

Bid Mistakes & Bid Protests Part I

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This is the first of a two part article regarding bidding controversies. This first segment will address the issue of bid mistakes. Part II will address the broader topic of bid protests.

Every potential new job is, of course, important. However, proceeding with a financially doomed project resulting from a bid mistake is wholly untenable. Similarly, losing a bid to an alleged "low bidder" you reasonably believe should not receive a particular award is equally unacceptable. These two articles are designed to help you promptly address bidding irregularities that might deprive you of an award or cause you to suffer the consequences of a mistake.

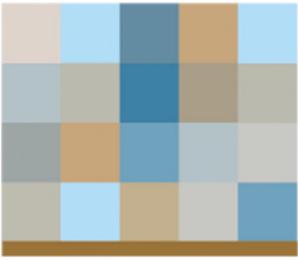
One of the fundamental messages conveyed in this first article concerning bid mistakes, and one that is applicable to bid protests as well, is the highly time-sensitive nature of your response. Bid mistakes must be treated as the emergency they are. Bid mistakes can be satisfactorily dealt with, but you must do so within a very short time frame.

"Excusable" Bid Mistakes

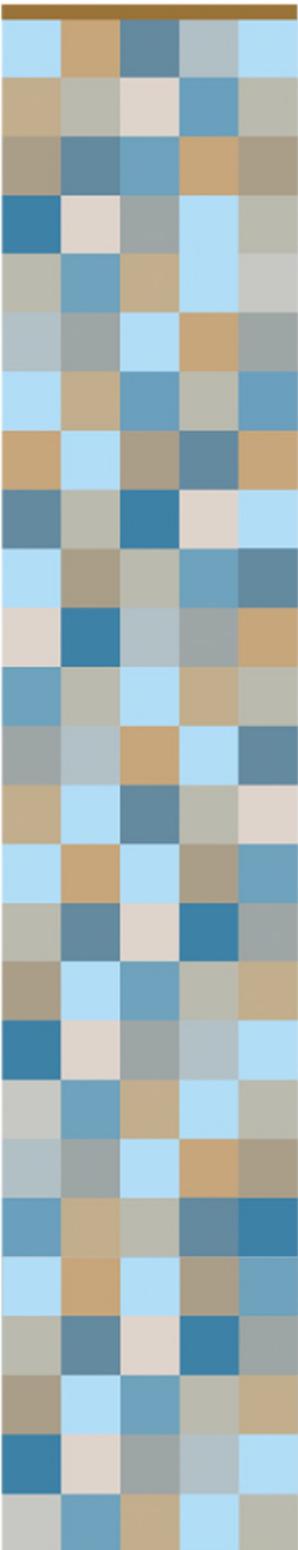
If, because of a unilateral error, a contractor's bid is significantly lower than all other bids, the contractor must promptly act to rescind its bid or it will be "bound" to the contract. Such a mistake could have significant financial consequences, including the loss of your bid security or bond.

If a contractor's mistake is deemed "excusable" under New York law, the contractor may be relieved of its bid. New York courts will determine whether a mistake is "excusable" on a case-by-case basis.

New York statute provides a "safe harbor" of excusable conditions. Where a unilateral error or mistake is discovered in a bid, such a bid *may* be withdrawn upon a timely showing of the following:



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- (1) the mistake is known or made known to the awarding officer, board or agency prior to the awarding of the contract or within three days after the opening of the bid, whichever period is shorter; and
- (2) the price bid was based on an error of such magnitude that enforcement would be unconscionable; and
- (3) the bid was submitted in good faith and the bidder submits credible evidence that the mistake was a clerical error as opposed to a judgment error; and
- (4) the error in the bid is actually due to an unintentional and substantial arithmetic error or an unintentional omission of a substantial quantity of work, labor, material, goods or services made directly in the compilation of the bid, which unintentional arithmetic error or unintentional omission can be clearly shown by objective evidence drawn from inspection of the original work paper, documents, or materials used in the preparation of the bid sought to be withdrawn; and
- (5) it is possible to place the public agency, board, officer, or subdivision in status quo ante.

Assuming these conditions are met, the only remedy at law for a mistaken bid in New York is for the contractor to be relieved of its bid. Moreover, a contractor who is legally relieved of its bid is also relieved of its obligations under its bid bond. However, revising a bid ("reformation") is *not* an available remedy. A bid may be withdrawn, it cannot be "corrected," even where the original intent was obvious and could be demonstrated by documentary evidence.

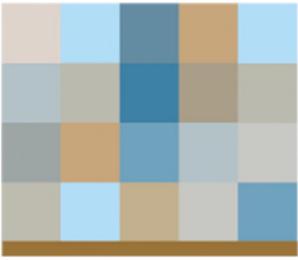
After a bid is withdrawn, the owner, for its part, has only two options: go with the next lowest responsive and responsible bidder, or re-bid the project.

Examples of an "Excusable" Mistake

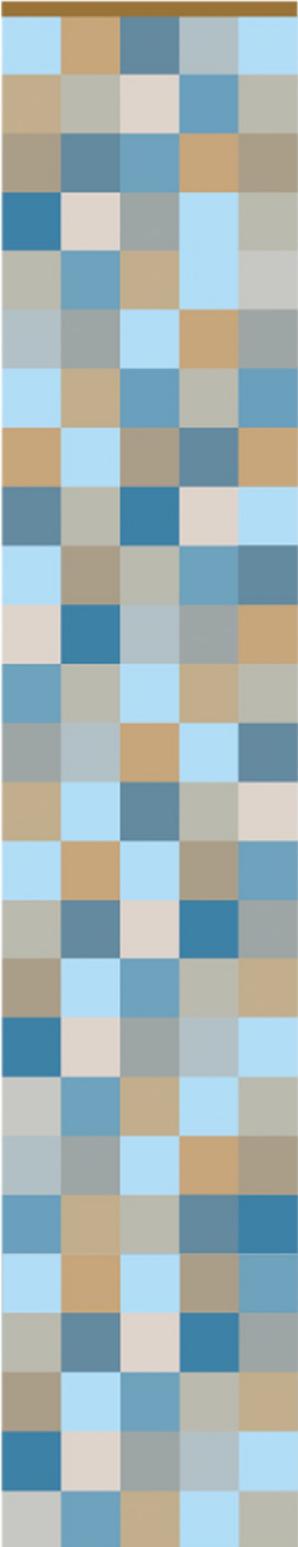
The most common excusable mistakes are clerical errors. Two typical clerical errors are calculation errors and transference errors.

A calculation error is simply a mathematical error, which typically occurs when a larger number than intended is subtracted from a bid during the calculation. For example, a contractor inadvertently reduced a number/value in the bid by \$200,000 instead of \$20,000.

Transference errors, on the other hand, occur when a person who calculates a bid transfers a number incorrectly from the bid calculation sheet to the bid submission. For example, a contractor assessed \$5,100,000 on its bid calculation, but when this



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number was transferred to the bid form, it accidentally switched the first two digits and wrote down \$1,500,000. This obviously results in a substantially lower bid than intended.

In contrast to a purely "clerical error," it is unlikely that a mistake that is the result of a bidder's *negligence* in analyzing the project's plans and specifications, an error in *judgment*, will be held to be "excusable" by the courts. A mistake in judgment is a risk inherent to the bidding process and courts will typically not relieve a contractor from its low bid for making such a mistake. While this may appear harsh, it is important to keep in mind that the bidding process is clearly part science and part art. For example, a bidder might have chosen to "go low" as a matter of strategy, but, after seeing the other bids upon formal public opening of the bids, may have had a change of heart and wanted out. This will, most likely, not be countenanced.

"Non-Excusable" Mistakes

An example of a non-excusable or judgmental mistake concerned a bid specification that required a contractor to supply temporary heat. The bidder later discovered that it did not include the price of temporary heat in its bid calculation. The court found the mistake to be non-excusable.

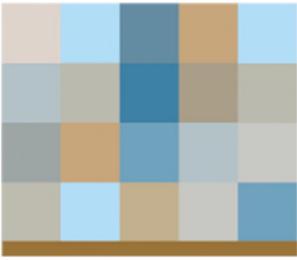
Where a court denies rescission of a bid, such as in the example above, the bidder must make the often difficult choice of whether to perform the contract, or forfeit its bid security. In some cases, where the mistake is too great to withstand, it's an "easy", but unpleasant, decision to forfeit the bid security, typically five percent of the total contract price.

Despite "Non-Excusable" Mistake, Courts May Apply "Fairness" Principles

All hope is not lost, however, even in the event of a non-excusable mistake. Courts may still find that it would be inequitable to force a contractor to perform its grossly underbid contract. In consideration of such equitable considerations, courts may consider the following factors to still grant the remedy of rescission to the bidder:

- a. The mistake was of such consequence as to make enforcement unconscionable;
- b. The mistake was material;
- c. The bidder exercised ordinary care in compiling the bid; and
- d. The other party (the owner) may be put back to the status quo.

Keep in mind that while available, these arguments are reserved for extraordinary circumstances. Do not expect to rely on them.



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MH&H Commentary

If you take no other message from this article, be certain to always treat bid mistakes as the emergency they are. Do not sit on your rights.

Courts do permit bidders to promptly rescind their bids where the "right" type of mistake or error has occurred.

If a mistake is discovered at bid opening, the bidder must take immediate action. A bidder has only *three days from bid opening* to make a claim for rescission or withdrawal.

If after analyzing your estimating documents, you realize that your mistake was not due to a mere clerical error, but instead, a judgmental error such as a failure to account for a detail in a specification or drawing, as discussed above, it still may be possible for a court to allow for a bid withdrawal if the appropriate arguments are made. Act quickly and consult your lawyer who can guide you through this minefield. With the proper advice, you may still be able to avoid the harsh consequences of a bid mistake, obtain the return of your bid bond, and survive the error to compete and win another day.

Any issues raised in this Alert may be addressed to either Mr. Goldberg or Mr. Fryman who can be reached at: (516) 873-2000 or by email at hgoldberg@moritthock.com or rfryman@moritthock.com



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