in lumber costs can attest. This may feel like a "hidden condition" to you, but the courts generally look at material price changes as the sort of substantive mistake you should know enough to avoid. That's why you would be well advised to protect yourself by limiting the number of days your bid remains open, or phrase the contract language to specify that material costs are subject to market availability at the stated price.

When You Find a Mistake

No matter what the situation, resolving it fairly requires quick, definite action. Notify the customer in writing immediately. You need to establish a paper trail. Get your lawyer's advice about what language to use so you don't inadvertently damage your position.

Your lawyer will probably suggest that you stop work, because trying to change the terms of the contract so that you can collect extra money for work that has already been performed is a difficult legal stunt under the best of circumstances.

I strongly suggest trying to negotiate a solution with your customer. Maybe a bigger and better project at a reduced profit level for you would persuade the customer to negotiate a new contract.

If you can't work something out with the customer and you face a large loss, it may be possible to rescind the contract. If not, in some instances it might cost you less to pay breach-of-contract damages than it would cost you to perform the contract. You will need to discuss this in detail with your attorney.

With any luck, none of this will ever happen to you. In the meantime, polish your math skills and revise that contract to cover your backside for extra costs due to hidden conditions or price changes. ■

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