

The Teton Update

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Stephen C. Forgét

Bid Errors

Saving Your Contract or Wrestling Wrongful Awards From Competitors

Welcome to the Mistake Season. Each September, as FY appropriation authority lurches to an end, contracting rules are often violated, and scores of contracts are erroneously awarded to the wrong firms. The combination of time and budget pressures on awarding officials, factors of convenience, and client demands make this time of year the most ripe for improper awards and bid errors. The purpose of this update is to sensitize our clients to this environment, and point out issues to watch for in case your firm is on the wrong side of an erroneous award, or makes an error in bidding.

Too Low! or What to do now?

The Bids are opened on a federal project and your Bid is much lower than all other Bids. You check the Bid worksheets and find that a subcontractor quote was not included during the final rush to submit the Bid. What to do now?

- A. Can the owner force you to perform at the price Bid?
- B. May the Bid be withdrawn without penalty?
- C. Can the missed quote be included and award obtained?

These are the typical questions that race through the low bidder's mind. The answers to the above questions are of course yes and no depending on the factual circumstances. Knowledge of rights and timely action are the keys to solving Bid-related problems.

A. In the pre-award environment relief can only be granted if the mistake is one of fact, as opposed to business judgment. Fact could involve a mathematical or clerical mistake. A mistake stemming from business judgment might involve an assumed, production rare that is not attainable. It is a rare situation in which the contractor is forced to perform at the Bid price when a mistake is claimed prior to award.

B. In the Federal sector; reasonably supported evidence of the existence of a mistake in fact is typically sufficient to allow withdrawal of the Bid without penalty.

C. A low bidder may assert a mistake and seek correction. If the bidder can establish with "clear and convincing evidence" both the mistake and the intended Bid amount, the Bid may be adjusted upward. Typically, the bidder will utilize Bid work sheets to meet this proof. With the above example, the bidder would likely need to provide very detailed Bid work sheets which demonstrated the inclusion of all contract cost elements except the work detailed in the omitted quote. A work sheet on the back of a cocktail napkin will not provide results.

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If correction of the Bid is to be sought, the bidder should strategically initiate contact with the owner immediately upon recognition of the mistake and not wait for a Bid verification letter. This proactive approach may allow more time for consideration. This is especially important with year-end Federal contracts where the Bid may be rejected for the sake of expediency when award is required prior to October first or the project is lost

If you are not the low bidder; and find a mistake that would make the Bid low, correction will only be allowed if the mistake and intended Bid amount can be proven “substantially from the invitation and Bid itself.” The Bid worksheets may not be utilized.

Too low on federal project is not a dead end Swift action and the right set of facts can result in award.

Should Your Competitor’s Bid Have Been Rejected?

- A day before bid opening the government releases a new drawing showing minor additional work. Your competitor notes on its bid that the contract bid price does not include work indicated on the drawing. You are second low bidder.

***Proper result:** You should receive the award. Your competitor’s bid modification renders its bid non-responsive, which requires rejection of its bid and award to your firm.*

- The low bidder on the construction project submitted a bid with a discrepancy between the total bid price and the sum of the line items. The government notifies the low bidder that it will receive award.

***Proper result:** As second low bidder, you may successfully overturn the award because the pricing discrepancy made the bid subject two reasonable interpretations, only one of which was the low bid.*

- The Agency awards to a low bidder despite the low bidder’s request for progress payments not specified in IFB. **Proper result:** The bid is non-responsive because it changes the requirements in a material respect. The bid should be rejected.

Other items to watch for are missing acknowledgment of amendments, bids which offer completion dates later than the date specified in IFB, and other material changes to the IFB.

Every variance from an IFB is not necessarily fatal to a bid. The Agency has discretion to overlook certain minor bid deviations under the minor informality rule. Whether a particular bid exception falls within the minor informality rule is a determination made on a case by case basis and often is not predictable.

Each year at this time, hundreds of contractors walk away from projects on which they should have received award, or are unfairly denied relief permitted by the regulations.

If you believe an error has occurred in an award or a bid should be rejected as non-responsive, recourse may be had through an agency level protest, a protest with the General Accounting Office or an injunction in Federal court. On July 26, 1996 new rules were published which require agencies to resolve concerns raised at the contracting officer level through “open and frank discussions” and to provide alternate dispute resolution techniques for resolving protests. The new rules have also imposed new detailed requirements for filing protests and challenging awards. ❀

About the Authors

Mr. Forget founded Teton Construction Consultants in 1984. He specializes in the prevention of claims and resolution of disputes on Federal construction projects throughout the U.S.

Albert B. Krachman, an attorney in the Washington, D.C., office of Bracewell & Patterson, L.L.P., is a consulting editor on the Teton Update, 202-828-5800, Fax 202-223-1225, akrachman@bracepatt.com.