Legal

Who Pays If Something's Wrong With The Plans and Specs?

You're looking at an invitation to bid, complete with plans and specs. It would be a big job for you — very profitable.

Great! Go for it, but don't lay in the champagne just yet. There are risks involved, one of which is that since you didn't put those plans and specs together, you can't be sure they're complete and correct.

It's not enough to rely on the customer's plans; you need to do some checking yourself. The courts say that if you could have investigated and discovered the problem, then you should have.

Missing Information

Here's a horrifying example: You are asked to bid on a renovation project that involves turning an old department store into residential lofts, and you win the bid. But after you get started, you discover foundation problems that weren't on the plans. Apparently, when the foundation was built the mix was incorrect, and it does not meet current standards.

So you contact the customer and say, "Hey, your specs didn't say anything about footing problems. Since we'll have to fix them, it's going to cost you more." The customer says, "What do you mean, cost us? You bid at that price, so you're stuck with it."

"That's what you think," you say. "There's a changed or hidden conditions clause in the contract that says the contractor gets a change order with accompanying price adjustments when changed or hidden conditions turn up."

But will that clause actually save you? After all, nothing has really changed; the bad concrete was there long before the contract was signed. How about "hidden"? Would the reference to hidden conditions save you?

Changed Conditions

Let's start with changed conditions. Here's the legal standard: To get some adjustment in the contract price for changed conditions, those conditions don't have to physically change. The conditions are considered changed if they are not what the parties thought they were when they made the contract.

You certainly didn't have bad concrete in mind when you signed the contract. But — and there's always a "but" — you do need to understand that what you "knew" when you signed the contract includes what you *should* have known, and what you would have discovered if you had inspected the job thoroughly.

That's right: It's not enough to rely on the customer's plans and specs. You need to do some checking yourself. The courts say that if you could have investigated and discovered the problem, you should have. If going onto the site, taking soil borings, doing a little digging, and banging on a few walls would have revealed the problem, then that's what you should have done.

There's even a court case that says if there were archives (or original plans) for the building and you could have discovered the problem by reading them, then you should have read them.

Hidden Conditions

The same thing goes for hidden conditions. They are not considered hidden if, with some effort, you could have found them.

Let's return to our example, the store-renovation project: It may be true that you didn't know about that bad concrete and it was hidden from sight — but if you could have found out about it with a little investigating, the bad concrete won't be considered a changed or hidden condition.

My point here is not that you need to start filling out those bankruptcy petitions; I am simply pointing out that the changed and hidden conditions clause may be more complicated than you thought.

Reasonable Practice

In the case of the store-renovation project, if I were your attorney there are two issues I would be scrutinizing.

First, how much investigating is enough? The standard used is "what is considered reasonable practice in the trade." If you wouldn't have discovered the problem by investigating in the way that people in the construction trade typically investigate — people in your area who do what you do — then the condition qualifies as hidden or changed.

Second, what should the people who prepared the bid have known? And what should they have told you if they knew — or had reason to know — that there might be a concrete problem? We in the legal trade call the withholding of information under those kinds of circumstances fraud, or sometimes failure to disclose.

Whatever we call it, your customer isn't allowed to lure you in and trap you into a bad bid. Not knowingly, at any rate. The good news is that customers are subject to the same standard that you are: What matters is not what they actually knew, but what they should have known.

So if you're handed specs and plans and invited to bid, don't sign anything until you've gone out on the job site and thoroughly investigated the proposal. That's something you should do anyway — putting together your bid without ever leaving your office isn't good business. You should always find out what's actually on the ground, and whether those plans and specs are accurate.

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