

CHAPTER 4:
COMPETING FOR THE CONTRACT
TEACHING SUPPLEMENT

I. EXERCISES AND SAMPLE PROBLEMS

Problem No. 1: Use of Bid by Prime

Gotcha General Contractors, Inc. (Gotcha) invited Dew Wright Electrical Co. (Dew Wright) to give it a price for the electrical work on a project it was bidding as a general contractor. Dew Wright submitted its price in a telegram that also stated: "If our estimate used, wire us collect prior to June 6 or else same is withdrawn."

At the bid opening on June 4, Gotcha is the apparent low bidder. So, the next day, Gotcha wires Dew Wright: "We used your bid."

On June 26, Dew Wright writes to Gotcha: "We would like to receive our subcontract as early as possible." In response, Gotcha writes: "Thanks for your letter. The electrical work has been let to Lowball Electric. Your bid, after full consideration, was found to be incomplete." Ironically, Lowball's more complete bid was lower than Dew Wright's.

Dew Wright sues Gotcha for his bid preparation costs and lost profit.

QUESTIONS

1. Who wins?
2. Assume that Gotcha's June 5th letter to Dew Wright also states: "Start submission of shop drawings by June 26 as the construction schedule is very tight."

Comment: The basic question is whether use of a bid constitutes acceptance of the bid. Would other actions such as the statement about shop drawings be sufficient to create a contract? Ask the students to identify other facts which may affect their views.

Problem No. 2: Subcontractor Withdraws Bid

Prime Construction Co. was preparing its bid on a school project. Paving, Inc., submitted a price for the paving portion of the work to Prime by telephone on the morning of bid day. Paving's price was low and Prime used it in its bid.

Prime was the low bidder and was awarded the general contract. The next day, Prime visited Paving's office. Before he could even say hello, Paving's president blurted out: "We hereby duly rescind and revoke our offer heretofore made to you." Prime protested, but ultimately had to use the second low bidder on the paving. It then sued Paving for the difference in the bids.

QUESTIONS

1. Who wins?
2. Does your answer change if there was a great discrepancy between Paving's price and the next four subs' bids?
3. What if Prime asked Paving to check its price and was told "we know what we are doing – we have been in business for 15 years".

Comment: This is a classic promissory estoppel case. The result varies from state to state.

Problem No. 3: Bid Mistake

Busy Construction Co. (Busy) submitted a bid of \$177,000 on the last day for filing of bids on a public project. The bid had been delayed in preparation by the slowness of subcontractors in submitting their prices and by delays in the calculation of certain items because of rising labor and material costs. Shortly after the bid was submitted, it was accepted by the owner and the contract awarded to Busy. The only other bid was for \$203,700.

When Busy's Vice-President learned of the difference in the two bids, he was not concerned over a 15% price difference. He later examined the estimate sheets and found that a clerk, though experienced in preparing bids, had inadvertently entered an amount of "\$2,628" instead of "\$26,289" for the structural steel, resulting in an error of approximately \$23,000. The owner was notified of the error on the next day, but insisted on compliance with the bid. Four days had elapsed between the bid opening and notification of the mistake.

Busy refused, the owner sued Busy and its bid bond surety.

QUESTIONS

1. Who wins?
2. Would your decision change if 30 days had elapsed before the notification was given even though Busy discovered the error within 3 days of bid opening?

Comment: Bid withdrawal on public works is governed by statutes in many states. Some key factors to be considered is the amount of the discrepancy. Is 15% an unusual spread in prices? The type of error – clerical or judgmental. The promptness of the request for relief and notice of the error.

Problem No. 4: Bid Shopping

Dew Wright Subcontracting (Dew Wright) submits a bid to Sharp General Contracting in connection with a hospital construction project. In its proposal, Dew Wright states:

“Notwithstanding any contrary requirement regarding the irrevocability of this bid, in the event of bid shopping by the general contractor, Dew Wright shall not be estopped to withdraw its bid.”

Sharp relies on Dew Wright's bid and is the apparent low bidder for the project. Sharp then begins to shop Dew Wright subcontract price. Although unable to get a better price, Sharp sends a fax to Dew Wright stating that Dew Wright must reduce its price 5% in order to get the subcontract. Although not aware of Sharp's effort to shop its price, Dew Right decides to walk away from the project, faxes back to Sharp "your offer is rejected". Sharp tenders a contract to Dew Wright at the bid price and threatens to sue Dew Wright for the additional costs associated with finding a replacement subcontractor. **Who wins?**

Comment: This bid qualification and the facts related to it require students to consider:

- (1) Whether Dew Wright's qualification was absolute. Did the fact that Sharp attempted to shop the price automatically operate to effect a withdrawal of the bid or just give Dew Wright an option if it had actual knowledge of the bid shopping.
- (2) Does the request to reduce the price constitute a new offer? Does it constitute bid shopping?
- (3) Did Dew Wright's fax rejecting the 5% reduction leave the original bid available for acceptance? What should Dew Wright have said?

Exercise No. 1

Ask the students to create a comprehensive checklist of all the important issues that should be considered before submitting a bid. After completing the task, provide the students with copies of Sample Forms A, B and C. How did the student's checklist compare with those provided? Were the students surprised by the number of considerations to be made before even submitting the bid? Use this as an opportunity to lead a discussion on bid mistakes.

Exercise No. 2

Review forms D through E with students highlighting some of the more practical formalities of bidding on the project.

II. SAMPLE FORMS AND CLAUSES

<p style="text-align: center;">Sample Contractor Pre-Bid Request For Information Form A</p>
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TO: _____
(The Owner)

FROM: _____
(The Bidding Contractor or Construction Manager)

DATE: _____

RE: _____
(The Project)

We are grateful for the opportunity to submit a bid in connection with your project referenced above. We are diligently attempting to analyze the project requirements and to put together a bid which will give you the final project you desire for a reasonable construction price. In order to give the best possible price, however, we need the benefit of certain information which was not part of the bid document package. We would appreciate your assistance in providing to us, as quickly as possible, the following additional information:

1. **Design Constructability Review.**
Has there been a third-party constructability review of the design documents? If so, please share with us the product of that assessment.
2. **Site/Subsurface Information.**
Has there been any site or subsurface investigation of the project site, or the surrounding properties, which has not been furnished to us as part of the bid documents? Do you have any other information whatsoever about the likely nature of the site or subsurface conditions? If so, we request that you provide us with all information available to you. We will view your silence in response to this request as confirmation that you have provided all of the available information regarding the site and subsurface conditions.
3. **Environmental Site Assessment.**
Has there been any environmental site assessment? If so, please provide us with all results of that assessment.
4. **Special Site Conditions.**
If you have any available information regarding wetlands, historic properties, endangered species, flood plains, or coastal plans on or near the project site, please provide us with copies of all available information.

5. **Environmental Contamination.**

We assume, in the absence of any information suggesting the contrary, that there has been no prior environmental clean-up on or near the site, and that there also is no evidence of asbestos, lead-based paint, underground storage tanks, soil or water quality problems, or hazardous waste at or near the site. If any of these assumptions are incorrect, we will count on you to provide us with any pertinent information available to you.

6. **Project Financing.**

Please provide us with reasonable evidence that financial arrangements have been made to fulfill the owner's obligations under the contract.

7. **Obstructions or Interferences.**

We have assumed that there will be no obstructions or interferences with our gaining access to the site and to our constructing the project in the most efficient manner possible. If you are aware of anything which would conceivably contradict that assumption (e.g., separate prime contractors, etc.), we will count on you to call to our attention prior to the bid date.

8. **Mediation.**

It is our goal that this project will be a dispute-free project for both of us. However, our long experience in the construction industry tells us that all parties to the construction process are better served if we provide, in advance, for some mechanism for solving potential disputes early and economically. We have found that mandatory mediation of disputes—at which principals of all parties must appear and participate—often lead to a resolution of problems before they become big problems. We have drafted such a contract clause and attach it for your consideration. If you believe, as we do, that every effort should be made to avoid a costly dispute, then we hope that you will adopt this provision as part of the contract documents.

9. **Early Completion.**

It is our plan to complete this project by date earlier than the scheduled deadline. In so doing, we plan to save a significant sum in terms of our reduced job site and home office overhead support for this project, and you will benefit from this early completion by a bid price which reflects that plan. We will assume that there are no obstacles which would prevent us from achieving this early completion goal, unless you advise us to the contrary prior to the bid date. Although we cannot guarantee an early completion, and you should not rely upon our plan, we do expect to be able to deliver the project at a date prior to the scheduled completion date.

Once again, we appreciate this opportunity to submit a bid for your project, and we look forward to being a part of your project team.

**Checklist: Qualifying The Project Locale
Form B**

Project: _____
Completed by: _____

Date Completed: _____

Yes No

PROJECT LOCALE QUALIFICATION

- | | | | |
|-----|-----|-----|--|
| ___ | ___ | 1. | Have we had sufficient prior experience in the project jurisdiction? |
| ___ | ___ | 2. | Has our prior experience in this jurisdiction been profitable? |
| ___ | ___ | 3. | Do we have required licenses to work in this jurisdiction? |
| ___ | ___ | 4. | Are local licenses/permits required? |
| ___ | ___ | 5. | Are our insurance policies/coverages adequate for work in this locale? |
| ___ | ___ | 6. | Do we understand bond/lien claim rights and requirements in this jurisdiction? |
| ___ | ___ | 7. | Do the laws in this jurisdiction create special risks or required changes in our contract form or documentation systems? |
| ___ | ___ | 8. | Is the available local labor adequate and sufficiently skilled? |
| ___ | ___ | 9. | Is the site locale a predominantly union or non-union labor market? |
| ___ | ___ | 10. | Is there a required project/union agreement for this work? |
| ___ | ___ | 11. | Are the state/local taxes to be considered? |
| ___ | ___ | 12. | Are materials and equipment available locally? |
| ___ | ___ | 13. | Have we identified local or required labor rates and fringes? |
| ___ | ___ | 14. | Are there project/local MBE/WBE requirements? |
| ___ | ___ | 15. | Are there unusual business or political circumstances which may affect the project? |

NOTE: All negative responses to any of the qualification questions above must be reviewed, and signed off on, by the _____ (Project Manager, Company Vice President) prior to the submittal of any bid.

Subcontractor/Supplier Bid Representations – FORM C

By submitting its bid, the undersigned Subcontractor/Supplier represents and guarantees the following:

1. The Bidder acknowledges that it is familiar with, and has made adequate provision for, all site, project and other conditions and circumstances which may affect in any way the cost of or time for the performance of its Work on this Project.
2. The Bidder acknowledges that, in submitting its bid, it is not relying on any representation or promise which is not set out expressly in the Contract Documents.
3. By submitting its bid, the Bidder agrees that, if offered a contract, it will accept as its contract and promptly execute, without change, deletion or addition, the subcontract form (for Subcontractors) or purchase order form (for Suppliers) offered by Contractor, together with all attachments, schedules, exhibits or other Contract Documents incorporated therein by reference. Bidder acknowledges that all Contract Documents have been made available for review prior to the submission of this Bid.
4. Except for the legally enforceable expectations created by the Bidder representations herein and by the submission of its bid, the Bidder acknowledges that no contract or legal obligation of any kind will be created between the parties unless and until the Bidder—
 - a. is offered, signs and returns the required subcontract or purchase order agreement;
 - b. all required bonds and insurance certificates are furnished;
 - c. all other documents required prior to the start of work by the Contract Documents are furnished in the proper and complete form; and
 - d. the Contractor executes the subcontract or purchase order agreement and directs the Subcontractor or Supplier to proceed with the Work.

The Contractor will not be liable to the Bidder for any cost incurred by Bidder, and the Bidder is not authorized to proceed with any aspect of the Work, until all of the above conditions have been satisfied.

5. The Bidder understands that its bid may be rejected for any reason, and for no reason, in the Contractor's sole discretion.
6. The Bidder shall keep its bid open and unchanged for a period of _____ days following the deadline for the submission of a bid by the Contractor.

7. Attached hereto as Exhibit "A" is a list of the Bidder's proposed subcontractors and suppliers.
8. Attached hereto as Exhibit "B" is a list of the full time site supervision which the Bidder agrees to provide for the duration of the Project, subject to the Contractor's approval. Attached to Exhibit "B" is a brief description of the prior experience for each proposed supervisory employee.

These representations and guarantees are made on behalf of _____
_____, and may be relied upon by the Contractor.

By: _____

Title: _____

Bidder: _____

Sworn and subscribed before me
this _____ day of _____, 2000.

Notary Public

My Commission Expires:

**Subcontract/Supplier Bid Confirmation
FORM D**

DATE: _____

PROJECT NAME/NO.: _____

PROPOSED SUBCONTRACTOR/SUPPLIER: _____

TRADE/ITEM: _____ COST CODE: _____

SCOPE OF WORK: _____

WORK REFERENCED IN AND INFERABLE FROM SPECIFICATION SECTION(S)/
PLANS: _____

IF SUBCONTRACT IS AWARDED SUBCONTRACTOR AGREES TO ACCEPT:

- | | |
|---|--|
| <input type="checkbox"/> Taxes: _____ | <input type="checkbox"/> Project Schedule (and GC Revisions) |
| <input type="checkbox"/> Payment Bond/Amount: _____ | <input type="checkbox"/> GC Standard Subcontract Documents |
| <input type="checkbox"/> Performance Bond/Amount: _____ | <i>(e-mailed to Bidder on _____)</i> |
| <input type="checkbox"/> Unit Price Sheet Attached | <input type="checkbox"/> Owner/GC Contract Documents
<i>(available for Bidder review)</i> |

SUBCONTRACT/PURCHASE ORDER

#1 _____
#2 _____
#3 _____

LUMP SUM

\$ _____
\$ _____
\$ _____

SPECIAL NOTES/COMMENTS/EXCLUSIONS:

The above information was read to and confirmed by the Subcontractor representative identified below, and was faxed to the Subcontractor, on _____ at _____ (a.m.)(p.m.)

Subcontractor Contact: _____ Contractor Contact: _____

Address: _____

Phone: _____

Fax: _____

Checklist: Pre-Bid Environmental Considerations
FORM E

Risk Assessed By:	✓	**
The Contract Documents		
Do the plans or specs include any remediation work, asbestos abatement or lead based paint removal?		
Do the plans or specs make reference to the performance by others of remediation work, asbestos abatement, or lead based paint removal?		
Do the Contract Documents attempt to allocate the risk or responsibility for hazardous materials or asbestos?		
Is there a contract requirement for the indemnification of the Owner or others for losses associated with hazardous materials or asbestos?		
Is the Contractor/Subcontractor indemnified against losses associated with hazardous waste or asbestos encountered on the Project?		
If unanticipated asbestos, lead based paint, tanks, drums, contaminated soil, PCB's or other hazardous material or waste are encountered, does the Contract specify the Contractor's rights and duties?		
If the Contract completion is delayed by unexpected environmental problems, does the Contract provide for a time extension, an equitable Contract price adjustment, or termination rights?		
Are any environmental permits necessary?		
Who is contractually responsible for any necessary environmental permits?		
What is the extent of the required site investigation?		
The Site Observation		
Did the site visit indicate any distressed vegetation, hydrocarbon or chemical contamination, underground storage tanks, transformers, drums, suspect lead based paint or suspect asbestos containing materials?		
Has any prior clean-up taken place at the site?		
Have tanks been removed or filled?		
Is there any Closure Report?		
Are there structures on the site, which must be moved or demolished?		
What is the extent of the required excavation and grading operation?		

Risk Assessed By:	✓	**
Will fill material be brought to the site?		
Will waste material be hauled off to another site?		
Owner-Furnished Information		
Has the Owner been requested to disclose any available information regarding any hazardous materials, asbestos, lead based paint, waste materials, contaminated soil or water that might affect the Contractor's work?		
Has a request been made for the results of any Environmental Site Assessment?		
Has a request been made for any building surveys or inspection reports on asbestos, lead based paint, underground storage tanks, soil or water quality, or hazardous waste present at the site?		
Has a request been made for all information regarding any prior clean-up on or near the site?		
Environmental Risk Allocation		
If environmental problems are encountered, is insurance coverage available?		
Are there insurance policy exclusions or limits which affect potential insurance coverage?		
Are environmental risks shared with appropriate Subcontractors?		
If Subcontractors will be or may be involved in work which could encounter environmental problems, do the Subcontractors have adequate insurance coverage or proper bond protection?		
Personnel Readiness		
Are responsible project personnel familiar with and able to recognize likely environmental hazards?		
Is there an in-house response plan for dealing with environmental hazards?		
Other Environmental Considerations		