

## How a Bidding Error Can Turn Into a Disaster

by Quenda Behler Story

**I**t's your worst nightmare: You've submitted a bid, it's been accepted, and then you find out there was a mistake in your estimate or that your bid was based on a subcontractor's mistake.

A recently decided legal case in California shows just how messy things can get when such a bidding error turns up. In this instance, after the prime contractor's bid was opened and accepted — but before the contract papers were signed — one of the subs told the prime contractor there was a huge mistake in that sub's bid.

### Right to Amend a Bid

California state law gave the prime contractor in the case the right to amend his bid to the customer in the event of a mistake. Nevertheless, the prime contractor chose not to do so. (The job was a municipal project and he would

have had to forfeit a sizeable bid bond if he backed out after his bid was accepted.) Instead, he went ahead and signed the contract without correcting the mistake, and then he started the job.

At that point, the sub said, "Hey, I told you there was a mistake in my bid before you signed the contract, and I'm not going to do the work at that price." So the prime contractor

hired someone else to do the work, but he ended up paying a lot more than the original bid price.

### Detrimental Reliance

After the work was finished, the prime contractor sued the original sub for the extra money that the work had cost. The prime contractor's lawyer said, "We relied on the figures in the sub's bid when we put our bid together. What's more, the sub knew we would be relying on his bid. The law calls that detrimental reliance, and what it means is that the sub created this problem,

so he should pay the difference between what he bid and what the work actually cost."

The sub's lawyer responded, "What do you mean, the sub created this problem? You knew those figures weren't reliable before you ever signed that contract."

The lower court agreed with the sub and said that once the prime contractor knew there was a mistake, he was no longer entitled to rely on those figures.

### Legal Hair-Splitting

Sounds reasonable so far, right? But here's where the legal hair-splitting comes in: The prime contractor appealed the lower court's decision and the Court of Appeals ruled in the prime contractor's favor.

The higher court ruled that even though state law *allowed* the prime contractor to correct his bid, it did not *require* him to do so. So even though the prime contractor knew there was a mistake, he did not have to correct it.

In effect, the Court of Appeals was saying that detrimental reliance occurred at the moment the contractor submitted his bid; therefore, the subcontractor was bound to honor his price from that point forward. Not honoring it would be detrimental to the contractor.

According to the Court of Appeals, the only question that mattered was this one: Should the prime contractor have suspected that there might be a mistake in the sub's figures the first time the prime contractor saw them? In other words, was the sub's bid price just too good to be true?

If the prime contractor should have suspected a mistake, then it was unreasonable for him to rely on the sub's bid.

Unfortunately for the sub, the court also ruled that if it was reasonable for the prime contractor to rely on the sub's bid, the sub had to pay.

So the higher court sent the case back to the lower court to make a determination about how reasonable it was for the contractor to have relied on the original bid. The lower court has not yet made that determination.

If a sub gives you a price that seems low, don't rely on it without first calling to make sure that it's correct and he will honor it.

# Legal

## Moral of the Story

Clearly, you can't be too careful when you write your bids. If you're a contractor and a sub gives you a price that seems too low (or is significantly lower than prices from other subs), do not rely on it without first calling him to make sure that it's correct and he will honor it.

And if you're a sub, and a contractor relies on your bid to get a job — and will be significantly damaged if you do not honor it — keep in mind that you may be *required* to honor it even if you don't want to and haven't signed anything.

Those are the first two lessons. But I can think of at least two more that you

should take away from this case:

First, think how much better off the subcontractor would have been if he had included a clause in his bid that allowed him to amend the bid in the event of a mistake. You don't need a state law authorizing that kind of clause if both parties agree to it.

Second — and this is probably the most important lesson of all — one guy wins and the other guy loses in a lawsuit, but so what? The reality is that they both lose. Even the winner loses money — in unreimbursed legal fees, in time, and in the delay in collecting what he had coming from the original contract. These guys

should have worked out a deal long before this ever got to court.

Yes, it's painful to compromise when you're right and the other guy's wrong, but we're not talking about life-and-death constitutional principles. It's just business. When there's a controversy, you need to solve it as quickly as possible so you can get back to running your company.

---

*Quenda Behler Story, author of The Contractor's Plain-English Legal Guide, has practiced and taught law for more than 25 years.*