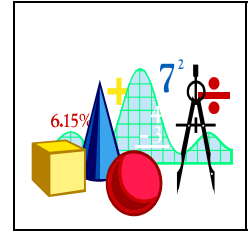


CONSTRUCTION LAWLETTER

For Industry Professionals, Managers, Trades & Suppliers



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BIDDING, AND BID MISTAKES

Conflicts may arise during the bidding phase of a public construction project, as to whether a certain bid is “responsive” to the public owner’s solicitation. The standard applicable to most public construction projects requires the public owner to select the “lowest responsive and responsible bidder”. Certain public entities, such as townships, counties, and cities are required, by law, to select the “lowest and best bidder”.

Pursuant to Ohio Revised Code Section 9.312, a “responsive” bid is defined as one which: “...Responds to bid specifications in all material respects and contains no irregularities or deviations from the specifications which would affect the amount of the bid or otherwise give him a competitive advantage.” Not every deviation from public contract bid specifications will constitute a deviation that renders the bid non-responsive. Accordingly, only those deviations from the State’s requirements that affect the amount of the bid or give the contractor a competitive advantage are to be considered “non-responsive” and rejected outright. The State has the discretion to waive informalities that do not affect the amount of the bid or give the contractor a competitive advantage.

Material deviations that render bid on public contract non-responsive to bid specifications include failure to specify time for completion of project, failure to supply pertinent data that affects budgetary considerations, and failure to include affirmative action plan. Cf. Bale Contracting, Inc. v. Westerville (1982), 7 Ohio App.3d 271; Natl. Eng. & Contracting Co. v. Cleveland, (C.P.1957), 76 Ohio Law Abs. 303; Weiner v. Cuyahoga Community College Dist. (1969), 19 Ohio St.2d 35. However, it has been held that the absence of a signature on an affirmative action statement of bid on a public contract did not constitute "material deviation" and thus, did not render the bid nonresponsive. Kokosing Constr. Co. v. Dixon, 72 Ohio App.3d 320, (Ohio App. 2 Dist. 1991)

A question frequently arises as to whether a contractor may withdraw a bid containing a mistake. In 1972, the Ohio Legislature enacted the “**Mistake-in-Bid**” law, set forth under Sections 9.31, 153.54, and 5525.01 Ohio Revised Code. Withdrawal of a bid is permitted only where the price bid was substantially lower than the other bids, and was submitted in good faith. The bid price must be substantially lower than the other bids and the price difference must have resulted from a clerical mistake and not a mistake in judgment. It must also have been caused by an unintentional and substantial arithmetic error or an unintentional omission of a substantial quantity of work, labor, or material made in compilation of the bid. In order to successfully withdraw its bid, the mistaken bidder must notify the public authority of its intent to withdraw the bid within two (2) business days after the conclusion of the bid opening, and one (1) business day for an ODOT bid, under R.C. Section 5525.01.

Available legal remedies to unfair and unlawful treatment consist of bringing an action against the public entity and the successful bidder seeking damages, for an injunction to prevent the project from going forward or, under certain limited circumstances, a Writ of Mandamus, compelling the public entity to perform its duty as required by law. Such writs, however, are very difficult to obtain.

Experience is simply the name we give our mistakes.

Oscar Wilde

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