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Contract and bid rescission: Be careful when submitting bids and exercise due diligence - by Andrew Richards

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Contractors are continually requested by owners to submit non-revocable bids or proposals for construction work whereby the bid or proposal is binding on the contractor for a certain period of time so that the owner can determine which contractor it wants to hire. During this process there are times when a contractor figures out that it underbid the project and seeks to withdraw its bid. However, a bid may be rescinded only under very specific circumstances.

Bids may be rescinded due to mutual mistake, fraud and unilateral mistake. Mutual mistake exists when the bid was provided based on a mistake by both parties that was so substantial that there is no “true meeting of the parties’ minds” to form a contract. For a court to rescind a bid based on mutual mistake both parties must have based their transaction on mistaken information that was known and relied upon by both parties. Mutual mistake is generally easy to determine since both parties understood the same set of facts and relied on the same information.

On the other hand, rescinding a bid based on fraud is harder to prove. For a court to rescind a bid based on fraud, the complaining party must show that it justifiably relied on an intentional misrepresentation of fact from the other party in submitting a bid. The key here is that the complaining party must show that it did not have or could not have determined with due diligence the truth of the fact that was misrepresented by the other party. The hardest ground to prove that a contract or bid should be rescinded is by a unilateral mistake. Many parties to contracts believe that if they can prove that they made an honest mistake then they can easily have a contract or bid rescinded. Not so fast.

A bid is a binding offer to make a contract. It may be withdrawn in the case of unilateral mistake by the bidder where the mistake is known to the other party to the transaction and (1) the bid is of such consequence that enforcement would be unconscionable, (2) the mistake is material, (3) the mistake occurred despite the exercise of ordinary care by the bidder and (4) it is possible to place the other party in status quo. Unilateral mistake under a fraudulent concealment theory is established by facts showing one party to a contract knew of some material fact at or prior to the time the contract was awarded, but concealed that fact from the other party in order to take advantage of the other party.

This is a high burden, and still appears to require actual knowledge as opposed to constructive knowledge of the error in the bid. See Westinghouse Elec. Corp. v NY City Tr. Auth., 735 F Supp. 1205, 1211-1212 [SDNY 1990]).

In Westinghouse, the court declined to read into New York law a “should have known” standard for bid error recession. (“No New York court has held, however, that imputed, as opposed to actual knowledge, of a bidder’s mistake suffices to reform a contract, nor is it the law in New York that just any sort of unilateral mistake is subject to reformation provided the bidding authority possessed actual knowledge of it early on.”). However, there is one lower New York supreme court case that granted the rescission of a bid on unilateral mistake without proving all of the foregoing elements. In Iversen Construction Corp. v. Palmyra, 143 Misc. 2d 36 (NY Sup. Ct, Wayne 1989) wherein the court addressed a mistaken bid price of nearly $800,000 less than the contractor intended, caused by a clerical error. The court stated that the law of New York makes it “very clear that under the circumstances of this case, it would be unconscionable to require Iversen to perform at the mistaken bid price.”

Despite the decision in Iversen, New York law still requires that a party attempting to withdraw a bid show that the other party had actual knowledge of the mistake or concealed the mistake from the complaining party. The moral of the story is be very careful when submitting bids and exercise due diligence when preparing a bid. The repercussions could be devastating monetarily if a court rules that the bid may not be rescinded.

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