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Tender with care

Tendering is often a complex and hurried process, and sometimes mistakes are made. These errors can be costly, as contractors are generally required to submit an irrevocable bid along with bid security, which may be lost if the contractor attempts to withdraw the bid. Even without security, if a contractor's bid is accepted and the contractor refuses to proceed, the contractor may be liable to the owner for damages. However, in some rare situations, contractors have been able to show that their bid was not compliant with the tender call or that it contained a patent error. Either scenario renders the bid incapable of being accepted by the owner.

WHEN IS A BID NON-COMPLIANT?

When contractors raise the issue of non-compliance, the courts have indicated that the key question to be answered is whether the tender was substantially compliant. Trivial non-compliance will not avoid liability.

A tender that fails to provide information that was requested by the owner's tender call and is fundamentally necessary to undertake and complete all aspects of the project may go beyond trivial non-compliance. When a contractor's non-compliance is beyond trivial, its bid cannot be accepted. However, the same cannot be said for a bid that omits inconsequential details or is submitted in a different format

than what was requested, as long as the tender contains all relevant information. These instances of non-compliance will typically be seen as trivial.

IS IT THE SIZE OF THE MISTAKE THAT MATTERS?

When contractors raise the issue of a mistake, the courts have made it clear that the mistake must be material and



patently obvious at the time the bid was opened and evaluated by the owner. In such situations, the bid may be incapable of being accepted, and the contractor may be under no obligation to perform. Trivial or immaterial mistakes are insufficient and avoid liability.

A common example of a mistake is an error in price. If a breakdown of costs

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is provided and it's missing essential elements of the work that are addressed throughout the bid, such as labour, materials, transportation or other costs that are related to the project, then the mistake may be material and obvious, rendering the bid incapable of acceptance. Similarly, if the arithmetic within the bid contains errors that result in the total price conflicting with explicit costs, taxes, security, etc.,

then the bid may contain an obvious and material mistake. However, when a bid states only a total price and fails to include certain costs, it is unlikely that the bid will be considered to contain an obvious error.

Contractors should take great care in preparing their bid materials to avoid having to rely on arguments of non-compliance or mistake to avoid performance in respect of a project. The courts are often reluctant to accept these sorts of arguments. They fear such arguments are raised to obscure a contractor's real reason for refusing to honour its bid, namely that the contractor will lose money on the project. In order to minimize risk, and to avoid costly court proceedings,

contractors should review the process for tending, the required elements of a bid and tender with care. □

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