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What Kinds of Mistakes Allow a Contractor to Withdraw Its Bid for a Public Contract in North Carolina?

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The scenario—The deadline has passed for the submission of bids for a public contract with Carolina County. A county official reads off the bids at the bid opening. Most of the contractors who placed bids are present. The bids vary in amount with the lowest bid being 25 percent lower than the next highest bid and 15 percent lower than the county's estimate. Three days after the bids are opened, but before the governing board has awarded the contract, a county official receives a call from the contractor with the lowest bid. The contractor states that after he heard the bids read he became concerned about the amount of his bid. He adds that after very careful and tedious checking, he has discovered an error that, if corrected, will increase the amount of his bid by 10 percent. Furthermore, he continues, his company cannot perform the contract at the bid price. He requests that his bid be withdrawn and his bid bond returned. What can the county official do?

The answer to the above question can be found in Section 143-129.1 of the North Carolina General Statutes (hereinafter G.S.) and in the common-law principles of equity. Both the statute and the common law allow contractors to withdraw bids based on a mistake.[1] Not just any mistake will justify withdrawal, however. A number of factors must be examined in order to determine if withdrawal is proper. Unfortunately, the North Carolina courts have neither interpreted the state's withdrawal statute nor ruled on any cases regarding withdrawal as an equitable remedy for a mistake in public contract bids.

This bulletin will examine similar statutes and case law from other jurisdictions in order to provide guidance to North Carolina public contracting officials who are faced with decisions similar to the one in the opening scenario. After explaining the basics of North Carolina's competitive bidding procedure, the bulletin will define the common-law principles that established withdrawal as a remedy. It will then illustrate, with examples from case law, those situations where withdrawal has been allowed and where it has not. These examples will provide guidance in interpreting North Carolina's withdrawal statute as well as identifying what law should be used in situations not covered by the statute.[2]

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1. Forty-two jurisdictions, including the federal government and the Virgin Islands, have either case law or a statute that allows withdrawal of a bid for a public contract for unilateral mistake by the contractor. Only one jurisdiction, Kansas, has explicitly rejected withdrawal as a remedy for unilateral mistake. *See* Triple A v. Rural Water Dist. 4, 603 P.2d 184 (1979).

2. The statute applies only to public construction contracts; therefore, the most obvious contracts that are not covered are purchase contracts. However, in some situations a construction contract may fall outside of the requirements of the statute. For example, the statute requires that notification of the error be given within seventy-two hours after the opening of the bids. N.C. GEN. STAT. § 143-129.1. (Hereinafter the General Statutes will be cited as G.S.) What should happen if the error is found more than seventy-two hours after the opening? It can be argued that equity demands that if the common-law criteria are met then the bid can be withdrawn, regardless of the statute. Of course, the more plausible argument is that the statute states the intent of the legislature to limit the equitable remedy for construction contracts to only those cases where notification is given within seventy-two hours after the bids are opened.

North Carolina's Competitive Bidding Procedure

North Carolina, like most other states, has a competitive bidding statute that establishes the procedure for awarding certain public contracts.[3] G. S. 143-129 requires local governments to advertise for bids on construction and repair contracts costing $50,000 or more and on contracts covering the purchase of "apparatus, supplies, materials or equipment" (purchase contracts) costing $20,000 or more. Bids are received after advertisement, and the governing board must accept the lowest responsible bidder on the project, taking into consideration quality, performance, and time.[4] Each contractor is required to submit a bid bond or deposit with his or her bid.[5] North Carolina law requires that the bid bond be at least 5 percent of the bid amount. For most contracts, the bid cannot be considered and must be rejected if it is not accompanied by the bond or if the bond is not in the required form or amount. However, the governing body may accept a bid without the bond or a bond not in the required form or amount for purchase contracts under $100,000. As a general rule, if the contractor is awarded the contract but fails to execute a contract or provide required performance and payment bonds, the governing board is allowed to keep the bid bond.[6]

Under general contract law, the bid constitutes an offer, and the award of the contract constitutes acceptance.[7] General contract law also provides that an offer may be withdrawn before it is either accepted or rejected and the offeror will have no liability for the withdrawal.[8]

However, bids for public contracts are different kinds of offers. In many jurisdictions, state case law, city or county charter, bidding regulations, and other local and state laws commonly provide that these bids are *irrevocable offers* after the bids have been opened, even though the contract has not been awarded.[9] Damages for unlawful withdrawal of a bid may include the defaulting contractor forfeiting the bid bond, paying the monetary difference between his or her bid and the bid of the second lowest bidder, as well as assuming the responsibility for any other costs incurred by the governing board in seeking a new contractor.[10] The question this bulletin seeks to answer is when should a governing board in North Carolina permit a contractor to withdraw its bid without imposing liability for the withdrawal on the contractor?

Equitable Basis for Allowing Withdrawal

Overview

It is necessary to examine the common-law basis for withdrawal of a contractor's bid before examining North Carolina's withdrawal statute. Under a limited set of circumstances, fairness and equity allow a bid to be withdrawn without forfeiture of the bond or other damages being assessed against the contractor. The doctrine of equity provides that relief should be granted where the law fails to provide an adequate remedy or where enforcement of the law would cause serious injustice to one of the parties.[11] Equity also demands, according to the United States Supreme Court's decision in *Moffett, Hodgkins, & Clarke Co. v. Rochester*, that a bidder be allowed to withdraw a bid where a certain type of mistake has been made by the contractor in computing the bid.[12] In *Moffett*, the city of Rochester advertised for bids for improvements to and an extension of the city's water works. Moffett submitted a bid and the requisite bond.[13] The city charter provided that all bids submitted were irrevocable and that failure to enter into the contract once it was awarded meant forfeiture of the bond.[14]

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3. G.S. 143-129.1.

4. *Id.*

5. *Id.* The statute states that the contractor may submit a cash deposit, which includes cash, a certified check or a cashier's check, with the governing body, or a bid bond executed by a licensed corporate surety. For the purposes of this bulletin the use of the term *bid bond* refers to both a bond and a deposit. Return of the bid bond means either the return of the deposit to the contractor or the release of the surety from the obligation to pay the bond.

6. *Id.*

7. Frayda S. Bluestein and Jaye Sitton, *Can a Local Government Rescind Its Award of a Contract Under North Carolina's Formal Bidding Statute?* LOC. GOV. L. BULL. No. 52 (1993) 1 [citing CONSTRUCTION BIDDING LAW § 1.3 (Robert F. Cushman and William J. Doyle eds., 1990)].

8. E. ALLAN FARNSWORTH AND WILLIAM F. YOUNG, CONTRACTS, CASES AND MATERIALS 176 (4th ed. 1988).

9. For examples *see* City of Cheyenne v. Reiman Corp., 869 P.2d 125 (Wyo. 1994) (quoting Wyoming statute); City of Baltimore v. DeLuca-Davis Construction Co., 124 A.2d 557 (Md. 1956) (quoting a provision in the city's charter).

10. David B. Harrison, Annotation, *Right of Bidder for State or Municipal Contracts to Rescind on the Ground that Bid Was Based Upon His Own Mistake or That of His Employee*, 2 A.L.R. 4TH 991, 997–999 (1980).

11. EDWARD D. RE, CASES AND MATERIALS ON EQUITY AND EQUITABLE REMEDIES (5th ed. 1975).

12. 178 U.S. 1108 (1890). The case was on appeal from the Second Circuit Court of Appeals. It was in the federal system on the basis of diversity jurisdiction.

13. *Id.* at 1109.

14. *Id.* at 1115.

It was later discovered that one of Moffett's employees, an engineer on the project, created two errors by transposing figures when computing the bids. The work required excavation at a number of sites. At one site he inadvertently charged $1.50 per cubic yard for the excavation instead of $15 per cubic yard. Other bids submitted ranged from $12 to $15 for this work. The engineer also charged $.50 per cubic yard instead of $.70 per cubic yard for excavation at another site for the project. As a result of these errors, Moffett's bid contained an error amounting to $63,800. When the bids were read aloud on December 23, 1892, the engineer informed the board of one error. On January 11, Moffett informed the board of both errors, and on January 12 the board adopted a resolution awarding the contract to Moffett. Moffett refused to perform and the city threatened to declare the contractor in default and keep the bond.[15]

The Supreme Court applied the basic principles of equity and contract law in determining that Moffett could withdraw its bid without penalty. Moffett initially asked for reformation or for a change that would reflect its true bid, but the Court found that a contract could only be reformed when both parties were mistaken about some material aspect of the contract. Here both lower courts had found that only Moffett was mistaken. The Court added that withdrawal was sometimes an option when only one party to the contract was mistaken (a unilateral mistake).[16]

The Court then examined the mistakes made by Moffett to determine if these mistakes were the type that allowed withdrawal. Since equity provides relief where enforcement of the contract would be unfair, the Court looked to factors that showed that the city would be virtually unharmed by enforcement of the contract while the contractor, who had acted responsibly, according to the Court's findings, would be harmed by enforcement. The Court emphasized the facts that the contractor made the city aware of the mistake promptly, that the contractor had not been accused of bad faith, that the mistakes were clerical in nature, and that the price discrepancy was large enough so the city knew or should have known when the bids were opened that Moffett's bid contained a mistake. It was also relevant that if the bid was not withdrawn Moffett would face bankruptcy. The city, however, would not be harmed by allowing Moffett to withdraw its bid.[17] In other words, enforcement of the contract would work great detriment on Moffett with little or no benefit to the city. The Court also found that unfairness of enforcement overrode the city's charter forbidding withdrawal.[18]

The Supreme Court in *Moffett* established the basic framework for determining when a bid for a public contract can be withdrawn. Decisions since then have refined the criteria used by the Supreme Court. With only slight variation, the factors examined by each court have been very similar and most cases have simply cited the factors as listed in a handful of other cases. The Maryland Court of Appeals, in one of the most commonly cited opinions, *City of Baltimore v. DeLuca-Davis Construction Co.*, succinctly laid out the factors used by most courts:[19]

> 1, the mistake must be of such grave consequences that to enforce the contract as made or offered would be unconscionable; 2, the mistake must relate to a material feature of the contract; 3, the mistake must not have come about because of a violation of a positive legal duty or from culpable negligence; 4, the other party must be put in the status quo to the extent that he suffers no serious prejudice except for the loss of his bargain.[20]

The sections below discuss cases that focus on defining these factors as well as point out differences in the interpretation of these criteria.

15. This case actually involved two issues. The bids were for two contracts, and the city had stated that the contracts would be awarded to the bidder with the lowest aggregate cost for both contracts. Moffett's errors were contained solely in the bid for one of the contracts and therefore Moffett had the lowest bid for that work. Moffett's bid was also the lowest in the aggregate, but it submitted one of the highest bids for the other contract. The city informed Moffett that the contracts would be split and that another contractor with the lowest bid on the other contract would be awarded that work. Moffett then brought this suit asking the court to order the city to award both contracts to Moffett and to order the city to reform the contract containing the errors. *Id.* at 1111–12.

16. *Id.* at 1114.

17. Moffett, Hodgkins, & Clarke Co. v. Rochester, 178 U.S. 1108, 1115–16 (1890).

18. *Id.* at 1115. The case was not clear on whether or not Moffett's bond was returned.

19. 124 A.2d 557 (Md. 1956). Other commonly cited cases are Peerless Casualty Co. v. Housing Authority of Hazelnut, 228 F.2d 376 (5th Cir. 1955) and Dick Corp. v. Associated Electric Co-op., 475 F. Supp. 15 (W.D. Mo. 1979).

20. 124 A.2d. at 562. A very small number of courts add that the governing board must have either constructive or actual knowledge of the mistake at the time the contract is awarded in order to allow the contractor to withdraw. Townsend v. McCall, 80 So. 2d 262 (1965); *but see* Marana Unified Sch. Dist. v. Aetna Casualty and Surety Co., 696 P.2d 711, 715 (Ariz. 1984) (discussing why the governing board's knowledge is not relevant to the determination). Also, some courts ask the contractor to provide a certain level of proof when establishing the amount and nature of the mistake. Wilfred's Inc. v. Metropolitan Sanitation, Inc. 372 N.E.2d 946, 951 (Ill. 1978) (requiring "clear and positive evidence"); *Dick Corp.* at 16 (requiring "clear and convincing evidence").

Elements of Equitable Basis for Withdrawal

Enforcement is Unconscionable

A bid can be withdrawn if enforcement of the contract would be unconscionable.[21] In these cases, the courts are interested in whether or not the enforcement would be so unfair that it would violate public sensibilities. A contract violates public sensibilities if (1) the error was substantial and material to the contract and (2) the contractor will lose a substantial amount of money if the contract is enforced. Although unconscionability is listed as a separate criterion, it is solely addressed in terms of the substantial and material nature of the mistake and is rarely discussed in any significant manner outside that context.[22]

Substantial Error Material to Contract

Courts have been interested in the amount of the error and the relationship of this error to the total contract. The terms "material to the contract" and "substantial error" have been used interchangeably, but they both concern discerning how large the error is and how much the contractor who has made the error stands to lose on the project. In making the determination of substantiality and materiality courts often look to the percentage of the error in comparison to the total bid, the net worth of the company, and whether the mistake concerns a material part of the contract.[23]

For example, in *Alaska International Construction, Inc. v. Earth Movers*, the error constituted $81,000 of a $4 million bid, or 2.5 percent of the bid, and the amount of the bid was within the expected variation of the contractor's costs. The Alaska court found that the error was not substantial enough to warrant withdrawal.[24] Conversely, in *City of Devils Lake v. St. Paul Fire and Marine,* the error also constituted a relatively small percentage of the bid amount (4.5 percent), but the federal District Court for North Dakota found that the error was substantial enough to warrant withdrawal. The court concluded that because the contractor would lose $112,000 if forced to perform the contract and because the error, an omission of the cost of an item, related to a feature integral to the bid, withdrawal would be allowed.[25]

Absence of Negligence and Good Faith

The absence of negligence and good faith on the part of the bidder are the factors most examined and discussed by courts facing the issue of bid withdrawal. In most cases, the role of the contractor both in making the error and in promptly informing the governing board of the error appears to be most pivotal.[26] This stems from the equitable principle that bars equitable remedy where there is fault or neglect on the part of the complaining party.[27]

Courts have taken a variety of approaches when evaluating negligence and good faith of the bidder. Some courts look to the level of negligence on the part of the contractor and attempt to determine whether or not the contractor has been so negligent that it should not be allowed to withdraw its bid without incurring liability. Of these courts, most find that gross negligence will prevent withdrawal.[28] For example, in *James T. Taylor and Sons v. Arlington Independent School District*, the court concluded that the contractor was negligent and careless because he failed to carry over a digit when computing the amount of his bid. This negligence, however, did not prevent withdrawal of the bid. The Texas court added that

> ordinary negligence will not necessarily bar the granting of equitable relief. Generally, it is only when the negligence amounts to such carelessness or

21. In the alternative, a minority of courts require that the mistake be so substantial that the governing board and the contractor did not have a "meeting of the minds." Basic contract law provides that both parties must intend to make the agreement. These courts reason that because of the mistake the bidder did not intend to make the offer (bid) that was made and therefore the parties did not have a meeting of the minds on an essential term of the contract. Peter Kiewit Sons' Co. v. Washington State Dep't of Trans., 635 P.2d 749 (Wash. 1981). Courts that require that the parties did not have a "meeting of the minds" to permit withdrawal have interpreted this requirement the same as other courts have interpreted unconscionability.

22. *See Marana Unified Sch. Dist.,* 696 P.2d at 716 *and* City of Devils Lake v. St. Paul Fire and Marine Ins. Co., 497 F. Supp. 595 (N.N.D. 1980).

23. Alaska Int'l Construction, Inc. v. Earth Movers, 697 P.2d 626, 630 n. 8 (Alaska 1985) gives a detailed listing of other cases and the amount of error necessary in those cases to warrant withdrawal and rescission. These errors range from 4.7 percent to 100 percent.

24. *Id.* at 630.

25. *City of Devils Lake* at 597–98.

26 . This is not true of all courts. At least one court found the issues of negligence and good faith irrelevant. Regional Sch. Dist. No. 4 v. United Pacific Ins. Co., 483 A.2d 895 (Conn. 1985). In *United Pacific,* the Connecticut court concluded that the relevant consideration was whether the governing board was taking advantage of the bidder's error. In making its ruling, this court focused on prompt notification to the governing board of the error before the contract was awarded. *Id.* at 899.

27. The doctrine of unclean hands states that a person seeking an equitable remedy must not be at fault. *Re, supra* note 11.

28. James T. Taylor and Sons v. Arlington Indep. Sch. Dist., 335 S.W.2d 371 (Tex. 1960); *see, e.g.,* People *ex rel.* Dep't of Pub. Works and Build. v. Southeast Nat'l Bank of Chicago, 206 N.E.2d 778 (Ill. 1971) (secretary improperly inputted a figure into the adding machine).

> lack of good faith in calculation that [it] violates a positive duty in making up the bids . . . that [the court] will deny equitable relief.[29]

At least two courts, however, have held that simple negligence is enough to prevent withdrawal.[30] In *Mountain Home School District No. 9 v. T. M. J. Builders, Inc.,* the contractor hastily prepared the bid, accepted proposals from subcontractors up until a few minutes before the bids were due, and did not check the figures before submitting the bid. The Arkansas court found that this amounted to a failure to exercise ordinary care and prevented withdrawal of the bid.[31] Likewise, in *Nelson Inc. of Wisconsin v. Sewerage Commission of the City of Milwaukee,* a Wisconsin court found that the plaintiff did not exercise ordinary care by omitting the cost of five separate items from the final bid proposal.[32] Other courts have held, however, that behavior identical to the behavior in *Mountain Home* and *Nelson* was not even ordinary negligence. In *People ex rel. Dept. of Public Works and Buildings,* the contractor was found not to be negligent when the bid was hastily prepared, the contractor accepted proposals from subcontractors up until minutes before the bids were due, and the secretary entered the wrong amount when calculating the total on an adding machine.[33]

Still other courts have abandoned the idea that negligence is relevant and have simply stated that it is the absence of good faith that is most relevant.[34] In *Powder Horn Construction v. City of Florence*, Powder Horn submitted a bid for construction work on a water treatment plant. A sum of $66,600 that represented the cost of one major item was omitted from the bid. Powder Horn informed the city and requested that the bid be withdrawn, but the city awarded the contract to Powder Horn.[35] The Colorado Court of Appeals ruled against Powder Horn, concluding that the contractor was negligent. The Colorado Supreme Court reversed the ruling and established good faith as the requisite factor to consider. In doing so the court stated that

> [t]he very term mistake generally connotes some degree of negligent conduct. [citations omitted] In most circumstances it would be illogical, if not impossible, to require a bidder who made a mistake in calculating a bid to establish that the mistake was one most reasonable bidders would make under the same or similar circumstances.[36]

The court added that if an error was either clerical or mathematical the proper standard should be one of good faith. It noted, however, that evidence of negligence could be considered when determining good faith.[37]

A third group of courts has used the negligence standard to draw the distinction between a clerical or mathematical error, which is allowable, and a judgment error, which would bar withdrawal of the bid.[38] The majority of these courts have held that withdrawal is permitted for a clerical mistake, such as transposing figures or mathematical errors. A number of courts have found the error excusable when the contractor transposed figures while filling out the bid sheet or when the contractor failed to include the cost of a portion of the project on the bid sheet.[39] Other examples include situations when the contractor failed to realize that his calculator only had seven places and his estimate had eight, as well as a situation when the subcontractor's bid contained an error.[40] And at least three

29. *James T. Taylor* at 375.

30. Mountain Home Sch. Dist. No. 9 v. T. M. J. Builders, Inc., 858 S.W.2d 74 (Ark. 1993); Nelson Inc. of Wisconsin v. Sewerage Comm'n of the City of Milwaukee, 24 N.W.2d 290 (Wis. 1976).

31. *Mountain Home* at 76.

32. *Nelson Inc.* at 294.

33. *People ex rel.* at 781.

34. Powder Horn Constr. v. City of Florence, 754 P.2d 358 (Colo. 1988); *see, e.g.,* Puget Sound Painters v. Washington, 278 P.2d 302 (Wash. 1954); Marana Unified Sch. Dist. No. 6 v. Aetna Casualty and Surety, 696 P.2d 711, 717 (Ariz. 1994).

35. *Powder Horn* at 358–59.

36. *Id.* at 361.

37. *Id.* at 363.

38. Peter Kiewit Sons' Co. v. Washington State Dep't of Transportation, 635 P.2d 749, 744 (Wash. 1981); *see also* State v. Hensel Phelps Constr. Co., 634 S.W.2d 168, 172 (Mo. 1982) (containing a detailed citation to other cases involving typical errors).

39. *See* Cataldo Constr. v. County of Essex, 265 A.2d 842 (N.J. 1970); City of Baltimore v. DeLuca-Davis Constr. Co., 124 A.2d 557 (Md. 1956); Peerless Casualty Co. v. Housing Authority of Hazelnut , 228 F.2d 376 (5th. Cir. 1955); City of Cheyenne v. Reiman Corp., 869 P.2d 125 (Wyo. 1994); M. F. Kemper Constr. Co. v. City of Los Angeles, 235 P.2d 7 (Cal. 1951); Dick Corp. v. Associated Electric Co-op, 475 F. Supp. 15 (W.D. Mo. 1979). Although rejection for nonresponsiveness will not be addressed in this bulletin, it should be noted that a failure to comply with specifications may be grounds for the governing body to reject the bid for nonresponsiveness. Professional Food Services Management v. North Carolina Dep't of Admin., 109 N.C. App. 265, 268, 426 S.E.2d 447, 450 (1993). This, however, is grounds for the governing body and not the contractor.

40. Kenneth E. Curran, Inc. v. State, 215 N.E.2d 702 (N.H. 1965) (calculator went to $99,999.99 but bid total was $186,495.20); Wilfred's Inc. v. Metropolitan Sanitation, Inc., 372 N.E.2d 946, 949–950 (Ill. 1978) (holding that the general contractor had not made a judgment error where the general contractor chose a subcontractor who made an error in judgment that amounted to a $150,000 underestimate).

courts have found a clerical error where the contractor failed to properly read the specifications.[41]

Bids cannot be withdrawn for errors in judgment. Such errors generally involve situations when the contractor failed to consider an additional cost that was foreseeable when the bids were computed. The following cases illustrate when withdrawal was not allowed.

In *Guido and Guido, Inc. v. Culberson Co.*, the contractor attempted to withdraw his bid after his accountant informed him that the company was not financially able to proceed with the contract.[42] No error had been made in computing the bid; the company was simply not financially prepared to do the work.[43] Similarly, a federal district court found that a judgment error was made in *Osberg Construction Co. v. City of Dalles.* Here the contractor failed to take into account additional labor and materials that could be needed because of a contingency in the project's specifications.[44] A judgment error was also found in *Town of Lyndon v. Burnett's Contracting Co.* In this case, the contractor's assumption that the city would obtain all the necessary easements in order to complete the project was incorrect, and the contractor was required to incur additional cost getting these easements.[45]

Judgment errors have also been found when the contractor failed to consider additional costs that would have been foreseeable had the contractor made reasonable investigation.[46] In *State v. Hensel Phelps Construction Co.*, Missouri was seeking a contractor to construct a bridge over the Mississippi River to link Missouri and Tennessee. Before computing the bid the contractor asked other contractors who had done work in the area whether or not the purchases for the project would be free of sales tax under Tennessee law or taxed under Missouri law.[47] He also asked if there were any "union problems" in the area. He was informed that the purchases were tax free and that the area had no labor problems. It later turned out that his purchases were not tax exempt and that he would incur additional cost transporting the workers because of a long-standing oral agreement regarding the labor.[48]

The Missouri court held that the errors were clearly not clerical in nature, but instead were errors in judgment. The court reasoned that

> a party [should] not be allowed to rescind its obligation in equity when its mistake has resulted from a failure to ascertain the true state of the facts and, without inducement by the other party, neglects to avail himself to opportunities for information.[49]

The court found that Hensel Phelps had performed limited investigation of both the area labor practices and the tax consequences of the project by failing to ask the authorities about the tax consequences and by failing to ask area labor officials about any oral agreements in the area. The court concluded that the failure to adequately investigate constituted "decisional errors," which should bar withdrawal.[50]

Substantial Hardship to the Governing Board

When determining substantial hardship to the jurisdiction, courts have almost always focused on whether the governing unit was informed of the mistake before or after the bid was awarded. As a general rule, most courts hold that if the bid was accepted before the error was known then the bid could not be withdrawn.[51] However, when the contract was awarded immediately after the bids were opened, the courts have been more lenient in allow-

41. State of Connecticut v. F. H. McGraw & Co., 41 F. Supp. 369 (D. Conn. 1941) (contractor failed to read specification that required a more expensive type of drilling, and calculated the bid with a cheaper method); City of Devils Lake v. St. Paul Fire and Marine Ins. Co., 497 F. Supp. 595 (D.N.D. 1980) (project required one method of laying pipes and engineer computed the cost using a cheaper method); Utah v. Union Constr. Co., 339 P.2d 421 (Utah 1959) (contractor visited the site and made a mistake in determining the boundaries of the property).

42. 459 S.W.2d 674 (Tex. 1970).

43. *Id.* at 676.

44. Osberg Constr. Co. v. City of Dalles, 300 F. Supp. 442, 444–45 (D. Or. 1969).

45. Town of Lyndon v. Burnett's Contracting Co., 413 A.2d 1204 (Vt. 1980).

46. State v. Hensel Phelps Constr. Co., 634 S.W.2d 168 (Mo. 1982).

47. As it turned out, both Missouri and Tennessee law said that the purchases were not exempt. The court also found that the Missouri state regulations given to all bidders clearly stated that the purchases were not tax exempt. *Id.* at 170.

48. *Id.* at 170. The project involved work in both Missouri and Tennessee. Hensel Phelps decided to begin work in Tennessee because the height of the landscape made Tennessee less susceptible to flooding and also because most of his purchases would be made in Tennessee. He did not find out until after submission of the bid that because of local labor agreements, the work crew was to report in Missouri every morning and would therefore have to be ferried across the river to work. Additional costs would be incurred because the contractor needed to rent a vessel, hire operators for the boats, pay workers one way, and acquire longshoremen's and marine insurance. *Id.*

49. *Id.* at 174.

50. State v. Hensel Phelps Constr. Co., 634 S.W.2d 168, 176 (Mo. 1982).

51. *See* City of Baltimore v. DeLuca-Davis Constr. Co., 124 A.2d 557, 562 (Md. 1956). *See, e.g.,* Powder Horn Constr. v. City of Florence, 754 P.2d 358, 359 (Colo. 1988) (giving a catalog of cases where courts have held that the bid cannot be withdrawn if it is accepted before the mistake is detected).

ing withdrawal.[52] And in a limited number of circumstances, courts have allowed withdrawal of the bid when the mistake was not discovered until after the contract was awarded.[53]

The courts have also recognized that all governing boards suffer a loss of the benefit of the bargain, but have consistently held that this loss is not sufficient to prohibit withdrawal of the bid. When the loss was greater than the benefit of the bargain, courts have tended to be sympathetic to the contractor— if the loss was caused by the governing board's failure to let the bidder withdraw after prompt notification of an error was given.[54]

Forfeiture of Bid Bonds and Other Damages

One focus of litigation in bid withdrawal cases is whether the withdrawal will cause any action to be taken against the contractor. The rulings of the courts when dealing with the bid bond and damages have been largely consistent. Most courts hold that when equity allows withdrawal, the bid bond should be returned and that no action for damages should be taken against the contractor. However, a minority of courts have held differently when a state statute, county ordinance, or the like mandated forfeiture of the bid bond.[55] These courts have held that by passing legislation that mandates forfeiture of the bid bond, the jurisdiction intended to override the common law. They also add that ignoring the statute would "materially weaken the purpose of the bidding procedure for public contracts and make the bid bond requirement meaningless."[56] While these courts require forfeiture of the bond, they generally add that the contractor cannot be sued for other damages that result from withdrawal of the bid, such as the difference between the eventual contract price and the withdrawn bid or other costs that result from seeking another bidder. The courts have held this because they have determined that the bid bond was intended by the legislature to be the exclusive remedy of the governing board.[57]

Application to North Carolina Public Contracts

Construction Contracts

North Carolina law permits withdrawal of bids for public construction contracts.[58] G.S. 143-129.1 provides that a bid for a public construction or repair contract can be withdrawn without forfeiture of the bid bond under certain circumstances. The request to withdraw must be made within seventy-two hours after the bids are opened, and the contractor must show, with clear objective evidence, that

> the price bid was based on a mistake, which constituted a substantial error, provided the bid was submitted in good faith, and the bidder submits credible evidence that the mistake was clerical in nature as opposed to a judgment error, and was actually due to an unintentional and substantial arithmetic error or an unintentional omission of a substantial quantity of work, labor, materials or services made directly in the compilation of the work . . .[59]

The statute is an apparent codification of the common-law principles of equity. Like the common law, the statute requires that the error be clerical, substantial, and unintentional and that the bid was submitted in good faith. Unfortunately, no courts in North Carolina have interpreted the withdrawal statute and therefore no North Carolina court has stated that the common-law principles of equity should be used in interpreting the North Carolina withdrawal statute.

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52. Board of Sch. Comm'rs v. Bender, 72 N.E. 154 (Ind. 1904) (contract awarded at bid opening).

53. R. O. Brogmagin & Co. v. Bloomington, 84 N.E. 700 (Ill. 1908) (error discovered day contract awarded).

54. Santucci Constr. Co. v. County of Cook, 315 N.E.2d 565 (Ill. 1974) (holding that the contractor was not responsible when the county suffered an additional $100,000 loss because it failed to allow the plaintiff to withdraw the bid when it was originally requested). *See also* La Conner v. American Constr. Co., 585 P.2d 162 (Wash. 1978).

55. *Compare* M. F. Kemper Constr. Co. v. City of Los Angeles, 235 P.2d 7, 12 (Cal. 1952) (holding that principles of equity override a statute mandating forfeiture of the bid bond for withdrawal) *with* City of Cheyenne v. Reinman Corp., 869 P.2d 125, 128 (Wyo. 1994) (holding that the statute requiring forfeiture of the bond expressed the intent of the legislature and therefore must be followed). For more cases on both sides see David B. Harrison, Annotation, *Right of Bidder for State or Municipal Contracts to Rescind on the Ground that Bid Was Based Upon His Own Mistake or That of His Employee*, 2 A.L.R. 4th 991, 997–999 (1980). In order to avoid this interpretative problem the Texas competitive bidding statute that requires forfeiture of the bid bond also provides that this statute is to have no effect on the common-law right of a bidder to withdraw a bid due to mistake. TEX. LOCAL GOV'T CODE § 271.026 (1995).

56. Marana Unified Sch. Dist. No. 6 v. Aetna Casualty and Surety, 696 P.2d 711, 714 (Ariz. 1994); *see., e.g.,* A. J. Colella, Inc. v. County of Allegheny, 137 A.2d 265, 268 (Penn. 1958); Clark Constr. Co. v. State of Alabama Highway Dep't, 451 So. 2d 298, 300 (Ala. 1984).

57. *Colella* at 268.

58. G. S. 143-129.1.

59. *Id.*

Fortunately, the North Carolina statute contains some of the same criteria used by other states with very similar withdrawal statutes.[60] Courts in states with similar statutes have used the common-law principles in interpreting these statutes in their jurisdictions. Accordingly, it helps in interpreting North Carolina law to examine how these other states have interpreted their own statutes on the bid withdrawal.

For example, Idaho's statute grants relief if a "clerical or mathematical mistake was made" and the "mistake was material."[61] The Idaho Supreme Court decided in *Boise Junior College District v. Mattefs Construction Co.*[62] that the error made by the contractor was the type contemplated by the legislature. Using common-law principles of equity from states where there was no withdrawal statute, the court concluded that the contractor had made a clerical error that would entitle it to withdraw its bid. The error was caused when the contractor failed to record the bid of a subcontractor on the bid sheet. The office manager discovered the mistake at 1:55 p.m. on bid-opening day and was unable to contact the president of the company before the bids were opened at 2:00 p.m. The court found that this was not an example of gross negligence or willful or fraudulent intent to omit the item in order to gain an advantage and allowed the contractor to withdraw its bid without forfeiting its bid bond.

Maryland also has a statute that allows contractors to withdraw bids based on clerical error.[63] The statute codifies the common law as found in *City of Baltimore v. DeLuca-Davis Construction Co.*[64] In that case, the Maryland Court of Appeals allowed the defendant contractor to withdraw its bid that was based on a clerical error. The testimony showed that in calculating the cost of item #2 in the specifications, the "estimated number of cubic yards was divided into the estimated dollar cost to obtain a unit cost of $13.34 per cubic yard." On the afternoon prior to the submission of the bid, the estimator prepared a summary sheet using the figures from the previous calculations. Instead of using $13.34 for the cost of item #2, the estimator used $3.34 because the "1" on the first sheet was "on a vertical ruled line in the work sheet apparently accentuated by the paper having been folded." The mistake resulted in the bid being $589,880 lower than it should have been. The court found the error was entirely clerical and mechanical and that the bid was submitted in good faith. It also found that the error was material and substantial because the bid would have caused a loss of $400,000 to a company that was worth only $82,000.[65]

As for damages if the contractor is allowed to withdraw, the North Carolina withdrawal statute states that if the withdrawal is in accordance with the withdrawal requirements set out in the statute, the contractor will not forfeit the bid bond.[66] Some state statutes on the subject provide likewise.[67] There are few cases interpreting these states' withdrawal statutes. None of the cases discuss the ability of the governing board to seek other damages where the court has ruled that the bid bond must be returned to the contractor. However, it seems likely that withdrawal statutes are intended to codify equitable principles. In none of the common-law cases where equity permitted withdrawal without forfeiture of the bid bond did the court allow any additional legal action to be taken against the bidder for any monetary damages.[68] Therefore,

60. For example, Ohio's statute says a bidder may withdraw a bid provided that the bid "was a clerical mistake as opposed to a judgment mistake, and was actually due to an unintentional and substantial arithmetic error or an unintentional omission of a substantial quantity of work, labor, or material made directly in the compilation of the bid." [OHIO REV. CODE ANN. § 9.31 (Baldwin 1994)]. Georgia's statute explicitly codifies the common-law principle of equity [GA. CODE ANN. § 23-2-31 (Michie 1994)]. *See, e.g.*, N.Y. GEN. MUN. § 103(11) (CONSOL. 1994) (explicitly providing that withdrawal is the only remedy for the contractor); 31 V.I. CODE ANN. tit. 31, § 236 (1993) (providing that "[t]he government is equitably responsible for a mistake in the calculations on a bid by the bidder . . ."); 73 PA. CONS. STAT. § 1602 (1994); VA. CODE ANN. § 11-54 (Michie 1994).

61. IDAHO CODE § 54-1904C (a), (c) (1994). Subsection (b) mandates that the bidder gives the public entity written notice of the mistake within five calendar days after the opening of the bids, specifying in the notice in detail how the mistake occurred.

62. 450 P.2d 604 (Idaho 1969).

63. MD. STATE FIN. & PROC. § 13-209. Bids based on clerical or arithmetic mistakes that substantially affect the bid may be withdrawn.

64. 124 A.2d 557 (Md. 1956).

65. *Id.*

66. Under the North Carolina withdrawal statute a bidder who is permitted to withdraw may not forfeit the bid bond but he or she still faces a penalty. The statute states that a bidder who has filed a request to withdraw is not permitted to rebid on the work if the project is relet for bids. Also, a bidder who is permitted to withdraw cannot supply any "materials, or labor to, or perform any subcontract or work agreement for" the person to whom the contract is awarded without approval of the agency. G.S. 143-129.1.

67. ALASKA STAT. § 36.30.160 (1994); D. C. CODE ANN. § 1-1185.2 (1994); KY. REV. STAT. ANN. § 45A.185 (1994); N.Y. GEN. MUN. § 103 (CONSOL. 1994); R.I. GEN. LAWS § 37-2-40 (1994). *But see* WIS. STAT. § 16.855 (1994) (providing that the bid bond is still forfeited but limiting damages for equitable withdrawal to the amount of the bid bond).

68. For a discussion of damages where the court used equity to permit withdrawal, see the section of this bulletin on "Forfeiture of Bid Bonds and Other Damages," *supra* text p. 7.

unless the statute that permits withdrawal allows for damages to be assessed against the bidder, the contractor should be entitled to the return of the bid bond and no other damages should be assessed against the bidder.[69]

Purchase Contracts

As stated earlier, the North Carolina statute permitting withdrawal applies only to construction and repair contracts. The absence of any statute or case law on withdrawal of bids for purchase contracts in North Carolina creates an ambiguity that cannot definitively be resolved. The absence of a statute may mean a number of things. Either the legislature (1) excluded purchase contracts by oversight, (2) excluded purchase contracts with the intention that the common law should still apply, or (3) excluded purchase contracts because withdrawal is not an option in the bidding process for these contracts. It is most likely that North Carolina courts would hold that the absence means the common-law principles apply.

The Alabama Supreme Court, when faced with a similar situation, found that Alabama common law regarding withdrawal for unilateral mistake applied to a particular type of public contract, even though the bidding statute omitted that particular type of public contract from its coverage. The Alabama court, through a series of court decisions, held that the bidding statute, which disallowed withdrawal for public works contracts, did not apply to other state contracts.[70] However, North Carolina, unlike Alabama, lacks any court decisions that hold that unilateral mistake will allow withdrawal. Because of this void, there is a slim chance that North Carolina courts could reject the common-law principles altogether.[71]

Assuming that North Carolina courts follow the common-law principles when faced with withdrawal of bids on purchase contracts, the case law clearly suggests that if bid withdrawal is allowed, the bid bond will be returned to the contractor and no additional damages can be sought by the governing board.[72] However, a complication could be created by the provision in G.S. 143-129 that mandates forfeiture of the bid bond. As stated earlier, a minority of courts have held that such a provision will override the common-law principle that would allow return of the bond. If North Carolina courts follow this philosophy, then the existence of the withdrawal statute for construction could provide evidence that equity should not be controlling for purchase contracts. The court could reason that if the legislature had intended withdrawal without penalty for purchase contracts, then the withdrawal statute would have covered all public contracts.[73]

Alternatives to Withdrawal

Governing boards should not ignore other means of avoiding a contract when there has been a bid error. Withdrawal is not the only option. One possibility is that the governing board may reject a bid that contains an error as nonresponsive. A bid with a substantial mistake may be deemed nonresponsive if it does not conform substantially with the terms of the request for bids. Whether a bid conforms substantially or whether, instead, it contains a material variance depends on whether the bidder's proposal gives the contractor an advantage or benefit not enjoyed by other bidders. If the bid is nonresponsive, the authority may reject it outright, and the contractor will not have to attempt withdrawal.[74] In this situation, it would seem that the error must be apparent from the face of the bid.

Another possibility is that the governing board may deem the contractor nonresponsible. A nonresponsible contractor is one who lacks the skill, judgment, integrity, sufficient financial resources, and ability necessary for the

69. To avoid any confusion on this issue a number of states provide that no action can be taken against the contractor where withdrawal is permitted. KY. REV. STAT. ANN. § 45A.185(4) (Baldwin 1993) ("if a bidder is permitted to withdraw his bid before award because of mistake in the bid as allowed by law or regulation, no action shall be taken against the bidder or the bidder's security"); *see, e.g.,* R.I. GEN. LAWS § 37-2-40 (1994).

70. *Ex parte* Perusini Constr. Co., 7 So. 2d 576 (Ala. 142) (holding a contractor could withdraw his bid without forfeiture of his bond when there has been a unilateral mistake). Clark Constr. Co. v. State of Alabama Highway Dep't, 451 So. 2d 298 (Ala. 1984) (holding that a contractor was not entitled to the return of his bid bond when a state statute explicitly demanded that the bond not be returned if the bid was withdrawn on a public works contract). Water Works Bd. v. Jones Environmental Constr. Co., 533 So. 2d 225 (Ala. 1988) (holding that in the absence of a statute specifically changing the common law as it applied to the type of contract at issue, the common law demanded that the contractor's bond be returned upon bidder's withdrawal for unilateral mistake).

71. As noted *supra* note 2, North Carolina would be part of a very small minority if it did not allow withdrawal for unilateral mistake.

72. For a discussion of this question under equitable principles see the section of this bulletin on "Forfeiture of Bid Bonds and Other Damages," *supra* text p. 7.

73. This is a minority view, but the possibility that North Carolina courts could follow this view should not be ignored.

74. Professional Food Services Management v. North Carolina Dep't of Admin., 109 N.C. App. 265, 268, 426 S.E.2d 447, 450 (1993).

faithful performance of the contract.[75] Thus, even if the contractor cannot withdraw under the bid withdrawal statute or under common law, the authority may deem the bidder nonresponsible because it submitted such a substantially erroneous bid or because the contractor cannot obtain the backing of a surety at the erroneous price and therefore lacks the requisite financial resources to complete the job.

A third option is reformation. Reformation, or a change in the bid, is an option when both the governing board and the contractor have made a mistake.[76] Here the contractor is allowed to change the bid and is assessed no penalty. Also, the governing board can reject all bids and re-advertise. The board need not give any reason for rejecting all the bids, but cannot reject bids in order to evade the competitive bidding statute.[77] If the bids are rejected, then the bid bonds are returned to all parties and bids are taken on the project again.

Conclusion

Determining when a governing board should permit withdrawal without imposing liability on the contractor for the withdrawal cannot be based on any one factor alone. Courts often do not even discern which factors are being considered, and most courts have not stated that any one factor weighs more heavily than any other. An error can be so material or substantial that even a great degree of negligence will not stop a court from permitting withdrawal; or a court may allow withdrawal when there was a judgment error because the notification was prompt and the governing board stands to lose nothing by the withdrawal.

Whether the contract is a purchase contract or a construction contract, the issue is the same. The major question to ask is whether enforcement seems so unfair to the contractor that the governing unit is taking advantage of the mistake of the other party. The Superior Court of New Jersey in *Cataldo Construction Co. v. County of Essex*, caught the essence of the evaluation:[78]

> "Mistake," by its very definition, implies some degree of negligence. Human failing is its essence and it denotes error of judgment. However, it still remains the obligation of a court of equity to determine whether, despite such misjudgment, it would be inequitable and fundamentally unjust not to set aside the sale.[79]

It is probably safe to assume that North Carolina courts will follow the majority of the jurisdictions that have addressed this issue and hold that withdrawal without any penalty will be allowed only for those construction contracts that meet the statutory requirements and for those purchase contracts that meet the equitable principles outlined by other courts. However, a definitive answer on the issue cannot be given until a North Carolina court deals with the issue.

75. Kinsey Contracting Co., Inc. v. City of Fayetteville, 106 N.C. App. 383, 385, 416 S.E.2d 607, 609, *petition for disc. rev. denied*, 332 N.C. 345, 420 S.E.2d 189 (1992).

76. Moffett, Hodgkins, & Clarke Co. v. Rochester, 178 U.S. 1108 (1899). It is unclear how the equitable remedy of reformation will work with North Carolina's bidding statute.

77. G .S. 143-129.

78. 265 A.2d 842 (N.J. 1970).

79. *Id.* at 846.

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