



Legal Brief

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Condition your bid to negotiate a better contract

Properly conditioning a bid will put you in position to protect your interests

Many contractors and subcontractors believe that they are powerless to negotiate better contract terms. This is particularly true in this weak economy in which many higher-tier entities have taken advantage of their heightened leverage and strengthened their contracts with one-sided terms. Many contractors and subcontractors feel that if they object to the contract terms or request changes, the customer will move on to the next contractor or subcontractor who will sign it without modification. One of the most effective ways to increase your bargaining power is to condition your bid.

A simple but effective method of conditioning a bid is to include the following language in the bid or proposal:

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

If the customer accepts your price and scope and later sends you a contract containing one-sided terms, you would be within your rights to refuse to sign it, and you cannot be held liable for refusing to do so. If your bid was not conditioned, however, it is possible that a binding contract

could have been formed based on the doctrine of promissory estoppel which, in some cases, results in a binding obligation even without a signed contract. On the other hand, if your bid is conditioned as above, a binding obligation is not formed until you and your customer agree on the terms. With a properly conditioned bid, if

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the customer sends you an objectionable contract after the proposal is submitted, you can tell him/her that you are walking away because mutually acceptable terms were not reached (i.e., the condition was not satisfied and no contract was reached). Because it may be impractical or more ex-

pensive 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 slightly more aggressive option is to include a set of terms and conditions with the bid and state that the bid is conditioned upon acceptance of those terms and conditions. If the customer accepts the price and scope but rejects the terms and conditions, it will have made a “counteroffer” and you are free to walk away without liability. If the customer says nothing about the terms and conditions and instead directs you to commence work before a contract is signed, the customer is deemed to have accepted the terms and conditions of your bid. A subsequent demand by the customer that you sign a new contract would constitute a breach of the contract which was formed when your “offer” (bid) was accepted. Remember, an offer can be accepted by conduct – signing is only one of numerous ways to enter into a contract or subcontract. As in the prior situation, you may not want to actually walk away be

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cause you may want the work. However, because you have conditioned your bid and, in doing so, created a strong argument that a contract contains the terms and conditions in your bid, you have much greater leverage to persuade the customer to strike or modify the unfavorable terms.

Still another option is to condition the bid to the use of a specific contract form as follows: "This bid is subject to a mutually agreeable contract and if none can be reached, the parties agree to use the Standard Form AIA A401-2007 Subcontract Agreement and this bid." General contractors can use the same language, but should refer to the AIA A101/A201

Contract (or whichever contract form is preferred). If your bid is conditioned in this manner and you are asked to start work before the contract is sent, the contract would consist of the AIA contract and the terms contained in your proposal. If a one-sided contract is sent later, you have the right to reject it and to take the position that the AIA contract governs.

If you start work under a bid that was not conditioned, your bargaining position will be much weaker since there is a possibility that you could already be bound. If you are already on site when the one-sided contract arrives, you will have little practical choice but to sign it. If you were to refuse to sign the contract and walk away, the customer could re-

place you and sue you for the increased costs of the replacement contractor under a promissory estoppel theory. Notably, general contractors and trade contractors that submit prime bids on public projects need to be aware that conditioned bids are usually considered non-responsive. Therefore, primes should address issues with the proposed public contract through a pre-bid RFI in accordance with the requirements of the bid instructions rather than by conditioning bids.

However, nothing prevents subcontractors who are bidding to primes on public projects from conditioning bids. By properly conditioning your bid, you are in a much stronger position to protect your interests.

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