

PUBLICATION

Government Contractors - Make Sure You Know the Pre-Opening Bid Modification and Withdrawal Rules in the Jurisdictions Where You Submit Bids [Ober|Kaler]

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The competitive bidding process for government contracts often requires contractors to submit detailed bids under tight, pressure-packed deadlines. While contractors may check their bids meticulously before submitting them, the last-minute rush to confirm subcontractor prices or finalize line items can lead to inadvertent mistakes in bids. In Maryland, the effect such mistakes have on contractors that recognize them before bid opening depends on the procuring jurisdiction.

For example, if a contractor bidding on a State of Maryland contract recognizes a mistake in its bid, the Code of Maryland Regulations (COMAR 21.05.02.09) allows the contractor to modify or withdraw the bid if it gives proper notice to the applicable State agency before bid opening. Likewise, if a contractor recognizes a mistake in its bid submission for a Baltimore County Department of Public Works procurement, the County's Standard Specifications for Construction and Materials (general provisions 2.11 and 2.14) allow the contractor to modify or withdraw the bid upon proper notice before bid opening.

Baltimore City, however, has no such "pre-opening modification or withdrawal of bid" regulation. Rather, the Charter of Baltimore City (Article VI, § 11) expressly provides that bids are irrevocable once they are filed. The City's Department of Public Works Specifications for Materials, Highways, Bridges, and Incidental Structures (section 00 21 13.13) incorporates this policy, providing that bids are irrevocable once filed with the Comptroller's office and that bid modifications will not be considered.

Thus, if a contractor recognizes a mistake in its bid for a Baltimore City Department of Public Works contract before bid opening, it does not automatically have the right to modify or withdraw the bid, like it does with similar Baltimore County or State procurements. Instead, the contractor should immediately notify the applicable procurement agency and the City's Board of Estimates to see if its bid can be withdrawn. The contractor, however, could be bound by its mistaken bid if the Board of Estimates denies the request. While the Board has sole discretion to reject any bid if it is in the City's best interest, it is not required to reject a mistaken bid, even if it is notified of the mistake before bid opening.

This potentially harsh policy has been somewhat tempered by the Maryland Court of Appeals in *City of Baltimore v. DeLuca-Davis Construction Co., Inc.*, 210 Md. 518 (1956). While this case involved a mistake that was discovered after bid opening (versus before), it remains instructive about how the law of equity may (or may not) allow a contractor to escape the consequences of a mistake in its bid.

In *Deluca-Davis*, a contractor submitted a bid in 1956 to the Baltimore City Bureau of Highways to construct storm water conduits for the Jones Falls Expressway. The contractor's bid was \$589,880 less than intended, and almost \$700,000 less than the engineer's estimate. The contractor did not recognize the mistake until after bids were opened, but before the contract was awarded. At that time, the contractor notified the Board of Estimates about the mistake and asked the Board either to correct the bid or allow it to be rescinded/withdrawn. The Board, however, told the contractor that it planned to accept the bid pursuant to the City's Charter and the notice of letting for the procurement, both of which provided that the contractor's bid was

irrevocable once filed. The contractor then filed suit, asking for equitable relief to prevent the Board of Estimates from accepting its bid.

The Court of Appeals ultimately allowed the contractor to rescind its mistaken bid for equitable reasons. The process, though, required costly court intervention - versus simple notice as allowed under COMAR or Baltimore County's Standard Specifications. The Court of Appeals also made clear that the bid could be withdrawn because the contractor had made a material, honest, and palpable mistake of a clerical, mechanical, or technical nature. Thus, if a contractor's mistake is of a different nature, the result may not be the same.

Furthermore, in deciding that equity allowed the mistaken bid to be withdrawn, the Court of Appeals considered the contractor's capacity to perform. The Court noted that the mistake would cause the contractor - with a net worth of only \$82,000 - to lose \$400,000, driving it into bankruptcy. This analysis implies that if a contractor bidding on a Baltimore City procurement retains the capacity to perform the contract in spite of a mistake in its bid, the contractor may not be able to rely on equitable grounds to have its bid withdrawn. In such a case, the contractor may be stuck performing an unprofitable contract that could have been avoided in other jurisdictions.

Knowing the pre-opening withdrawal and modification rules for the different procurement jurisdictions will not prevent the inadvertent mistakes that inevitably occur in competitive bidding. Knowing the rules, however, will allow contractors to act promptly and appropriately if they discover mistakes in their bids before bid opening.