Condition Your Bid for Leverage to Negotiate a Fair Subcontract

by Timothy Woolford, Woolford Law, PC

Many subcontractors often incorrectly perceive that they are powerless to negotiate better subcontract terms. After the bid process is complete and price and scope negotiations are concluded, general contractors usually send the subcontract to the subcontractor advising that it has to be signed on short notice. Over the years, these subcontracts have become more and more complex and very one-sided. Many subcontractors believe that if they object to the contract terms—or request changes—they will alienate the customer, lose the job and the customer will move on to the next bidder, who will happily sign it without modification. GCs often tell subs that their "policy" prohibits any changes to the subcontract or that all other subs think the subcontract is fine and sign it with no hassle. If you tell the customer that you will not sign the subcontract, the customer might argue that you are bound to the subcontract even if you refuse to sign it. In many states, the customer might be correct based on the legal doctrine of promissory estoppel. This doctrine provides, in essence, that where a GC reasonably relies upon a subcontractor's bid and uses the bid in the computation of its bid to the owner, an implied agreement is formed and the subcontractor is bound to its bid. If the subcontractor refuses to perform, or "jumps," the customer can sue for breach of contract and recover the additional costs incurred in using another subcontractor.

One of the most effective ways to avoid this dilemma—and a tool that can dramatically increase your bargaining power so you can negotiate changes to the subcontract later—is to condition your bid. Very few subcontractors condition their bids, but more should. A simple but effective way for a subcontractor to condition its bid or proposal is to include the following language:

"This bid is subject to mutually agreeable contract terms being reached."

If you've conditioned your bid in this way and the customer accepts your price and scope and later sends you an unacceptable subcontract, you would be within your rights to refuse to sign the subcontract and to

walk away from the job without liability. With a properly conditioned bid, you could not be held liable if you refused to sign the customer's one-sided subcontract. This is because the customer would probably not be able to successfully argue that it reasonably relied on your bid. After all, your bid specifically informed the GC that it was conditioned on a mutually acceptable subcontract. The customer would not be able to claim that it relied on your bid when your bid clearly stated that it was conditioned on a mutually acceptable subcontract. The doctrine of promissory estoppel would not apply, and a subcontractor can walk away without liability if it wishes.

When the customer realizes you can walk away without liability, it is usually much more willing to accept some or all of your proposed revisions. Simply by conditioning the bid with the above language, you now have more leverage to negotiate and convince the customer to accept your changes. If your bid is conditioned, a legal and binding subcontract is not formed until you and your customer agree on the terms. Because it may be impractical for the customer to "switch horses" at that stage of the game, the customer is much more likely to negotiate with you to reach a fair contract.

A more aggressive approach to conditioning a bid is to include a set of terms and conditions with the bid and to state that the bid is conditioned upon acceptance of the terms and conditions. ASA members are encouraged to review the bid proposal form available in the ASA Subcontract Documents Suite located under "Contracts and Project Management" in the Member Resources section of the ASA Web site at www.asaonline.com. You can use that form or customize one to suit your company's preferences. (You are well advised to consult with an experienced construction attorney about the terms and conditions of your bid). If the customer tries to accept the price and scope but reject the terms and conditions, it will have made a "counteroffer" and you are again free to walk away without liability. Once again, rather than let you walk away, the customer will probably be much more receptive to entertaining your subcontract revisions. If the customer says nothing about the terms and conditions and instead directs you to start work before a subcontract is actually signed, a binding subcontract may have been formed consisting of your bid and its terms and conditions. Remember, an offer (such as a bid or proposal) can be accepted by conduct—signing is only one of several ways for a binding contract to be formed. A subsequent demand by the customer that you sign a new subcontract in order obtain payment would likely put the customer in breach of the subcontract. As in the prior situation, you may not want to walk away because you may want or need the work. However, because you have conditioned your bid and created a strong argument that a contract was already formed, you now have much greater leverage to convince the customer to eliminate the unfavorable terms in the subcontract.

Still another option is to condition the bid to the use of a specific contract form. An example would be the following:

"This bid is subject to a mutually agreeable contract and if none can be reached, the parties agree to use the Standard Form AIA A401-2017 Subcontract Agreement (or the ConsensusDocs 750 Agreement between Constructor and Subcontractor).

If your bid is conditioned with this language and you are asked to start work before the contract is provided to you, the subcontract would consist of the *AIA contract and the terms contained in your proposal*. If a one-sided subcontract is sent later, you have the right to reject it and insist that the subcontract consist of either the AIA or ConsensusDocs agreement. You might elect not to insist on the use of the AIA or Consensus Docs subcontract if the GC agrees to your reasonable changes to make the subcontract fair. The point is that by conditioning your bid, you have now obtained considerable leverage in the negotiations. When the customer realizes that you could walk away or that you have the right to insist on the AIA or ConsensusDocs agreement, it is often suddenly willing to negotiate fairly. (The *ASA Bid Proposal*, which is part of the *ASA Subcontract Documents Suite*, conditions your bid on the ASA-endorsed ConsensusDocs 750 subcontract document.)

Having conditioned your bid in any of the foregoing ways, you may now have the leverage to negotiate fair terms such as: eliminating onerous conditional payment clauses like pay-if-paid, eliminating retainage (or at least reducing it when your work is 50 percent complete), work stoppage if you are not paid, payment for stored materials, striking liquidated damages, an acceptable procedure for resolving disputes, and so on. Even one or two targeted revisions to a one-sided subcontract can sometimes make a huge difference in whether you get paid or not. Follow these tips to gain critical leverage to work out fair terms.

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