# Legal

## Beware Mistakes That Bind

by Quenda Behler Story

Here's the scenario: A contractor hires a new estimator and he makes a bid on a remodeling job. Unfortunately, the bid is way off the mark. By the time the contractor notices the mistake, the customer has signed the contract and given him a check, which he's deposited. So he goes to see the customer, tells him the bid had been a mistake, and gives him back his money.

And that's the end of it. Right?

Wrong. Well, okay, not wrong if the customer doesn't make an issue of it — but if he says "Hey, what about our contract?" the contractor has a problem.

### Not a Mutual Mistake

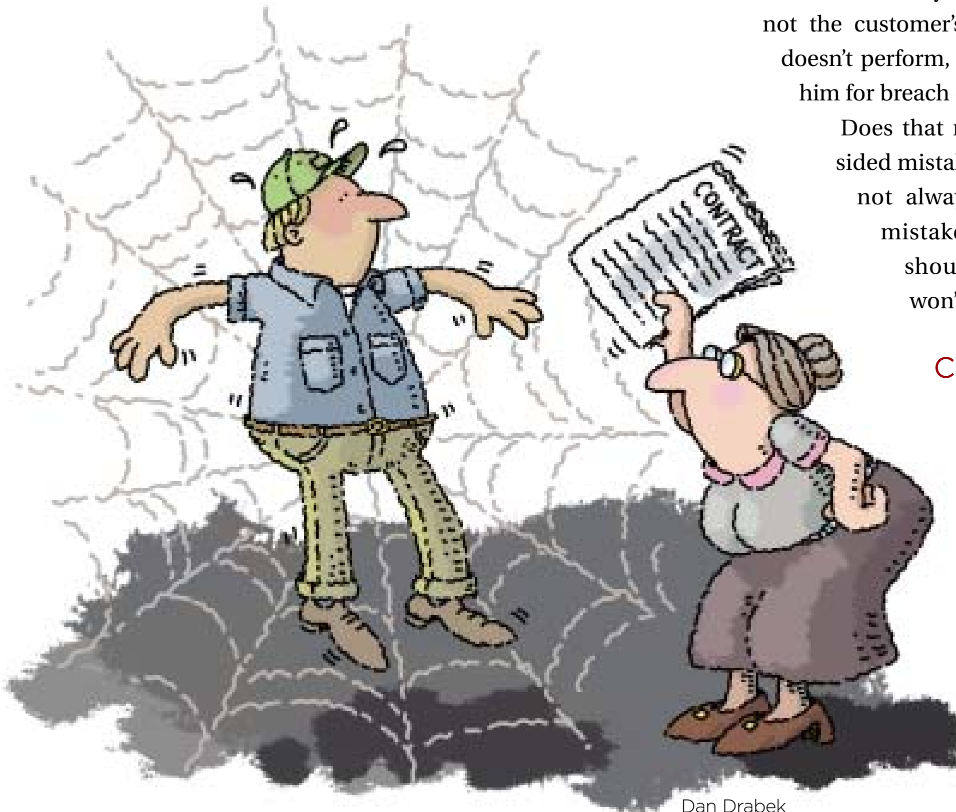
The big question, of course, is whether the contract is binding, meaning the contractor could be sued if he doesn't perform. And the answer is yes, it is. The contract became binding the moment the customer accepted the offer.

But, you may protest, the contract isn't any good because it was based on a mistake. Nice try, but the mistake on the estimate does not mean the contract is not binding. A mistake only voids a contract when it is mutual (see "How Bidding Errors Affect The Contract," *Legal,* 12/04). In this case, the mistake was not a mutual one — the contractor made it. The customer didn't.

A mutual mistake can be a hard concept to get your mind around. Think of it this way: If both parties have made a mistake regarding the terms of a contract — for example, both thought the zoning board had already approved a necessary variance — there's no contract, because what both of them were thinking about the nature of the contract was wrong.

However, if only the contractor was mistaken, that's not the customer's problem. And if the contractor doesn't perform, the customer can successfully sue him for breach of contract.

Does that mean that a contract with a one-sided mistake in it will always be binding? No, not always. For instance, contracts with mistakes in them that the customer should have realized were mistakes won't be binding.



Dan Drabek

### Customer Deposit

What if the customer had not paid the deposit money? Then could the contractor safely cancel the contract?

No. Many people believe that a contract isn't binding until money changes hands. They're wrong. The promise to pay money at some future date is enough, except in unusual circumstances that don't apply here.

## Apparent Authority

How about the fact that it was the contractor's employee who offered that contract, not the contractor? Does that make a difference?

For the most part, no. Here's the black-letter law: If the contractor made his employee appear to the rest of the world to be his agent, that employee can bind the contractor to a contract even without the contractor's permission.

Many people believe a contract isn't binding until money changes hands. They're wrong.

In this case, for example, the estimator was out there making an estimate on behalf of the contractor; he was using contractor-supplied contract forms to offer the customer a deal; he was driving a truck with the contractor's name on it; and he was handing out business cards the contractor had given him. He had what the law calls apparent authority — lots of it.

When the issue of apparent authority comes up, it's usually because the customer went to one of the tradespeople working for the contractor and tried to get that person to change the scope of work by doing something that wasn't in the contract. It's reasonable for the client to assume that the estimator and job-site supervisor can speak for the contractor, but probably not the hired tradespeople who are out there doing the work.

## Contract Damages

I'm quite aware that people don't come to me to hear what they did wrong, even though I'm always happy to tell them. What they really want to know is: What to do now?

The first thing a contractor in this situation should do is figure out which would hurt more: doing the work at a loss or just paying off the customer. And if he decides to pay off the customer, he needs to decide how much he should offer. In a lawsuit, remember, the customer can't collect the entire contract price (except in certain very limited circumstances that this contractor needn't worry about). The customer can win only what are called contract damages.

So relax: The customer can't sue for millions of dollars. He can *ask* for millions, but he won't win them. The contractor didn't cripple the guy for life or beat him up — he just failed to carry out a contract. According to the law, a customer with a breach-of-contract claim is entitled only to the money he lost because of the contractor's failure to perform. If the contract was for $10,000, and the customer has to pay someone else $15,000 to do the work, the customer will win what he has lost: $5,000.

## Negotiating a Settlement

Actually, the contractor in this case would most likely be able to persuade the customer to settle for less than $5,000.

Why would the customer accept less? First, because suing people costs money and consumes lots of time, and frequently the plaintiff doesn't get his legal expenses back — the net effect being that he doesn't really win $5,000.

Second, sometimes the best lawsuit in the world loses. Why? I don't know. I just know sometimes it happens that way.

Third, judges don't like plaintiffs who refuse reasonable settlement offers. This is something you don't learn in law school: Judges have ways of hurting plaintiffs they don't like.

Finally, don't forget that there are other ways of handling these kinds of problems. I remember an incident very similar to this one that happened a few years ago. In this instance, the contractor immediately went to the customer with a box of Godiva chocolates, a bottle of wine, and a $1,000 discount coupon toward the cost of a new remodeling contract at the correct price. The contractor kept the job — though without quite as big a profit margin — and, as I recall, the customer even shared the wine with him and his crew when they finished the job.

***Quenda Behler Story** has practiced and taught law for more than 25 years.*