

Bad Blood

Ethical Issues in Bidding and Contracting

Theory and Practice

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One of the most common unethical activities in the construction industry is the practice of taking advantage of other members of the construction team. In

bidding and contracting, this practice often manifests itself as bid shopping, bid peddling, or names of similar import.

The practice has been widely examined in recent years and there has been universal condemnation of the practice as unethical. And some, notably the American Society of Professional Estimators, have argued that it is economically unsound as well. Most professional organizations have public pronouncements, in their codes of ethics or elsewhere, decrying it.

There have been various types of actions taken to try to combat the problem. These have included lawsuits, bid depositories, bid listing laws, and specification language requiring subcontractor and/or material supplier listing with the general contractor's bid. Indeed, some owners have gone so far as to change the way they procure construction services to help negate the consequences of unethical bidding practices.

Legal solutions generally fall into two categories, those which approach the issue from a contract law perspective and those which approach it from a bid listing law perspective. In general, remedies which use contract law as their basis have been unsuccessful. Courts have fairly consistently ruled that a general contractor may rely on a bid it receives from a subcontractor or material supplier in compiling its bid, and in the absence of some special contravening provisions may compel the subbidder to perform the services offered in its bid for its bid price. They have as consistently ruled that the reverse is not true; a general contractor's reliance on a subbidder's bid does not compel the general contractor to contract with the subbidder. In short, the general's reliance on a sub bid is not an acceptance of the subbidder's offer in the sense contract law requires.

Bid listing laws may offer subbidders more of a remedy, depending upon how strong the laws are written and how well they are enforced. Bid listing laws are not widely used, however, and their effectiveness as a remedy to bid shopping are thereby limited.

Specification language attempting to combat the problem is also used. This remedy is even less widespread than bid listing, however, and thereby has limited impact.

One is left with the perception that the attempts to curtail bid shopping, be they codes of ethics, arguments from economics, legal remedies, bid listing laws, or specification language changes, are useful, admirable, and to be encouraged, but of limited effectiveness. Still the problems persist, and they are encountered by the members of the construction community every day. How can the company which does not wish to be either a bid shopper or a victim of bid shopping then structure itself to minimize the cost of these practices?

The answer in theory is deceptively simple: *do not shop and don't do business with companies that do*: a reverse restatement of the construction and bidding golden rule. But theory and practice in this area, like so many others, are considerably different. This is true because the practice is so pervasive it is doubtful that a company can exist without being affected. The general which refuses to practice finds its competitors being low on

all the bids, and the sub which refuses to practice finds itself with diminished work possibilities. One need not take a mud bath to get splattered.

What are some actions a general contractor can take to minimize its chances for being negatively affected by its competitors' bid shopping. Here are some ideas to consider.

Don't divulge information the subbidder provided you to other subbidders. You may believe that you will get a better price than your competitor by doing so, but that is not the case. If sub B wants to know what its competitor's prices are in order to beat them in its bid to you, is it not reasonable to assume that it will, having found out its competitors' prices and lowered its price to you, immediately call your competitors and lower its price to them? The object of the bid shopping and peddling game is to get more work, and the subbidder who plays the game maximizes its chances of getting more work by bidding everybody.

Do ask the subbidder if you have its lowest and best price. This is not the same as asking the sub to lower its price, it is asking the sub to quote your company the lowest price it has available, as a tacit recognition that many subs do have lower prices to offer.

Ask the subbidder for a preferential bid. Do not set the target, do not divulge other bids, just ask the subbidder to give you a better bid than it gives your competitors. If your company is the right kind of company, you might be successful. Successful in at least getting as good a price as your best competitors.

For the subcontractor and material supplier to consider:

Give different prices to different bidders. Most subbidders are reluctant to quote different prices to different bidders. They justifiably feel that if the general bidder which receives a less favorable price discovers the fact, they will be in hot water with that general. While that is true, isn't it also true that the subbidder is in hot water if it doesn't bid a higher price to a less desirable general? The hot water may take longer to boil, but it may also cook more thoroughly, if the form of late payments, poor contract terms, poor jobsite management, etc. Remember, a bid shopping general is thereby firing only the first salvo across your bow. Who is to say the demands for lower prices to get the job today will not be followed up by other costly demands throughout the job?

Put bid shopping money in your bid. This is a slightly different scenario than the first. Here you have a bottom line, you feel that you will be invited back to the game for another round of negotiation, so put something in that you can give up. Then give it up slowly. Even in this case remember that there will be other opportunities to give something up throughout the project.

Don't bid the bid shoppers and don't do business with them. This is the purest and hardest path to take, but in the long run, if you can make the long run, you may be better off. There are undoubtedly some generals which you can give up, as being the worst

offenders from whom you stand little chance of getting any work and less chance of making any money on it if you do.

Do your absolute best to help the ethical general contractor get the job. That means giving the ethical contractor a better bid, better service, etc. It may be difficult to find an ethical general contractor, but you can probably identify one or two who are predisposed to be ethical and help them.

Do your absolute best to become educated about the gamut of practices which may be thrown at you by unethical general contractors and the ways you may be able to combat those practices. The only thing worse than having to participate in the bid shopping game is having to do so and not doing it with your eyes wide open.

The construction industry is a risk laden industry. Bid shopping practices, and all their inbred kin, serve in the final analysis to increase the level of risk considerably. Learning how to identify and cope with this risk is fully as important as are dealing with all the other categories.

APPENDIX

The American Society of Professional Estimators “Bid Shopping” Brochure

American Society of Professional Estimators Bid Shopping and Bid Peddling

The American Society of Professional Estimators in its Code of Ethics has stated that bid shopping and bid peddling are unethical and are not to be practiced by members of the Society.

Bid Shopping

Bid shopping, defined in Canon 5 of the Code, occurs "when, after the award of the contract, a contractor contacts several subcontractors of the same discipline in an effort to reduce the previously quoted price."

In other words, if a prime bidder attempts to compel a sub-bidder to lower a previously quoted bid price that is bid shopping. Bid shopping may occur either on bid day or after bid day; either before or after the award of the contract.

In addition to price information, the status of a sub-bidder's competitive position or technical scope are equally sensitive. Legitimate practice precludes use of this information in haggling, trickery, or coercion of any kind. During contract negotiations, sub-bidders should not be advised, nor should they inquire, of the other bidder's price or scope, nor of any changes that would be required to qualify them as the successful sub-bidder. After sub-bidder commitments are made, or within a reasonable time after prime contract award, sub-bidders should request, and should be advised of their competition position, both in price and scope.

Owners Participation

Bid shopping is not confined to prime bidders and sub-bidders. Some owners also participate by encouraging prime bidders to bid shop and by bid shopping themselves. Ethical contractors will propose value engineering to lower their bid. They will not engage in bid shopping. Owners will protect the confidentiality of prime bidder's value engineering ideas and all other pre-award submissions.

Bid Peddling

Bid peddling, defined in Canon 7 of the Code of Ethics, occurs when a sub-bidder "approaches a general contractor who has been awarded a project with the intent of voluntarily lowering the original price below the price level established on bid day. This action implies that the subcontractor's original price was either padded or incorrect."

When a sub-bidder lowers a price to get closer to or below the legitimate price, that is bid peddling. Whether or not the low prime bidder has a contract, whether or not the action occurs before or after bid time, it is bid peddling.

Comparable Price

"Price" here means "comparable price, " the price which accurately reflects to the prime bidder a scope of work comparable to the other sub-bidders in that trade. It is the prime bidder's responsibility to understand the complete scope of work being bid by the sub-bidder, and to determine the value of adjustments to a sub-bidder's price which must be made to compare it with other prices. In this way, sub-bidder prices are judged "apples to apples."

When negotiating a contract, it is the sub-bidder's responsibility to provide accurate prices for legitimate scope additions and deletions, where necessary, - not to use such pricing as an opportunity to bid peddle.

Why ASPE Prohibits These Activities

The contract (or sub-contract, or purchase order) should go to the qualified prime bidder or sub-bidder determined on bid day at bid time, excluding prime bidders or sub-bidders who shopped or peddled bids prior to bid time. This does not preclude a prime bidder from using a bid higher than the low legitimate bid, but the prime bidder cannot ethically ask the sub-bidder to lower a price quoted on bid day. This prohibition includes requesting the sub-bidder to perform added work for the price quoted on bid day.

The Ethical Dimension

The ethical basis for this stand is free competition and fair play. The competitive prime bidder assumes the low sub-bidder has carefully quantified the scope of work, has evaluated his risk and pricing options, has included a fee which will justify the risk, offering the best price in confidence. To shop such a price is neither free competition nor fair to the legitimate sub-bidder. For a sub-bidder to peddle his own price is similarly neither free competition nor fair play to the legitimate bidder.

Many construction firms fall prey to the practice of bid shopping or bid peddling in the belief that they will procure contracts not otherwise available to them, or that peddling will allow their firm to maximize profits on the project being bid. In the short run, this may indeed be true. But, in the long run, shoppers and peddlers gain reputations, and soon find it more difficult to obtain legitimate bids. This lack of legitimate bids causes the bidder to "discount" even more, because only those sub-bidders who put "shopping money" in their bids are available. This added risk may be disastrous for the bidder, should he be unable to "sell" the work for his discounted price. Skill and insight are replaced by gambling and often greed. Professionalism is replaced by rolling the dice, and bid shoppers are gradually isolated and change or perish.

The Economic Dimension

In addition to the ethical dimension of bid peddling and bid shopping, there is an economic one. Simply stated, it is this: Bid shopping and bid peddling reduce the total profit available to the construction team. When a bidder cuts a bid below the lowest legitimate bid, the bidder is admittedly taking the contract for less than originally desired and bid. The bidder is, in other words, reducing profit below what is really desired, and is doing so in order to get the job.

No contractor enjoys the prospect of making less profit than desired. Therefore, the shopper has strong incentive to develop ways to recoup that lost profit. One of these ways is to cheapen quality. The shopper may not use the specified material and/or allows workmanship to suffer in order to gain back the profit lost.

Another way is to search for opportunities to increase the amount of one's contract through extras. The bidder is constantly motivated to seek change orders, often pricing them at substantial premiums above the actual cost of the work done. In either of the two scenarios, conflict is sure to result, and legal issues arise. The original fee is lost or reduced by discounting and the added burden of legal fees to resolve the ensuing conflict is inevitable.

Elimination of bid shopping and bid peddling is essential if the construction industry is to regain its rightful fee structure, and it must begin to eliminate these unethical practices now. For information on how you may help, contact:

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