

CONTRACT ISSUES IN FIX-PRICED BIDDING

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A common issue faced by contractors in the construction industry is how to approach a fixed-price bid when there is some uncertainty of costs. This issue is all the more prevalent given the trade relationship between Canada and the United States of America, which has resulted in tariffs on products such as steel and aluminum.

LEGAL CONSIDERATIONS

There will always be a difference between strict legal advice meant to mitigate risk and the practicalities of applying that advice to the marketplace. Your legal counsel should assist with striking a balance between those two values. Legally, a contractor has a couple of options to structure their bid in a manner that will mitigate their risk, including:

- i. a cost-plus-supply clause, which can be tailored so that only specific materials are subject to the clause; and
- ii. a material price escalation clause which may trigger:
 - a. a change order to address the price escalation;
 - b. a force majeure clause, if present elsewhere in the bid; and/or
 - c. termination of the contract.

Further, there is the possibility in any contract that the parties have a difference in interpretation of the terms. For this reason, it is important to use clear language in drafting the bid. It is also advisable to include a dispute-resolution clause appointing a neutral third party to mediate or arbitrate any dispute that may arise. This can help curtail the expense and delay that often come with litigation over contract interpretation.

PRACTICAL CONSIDERATIONS

As business owners, contractors must consider more than just strict legal advice. The reality in many markets is that the inclusion of and/or reliance on the clauses mentioned above may have a negative impact on the competitiveness of the bid and the contractor's relationship with owners/general contractors in the market.

There are other clauses that can be built into a bid that may not guarantee cost recovery if prices of materials fluctuate, but that can help manage a fixed-price project. For example, ensuring that the contract clearly defines the scope of work and what constitutes completed and accepted deliverables can help ensure that both parties have an equal understanding of the work to be done. These types of clauses and definitions are less likely to have a negative impact on the bid in the marketplace, but do not offer the same level of protection as the cost-plus-supply or material price escalation clauses. For every bid, the contractor should undertake a risk-benefit analysis to determine which clauses are appropriate to include.

If a contractor has an existing relationship with an owner/general contractor and now seeks to add a cost-plus-supply or material price escalation clause to their bids, those clauses should be brought to the attention of the other party.

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