Can a Contractor Hold a Subcontractor to its Bid

The Contractor was preparing to bid on a school project. On the day of the bid, a Subcontractor submitted its bid to the Contractor to perform the paving work on the project. The Subcontractor’s bid was submitted by telephone on the day that the Contractor had to submit its bid to the school district. Because the Subcontractor’s bid was the lowest bid received on the paving work, the Contractor included the Subcontractor’s price in its computation of the overall costs of the project and submitted the total as its bid to the school district. Because it had submitted the lowest general bid, the Contractor was awarded the prime contract for the project.

The next day the Subcontractor informed the Contractor that the Subcontractor was revoking its bid. The Contractor indicated that it had used the Subcontractor’s bid in computing its own overall bid and that it expected the Subcontractor to perform the work in accordance with the terms of the Subcontractor’s bid. The Subcontractor refused to perform. The Contractor was forced to obtain a subcontract for the paving work from a different company at a higher price. The Contractor then sued the Subcontractor for the amount of the price increase.

In this scenario, the contractor was faced with the unfortunate situation of having relied on the subcontractor’s low bid only to discover after award of the prime contract that the subcontractor would not perform at the price originally bid. Although the prime contractor’s formal, written bid had been accepted, and the contractor was bound to the owner, the contractor had no written contract with the subcontractor and was faced with making up the shortfall. Under this scenario, did the contractor have a basis to sue the subcontractor and recover its damages? In most states, the answer is yes.

This scenario is based on the Supreme Court of California’s decision in Drennan v. Star Paving Co., which is the leading case regarding the application of the doctrine of promissory estoppel to subcontractors’ bids. To prevail in a promissory estoppel action, the plaintiff must prove that (1) the defendant made certain promises; (2) the defendant should have expected the plaintiff to rely upon those promises; (3) the defendant did in fact rely upon those promises to its detriment; and (4) injustice can be avoided only by enforcement of the promise. In Drennan, the court applied the doctrine of promissory estoppel to rule that the subcontractor had become bound to the terms of its offer as a result of the contractor’s detrimental reliance on the promises contained in the subcontractor’s offer. While some state courts have rejected the reasoning in the Drennan decision, the courts in most states now hold that a contractor may enforce a subcontractor’s bid under a promissory estoppel theory. Thus, the subcontractor may be bound to the contractor as if a subcontract had actually been executed.

The analysis of a contractor’s ability to hold a subcontractor or supplier to its bid applies to any tier in the contracting process. In order to hold a subcontractor to its bid under the doctrine of promissory estoppel, the contractor must show all four of the following: (1) a clear and definite offer by the subcontractor to
perform the work at a certain price; (2) a reasonable expectation by the subcontractor that the contractor would rely on the subcontractor’s price in preparing the contractor’s bid; (3) reasonable reliance by the contractor on the subcontractor’s bid; and (4) detriment to the contractor as a result of reliance on the subcontractor’s bid and the subcontractor’s subsequent refusal to perform.

When analyzing whether you can hold a subcontractor to its bid, there are several questions you should consider. For example, what if the subcontractor offers only an estimate of the cost of the work without intending to make a definite offer to perform the work at that price? What if the subcontractor’s bid or proposal is made expressly revocable or subject to revision? Is there a clear and definite offer under such circumstances? Did the subcontractor have actual knowledge and expectation that its bid or proposal would be used by the contractor in submitting a bid or proposal for the overall project? Do the ordinary customs and practices of the construction industry suggest that it must be reasonable for the subcontractor to have expected the contractor to rely on the subcontractor’s bid or proposal in the preparation of the contractor’s overall bid or proposal on the project? Did the subcontractor’s bid or proposal differ substantially from the other bids or proposals that the contractor received? Was there an obvious mathematical error in the subcontractor’s bid or proposal that should have been evident to the contractor? Was the subcontractor’s bid or proposal much lower than other quotes received on the same work? If so, did the contractor take any steps to verify or validate the subcontractor’s bid or proposal? Did the contractor mislead an inexperienced subcontractor into believing that the subcontract work could be performed at a price suggested by the contractor when that price underestimated the true cost of performance?

The answers to these and similar questions may determine the strength of the contractor’s position and whether the subcontractor has any defenses that can defeat the contractor’s promissory estoppel action. Accordingly, when attempting to hold a subcontractor to its bid or if faced with a promissory estoppel action, getting the advice of an experienced construction lawyer is essential.

© Smith, Currie & Hancock LLP

(This article was originally published in the Construction Connection Newsletter. See www.constructionconnection.com.)

Gene invites you to connect with him on LinkedIn at: http://www.linkedin.com/in/constructionlawgeneheady

Eugene (“Gene”) J. Heady is a Partner in Smith, Currie & Hancock’s Atlanta office. He is rated AV® Preeminent™ by Martindale-Hubbell and was selected as one of Georgia’s Top Rated Lawyers of 2014. Smith, Currie & Hancock is a well-respected national law firm focusing on construction law, government contracts, environmental law, and commercial litigation. Gene is also a mediator and arbitrator and is a member of the American Arbitration Association’s national Panel of Construction Arbitrators. Gene is a regular contributor to the Construction Connection Newsletter. He has over 30 years of experience as a problem solver in the construction industry. Following a successful career in the construction business, Gene began practicing law in 1996. He represents and assists owners, general contractors, builders, subcontractors, suppliers, architects, engineers, designers, sureties, real estate developers,
and manufacturers in avoiding and resolving disputes related to
cstruction projects throughout the continental United States,
Alaska and the Caribbean. His work involves private, local, state
and federal government contracts and commercial, industrial and
institutional construction projects. Gene literally grew up in the
construction industry; his father was a successful electrical
contractor. Unlike most construction attorneys, Gene has hands-on
experience. Gene has worked with the tools, at the drafting table
and at the helm of a construction company. In 1981, Gene earned a
B.S. degree in Engineering from the University of Hartford, majoring
in Electrical Contracting. Before law school, he worked in the
electrical construction business as a project engineer, project
manager, and construction business owner. Gene is a prolific writer
and has published numerous works related to the construction
industry and alternative dispute resolution. He is also a frequent
lecturer on construction law topics. Contact Gene at
gheady@smithcurrie.com or directly at 404-582-8055.