

Construction Law Practice Tip: An Accepted Subcontractor Bid May Not be Enforceable Unless it Satisfies the Statute of Frauds

March 17, 2017

PRACTICES Construction Litigation

A general contractor (“GC”) relies on a subcontractor’s written bid to win a project. The subcontractor then withdraws its bid, forcing the GC to hire the next lowest bidder to perform the work. The GC sues the first subcontractor for its damages, *i.e.*, the difference between the two bid prices plus attorneys’ fees. If this Contracts-101 fact pattern sounds like a slam-dunk for the GC, think again. In *Heritage Constructors, Inc. v. Chrietzberg Elec., Inc.*, the GC lost because the subcontractor’s written bid was unenforceable because it did not name Heritage and, therefore, did not satisfy the statute of frauds.¹

In *Heritage*, the eponymous GC bid for the construction of water and wastewater treatment plants. Heritage relied on Chrietzberg Electric’s written bid (on letterhead) for the electrical work and won the project. Electric withdrew its bid after it learned that the next lowest bid was roughly \$100,000 higher than its own \$705,000 bid. Heritage accepted this other bid and sued Electric for breach of contract and other claims. The jury awarded Heritage \$50,000 in damages and the court entered a judgment for this sum plus attorney’s fees. On cross-appeal, Electric argued, *inter alia*, that the statute of frauds barred Heritage’s breach of contract claim. The court of appeals agreed, reversed the trial court, and rendered judgment that Heritage take nothing.

As a threshold issue, the court found that the statute of frauds applied to the contract because its performance would take more than one year. The bid, therefore, had to satisfy all the essential elements of an agreement under the statute of frauds, including the requirement that it identify the parties.² But Electric’s bid did not identify Heritage by name. The bid only included the owner’s name, a terse description of the work scope, the bid price, and the contact information on Electric’s letterhead. The court held the bid did not satisfy the statute of frauds because it failed to identify Heritage as the bid’s recipient.³ Oral testimony was required “to supply an essential term of the agreement” in violation of the statute of frauds. The court also rejected Heritage’s partial performance exception argument because nothing in the record suggested that the defense applied.

The take-away for general contractors: make sure that all bids satisfy the essential terms of a contract, and those of the statute of frauds if applicable.

¹ No. 06-14-00048-CV, 2015 WL 3378377, at ** 6–7 (Tex. App.—Texarkana Mar. 4, 2015, no. pet.) (mem. op.).

² *Id.* at *6 (citing *Cohen v. McCutchin*, 565 S.W.2d 230, 232 (Tex. 1978); *Dobson v. Metro Label Corp.*, 786 S.W.2d 63, 65 (Tex. App.—Dallas 1990, no writ).

³ *Id.*