SCRIBBLES SQUIBS #35 (May 27, 2015)*

MORE PROFITABLE CONSTRUCTION PROPOSALS: PART ONE

By Attorney Jonathan Sauer

I. INTRODUCTION.

I was going to make this *Squib* a review of a current court case. But, the following situation recently came to my attention, suggesting that many might benefit from a *Squib* on various aspects of the preparation of construction proposals. For the purposes of this *Squib*, we will refer to the following situation as 'The Problem'. Certain aspects of The Problem have been changed for the purposes of this *Squib*. This is the first of a series that will address specific contract formation problems and issues related to proposals.

In our last *Squib*, we introduced 'Earl', a very savvy guy who could be a material supplier, a subcontractor, a general contractor or an owner. (If George Foreman has five sons all named 'George', why can't there be more than one 'Earl'?) While maybe not a bad guy outside of construction matters, he's always quick to take advantage of someone else's errors to put more gold in his particular pot, that gold, unfortunately, possibly having come out of *someone else's* pot. He already knows *everything* discussed in this *Squib*. In fact, he knows *everything* discussed in *every Squib* and in all of our construction articles. He's smarter than I am. But, in all fairness, this is a class containing members too many to count. Innumerable, like the stars in the sky or the grains of sand at Craigville Beach in Hyannis, MA at low tide on a hot, sunny day. On a Thursday. In June. He might make an appearance in this *Squib* also. He almost *always* makes an appearance in most construction projects, such appearances often unwelcome. This *Squib*, along with all other things that I write (construction articles, *Squibs*) are intended to help my readers deal more effectively with Earl.

A construction contract typically begins by someone's making a written proposal to someone else to engage in a business relationship for the performance of a construction activity. Some contractors aren't 100% sure, however, exactly what a proposal *is* within the legal scheme of things. This *Squib* is addressed to that issue, dealing with the issue, however, practically rather than legally. An understanding of 'proposal' issues is critical for the success of your business. This is because in contract law, no terms are 'assumed'. Courts enforce the contracts that parties enter into with almost no exceptions. Period. So, thinking or saying 'any jerk would realize that in the proposal I meant BLANK', is most likely going to be of no importance if you have to come play in my sandbox (the courts), an unpleasant experience for many, a place where good quality sand can turn into mud rather quickly.

II. THE PROBLEM.

I received a call from a plumbing subcontractor the other day. Although he had been much larger pre-Great Recession (which is not over yet, by my observation), he is still in business at a reduced level, working with five or six guys. He is, like all of us, trying to build his business back up to where it was before the subprime mortgage originators were busy getting rich at the expense of the rest of us. He had an opportunity recently to quote a job for the plumbing work in three buildings, each of which would be more than one million dollars for his work. He thought it made sense to just quote on the first building initially because he had never worked for this developer before. (Smart!) His thinking was that since this is the first building to be built in this project, he could/might end up with all three buildings but that it might make sense for him to take them one at a time in case the project or the developer proved problematic.

For whatever reasons, the building shell was erected without having the rough work required for his trade performed first, which would make his job harder. There was pressure on the developer to get the job done, who was transmitting the 'need for speed' to the subcontractors. (There's a surprise!) He would have to bulk up and add some guys and a job of this size was either at the outer edge of his comfort zone or, perhaps, a good measure beyond.

He made a written proposal for a certain number which was accepted. However, that proposal didn't clearly deal with some elements that were necessary for him to do the job. Although his proposal excluded the ten thousand dollar permit, it did not propose how and when and by whom this would be initially paid. Also, he needed to have an advance on his labor before commencing work and then either weekly or bi-weekly payments for his weekly labor, terms not set forth in his proposal. From different things he said, he might need an advance payment before ordering fixtures which, again, was not covered in his prior discussions with the developer or in his proposal. The developer accepted his proposal in writing.

The plumbing subcontractor asked me to prepare a contract for this job. After discussing this with him for a bit, I told him that the contract would not/should not be the vehicle to add in material portions of the business deal which his proposal had not dealt with. The developer wanted him to begin immediately. (Another great surprise!) We left it that he would call the developer and see if he could work out these various issues, which he wanted/needed to be in the business deal. I suggested that before he make that call, he should check his proposal and compare it against his anticipated performance and make sure that if there were any other issues that had not been proposed, they be raised in that phone call. I suspect that the developer will not be happy to receive that call.

Does the plumber have to do the job irrespective of how these issues are resolved? Will he lose the job? Or, just his shirt? How could this have been handled differently?

III. WHAT IS A 'PROPOSAL'?

A necessary bit of contract law here but not difficult to understand and with no references to statutes or court cases.

Somewhat simplified, there are three elements to the formation of a contract: an offer, an acceptance and consideration.

A proposal is an **offer** to enter into a contract. An **acceptance** would occur if the party to whom the proposal is made accepts that proposal without changing any of the material terms. (An acceptance which rejects material terms offering other terms is in the nature of a counter-offer, which usually operates as a rejection of the offer made.) **'Consideration'** is what each party will get out of the contract. Here, the plumbing subcontractor would be paid a certain sum. In return, his contracting party gets the plumbing work he needs performed.

When all three elements are present and properly documented, one has a contract. ('Oral' contracts in Massachusetts are sometimes enforceable but problematic in the extreme because how can one make out words written on something no more substantial than air?)

So, a proposal is a significant and important business transaction, not to be taken lightly. Under certain circumstances, the party accepting the proposal might be correct in claiming that at the point of the acceptance, a 'contract' exists, which the offering party would have to perform for the terms contained in the proposal. (For a discussion of 'letters of intent' and how they differ from contracts, please see the discussion on pages three through five of the construction article on my website – www.sauerconstructionlaw.com – titled "Twenty-Four Common Subcontract Questions and Issues.") These and other related important issues will be discussed in the second of our free upcoming seminar series, which commences on **June 2, 2015**. More information on these seminars along with a registration form is contained in the transmittal sending you this *Squib.* Think of attendance at the same as a kind of anti-Earl vaccination. It hurts only for the moment (e.g. a two hour delay in dinner!) But, it has long-standing benefits that are likely to make you money that you don't presently have. And, to keep money that you already do.

IV. TEN SUGGESTIONS FOR BETTER PROPOSALS.

My experience - and I generally only see problem jobs - is that proposals are generated too quickly, without giving them enough thought. This is particularly so where they are generated by salesmen more interested in the commission s/he will get from the sale than in the ramifications of a poorly-proposed job. Contractors typically consider scope, price and, maybe, how long they'll have to do the job. Better proposals consider the following issues, preventing them from becoming the kind of problems that make Earl smile:

1. **The proposal does not say 'how' it can be accepted**.

Since this is your offer to enter into a contractual relationship, this should be clearly and unequivocally stated. Something like this: "This proposal can only be accepted in writing." Since I think the best possible subcontract for a subcontractor is having a general contractor accept the subcontractor's proposal, its proposal might have an "Accepted by:' line at the bottom of the page. In such a case, we would modify the above-stated 'how' of acceptance by adding: "This proposal can only be accepted by your signature at the bottom of this page after

'Accepted by' ". A line should also be provided for the date of the acceptance. A dated acceptance is almost as important as a dated proposal.

It's important to specify *how* a proposal can be accepted. Otherwise, confusion may be interjected into the situation, confusion being Earl's middle name. As one example only, legally speaking, a proposal can be accepted by the conduct of the parties under certain circumstances. That is hardly an objective criteria – reasonable minds might differ - and when dealing with contracts, we like them as black and as white as possible. Grey is a color that should be limited to a lawyer's suit or to Earl's hair (although some say he might color it some.) Additionally, without a specific provision as to how the proposal can be accepted, the party receiving the proposal might claim to have accepted it orally. One should always keep in mind that the statutes (laws passed by a legislature) commonly refer to the requirements that various contracts (e.g. real estate deeds) be in writing as 'statutes of ***fraud***'. And, no one likes to be taken.

2. **The proposal does not say by 'when' it can be accepted**.

This, unfortunately, happens more than it should. If the proposal does not say how long the receiving party has to accept the proposal, questions arise. Can the proposal only be accepted within the next ten days? Or, can it be accepted within the next ten months or, even, within the next ten years? This is a problem that shouldn't exist.

Here's a common situation. Someone quotes a job when s/he is in his/her slow season, needing to perform some work right now to keep the core crew together and to help with the overhead. The proposal does not say for how long it is 'open' (can be accepted). S/he quotes with a lower margin because, after all, s/he needs the work *right now* when s/he doesn't have much else going on. But, the proposal is not accepted until three or four months down the road. Unfortunately, then, s/he is very busy and doesn't have the workers to support the job. And, the quotation s/he gave during his/her slow season was with a lower margin for overhead and profit than the jobs s/he is now performing. Earl frequently benefits when this issue is not addressed. What's not to like about getting winter pricing for summer construction? Besides, Earl doesn't generally work during the winter anyway. When it's cold, he usually is at one of his several *other* homes in places where it is warm. When Earl is deep in his cups – a not uncommon experience – he refers to various of his homes as financed by dumb subs.

It's a problem easily solved, however. A proposal simply has to state this unequivocally: "This proposal can only be accepted within ten days from the date of this proposal after which it is automatically withdrawn."

3. **Undated proposals**.

One can provide for how long a proposal can be accepted. But, if the proposal is not dated, we don't have a starting date from which the ten days (or whatever period) will run. Remember that in a court of law, in interpreting a contract, *nothing* or next to nothing will be inferred.

I wouldn't be comfortable with covering this situation by sending an undated proposal with a dated transmittal. This is because the transmittal is a document having no contractual significance. It is in no fashion a part of any contract that might result. It is only the proposal that will be accepted, not the transmittal.

4. **The proposal reflects an incomplete business deal.**

This is the biggest problem with The Problem. A contract should embody a business deal that has already been made before the parties get to the step of deciding what the form of the contract that will be between them will be. In other words, any negotiations over contract content should start from a complete business deal that both sides acknowledge.

That is not to say that specific terms of the deal aren't negotiated as part of the contract process. In most cases, they are. But, most of the time, the significant elements of the business deal have already been agreed upon and additional contract terms deal either with subsidiary matters or with someone's desired legalese. Also, a contract negotiation where significant core issues are negotiated during the contract negotiation may reflect situations where there were all kinds of offers and counter-offers before the actual contract negotiations commenced so that no one thought that there was a complete business deal in place before the negotiations over the form take place.

In my view, the best subcontractor 'contract' that there can be is when the subcontractor insists that the proposal itself is the contract form with the general contractor. That way, the difficulties of custom form general contracts and industry forms such as AGC forms and even AIA forms can be avoided.

So, the problem with The Problem is that before the contract form was negotiated, there really wasn't a complete business deal between the parties. This can be alright provided that both sides understand that. Difficulties may arise, however, when someone 'accepts' a proposal, thinking that *this* is the complete business deal when, in fact, the sender either didn't intend that to be the case or had not sufficiently thought through the proposal and the project.

Granted, sometimes someone might want to give a proposal that covers only the basic scope and price issues, leaving off issues that might cause them to lose the job because they are unusual, possibly not reflecting the norm. In other words, the party giving the proposal sees arriving at a business deal as a two-step process.

In a situation like The Problem, perhaps the party submitting the proposal doesn't want to sink his chances of getting the job by insisting on unusual or difficult conditions such as labor and/or material money up front or unusually short requisition and payment periods. The thought here might be that these can be raised *after* the proposal is accepted and somehow will be rolled over into or handled by the contract form itself.

Might this work? Sometimes it will, particularly if one's trade is unusual, its price is particularly good or the general contractor needs someone to start right away and no one else

better qualified is available to do the work at this price. But, other times, this might not work and could create some legal problems where the party to whom the proposal is made claims his acceptance of the proposal results in an actual contract without need for a further contract document because the offer, the acceptance and the consideration are contained within the signed-as-accepted proposal.

5. **The proposal should identify what other documents are included within/incorporated by reference into the proposal.**

Specifically state within your proposal what other documents your proposal incorporates, including detailed references to specification sections, contract drawings and ancillary documents that you use, such as separate 'service agreements' and separate 'terms and conditions' if they are contained in documents other than the proposal. This should include reference to general conditions, if only to exclude them. It should also reference in the proposal whatever addenda and alternates are currently in existence, again, if only to exclude them. But, I do know of certain specialty contractors who have separate documents entitled 'terms and conditions' and sometimes they have both a proposal and a 'service agreement' *and* 'terms and conditions', the latter documents being separate standard contract documents that are not physically a part of the proposal.

I favor the offered 'deal' (the proposal) be only *one* document. The more documents one has, the greater there will be the chance for contradictions among the documents. In such a situation, if the contract is based on those documents, there is a legal doctrine that says the other side can pick the interpretation of 'the contract' most favorable to it as the interpretation to be enforced. Good legal writing, despite popular perception, is as short as possible. Too many words increase the chance for inconsistencies and words are Earl's bread and butter. (He obtained several years ago a BA in English studies. He would have had a double major in business management had he not flunked a key course, 'Business Ethics'.)

Whatever other documents you want to be part of the proposal need be referenced in the proposal. That way, they are incorporated by reference into the proposal just as if they were physically attached to the proposal. Also, keep in mind that based on a legal doctrine known as the 'parole evidence rule', any prior documents to your proposal that aren't incorporated into the proposal or listed in the proposal lose any legal significance or importance. From a contractual (legal) standpoint, they no longer exist. *At all!*

6. **Not enough exclusions and exceptions**.

Recognizing that from a contractor's standpoint the three most important things in a deal are price, scope and schedule, stating what your proposal does *not* include is critical. After all, excluded or excepted items may be the gristmill for future change orders. But, when they are missing, what this may mean is that you get to supply additional materials and equipment or perform additional items of work that you never intended on performing for no additional money.

We've all seen contract documents containing something like the following statement: "This subcontract includes all work at no additional cost that is necessary to perform this subcontract which is reasonably inferable from the contract documents." The reason that this sentence is included is because additional terms are otherwise not generally inferable from a contract document. Your proposal for a specific scope and for a specific price is just that: specific. Stating what *is* not included in your proposal may be as important as stating what *is*.

7. **What work needs to be done first by others before you mobilize and perform**.

Many have been on jobs where the job is behind schedule for whatever reasons with an unhappy owner. As many of you have unfortunately experienced, in such situations, the general contractor may insist that you man the job to perform busy work to show 'progress' to the owner. This reduces, of course, your productivity, impairs your sequence of operations and otherwise simply increases your costs. This is all the more so where the job isn't really ready for your trade at that point in any event, so that whoever you send to the job doesn't have enough work to perform. If you need things done before you can perform your trade, in whatever contractual document you ultimately use, make sure that this is stated with some specificity in your proposal.

Otherwise? Earl once had the painters paint the drywall while it was *still on the truck*. A real card – particularly, for some reason, after lunch – he said that this leads to an 'uplifting experience'.

8. **Limit your proposed price stated in your proposal to only when and if your proposal is going to be the contract form.**

This serves a number of purposes. For one thing, this is something that encourages the general contractor to use your proposal as the contract form because otherwise it is going to cost him some more money. In doing so, this may help avoid custom subcontract forms with all kinds of difficult terms and less advantageous forms such as AGC forms and AIA forms. AIA forms *do* tend to be relatively neutral as between subcontractors and general contractors. But, where any individual AIA form is only intended as being part of a construction project with a great deal of additional AIA forms involving all of the other parties, the subcontract itself is not really designed or intended to be a stand- alone document. (As long as one knows what one is doing, the 'statutory' form of subcontract in MGL C. 149, s. 44F is a good, basic contract form.)

If after receiving your proposal Earl comes back to you saying that he'll accept your proposal as to scope and price but the contract will be on his form, you have some basis for saying you won't do it without additional monies because, after all, that is what your proposal *says*. Generally speaking, one can only accept an offer in accordance with its terms. Changes to the material terms of scope and price in the proposal can't, generally speaking, be unilaterally made in a purported acceptance. So, Earl is probably not in a position to claim he has 'accepted' your proposal to be put on his form where your offer in the proposal states otherwise.

Having spoken with many, many subcontractors, I have formed the impression that many don't really read the entire subcontract - and think about it - until the proverbial fan is not

spinning quite so cleanly. Truth be told, that also applies to many general contractors.

Additional terms not contemplated in the proposal but included in the contract can increase the cost of your doing the work and, in many circumstances, can *drastically* change the job from what you originally contemplated into something much more difficult and strenuous and expensive.

Let's take just one example. Your proposal will not contain a pay-when-paid clause in it while almost every custom contract form I have ever seen in the past ten years does. Because of this, when proceeding under just the proposal, you can (at least, contractually) count on seeing a check every so many days, which assists you in planning your cash flow and for the ordering and payment for materials and sub-subcontractors. With a pay-when-paid clause, however, you may not be entitled to payment from the general contractor for a very long time, even when the reason for the owner's non-payment to the general contractor is not for issues associated with your work. If the owner has claims against the general contractor (e.g. liquidated damages) with regard to a requisition seeking your money which are *greater* than the amount of the requisition, at least in the short term, this could be grounds for the general contractor's not paying you even when those issues have nothing to do with your work.

In that case, what do you do? If you draw on your line of credit, that has a cost. If you pay material suppliers with your credit cards, *that* has a cost. If this non-payment puts you in breach of your various material purchase orders and sub-subcontracts, you will have a lot of very unhappy people beneath you that can affect their willingness to work for you on future jobs.

So, that *one* change from your proposal can cost you some money and good will.

9. **Not referencing the proposal in a subsequent contract.**

Earl tends to do this *a lot*, especially after lunch in a dry town when he would prefer to be wet, which for him is a frequent state. We mentioned earlier the 'parole evidence' rule. Until the proposal is accepted in exactly the way you proposed it, it is simply one in potentially a series of various documents going back and forth between the parties leading up to the 'actual deal', which is the signed contract. Except in cases where alleged fraud or fraud in the inducement is claimed - and, by my experience, successful claims of this kind are rarely successful - a court is *only* concerned with the 'actual deal' as embodied by the contract, not with what someone may have suggested in a preliminary document along the way to the contract.

So, perhaps you have been unable to get the general contractor to accept your proposal as the contract. He then sends you a contract to sign which may contain elements of your proposal - say, scope and price - but does not include other terms of the proposal or even reference the proposal. In addition, the contract tendered includes any number of provisions (e.g. pay-when-paid clauses) not included in your proposal and which are unacceptable.

If you want to keep your proposal as part of the contractual mix, there are two things you have to do. The first is to insist that your proposal is listed in the proposed contract somewhere

as a contractual document. The second is that you must insist on insertion in the proposed contract a provision to the effect that if there are any conflicts between the terms of the proposal and the terms of the contract, the terms of the proposal will control. Having the first without the second is better than nothing. But, without the second, there is no contractual mechanism for resolving conflicts between the terms of the proposal and the terms of the contract. Where does that leave you? Potentially, not in a good place.

I'm sure you have seen in various better contract documents provisions 'ordering' the importance of one document over another (e.g. the supplementary general conditions will control the general conditions.) If you know that there are differences between the provisions of the proposal and the provisions of the contract, without having a mechanism for determining which document controls, you have confusion, material issues of fact and, potentially, material issues of law. And we know where *that* could lead you**.**

10. A **second person, preferably an owner, should review key proposals before they go out.**

Note, that I said 'key' proposals. If your business involves proposals not involving (for you) a lot of money, this is far less important. It's also less important to do this when your business involves making repetitive proposals for the same work (e.g. bathtub and enclosure replacement.)

Now, that we have *that* out of the way, let's discuss this both as to private jobs and as to public jobs. Since private jobs are negotiated, there isn't as much of a rush to prepare a proposal as there might be to prepare a proposal for a public job. And, even for a public job bid, where the person dropping off the bid might be receiving proposals from suppliers and subcontractors literally up to the last minute, the *basic* bid is prepared in the office, while not under the extreme pressure of bid day.

Two heads are often better than one! The person preparing the proposal may be too close to his/her estimate to pick up his/her errors. (That's why writers have editors!) Someone else looking at the proposal might ask: 'Did you consider *this*? Or, did you consider *that*'?

Look, an estimator is generally an employee, not an owner. The definition of an employee is someone who will no longer be employed at your business five years from now. The employee doesn't have the same concern for the company's welfare (and pocketbook) as an owner has. And, the employee will not be paying out of his/her pocket for any omitted items that can't be found in the proposal but were contained in the contract documents.

V. CONCLUSION.

There is only one place where disputes are ultimately resolved. In court. A venue that Earl knows how to play like a violin. And, not just any old ordinary violin. A *Stradivarius.* You think you can perform there as well as Earl, like one of the Dueling Banjos in Deliverance?

It would probably be more like The Devil Went Down to Georgia. This is one of Earl's favorite songs. You see, he *still* gets to win. But *this* time he doesn't even have to play The Devil!

There are plenty of ways to better prepare proposals. Some additional suggestions will follow in Part II of this series. If you have had certain problems with various of your proposals that you would like us to consider for discussion in a subsequent *Squib* on this topic, let us know. As always, we would very much appreciate your input and comments on this *Squib*.

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* A *'squib'* is defined as 'a short humorous or satiric writing or speech'. Wiktionary defines a '*squib'* as: "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses."

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