



## **When Subs Reneg On Their Bids, What Are The Contractor's Legal Remedies?**

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The general contractor for a project may often find itself in a vulnerable position. One such instance of this can arise as the contractor submits its bid and contracts with the owner of a project. In arriving at its bid, the contractor obviously must consider the cost of its performance. The determination of the cost of performance necessarily includes calculating the sum of the subcontractors' bids for their work. The following circumstance illustrates the contractor's potential vulnerability: Contractor obtains subcontractor bids, Contractor prepares its bid for Owner, then Subcontractor refuses to perform or refuses to perform for the bid amount.

In the foregoing scenario, the contractor must pay the subcontractor more than the agreed amount to induce it to perform its work, or it must obtain a replacement subcontractor. A replacement is often the next lowest among the original bidders and, therefore, more expensive. Either way, the contractor's costs go up, and as a result, its profits go down (or may disappear entirely). The exceptional competitiveness within the construction industry during this difficult economy has increased the instances of this problem, as parties may be overly aggressive in their bidding.

The contractor is not without legal remedies to address these instances of subs reneging on bids. Once the contractor has accepted a subcontractor's bid, courts generally hold that a contract has been formed. This is typically true even prior to the contractor and subcontractor entering into a written contract. Thus, reneging on the bid constitutes a breach of contract. As a result of such a breach, the contractor is entitled to what are called "expectation damages."

Expectation damages attempt to put the injured party in the position it would have occupied if the contract had been performed. This is sometimes called getting the "benefit of your bargain." To illustrate, if Contractor accepts the bid of Mason A to perform work on a project for \$50,000, Mason A reneges on the bid, and Contractor hires the next lowest responsive bidder, e.g., Mason B at \$75,000, then Contractor would be entitled to \$25,000 in expectation damages—the benefit of its bargain with Mason A (note: Contractor may be entitled to additional damages too, depending on the particular circumstances of the case—a discussion for another day).

Unfortunately, recovering the \$25,000 from Mason A may prove to be a practical challenge. For example, litigation can be expensive and slow-moving, attorney fees are not typically recoverable, and Mason A may not have the

financial wherewithal to satisfy even a \$25,000 judgment. Nevertheless, careful contracting and planning on the front end can avoid some of these pitfalls. For example, adding an attorney fees provision and an arbitration clause to bid documents can help you recover litigation costs and speed up your recovery.

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