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***BID PACKAGES
DETERMINING THE REMAINING SCOPE OF WORK TO COMPLETE
AREAS OF CONCERN***

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INTRODUCTION

"One of the options that is available to sureties in a contract default situation is the solicitation of bids from prospective completing contractors and then either tendering the best responsible bid to the obligee or alternately entering directly into a completing contract with the best responsible bidder after having negotiated and executed a takeover agreement with the obligee. This option is often selected by sureties and affords a method by which the surety can control and mitigate its exposure."

The paragraph above appeared as part of the Introduction to a paper presented by Chuck Stup of FORCON International to the Fourth Annual Southern Surety and Fidelity Claims Conference in April, 1993. The title of that paper was "Early to Bid, Early to Rise" and it discussed methods and considerations for selecting competent bidders, preparing a definition of the remaining scope of work to complete, allocating completion risks in a reasonable and cost effective manner, and obtaining sound competitive bids.

This paper expands upon the earlier paper by focusing in more detail on the bid package, specifically on the information and instructions that should be given to the bidders so that the Surety obtains competitive, responsive bids for a scope of work that includes everything necessary to complete the project, except for the correction of latent defects, for the bid price.

1. **DEFINING THE REMAINING SCOPE OF WORK TO COMPLETE**

Once a Surety has made the decision to obtain competitive bids for the completion of the Principal's work, a decision then needs to be made regarding who is going to define the remaining scope of work to complete.

One possible method for defining the remaining scope of work to complete. is to have a Surety consultant prepare a detailed definition of the remaining work based on the consultant's interpretation of the contract documents and the consultants assessment of the work that had been completed by the Principal. This method should produce a well defined scope for the bidders to price and should allow the bidders to minimize the contingency included in their bids. On the other hand it creates a situation where the successful bidder/completion contractor will be claiming an extra from the Surety for every item of work that he has to perform that was not clearly and specifically identified in the remaining scope of work to complete. This method is generally not recommended except in situations where the Principal's remaining work can be clearly limited to certain distinct and definable tasks and where the Principal's work in place has been clearly accepted by the Obligee and the Obligee's representative.

Another possible method that we understand some sureties have entertained, or employed, is to hire the design architect or engineer to prepare a re-let bid package. This has some potential benefits since the architect or engineer prepared the original bid documents and should be very familiar with the status and acceptability of the Principal's work. The potential risk to the Surety with this process is that the architect or engineer, who is first and foremost the representative of the Owner, may use this opportunity to include work in the completion contract which was not part of the Principal's scope of work. The architect or engineer might be tempted to cover up a design error or omission by incorporating a correction to the design error or omission in the bid documents without identifying it as such. Thus the Surety may end up paying for work that should have resulted in a change order to the Principal.

In most re-let situations it is best to let the selected bidders determine the remaining scope of work to complete via their review of the contract documents and their inspection of the project. The bidders may still be provided with a listing of the remaining work items as determined by the Surety's consultant, however, such a listing would be provided for information purposes only. The bidders would be advised that they were not to rely upon any listing provided and that they needed to independently determine the remaining scope of work to complete.

The underlying controlling factor that the Surety is relying upon in this scenario is that the competitive bidding process will compel the bidders to properly define the remaining work so that they can submit a competitive price. Provided that the re-let bidding process has been properly administered such that the bidders receive clear instructions and all the information they need to independently determine the remaining scope of work to complete, the successful bidder/completion contractor takes on the responsibility for the remaining scope of work to complete. He should not, therefore, be in a position to make claims against the Surety for extra work other than for latent defects.

The advantage of this method of defining the remaining scope of work to complete is that once

the bids are evaluated and a contract awarded, the Surety is in a position to firmly establish its loss with a contingency only for possible latent defects in the Principal's work. The disadvantage is that the bidders will include a larger contingency in their bids to cover the uncertainty of whether their assessment of the remaining scope of work to complete is the same as the Obligees'. This uncertainty can be minimized by providing the bidders with a complete re-let bid package and clear instructions regarding the basis for their bids.

2. MATERIAL TO BE PROVIDED WITH THE BID PACKAGE

In order for the bidders to accurately define the remaining scope of work to complete including the correction of patently defective work performed by the Principal, the following materials should be part of the bid package:

1. Documents that establish the Principal's contractual scope of work.
2. Documents that set forth any known defects or deficiencies in the Principal's completed work and, where necessary, identify acceptable corrective measures.
3. Documents which allow the bidders to determine whether they want to continue to use the Principal's subcontractors and suppliers.
4. Any other documents that will identify for the bidders all known potential changes to the remaining scope of work to complete which may take place after the completion contract is awarded.

A. Documents That Establish the Principal's Scope of Work

This category of documents is the easiest to identify and obtain. It includes the project plans and specifications, the executed contract between the Principal and the Obligee; any addenda that were issued during the original bid period, and any executed change orders to the original contract between the Principal and the Obligee. All of these documents should be available in the Principal's files as well as from the Obligee or project architect or engineer. The multiple sets of plans and specifications that will be needed for the re-let bid process generally have to be obtained from the project architect or engineer for the cost of printing the number of sets needed.

The instructions to the bidders should stipulate that the bid price should be based upon the Principal's contractual scope of work as defined by these documents.

Other documents which may have been generated and which, if generated, should be made available to the bidders to assist them in interpreting the contract documents include the following:

- ! Requests for Information (RFI's) generated by Principal with any architect/engineer responses.
- ! Rejected change orders/claims which are based on architect/engineer and owner contract document interpretation.
- ! Miscellaneous architect/engineer field directives or correspondence accepted by Principal which identify minor scope changes such as tradeoffs and dimensional clarifications.

- ! Shop drawings and submittals which establish the design for performance specification items (such as fire protection) and which may also require code authority approval.
- ! Principal's scope often includes quantity and/or unit price allowances. The status of such allowances at the time of termination needs to be established, and, if possible, approved by the architect/engineer and Obligee for proper allowance inclusion in the bids.

B. Documents Which Identify Known Deficiencies in Principal's Work

If the bidders on a re-let completion bid are to include in their bid price the correction of any patently defective work performed by the Principal, they should be provided with all documents that identify any known defects. Generally these will be documents generated by the Obligee or the project architect/engineer and include the following:

- ! Deficiency reports.
- ! Architects/engineers field reports.
- ! Job site meeting minutes.
- ! Correspondence from Obligee or architect/engineer to Principal.
- ! Punch lists.
- ! Concrete test reports and other tests/inspections that identify non-conforming work.

Again, all of these documents should be available in the Principal's files, however, it is advisable to ask the project architect/engineer to provide a complete set of any such documents. In fact, it is generally best to specifically request that the project architect/engineer provide a current and complete listing of all the defects or deficiencies that they have identified in the Principal's work so that this listing can be included in the bid package. Depending upon the scope of their construction administration contract, the architect/engineer may not be in position to provide such a detailed, current listing and may want to be reimbursed by the Surety to prepare such a list. The Surety should consider paying for this service if necessary since it will enable the Surety to provide the bidders with the architect/engineers current assessment of the work in place. A secondary benefit of having this list prepared is that it can be compared to work previously approved for payment by the architect/engineer to determine if there has been any overpayment to the Principal. The bid documents should state that the materials provided are for informational purposes only, and that the bidder should make their own assessment of other deficient work. If additional defects are left out, a bidder could argue that they are entitled to a change order if this caveat is not included..

When the necessary corrective measures are not clearly defined in the contract documents, then the architect/engineer should additionally be asked to identify the corrective measures that will be necessary. Any such listing of deficiencies and required corrective measures should be carefully reviewed by the Surety's representative, and by the Principal if possible, before it is included in the bid documents.

Although some deficiencies may be known or suspected to exist, they may be unquantifiable due to being covered by subsequent work. (Such as underground pipe having been covered without inspection). In certain situations the completion scope might include the uncovering, inspection, and recovering of such items. Specific unit prices for corrective work of such known or suspected items, where possible, should then be requested as part of the bid to protect the Surety.

In certain situations the Surety should be prepared to conduct tests and engineering reviews to both establish whether or not "suspected" deficiencies exist and also to establish the corrective measures to be incorporated in the remaining scope of work to complete. The purpose here is to change "suspected" latent defects into patent defects or non-defects prior to soliciting bids.

C. Documents Regarding Principal's Subcontractors & Suppliers

One of the decisions that the bidders will need to make in order to complete their bid is whether or not they intend to complete the project using any of the subcontractors or suppliers that had been providing services or materials to the Principal on this project. This becomes particularly important on projects with tight completion schedules and costly liquidated damages.

In order to make this decision the bidders should be provided with all of the following:

- ! Copies of all subcontracts and purchase orders issued by the Principal for services or materials on the project.
- ! Status of subcontractor and supplier change orders, claims and material stored.
- ! Complete information regarding the current financial status of these subcontracts and purchase orders. Ideally this information should be provided via a copy of the Ratification Agreements which the Surety has negotiated with any of the Principal's subcontractors or suppliers who have payment bond claims.
- ! Information on the status of shop drawings submitted to the architect/engineer for approval. This lets the bidders know whether materials or equipment covered by these subcontracts or purchase orders have already been accepted or rejected by the project architect or engineer. On projects with custom materials or equipment with long delivery times this information also allows the bidders to determine if all the critical materials and equipment have been ordered and approved, and how the current projected delivery dates of these items will affect the completion schedule.

The bidders should be advised that they are not required to use subcontractors or suppliers that were previously used by Principal. There are occasions, however, when the Surety may insist upon the new contractor using a specialty subcontractor or specialty supplier. Certainly the Surety will want to insist upon the new contractor using materials that were specially made for the job and/or are long lead items that would impact the job if the materials are not delivered in a timely manner. Each case needs to be evaluated on its own merits.

D. Documents Which Identify Future Potential Changes

This category of documents would typically include Field Directives, which represent changes in the scope of work that have been directed by the Obligee but have not yet resulted in executed Change Orders; Change Orders that have been issued by the Obligee but either not yet priced by the Principal, or priced by the Principal but not yet accepted and executed by the Obligee; or other documents that constitute the start of a potential change order process such as Value Engineering Change Proposals.

These documents need to be identified and included in the bid package because the Obligee might expect the completion Surety or the tendered completion contractor to honor the agreements that the Obligee made with the Principal prior to default regardless of whether or not those agreements resulted in a fully executed Change Order prior to default. This is particularly true if the Principal has submitted a price for a requested change in scope, or if the Principal initiated a value engineering change proposal indicating the expected reduction in the contract amount if the change is accepted by the Owner/Obligee.

The bidders need to be made aware of these future potential changes so that they can determine whether they agree with the Principal's assessment of these proposed changes, specifically if they agree with any pricing that has been submitted to the Obligee. If they see a large discrepancy between their pricing of a potential future change order and the pricing already submitted by the Principal, and if their independent assessment of the likelihood of implementation of the change is that it most likely will be implemented, then they have an opportunity to factor this into their bid.

If, on the other hand, the successful bidder/completion contractor was not made aware of such a potential change during the bidding period and is then asked to accept a change order to his completion contract that is based upon pricing submitted by the Principal, you can be certain that the completion contractor will want more money than the Principal had originally requested. By addressing these known future potential changes in the bid package, the Surety can avoid later claims from the completion contractor if these changes are implemented.

There are many instances where the bid package should request separate pricing for these items so the Surety can make a determination from them if they would materially impact the overall bid presented by the contractors. It would also help the Surety to push the Obligee to make a decision regarding these types of outstanding issues prior to awarding a completion contract if there are big differences in the prices received for these pending change orders.

3. JOB SITE INSPECTION

In addition to being provided with all of the materials previously discussed, the bidders will need to inspect the project so that they can independently determine the status and quality of the Principal's work. If the Principal was a subcontractor or a co-prime contractor on the project the job site inspection also allows the bidders to determine whether the completion of the Principal's work has been made more difficult by the progress of the project without the Principal on the job. In this way the potential increased cost caused by an out of sequence completion of the Principal's work will be included in the bidders competitively bid prices and not treated as a change in scope after the completion contract is awarded.

As part of the job site inspection the bidders should also be given the opportunity to inventory and inspect any materials stored on site by the Principal (and probably paid for by the Surety under the Payment Bond) so that the bids reflect the bidders assessment of the availability

and acceptability of these materials. The bidders should also be given the opportunity to inspect any materials stored off-site and designated for the project.

Electrical and mechanical subcontracts represent the potential for many trailer loads of inventory. The Surety may seriously want to consider having an inventory taken of the trailers and included in the bid package with the usual caveats that the inventory is being provided for informational purposes only, that the contractors need to satisfy themselves that the inventory is as set forth in the list, that the materials are those materials called for in the specifications, and that the materials are in good shape. The inventory must obviously be made in good faith, but can be presented without any warranties being attached to it.

It is often convenient and advisable to schedule the job site inspection to occur as part of the pre-bid conference which the bidders should be required to attend. This gives all the bidders equal access to the project and should minimize the disruption of a project where other contractors may still be working.

4. OTHER INSTRUCTIONS TO THE BIDDERS

Other instructions that should be provided to the bidders in order to obtain bids that are all inclusive except for correction of latent defects would include the following:

A. Completion Schedule

The bidders should be instructed to look at the schedule on the project to make a determination if they can complete it within the original allotted time. If not, the bidders need to understand that besides price, the timely completion of the project will be weighed in the evaluation of the bids. The bidders need to satisfy themselves as to the schedule and to give a date certain in the bid package for completion so that the Surety can properly evaluate the bids.

If there are liquidated damages associated with the project the bidders also need to understand that the successful bidder/completion contractor would be responsible for liquidated damages beyond the completion date that was indicated in their bid.

B. Plans & Specifications

It is not unusual for a general contractor to request 10 to 15 sets of plans and specifications for themselves and their subcontractors. The bid package should instruct the bidders that the cost of any additional sets of plans and specifications that they may require as completion contractor should be included in their bid price. If the bid package is silent on this issue you can be certain that the successful bidder will expect the Surety to provide these documents at the Surety's additional expense.

5. CONCLUSIONS

When a Surety decides to obtain bids for the completion of the Principal's work, the Surety should expect to obtain prices that are competitive and that are not subject to change after the completion contract is awarded unless latent defects are subsequently discovered. The way to achieve this is to issue a bid package which makes the bidders responsible for determining the remaining scope of work to complete, and which provides the bidders with all the information that they will need to independently make that determination with a high level of confidence in their assessment.