How Bidding Errors Affect the Contract

by Quenda Behler Story

I just had to explain the doctrine of "mutual mistake" to a small bidder on a local construction project. It was painful for both of us: painful for me because I didn't like telling him he was stuck between a rock and a hard place, and painful for him because he was stuck. The contractor missed some items that should have been in his bid, so it was almost guaranteed he would lose money on the job. The reason he missed the items was because he failed to read the specifications carefully enough.

Is this fair? That's not the question. The question is whether the property owners can enforce the contract even though the bidder made a mistake. The answer? It depends. Most of the time the property owners can enforce the contract, but there are circumstances where mistakes make contracts unenforceable.

Mutual Mistake

There is a legal doctrine called mutual mistake. The idea is that if both parties to the agreement are mistaken about the same thing, then there can't be an enforceable contract. This springs from the most basic rule of contract law, that there can be no valid contract unless there is a meeting of the minds between both parties. When the contractor and the property owner (or contractor and sub) both share the same mistaken belief, they can't have a meeting of the minds because neither one of them knows what he is talking about.

Here's an example. Let's suppose that an invitation to bid goes out for a building that has a basement. Neither the contractor nor the customer thinks the basement will be a problem, but it turns out the plans were based on an outdated flood-plain map. The site is actually on the flood plain, which means the building can't be insured unless it is redesigned or unless the basement is eliminated.

In this case, no one — not the customer, not the contractor, not even the person who bid on the foundation — would be held to the contract, because all of them were mistaken about what it would take to put in the basement. It was a mutual mistake.

Unfortunately, this does not describe the situation in which my client found himself. There was a mistake, but it wasn't mutual. The property owner did not make any mistake in his invitation to bid. My client simply hadn't read the specifications carefully enough. So, the contract was valid, because the mistake was all his.

Too Good To Be True

There is another important exception: If the bid was so low as to make it obvious that the bidder was mistaken about something, there are many courts that will say it's not fair to enforce the contract against the bidder. The legal theory that explains this is called "unreasonable reliance."

The idea is that it isn't reasonable to assume a bid is valid if it is too far off the mark. For example, suppose a homeowner solicits bids for a new slate roof. Two roofers offer to do it for $50,000, but a third one says he can do it for $15,000. It's obvious that the third bidder made a mistake. Maybe he made a math error or thought he was bidding composition shingles.

Either way, it will be difficult for the owner to force the low bidder to honor his price. That's because if there is a mistake in a bid that the customer could see just by looking at it, then his reliance on the bid is not reasonable. The law intends for contracts to be fair, not a game of gotcha.

Fraudulent Inducement

But what if the bidder made his mistake because he had been misled about the requirements of the job? That one is easy. There is another legal doctrine that sometimes applies to bid mistakes. It's called "fraudulent inducement." It means the mistake is not genuine; it's a mistake that happened because the bidder was misled about the nature of the project.

If the customer solicits a bid, but fails to include an important piece of information, then the bid won't be enforceable. Trying to enforce a contract induced by mistake or deceit is fraud. For instance, suppose a homeowner wants the vinyl siding stripped off his house and new siding installed. The homeowner gets a bid from a contractor who has worked on the house before. The contractor knows there is asbestos siding under the vinyl and prices the job accordingly. The homeowner decides the price is too high, so he gets a lump-sum bid from a second contractor without telling him about the asbestos. If the customer actually knows about the asbestos, he is engaging in fraud and the contract would not be enforceable.

Differing Site Conditions

Here's a word of caution. Many bid mistakes are caused by bad information about the actual site conditions. Sure, the contract will not be enforceable if everyone makes the same mistake, but sometimes it's not all that clear just who is responsible for the error.

For example, it's probably a mutual mistake not to know that there was a giant granite ledge where the basement was supposed to go — but maybe it isn't. Maybe you should have asked the client to pay for test bores, or perhaps you should have put something in your contract that says there will be an upcharge if you encounter hidden problems. What you should not do is rely on a judge to bail you out, because that might not happen. There are legal opinions that will say it's your mistake, not the client's, because you're the contractor and you know how to find out.

When you write your contract, always put in a clause about what will happen in the event of differing site conditions. Then you don't have to worry about being tied up in litigation over what kind of mistake it is, because you will already have your solution in place.

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