Legal Brief

by Timothy J. Woolford, Esquire

Exactly what design defects must a bidder search for and disclose pre-bid?

The current construction market is dominated by public works projects subject to the competitive bidding process.

Bidders are presented with a complex and lengthy set of construction documents that took many months (and in some cases years) to prepare. Bidders are required to review this material in the short period of time available before the bid deadline. They are also usually required by the contract to report any errors, conflicts, inconsistencies or ambiguities to the owner, architect, engineer or CM.

When a design issue arises during the project, it often prompts a dispute among the parties as to whether the issue should have been discovered and raised during the bid process. Courts and arbitrators have had to struggle with the difficult issue of whether the bidder should have sought clarification before bidding.

In Pennsylvania and many other states, courts have ruled that the duty to bring a defect in the plans to the attention of an owner arises when the defect is "not subtle, hidden or minor, but patent, blatant and significant." Com. Dep't.of Transp. v. Bracken Const. Co., 457 A.2d 995, 999 (Pa. Commw. 1983). In other words, if the error or ambiguity in the plans is obvious and glaring, the bidder is required to raise it pre-bid. The failure to do so will often operate to deny a contractor payment for additional work made necessary due to the error or ambiguity.

In DGS v. Bryan Mechanical, Inc., a plumbing contractor was hired to install plumbing systems in a new multi-level chemistry building at Penn State. The architectural plans for some floors depicted sanitary and laboratory waste piping, but the piping was not shown on every floor. During the project, the contractor requested additional compensation when it was directed to provide sanitary and laboratory waste piping on all floors. DGS rejected the request. DGS argued that the waste piping was depicted on the riser diagrams in the mechanical plans, and as a result, the contractor should have assumed that the waste piping was required on all floors. DGS also contended that, at the very least, there was an "obvious" ambiguity between the architectural plans and the mechanical plans and the contractor had aduty to inquire about it before submitting a bid.

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The ambiguity was obvious, according to DGS, because the absence of this piping

continued on page 8

WOOLFORD: Design defect disclosure

continued from page 7

would have constituted a violation of the plumbing code. The court agreed with DGS and rejected the contractor's claim. In essence, the court ruled that the lack of waste piping on certain floors was a "red flag" that should have jumped off the page to the contractor's estimating department who should have inquired with DGS or the Professional.

In another leading case, Mountain Home Contractors v. U.S. a contractor sought additional compensation for the cost of installing exhaust fans in the kitchens of housing units because they were not shown on the plans. The government rejected the claim citing to the specifications which called for exhaust fans. It further reasoned that since fans were described in the specifications but not shown on the plans, there was an inconsistency and the contractor should have inquired about it pre-bid. The court disagreed and ruled that no duty to inquire arose because the plans indicated that the fans would be provided under an alternate bid. Thus, the court reasoned, the contractor reasonably assumed that fans were not required under the base bid. The court ruled that this was not the kind of glaring defect that gave rise to a duty to inquire.

These are just a few of the cases to provide a flavor for the analysis that courts undertake; there are many more court cases involving this issue. The determination of whether a defect is patent (obvious) or latent (hidden and not obvious) is very fact-specific.

Courts usually inquire into the following areas in order to determine whether a duty to inquire arose:

Did other bidders raise it and ask for clarification? If not, it is less likely to be deemed patent. Some agencies have design and construction professionals on staff and if they did not detect the defect, it is less likely to be considered patent.

Another inquiry is how complex were the contract documents and did the error or defect relate to a small detail that the contractor would not normally be expected to notice?

Finally, will the contractor profit as a result of its failure to inquire pre-bid?

There are no bright line rules, but the resolution of the dispute will very likely turn on the answers to these questions. The safest course of action is to inquire about any problems discovered up front. But courts recognize that regardless of the contract language, contractors are not required to exhaustively review the plans to serve as a guarantor of the design.

HELP WANTED

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