

# RISK MANAGEMENT 101 FOR HIGHWAY CONTRACTORS

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In an era of volatile material costs it is important for highway contractors to implement strategies to minimize their risk. While unit price contracts tend to mitigate certain risks inherent in fixed fee contracts, the contractor is still assuming the risk of cost increases and other unpredictable developments post-bid.

The first risk that contractors can minimize is the risk of subcontractors walking away from their bids. A contractor can rely upon a subcontractor's bid if he uses that price in securing the work and the price of the sub is not so low as to trigger reasonable suspicions that the sub's bid is mistaken. If a contractor has reason to believe that a sub's bid is significantly low, he has a duty to inquire further before using that number. Contractors are also cautioned to avoid "bid shopping" "or value engineering" negotiations, or perhaps even an onerous subcontract, that may relieve a sub from his bid. A sub can be forced to perform a mistaken bid or be liable for the cost increase of going to the next highest bidder if the contractor follows the guidelines above.

Contractors on Ohio public work can generally withdraw their bids within 48 hours if the bid was (1) substantially low and (2) the mistake was the result of a math error or clerical mistake.

While contractors cannot condition their bids (upon price escalation for example) when bidding public work (or their bids will be declared unresponsive), contractors can reduce their risk by obtaining firm prices in writing from their subcontractors and suppliers.



In addition, ODOT provides some relief in its specifications (401.20) if the cost of asphalt increases by more than 5 percent. In addition, some ODOT bid proposals contain notes for fuel (#520 dated 3/1/06) and steel (#525 dated 8/2/04) price increases.

Absent a contractual escalation clause like these, a contractor may be unable to pass on significant price increases. A significant price increase, alone, is generally not enough to trigger relief under the "doctrine of impracticability." Yet the impossibility of providing the materials at any cost, due to floods, hurricanes, war, terrorism and other "acts of God," generally relieves the contractor of his obligation to provide the item.

Finally, contractors can seek an equitable adjustment if conditions differ materially (1) from those indicated in the contract, or (2) those ordinarily encountered in work of that nature, if timely notice is provided of the differing site conditions.

Contractors who recognize these risks and implement effective strategies to minimize these risks will have a better chance to remain profitable in the current industry climate.

