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The Architect's Authority During Bidding

You are a bidder on a large municipal project. One of your subcontractors contacts you three hours before the bids are due and asks if he can substitute Brand X Widgets in place of the Brand A Widgets specified in the bid documents. You take a look at the specifications under "Widgets" and, sure enough, the only brand of widgets specified is Brand A. You take a close look at the specifications and realize that the performance section is taken from the Brand A Widget sample specifications that Brand A gives to architects.

You place a call to the architect and ask if you can make the substitution. The architect suggests that you read the part of the specifications that states that all bids must be based on the specified products and substitutions can be made only by following the written request for substitution procedure. However, since the bids are due momentarily, there is no time for such procedures, so he suggests that you base your bid on the substitute and note this on your bid form. What is the effect of this?

Several questions are raised by this scenario, especially in the area of public bids. Assuming the widgets are a material part of the bid, is your bid non-responsive? If it is, then the owner has a right to (and under most laws, must) reject your bid as non-responsive. In other words, you must submit a bid that conforms exactly to all of the requirements of the Bidding Documents. If you are the only bidder using Brand X Widgets while everyone else's bid is based on the specified Brand A Widgets, you will have an unfair advantage and your bid should be thrown out. This may also create a controversy if you are awarded the bid and the owner insists on using the specified item. The only way to make this fair is to contact the architect or owner in sufficient time for the architect to issue an Addenda prior to bid opening that allows all of the other bidders to also bid Brand X Widgets. This way, all bidders can submit based on the lowest price using comparable and acceptable products.

In private bids, the owner has substantially more leeway. Usually

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the bid documents give the owner the right to accept or reject any bids based on virtually any reason. If a bidder makes a substitution as stated before, the owner and architect will then be able to contact the other bidders and invite them to resubmit their bids based on using Brand X. The owner can also negotiate with one or more bidders and look at further substitutions not shown in the Contract Documents. Remember that, prior to actually signing the contract, everything is just a negotiation. Once the contract is signed, most of the Bidding Documents become “Contract Documents” that are binding on the owner and contractor.

Can the contractor rely on the architect’s statements prior to bid submittal? The question usually turns on what the architect is being asked to respond to. If the architect is being asked to clarify something, the contractor can usually rely on the architect’s answer. The theory is that the architect is not changing anything, only giving an explanation to the contractor. If, on the other hand, the architect is being asked to authorize an actual change to the bidding requirements or Contract Documents, the contractor cannot rely on the architect but must get the owner’s approval. The only exception is the somewhat rare situation where the owner declares the architect to be the owner’s agent, with authority to actually bind the owner. Note that this is not the case with the AIA documents, where the architect is merely a “representative” of the owner and not an agent. As a representative, the architect does not have authority to alter the Contract Documents. For instance, the architect cannot accept non-conforming work, but does have the authority to reject non-conforming work. The problem regarding pre-bid substitutions is that A201 does not even apply until the owner and contractor have signed their agreement. A better place to look for a general overview of an architect’s customary authority is *AIA Document B141, the Standard Form of Agreement Between Owner and Architect*.

In B141, the architect is again merely a “representative” of the owner and not an agent. In Article 2.5 of B141, the architect is to “assist” the owner in obtaining bids or negotiating with bidders. Here is the relevant section:

2.5.4.4 The Architect shall consider requests for substitutions, if permitted by the Bidding Documents, and shall prepare and distribute addenda identifying approved substitutions to all prospective bidders.

Thus, if B141 applies, the architect can only consider pre-bid substitutions if they are permitted by the Bidding Documents. Usually,

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there is a procedure set forth in the specifications that includes a time limit for review of requests for substitutions, usually seven to ten days prior to bid opening. This then allows the architect to review the request and, if acceptable, distribute addenda to all bidders. What the contractor will usually not know is what contract the architect has with the owner. Even if told that the contract is a B141, the contractor will not know the modifications made to the contract. Many owners will alter the duties and responsibilities of the architect to be less or more than the standard AIA language.

What can the contractor do in these situations? Do not take verbal directions from the architect. Even if the direction is in writing, the contractor must independently evaluate the authority of the architect. If it is a public project, assume that the architect has no authority whatsoever to make any verbal modifications to the bidding documents. Assume further that the only valid modifications are in the form of formal written addenda that are given to all bidders. If this is a private project, you still cannot assume that the architect has authority, but there may be some flexibility, especially where the owner confers some authority on the architect. The best bet here is to get some written direction from the owner as to the architect's authority. Ask at the pre-bid meeting whether and to what extent the architect will have authority to make pre-bid modifications. Follow up in writing.

If you are the architect, you need to follow your contract. Contractors will call you during bidding and ask for permission to substitute materials, products or details. Be very clear about your authority. Generally, you will not have any authority to permit substitutions for only one bidder. If the substitution is a good idea, issue an addenda so that all bidders can bid the substitution. Do not be rushed at the last minute prior to bid opening. Adhere strictly to the time limits established in the Instructions to Bidders. If you don't have an AIA contract with the owner, you should clarify exactly what the scope of your authority is during the bidding process. Remember, that the owner will want to make you liable for all of your decisions, particularly the bad ones. It is never a good idea to make important decisions on a last minute basis.

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