

Traps for Unwary Subs:

**How Bid Day Deals
Turn into Litigation**

American Bar Association/ Division 9
Hot Topic Call

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General Contractor Gets Award

- **Option 1**: GC enters into written contract with subcontractor whose bid the GC relied. Everyone's happy, nobody sues.
- **Option 2**: GC relies on bid to win award. Subcontractor backs out of bid. GC sues sub.
- **Option 3**: GC relies on sub's quote, wins award, then subcontracts with another bidder or "bid shops". Sub sues GC.

Breach of Contract Theory

Difficult for GC to Prove

- *Drennan v. Star Paving Co.*, 333 P.2d 757, 759 (Cal. 1958) (breach of contract theory inapplicable where “there was neither an option supported by consideration nor a bilateral contract binding both parties”).
- *Complete Gen. Constr. Co. v. Kard Welding, Inc.*, 911 N.E.2d 959, 963 (Ohio Ct. App. 2009) (trial court found no firm offer, and appellate court concluded that there was no contract between the parties).

Breach of Contract Theory

Difficult for GC to Prove

West Constr., Inc. v. Fla. Blacktop, 88 So. 3d 301
(Ct. App. Fl. 2012)

Court emphasized: (1) the bid does not become a contract unless it is accepted by the GC; (2) the use of the quote by the GC in its bid did not equate to an acceptance of the bid; and (3) the equities of the bidding process weigh in favor of the GC having “leeway” and “flexibility” in selecting the subcontractors it will hire for a project.

*Dynalectric Co. of Nev. v. Clark & Sullivan
Constructors, Inc. (July 14, 2011)*



University Medical Center, Las Vegas, Nevada

Promissory Estoppel Theory

Easier for GC to Prove

- Nevada Supreme Court awarded GC \$2.5 million for electrical subcontractor's withdrawal of its pre-bid price quote.
- Sub assured GC of the accuracy of its bid, and stated offer was made without any disclaimers or caveats.
- GC used sub's quote to formulate bid for project, and told subcontractor that it was doing so.
- Sub repudiated bid after learning GC was awarded the prime contract.

Promissory Estoppel Theory Not Always Easier to Prove

*CG Schmidt, Inc. v. Permasteelisa, N.A., 2015
WL 6442634 (E.D. Wis. October 23, 2015)*

- **GC unable to prove promissory estoppel against curtainwall sub for \$7.7M LOI.**
- **Design drawings provided, kick off meetings, negotiations for a year on standard form subcontract.**

Promissory Estoppel Theory Not Always Easier to Prove

Fletcher-Harlee Corp. v. Pote Concrete Contractors,
(D.N.J. 2006)

- **District Court of New Jersey refused to enforce a sub's quote to perform concrete work at a college construction project.**
- **Sub's written quote included disclaimers, such as: "this is provided for informational purposes and no reliance should be placed thereon...the submission of this information should not be regarded as a firm offer.").**

Lomax Const., Inc. v. Triad Sheet Metal & Mech., Inc., No. (N.C. Ct. App. June 21, 2011)



Piedmont Triad International Airport, Greensboro, NC

What is an Implied-in-Fact Contract?

Lomax Const., Inc. v. Triad Sheet Metal & Mech., Inc., No.
(N.C. Ct. App. June 21, 2011)

- **Parties in this case did not agree on schedule or payment terms.**
- **GC never communicated with the mechanical contractor between the time it received its price quote and the time the GC submitted its bid.**
- **GC requested different terms after the mechanical sub submitted its bid, (i.e. increased participation of MBE).**

What is an Implied-in-Fact Contract?

Lomax Const., Inc. v. Triad Sheet Metal & Mech., Inc., No. (N.C. Ct. App. June 21, 2011)

- **No written agreement necessary to find bid binding.**
- **There must be enough evidence of communications and conduct between the parties to show that they intended to be bound.**
- **Needs to be agreement on material terms, such as:**
 - Scope**
 - Period of performance**
 - Payment terms.**

Offer or invitation to negotiate?

I & R Mech., Inc. v. Hazelton Mfg. Co.,
(Mass. App. Ct. 2004)

- Unsolicited quote circulated by wholesale supplier of heating and cooling equipment to a number of subcontractors for a project was a request or invitation to negotiate, not an offer.
- Wholesale supplier could not be held to its bid, even if subcontractor relied on quote from wholesale supplier to prepare its bid.

Can Promissory Estoppel Win the Day?

Can a Subcontractor Be Held to its Bid to a General Contractor?

Yes IF:

- The bid is unequivocal and reasonably relied-upon;
- An “implied-in-fact” contract with the main-terms agreed upon, even if not in writing;
- Firm-offer– not merely an invitation to negotiate;

Practical Considerations for Subcontractors to Avoid Bid Shopping

- Only submit your bid to those GC's with whom you have established a personal relationship. Someone you know personally is generally less likely to “shop” your price.
- Provide your very best price on bid day only to those GCs you are confident will not “shop” your price.
- Provide your scope letter to the GCs early (several days prior to the bid) and then call the GC the day before the bid to review your scope letter with them. This will help you determine which GCs appear to be the most serious about bidding the project and which GCs may be serious about working with you.