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.

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