

When software firms make mistakes, you pay

“In a few minutes a computer can make a mistake so great that it would have taken many men many months to equal it.” – Unknown

Several years ago, I worked with one of the most respected, hard-nosed superintendents in the Northwest. The man was old and grumpy but when it came time to build, he got the job done on time and under budget. And, he did it without modern technology.

Technology will never replace a good superintendent. However, over the past 10 years, technology has significantly changed the construction industry. Once considered a conservative industry, contractors around the world are using the latest advances in computer technology to build structures bigger, faster and cheaper. That's the good news. The bad news is that newfangled technologies present contractors with unprecedented risks, beginning at the bidding stage of a project.

Like many industries, the construction industry adheres to the law of “cause and effect.” For example, if you are a subcontractor, and you cause a scheduling delay, the effect is simple: you will pay for it, either immediately by fixing the problem, or years later in litigation. Surprisingly, the same rule does not necessarily apply to companies that provide bidding software. In general, the costs associated with software defects in a bidding program shift to the contractor, not the software company that causes the problem.

M.A. Mortenson, a nationwide contractor, learned this lesson the hard way in *M.A. Mortenson Co. Inc. v. Timberline Software Corp.* Timberline sent the software package to Mortenson with a so-



LEGAL STRATEGIES

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called “shrinkwrap” license agreement (an agreement wrapped on the outside of the software package in clear plastic), which stated that Mortenson could not sue Timberline for consequential damages, i.e., lost profits, lost savings, or any other incidental damages.

Shortly thereafter, Mortenson used the software to prepare a bid. After being awarded the project, Mortenson discovered that a “bug” in the software caused Mortenson to submit a bid that was \$1.95 million lower than it should have been. Mortenson sued Timberline, claiming the software was defective. The Washington Supreme Court rejected Mortenson's claim. The court recognized that a bug in the software probably caused Mortenson to submit the low bid. Nevertheless, the court held the license agreement eliminated Timberline's potential liability. The court held the shrink-wrap license agreement was valid and that Mortenson, a sophisticated company, assumed any risk by failing to return the product after receiving the agreement.

Since *M.A. Mortenson Co. Inc. v. Timberline Software Corp.*, courts have generally sided with software companies

in similar disputes. That being said, there are ways to minimize your risk. On the non-legal side, contractors should consider the following three suggestions.

Only use proven and supported software programs. Many software companies with minimal experience in the construction industry will claim they can develop an individualized program to meet all your estimating needs. Be careful; not all software companies are created equally. Like many industries, the larger, more experienced software companies often have a better record. Contractors should take time to investigate the company.

Make sure your company has experienced estimators analyzing the program's output for reasonableness. While this sounds easy enough, it requires estimators to understand the limitations and assumptions of the bidding program. In addition, this step can become impractical in the face of bid-day time constraints. Even so, it is necessary when considering the potential costs associated with unintentionally underbidding.

If your software appears to be malfunctioning, it probably is. In the Mortenson case, the software repeatedly gave the following warning message: “Abort: Cannot find alternate.” Mortenson ignored the warnings and suffered the consequences. When similar warnings appear during your bid, exhaustively check the accuracy of the output, and contact your software provider for assistance. If the errors continue, be prepared to finish the bid using traditional processes.

The considerations above are important. Nevertheless, faulty software can burn even the most prudent contractor.

Thus, in order to truly protect your interests, contractors should use legal measures to shift the risk (or at least some of it) to the software company. If the contract includes a clause eliminating consequential damages -- as did Mortenson's -- negotiate a better deal. Remember, given the many options available for bidding software, it is a buyer's market. Use that leverage to limit any one-sided contracts.

Limiting your contractual risk is only the first way to protect your company. To be successful in any software dispute, you must be able to prove that a latent bug caused the error. To this end, contractors should request that the software provider place the source code in commercial software escrow. That way, no matter what happens to the software company or the program, you will have the code that caused the problem.

Technology is here to stay in the construction industry and software offers contractors a way to increase their bottom line. However, even though bidding software will streamline operations and lower costs, there are risks and you should not abandon traditional legal and non-legal strategies. To the contrary, the traditional strategies apply: read your contracts, negotiate your risks, and come bid-day, implement a quality control program to ensure the accuracy of your bid.

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