Beware of Bidding Miscues

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Subcontractors know the bidding practice well. They receive a call from a general contractor looking to bid a new project. The general contractor asks the subcontractor for a price to perform the work within in the subcontractor's field of expertise. The subcontractor then provides the general contractor with its price to perform the work.

Following the submission of its bid, the subcontractor may never hear from the general contractor again on the new project for any number of reasons. There are times, however, that the general contractor submits a winning bid and then goes back to the subcontractor to formalize their agreement in a written subcontract under which the subcontractor performs the work on the new project.

It is in this latter situation that the court was asked to determine whether a subcontractor is somehow obligated to a general contractor in the absence of executing a written subcontract and prior to the subcontractor's performance of work.

In this recent case, in preparation for submitting a bid to serve as a general contractor on a reconstruction project, the general contractor solicited quotes from subcontractors to perform excavation and landscaping work for the project. A subcontractor submitted a quote, which the general contractor incorporated into its bid after purportedly confirming with the subcontractor the scope of work and price quoted. Thereafter, the general contractor informed the subcontractor that it had been awarded the contract to serve as the general contractor for the project. The general contractor and subcontractor then engaged in discussions regarding the subcontractor's scope of work and, upon the general contractor's request, the subcontractor provided a revised quote that included additional work that had not been included in the original quote.

The general contractor and subcontractor attempted further negotiations with the aim of entering into a written subcontract. When these negotiations proved unsuccessful, the subcontractor terminated the relationship by notifying the general contractor that due to the unreasonable terms and conditions in the proposed subcontract it would not enter into any agreement with the general contractor. As a result, the general contractor sought the desired excavation and landscaping services from a different subcontractor at a higher price.

The general contractor then commenced an action asserting, among other things, a breach of contract claim and sought to recoup the difference between the amount it ultimately paid for the excavation and landscaping work and the price quoted by the subcontractor.

The subcontractor moved to dismiss the complaint and the general contractor cross-moved to amend its complaint to substitute its breach of contract claim with a claim for

promissory estoppel.

The court granted the general contractor's motion to amend its complaint, holding that the general contractor stated a viable claim for promissory estoppel and that questions of fact existed as to what transpired during the contract negotiations. The subcontractor appealed the decision.

At the appellate level the court analyzed what was required to state a valid claim for promissory estoppel. Promissory estoppel requires an allegation that an individual or entity (here, the subcontractor) made a clear and unambiguous promise and that another individual or entity (here, the general contractor) reasonably relied on that promise to its detriment.

In upholding the lower court's decision, the appellate court held that the general contractor had pled a viable cause of action for promissory estoppel and that triable issues of fact existed, including, but not limited to, the parties' negotiation of the subcontract.

Commentary

This recent case should be an eye opener for subcontractors. Here, the subcontractor may ultimately be responsible to pay the general contractor for the increased subcontract price when the only reason the subcontractor did not go forward with the work was because the general contractor's proposed written agreement was unreasonable.

This case is only in its infancy as the parties' respective motions occurred during the pleadings stage. The general contractor still must prove at trial that the subcontractor made an unambiguous promise and that the general contractor reasonably relied on that promise to its detriment.

This case, however, does not appreciate the realities of the bidding process. Indeed, after the general contractor obtained pricing from the subcontractor, there was nothing preventing the general contractor from using the subcontractor's bid and signing a subcontract with a different subcontractor for that price.

Accordingly, a subcontractor must protect itself during the bidding phase. A subcontractor should only submit written bids and the bids should be made subject to the parties entering into a mutually agreeable subcontract. Moreover, in that bid, the subcontractor's exclusions and exceptions must be clearly stated.

Feel free to call me to discuss bidding.