



CONTRACTOR'S BRIEFS

By Law Offices of Robert L. Bachman

NEWSLETTER

VOL. 19 NO. 2

IRVINE, CALIFORNIA • LAS VEGAS, NEVADA

FALL 2005



Robert L. Bachman

Robert L. Bachman is an attorney whose practice is specialized in all phases of law relating to the construction industry, including collections, labor, general business, bankruptcy, litigation matters, construction defect litigation, licensing and incorporations, pre-lien notices, liens and stop notices. Mr. Bachman earned his Juris Doctorate Degree in 1973 at the University of California and has served as Vice President and General Counsel for VTN Corporation, Ultrasystems, Incorporated and Marmac. Mr. Bachman is a past director of the Orange County Chapter of the Associated General Contractors of California. Mr. Bachman's offices are located at 19100 Von Karman Avenue, Suite 380, Irvine, California 92612. (949) 955-0221, Fax: (949) 955-0324 and his Nevada Office is located in Las Vegas at 3431 East Sunset Road, Building #C, Suite #12, Las Vegas, NV 89120, (702) 456-9347, Fax: (702) 456-8346 – WATSLINE for NV & CA: (800) 540-5436. Email: rlbesq@aol.com or rlbesq@bachmanlaw.com

TRY MY NEW WEB SITE AT WWW.LAWYERS.COM/BACHMANLAW

PART III

Bidding Effectively for Construction Projects

Last issue, Part II of this series covered subcontract bidding including problems facing general contractors who try to hold low-bidding subcontractors to their bids in court. This issue will discuss two situations in which subcontractors have successfully avoided signing subcontracts containing mistakes that should have been noticed by the general contractor. In addition, this segment will cover two theories upon which disgruntled subcontractors have forced into court contractors who have not awarded contracts to them.

Escaping The Subcontract

There are two situations in which defenses have been successfully argued by subcontractors wishing to avoid signing subcontracts, even in those jurisdictions that are willing to apply the doctrine of justifiable reliance; where the subcontract contains additional, unnegotiated terms, and where a mistake should have been noticed by the general contractor.

Additional Subcontractor Terms

Normally a subcontractor will not be asked to sign a formal, written subcontract until after the general contractor has been awarded the prime

contract. When the formal subcontract form is presented to the subcontractor for execution, it may be found that it contains provisions not previously discussed by the parties. If the subcontractor wishes to avoid being held to its bid, it should be argued that if a contract existed, it consisted only of the bid and those terms actually discussed at the time of the bid. The subcontractor should argue that the law does not require that it agree to all the additional terms of the written form; indeed, the law has traditionally viewed a purported acceptance which contains such unnegotiated terms as constituting a mere counter-offer rather than a true acceptance.

The law has recognized that such a qualified or conditional acceptance proposes an exchange of obligations different from that proposed by the original offerer. Should the subcontractor decline to accept the counter-offer, the law would not permit the general contractor to demand performance of the subcontractor's original offer; the making of a counter-offer ordinarily terminates the general contractor's power of acceptance of the subcontractor's original bid. Court decisions endorse the usual understanding of bargainers that one proposal is dropped when another is taken under consideration.

The subcontractor should note that in order to successfully plead this defense of additional terms, it must be able to show that its refusal to sign the subcontract is indeed based on the presence of the additional, unnegotiated terms in the contract. Should the court be able to determine that the refusal to perform is based not on the presence of the additional terms but rather on a low price, the subcontractor will not be relieved of its obligation to perform.

Of course, if the general contractor attaches to the invitation for bid a subcontract form which includes any special provisions, the subcontractor will be precluded from later claiming that the formal, written subcontract adds anything new to the subcontract negotiations.

Mistake

To minimize the possibility of a bid containing a mistake being submitted to a general contractor, subcontractors should establish office procedures which ensure that bids are checked by at least one person other than the estimator who originally put the bid together. If possible, additional checks should be made on the bid by checking the price by a different method of com-

Continued on next page

Introducing . . .



see page 4 for details

EFFECTIVE BIDDING

Continued from previous page

putation. For example, if the original bid was calculated by a detailed time and material take-off, then a bid check should be made by calculating the bid using unit prices based on previous cost experience. The chances of an erroneous bid being sent out are reduced the more times that a subcontractor checks the bid.

But where a mistake does occur, the subcontractor can sometimes avoid being held to its bid. Where the subcontractor submits a bid which is so far out of line with the other bids that the general contractor should be alerted to the probability of a mistake, the courts will not force the subcontractor to perform.

Thus bids can be revoked under appropriate circumstances even if a general contractor uses the subcontractor's bid containing a mistake in calculating the bid to the owner. As a general rule, the use of a subcontractor's bid by the prime contractor in its own bid is not an acceptance of the subcontractor's bid because acceptance must be directly communicated to the subcontractor. Aside from some exceptions under the law of some states, the subcontractor can revoke its bid containing a mistake even after its bid is used in the general contractor's bid to the owner. Even where the bidder does not realize that there has been a mistake in a bid until the bid is accepted or even after the contract or subcontract is signed, the bidder is not bound where the bid is so obviously wrong that the general contractor or owner should have caught the error.

If a bid which contains an error is transmitted to the general contractor or to the awarding authority, the bidder should notify the proper parties of the error immediately and revoke the bid containing the mistake. A bid is an offer to make a contract; but before a bidding contract comes into existence, the bid must be accepted by the general contractor. If the bidding party revokes the erroneous bid before acceptance, then ordinarily there is no bidding contract. Whether the erroneous bid is oral or written, the bidder should immediately revoke the bid orally and confirm the revocation in writing either by letter or telegram addressed to the offeree. If the bidder waits an unreasonable length of time before revoking its bid, its inaction may be deemed to be a ratification of the mistake.

A subcontractor or general contractor who has submitted a bid containing a mistake should be cautious in submitting a corrected bid because after it commences the job, the other party might take the position that the first erroneous bid was binding and pay only the amount of the erroneous bid. This would force the bidder to take the legal offensive in order to collect the full payment due under its corrected bid, and the bidder would have to convince the court that the erroneous bid should not be binding.

Revocation of a bid or subcontract because of a mistake presents a tricky legal situation, and the subcontractor or general contractor should always consult an attorney immediately upon discovery of the mistake.

Holding The General Contractor To Its Promise

The prime contractor is occasionally forced into court by a disgruntled subcontractor who, because of negotiations, had expected to be awarded a subcontract only to see it go to another. These cases by subcontractors against shopping contractors generally have been based on two theories: (1) that the contractor by its actions (Primarily by using the subcontractor's bid in computing its own total estimate) has accepted the bid of the subcontractor and has thereby entered into a contract; or (2) that preaward conversations and negotiations constitute an oral contract. The courts have been notably unsympathetic to both theories, and a subcontractor entering upon any such action can do so with the melancholy assurance that it will be an uphill battle.

Acceptance By Use Of The Subcontractor's Bid

Courts generally require something more than mere use of a subcontractor's bid before finding that acceptance of the subcontractor's bid has occurred.

Bid listing requirements provided additional examples of how stringently the courts interpret the necessity for a clear and unequivocal acceptance before allowing the subcontractor to recover for loss of the subcontract.

An exception to this rule arises in a situation where a subcontractor proceeds with the work on the basis of such negotiations and informal agreements and with the full knowledge and apparent consent of the general contractor.

Under the limited fact situation where a contractor has allowed and perhaps encouraged a subcontractor to perform, the contractor will not be permitted to evade its obligation by claiming that it had not formally accepted the subcontractor's offer. Neither a written offer and acceptance nor the oral counterparts are essential to establishing a contractual relationship where unambiguous conduct clearly manifest an intention to contract.

To the subcontractor, there seems an obvious unfairness in allowing a prime contractor to hold the subcontractor to its bid price on the basis of justifiable reliance (promissory estoppel) while denying the subcontractor the right to prevent the prime contractor from changing to another subcontractor. The courts have admitted the unfairness but have justified it on the basis of reliance. Reasoning that the subcontractor, when making a bid, should reasonably anticipate that if its bid is the lowest the prime will use it and rely on it, the courts have found that such reliance requires that the subcontractor honor its bid. On the other hand, the subcontractor is not the victim of any such reliance because in the normal situation it has no idea of whether the general contractor will win the award or whether its own bid will be the lowest. The absence of such reliance removes the compulsion of enforcing the contract. When the subcontractor can prove reliance, the courts will generally bind the general contractor.

Existence Of Oral Contracts

The reluctance of courts to accept pre-awards communications between prime contractors and subcontractors as anything more than mere negotiations has already been discussed. However, even should the subcontractor and the prime contractor reach full oral agreement on all terms of their agreements and enter into an oral contract, problems would still exist should the subcontractor wish to go to court to enforce the contract. In most states, there are laws, generally referred to as the "Statute of Frauds", which require certain types of agreements to be in writing before the courts will enforce them. Generally, these statutes preclude enforcement of any contract if it cannot reasonably be performed and completed within one year. The Statute of Frauds is primarily intended to require evidence of oral contracts where the parties may later disagree as to exactly what was decided. The reason usually advanced for the exception of contracts to be performed within one year is that contracts to be performed within a short time offer less opportunity for memories to become clouded and disputes to arise.

Most construction contracts include a provision for a one-year warranty, and if the parties have indeed reached agreement on all the material items (a requisite for finding that an oral contract exists in the first place), they most likely will have agreed to such a warranty which begins on completion of the work which puts virtually all construction contracts beyond the exemption and thus makes them unenforceable should one of the parties later renege on its obligations.

The Uniform Commercial Code (UCC) which applies to a supplier who furnishes only goods and not services, also has a Statute of Frauds provision of which the subcontractor should be aware. It provides:

Except as otherwise provided in this section a contract for the sale of goods, for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon. The contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

Because of these limitations, in every situation where it is possible the subcontractor should obtain some sort of writing. Although the most complete protection is obviously the executed formal contract, something less than an elaborate document can be used in certain cases to establish the existence of a sufficiently specific agreement for enforcement. A short letter or memorandum signed by the party listing the agreed price and any other major terms not included in the specifications, drawings, and statement of conditions, together with a copy of the bid documents, should make the contract enforceable against the prime contractor. In the case of a supplier of goods, the UCC provides

Continued on page 4

STATUTES AND CASES OF INTEREST

Nevada Lien Law is Modified

Effective July 1 and October 1, 2005

Be Sure and Modify Your Mechanic's Liens

SENATE BILL NO. 300

(Effective July 1, 2005)

1. Expanded definition of contractor and subcontractor to include a contractor or subcontractor who provides materials or equipment along with one who performs work.
2. Limits the amount of retention that may be withheld by an owner, prime contractor or higher-tiered contractor to not more than 10 percent of the amount of any payment to be made.
3. Prohibits all withholdings other than retention and except for payments requested for: a) work that has not been performed or materials and equipment that have not been furnished; b) costs and expenses reasonably necessary to repair any work not in compliance with the agreement (to the extent such costs and expenses exceed 50 percent of the retention amount); and, c) any amount that the owner or prime contractor is required to pay a state agency or employee benefit trust fund on behalf of a lower-tiered contractor or subcontractor.
4. Allows contractors and subcontractors to stop work after giving a 10-day written notice if: a) they are not paid within 21 days after submitting an undisputed payment request; or, b) they dispute an amount withheld or the condition or reason for the withholding.
5. Requires that all requests for change orders be in writing and be timely submitted.
6. Allows contractors and subcontractors to stop work after giving a 10-day written notice if the owner, prime contractor or higher-tiered contractor fails to: a) issue a change order; b) give written notice of the reasons why the change order request is unreasonable; or, c) request additional information and time to make a determination within 30 days after the contractor or subcontractor submits a written request for the change order.
7. Provides that if the owner, prime contractor or higher-tiered contractor fail to either issue a change order or give written notice of the reasons why the change order request is unreasonable within the time allotted after the change order request is submitted:
 - a. The agreement price must be increased by the amount sought in the request for a change order;
 - b. The time for performance must be extended by the amount sought in the request for a change order;
 - c. The contractor or subcontractor may submit to the owner, prime contractor or higher-tiered contractor, respectively, a bill or invoice for the labor, materials, equipment or services that are the subject of the request for a change order; and
 - d. The owner shall pay the prime contractor who in turn shall pay the lower-tiered contractor or subcontractor for such labor, materials, equipment or services with the next payment made to the lower-tiered contractor or subcontractor.
8. Clarifies that if a higher-tiered contractor or subcontractor stops work in accordance with the provisions of chapter 624 of the Nevada Revised Statutes (NRS), the profit and overhead of the lower-tiered contractors and subcontractors are also recoverable.
9. Provides that any provision in any agreement requiring a contractor or subcontractor to waive, release or extinguish a claim or right for damages or an extension of time for delay, acceleration, disruption or an impact event that is unreasonable under the circumstances, that was not within the contemplation of the parties at the time of agreement was entered into, or for which the contractor or subcontractor is not responsible, is against public policy and is void and unenforceable.
10. Provides that any money which is payable to a prime contractor, higher-tiered contractor or lower-tiered subcontractor will accrue interest from the time it becomes due at a rate equal to the higher of: a) the rate agreed upon in the agreement between the parties; or, b) the prime rate plus 4 percent.
11. Clarifies that the stop work/prompt pay provisions of chapter 634 of NRS are applicable to all construction projects except public works and owner-occupied single-family residence. Public works projects are subject to the prompt pay provisions of chapter 338 of NRS.

SENATE BILL NO. 343

(Effective October 1, 2005)

1. Establishes that publicly owned land leased for a private or nongovernmental use is subject to liens.
2. Provides for the recording of a surety prospectively as well as retrospectively to bond around liens.
3. Allows a contractor to lien for change work, i.e. "additional or changed work, materials and equipment."
4. Requires all lessees (except those leasing ground only from the Clark County Airport Authority) to prospectively "bond around liens" by either recording a payment bond for 1.5 times the total amount of a prime contract or alternatively establishing and funding a construction disbursement account for no less than the total amount of the prime contract unless the lessor records a notice of waiver in which case the property on which the work of improvement is constructed may be liened. Note: This requirement is enforceable by the prime contractor who may – if the payment bond is not recorded or alternatively the construction disbursement is not established – stop work at any time before or during the life of the project and recover his subcontractors' anticipated profits for the project as well as their costs to date.
5. Establishes requirements for recording and administering a construction disbursement account if one is established by a lessee contracting for a work of improvement.
6. Allows a construction control to bring an action for interpleader if the construction control reasonably believes that a claim of lien is not legitimate or the construction disbursement account does not have sufficient funds to pay all lien claims.
7. Revises the requirements for a notice of nonresponsibility and simplifies the definition of a disinterested owner.
8. Prohibits a stay of a district court's ruling on a motion related to a frivolous or excessive notice of lien.
9. Increases the amount of interest that must be paid on an award of a lienable amount.
10. Encourages sureties to do business in Nevada by limiting the liability of the surety to not more than the penal sum of the surety bond and by requiring a lien claimant to bring an action against the principal and the surety within the later of (a) nine months after the date that the lien claimant was served with notice of the recording of the surety bond; or (b) nine months after the date of the completion of the work of improvement.
11. Changes the form for a notice of lien (see example on page 4).
12. Changes the form of a surety bond posted to release a notice of lien.

Continued on page 4

CALIFORNIA HIGH COURT CLARIFIES LICENSING LAW LICENSES; PAYMENT

The California Supreme Court Puts the Recovery of Funds by an Unlicensed Contractor to Rest

MW Erectors, Inc. v. Niederhauser Ornamental and Metal Works Co. Inc. (July 14, 2005)

The California Supreme Court has ruled that in order to recover payment, a contractor must be property licensed at all times during contract performance. But the contractor need not have been licensed at the time the contract was executed.

Niederhauser Ornamental and Metal Works Co., Inc., a contractor on a hotel project, awarded two subcontracts to MW Erectors, Inc., a structural steel contractor and an ornamental steel contractor. The contracts were executed in October and November respectively. MW started work on the structural contract December 3, but did not obtain a California structural steel contractor's license until December 21, MW started work on the ornamental contract in early January.

MW sued for payment under both contracts. Niederhauser argued that the claims were barred by the Contractor's State License Law, which

prohibits any action, legal or equitable, to recover compensation for "the performance of any act or contract" unless the contractor was duly licensed "at all times during the performance of the act or contract." Cal. Bus. & Prof. Code sec. 7031(a). Niederhauser said both contracts were void because MW was unlicensed at the time of contract execution. MW replied that it had substantially complied with the licensing requirement. And in any event, the only work for which it could not be paid was the small amount of work performed under the structural contract prior to obtaining a license.

The Supreme Court of California did not agree with either party. The statutory "substantial compliance" exception applies only with a contractor previously possessed a valid California license but inadvertently allowed it to lapse. MW had not been previously licensed in California and could not avail itself of that exception.

The Court rejected Niederhauser's argument that both contracts were void because MW had been unlicensed at the time the contracts were executed. The licensing statute protects the public against the performance of work by unlicensed contractors. It is not necessary to have a license at the time of contract execution.

The Court also rejected MW's contention that it could recover payment under the structural contract for all but the work performed in the 18 days prior to obtaining a license. The statute requires a contractor to be properly licensed at all times during contract performance. MW had been licensed at all times during performance of the ornamental contract and could sue for payment under that contract. But MW could not maintain a payment action for any work performed under the structural contract.

This should be the final word on this matter unless or until the statute is amended.

LIEN LAW

Continued from page 3

A notice of lien must be substantially in the following form:

Assessor's Parcel Numbers _____

NOTICE OF LIEN

The undersigned claims a lien upon the property described in this notice for work, materials or equipment furnished **or to be furnished** for the improvement of the property.

1. The amount of the original contract is: \$ _____
2. The total amount of all ~~changes and additions~~ **additional or changed work, materials and equipment**, if any, is: \$ _____
3. The total amount of payment received to date is: \$ _____
4. The amount of the lien, after deducting all just credits and offsets, is: \$ _____
5. The name of the owner, if known, of the property is: _____
6. The name of the person by whom the lien claimant was employed or to whom the lien claimant furnished **or agreed to furnish** work, materials or equipment is: _____
7. A brief statement of the terms of payment of the lien claimant's contract is: _____
8. A description of the property to be charged with the lien is: _____

(Print Name of Lien Claimant)

By: _____
(Authorized Signature)

State of Nevada)
) ss.
County of _____)

(print name), being first duly sworn on oath according to law, deposes and says:

I have read the foregoing Notice of Lien, know the contents thereof and state that the same is true of my own personal and, as to those matters, I believe them to be true.

Subscribed and sworn to before me _____
this _____ Day of the month of _____ of the year _____
(Authorized Signature of Lien Claimant)

Notary Public in and for the County and State

EFFECTIVE BIDDING

Continued from page 2

that should the supplier send some written confirmation of the oral contract to the purchaser (for example, a purchase order), that writing is sufficient to establish an enforceable contract unless written notice of objection to its contents is given within 10 days after receipt.

As discussed previously, even a purely oral contract can be enforced should the subcontractor (with the full knowledge of the general contractor) commence the work agreed on.

The subcontractor and the general can give some structure and stability to their negotiations if the subcontractor will submit his bid on a carefully drawn bid-proposal form. Such a form should specifically list the conditions governing the bid and should detail those circumstances which will constitute acceptance of the bid, for example, beginning work.

It should be obvious from the foregoing discussion that the effectiveness of the individual subcontractor in holding the general contractor to an anticipated contract is minimal at best. The more promising solution seems to be in such collective addition of the subcontractors as the bid-listing procedures.

Introducing . . . 

Specializing in business and construction litigation, pre-lien notices, mechanic's lien, foreclosures, stop notices, bond claims, contracts, corporate law incorporations & collections for the construction industry.

Demand letters — Attorney on staff

California & Nevada

Call for Immediate Service

800/540-5436 • FAX 714/744-5347