

Subcontractors Beware: Bid Conditions Matter

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Subcontractors bidding on projects must thoroughly review and understand the terms of the bid documents. A failure to read and understand the conditions can have incredibly harsh results. A recent decision issued by an intermediate appellate court in New York State had harsh implications for a subcontractor who proceeded with work without having a signed contract. The court ruled that, under the bid documents, the subcontractor was entitled to nothing, despite properly performing significant work.

Not bound until set in stone

In *Jordan Panel Systems, Corp. v. Turner Construction Co.*, the general contractor solicited bids from several subcontractors to design and construct a steel hanger at an airport. The subcontractor submitted a bid to the contractor. During the contract negotiations, the general contractor sent the subcontractor a term sheet.

The term sheet included a provision which stated that, “unless and until [the general contractor] executes this Subcontract, [the general contractor] shall not be bound by any of the terms or conditions herein.” The term sheet also included language to the effect that if the general contractor had not signed the subcontract by a certain date, “...neither [the general contractor] nor the Subcontractor shall have any liability to the other and [the general contractor] shall have no liability to make payments for Work performed by Subcontractor, if any, or for anticipated profits.” These two sentences proved damning to the subcontractor.



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The subcontractor claimed that a few days after receipt of the term sheet, there was a phone call between the general contractor and the subcontractor. The subcontractor claimed the parties agreed to a subcontract price. During the same phone call, the general contractor informed the subcontractor that they had been awarded the subcontract and directed the subcontractor to begin the design work in order to accommodate the project's fast track schedule. There was a subsequent kick-off meeting including the subcontractor, general contractor and additional parties.

Just two short days after the kick-off meeting, the subcontractor was

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informed that the general contractor was terminating the subcontractor's involvement in the project. The subcontractor brought suit against the contractor to enforce the contract and to receive payment for work performed. The court rejected all of the subcontractor's claims based on the contract provision above.

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The court was unsympathetic to the subcontractor. The court held that, because the general contractor specified in writing that it would not be bound until it had signed the subcontract, the subcontractor could not have reasonably relied on the general contractor's verbal hiring. Further, the court held that, "[The subcontractor] could not have had any reasonable expectation of compensation for the work it performed in the absence of such a signed subcontract." Therefore, the subcontractor recovered nothing for the work it performed.

Implications

Other courts are following the lead of the *Jordan Panel Systems* case. A federal court applying New Jersey law recently held that the plain language in a subcontractor's bid, where the bid clearly stated that the bid was for information purposes and was not a firm offer, would be enforced. The court's enforcement of the bid's language barred the subcontractor from recovering any damages from the contractor. As a subcontractor, you should expect and plan for strict enforcement of bid terms and conditions, no matter how severe.

Lessons learned

When putting out bids for a job, you should make sure to thoroughly read and understand the terms and conditions of all the bid documents. Most importantly, get everything in writing and have a signed contract before proceeding with work. As the above cases demonstrate, lack of a signed written agreement can permanently kill your ability to get paid. **IMAS**

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