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CONSTRUCTION NEWS

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Subcontractor Bids –
When is A Bid Binding?

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SUBCONTRACTOR BIDS – WHEN IS A BID BINDING?

A recent Federal Court Case in the Eastern District of Pennsylvania points out the typical pitfalls plaguing contractors in the construction bid process. The Court found that a subcontractor is not bound by its bid in the absence of a formal acceptance. Although not surprising, the case does raise interesting factual twists.

In March of 2006 Concrete Building Systems, Inc. (“BSI”) submitted a proposal to fabricate and install pre-cast concrete elements to Neshaminy Constructors, Inc. (“NCI”) which was submitting a general construction bid to SEPTA for the construction of a parking garage.

Because BSI had a production window in June, its proposal to NCI stipulated that it was based on a contract award by April 15, 2006, fabrication work starting in June and that the proposal “will be void if not accepted with in 30 days.” BSI’s bid included shop drawings, fabrication and installation of the pre-cast components.

NCI, in its bid to SEPTA, utilized BSI’s bid but reduced the bid number when determining its overall costs. NCI was the sole bidder for the SEPTA project but the acceptance of its bid was delayed because SEPTA was required to perform certain independent financial reviews when only one bid was received to determine if the bid price was reasonable. Under NCI’s bid to SEPTA, it agreed to hold its bid open for 90-days.

With an understanding that BSI needed eight weeks to prepare shop drawings, NCI in March began expressing concerns to both SEPTA and BSI about the project schedule since its bid had not been accepted. In late March, without a formal commitment from SEPTA, NCI notified BSI that, “it looked like the job was moving forward” and requested BSI to provide a break-out price for shop drawings so that BSI could get started on the project while awaiting approval from SEPTA. BSI did not comply with the request stating that it wanted a commitment from SEPTA before working on the project.

Several days after NCI’s request, BSI made a commitment to another contractor for pre-cast materials, which prohibited it from supplying material on the SEPTA project. As a result, BSI, several days prior to the expiration of its bid to NCI, notified NCI that its June production slot was not longer available and offered a later production schedule. NCI, in response, sent a proposal for only shop drawings, which BSI declined.

When SEPTA awarded the contract to NCI in May, NCI retained another subcontractor to perform the pre-cast work at a cost above BSI. NCI brought an action to recover the additional costs against BSI arguing that BSI, in committing to another job prior to the expiration of its bid, breached its contract or in the alternative, sought equitable relief under a theory of promissory estoppel.

The Court started its opinion ruling that Pennsylvania Common Law rather than the Uniform Commercial Code applies to the controversy. In applying Pennsylvania common law the Court cited various cases which should guide bidders in their bid negotiations. For example, the submission of a bid by a subcontractor to a general contractor does not create a binding contract even if the bid is used by the contractor in making its bid on the project. The fact that a general contractor informs a subcontractor that it was the lowest bidder does not create a binding contract between the parties. A reply to an offer, though purporting to accept it, which adds qualifications or requires different performance, is not an acceptance, but a counter-offer. A counter-offer operates as a rejection of the original offer.

Based on the Court’s outline of Pennsylvania case law it held that even though BSI notified NCI that it would not perform under its bid that it did not breach its contract for the simple reason that there was no contract between the parties. When NCI sent a request for shop drawings only, this was a “counter-offer” for a new obligation thereby serving to terminate BSI’s initial bid. The Court found that the parties exchanged a series of offers and counter-offers none of which were ever accepted.

The Court also rejected NCI’s promissory estoppel argument holding that promissory estoppel only applies if a promise is made that induces reasonable reliance on the part of

the promisee. In cases in which bids are found to be binding, there is typically a course of conduct by the bidder which leads the contractor into taking certain actions even though no formal subcontract is executed. Without some additional action or representations, a bid standing alone is not a contract.

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