STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0105, A07-0107, A07-0108

City of Lonsdale, Minnesota,

Respondent (A07-105, A07-108),
Appellant (A07-107)

vs.

NewMech Companies, Inc., et al.,
defendants and third-party plaintiffs,

Respondents (A07-105, A07-107),
Appellants (A07-108),

vs.

BNR Excavating, Inc.,

Appellant (A07-105),
Third-Party Defendant (A07-107),
Respondent (A07-108).

Filed January 22, 2008
Affirmed
Wright, Judge

Rice County District Court
File No. 66-C7-03-001941

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Considered and decided by Peterson, Presiding Judge; Willis, Judge; and Wright, Judge.

U N P U B L I S H E D O P I N I O N

WRIGHT, Judge

This is a consolidated appeal in which each party challenges a different aspect of the district court's judgment. After a bench trial, the district court found that general contractor NewMech Companies, Inc. (NewMech) breached a bidding contract with the City of Lonsdale (city) and was liable for the amount of the bid bond but that subcontractor BNR Excavating, Inc., (BNR) was liable to NewMech for one-half that amount. The city challenges the measure of damages for NewMech's breach, arguing that the district court misconstrued the contract. NewMech challenges its liability for the breach, arguing that the district court erroneously found that it failed to prove its unilateral-mistake defense. NewMech also challenges the measure of BNR's third-party liability, arguing that the district court erred by finding that NewMech's conduct contributed to the breach of its contract with the city. Finally, BNR challenges its third-party liability to NewMech, arguing that the evidence does not support the district court's finding that NewMech justifiably relied on its subcontractor bid. We affirm.

FACTS

In 2003, the City of Lonsdale solicited sealed bids for construction of a wastewater-treatment plant. Each prospective bidder received a large packet that

included instructions, various contract documents, and technical specifications for the project. According to the terms of the bid form, a bidder who submits the bid form

> proposes and agrees, if [the] Bid is accepted, to enter into an Agreement with [the city] in the form included in the Bidding Documents to perform all Work as specified or indicated in the Bidding Documents for the prices and within the times indicated in the Bid and in accordance with the other terms and conditions of the Bidding Documents.

To be considered for the project, bidders were required to submit a completed copy of the bid form by 2:00 p.m. on August 21, 2003, when the city would open the bids. As security for the bid, bidders also were required to include a bond worth five percent of the submitted bid price. Bidders could withdraw without penalty a submitted bid within 24 hours after the bid opening if the bid contained a "material and substantial mistake." If awarded the contract, the bidder would be required to sign and return a number of copies of the Agreement and other documents included in the bidding packet.

NewMech submitted its bid on the project. Before doing so, NewMech solicited subcontractor bids to perform various aspects of the project. NewMech received BNR's bid to perform the necessary excavation work approximately 20 minutes before the bidding deadline. NewMech's bid captain, Paul Ptak, noticed that BNR's bid was over $1,000,000 lower than the competing excavation bid that NewMech had received about one and one-half hours earlier. Because the other bid specifically excluded certain labor and material, including a PVC pond liner, Ptak immediately called BNR's project manager and estimator, Larry Walde, to confirm BNR's bid. Walde assured Ptak that BNR's bid of $984,500 was complete and included all the labor and material costs

associated with each of the items bid unless specifically noted. Ptak testified that, after speaking with Walde, he felt "completely satisfied that BNR's bid contained an acceptable bid number and was free of mistakes."

Although Ptak knew little about BNR, he did nothing else to verify its reliability as a subcontractor. Ptak did not know that BNR was a small excavating company that had previously worked on "small to mid-size jobs" typically valued at less than $1,000,000. But after 12 years in the construction industry, Ptak had "quite frequently" seen 100-percent differences between valid subcontractor bids and was "completely confident" in using BNR's subcontractor bid in NewMech's bid for the project. Using BNR's bid, NewMech submitted a bid form stating that it "will complete the Work . . . for the . . . lump sum price [of] $4,910,000" and attached a bid bond of $245,500.

In the rush to submit NewMech's bid before the deadline, Ptak had failed to notice the "sloppy work" in BNR's bid. Although Walde had performed a general inspection of the site conditions, he had not studied the technical specifications for the project in detail and he began his preparation of BNR's bid only one day before it was due. When Ptak called BNR to confirm its bid minutes before NewMech's bid was due, Walde was shocked to learn that BNR's bid was more than $1,000,000 lower than the other excavation subcontractor's bid. Indeed, when he called his boss a few minutes after learning this, Walde was told that he "should have withdrawn [BNR's] bid." But it was too late.

NewMech's bid was the lowest by a margin of $863,600. Bill Chang, the city's engineer in charge of the project, called NewMech's president and CEO, Paul Jordan, to congratulate NewMech on being the low bidder. Because he was concerned about the large difference between the two excavation bids, Jordan told Chang that he would "like to go back and sit down with [BNR]" and notify the city of NewMech's decision by 2:00 p.m. the following day.

Aware that they had only 24 hours to withdraw their bid without penalty, Jordan, Ptak, and NewMech's vice president, Steve Poser, met with Walde the following morning to discuss BNR's bid. Despite Walde's assurances to Ptak on the phone one day earlier, by the end of the meeting, everyone was "well-aware that the BNR bid failed to include several items." But "neither company realized the scope of the errors" because no one discussed how much the missing items would cost. Rather than withdraw, NewMech and BNR "assumed they would be able to resolve their differences and proceed with the project." Jordan, therefore, called Chang and informed him that, although NewMech had "discovered some discrepancies," it "would proceed with [its] bid."

At 3:49 p.m. on August 22, almost two hours after the deadline for NewMech to withdraw without penalty, Walde faxed a revised bid proposal that added $129,500 for a missing PVC pond liner. A second revision faxed the following day quoted an additional $8 per cubic yard for sand required for the project. Both faxes indicated that they excluded the cost of other missing items, which would be extra. Characterizing the magnitude of the revisions as a "major problem," Poser estimated that the revisions

received after the withdrawal deadline had increased BNR's initial bid by approximately $730,000. Poser advised Walde that the new bids were unacceptable and that NewMech expected BNR to honor its initial bid.

On August 28, Ptak appeared before the Lonsdale City Council. One councilmember noted that there was approximately $800,000 difference between NewMech's bid and the next lowest bidder and asked Ptak whether NewMech "was prepared to proceed and fulfill this contract at the bid price." Despite his awareness of BNR's mistake, Ptak advised the city council that NewMech would complete the project at the bid price. The city council passed a resolution awarding NewMech the project. In mid-September, Chang sent NewMech a Notice of Award under which NewMech was required to sign and deliver "four fully executed counterparts of the Contract Documents" to the city by September 30, accompanied by performance and payment bonds.

NewMech did not attempt to secure other subcontractors that might have been able to perform the excavation work. On September 22, Poser sent Walde a proposed subcontract for $1,114,000, the amount of BNR's first revised bid. This was NewMech's first contact with BNR since Poser's discussion with Walde almost one month earlier. Walde immediately rejected this proposal and handed Poser his attorney's business card. Walde later sent a proposed subcontract for $1,250,000, which NewMech rejected.

NewMech also sent a letter to the city informing the city that "a material error in the bidding process," combined with "BNR's unlawful withdrawal of its bid," significantly affected NewMech's "ability to enter into a contract [for the project]." NewMech proposed two alternatives: (1) rebid the excavation subcontract and renegotiate

the overall price for the project, or (2) permit NewMech to withdraw based on mutual mistake in the bidding process. The city rejected NewMech's alternative proposals, stating that it would "be waiting for a signed contract and for NewMech to proceed with . . . construction." NewMech subsequently informed the city that it was withdrawing its bid.

After awarding the project to the next-lowest bidder, the city sued NewMech for breach of contract, seeking both $863,600, the difference between NewMech's bid and the next-lowest, and $245,500 as forfeiture of the bid bond. NewMech, in turn, impleaded BNR as a third-party defendant.

After a four-day bench trial, the district court found that: (1) BNR was negligent in preparing and submitting the subcontractor bid on which it intended NewMech to rely; (2) given the time constraints, NewMech was justified in relying on BNR's assurances when NewMech submitted its bid, but NewMech was negligent when it continued to rely on BNR's assurances after discovering potential problems during the meeting with Walde; (3) NewMech breached the "bidding contract" when it failed to sign and deliver the executed construction-contract documents by the deadline, which also prevented the formation of a construction contract; (4) BNR's negligent misrepresentations in submitting its subcontractor bid caused NewMech to breach the agreement to enter into a construction contract, but NewMech's negligence in continuing to rely on BNR's bid rather than promptly withdrawing also caused the breach; (5) although NewMech's bid contained a substantial mistake, NewMech failed to prove its unilateral-mistake defense by clear and convincing evidence; (6) NewMech was liable for the $245,500 owed under

the bid bond, which was the maximum amount of liability under the bidding contract; and (7) BNR was responsible for 50 percent of NewMech's liability.[1] This appeal followed.

D E C I S I O N

In each of the three appeals here, the appellant is challenging a different factual finding made by the district court. A district court's findings of fact will not be disturbed on appeal unless they are clearly erroneous. *Untiedt v. Grand Labs., Inc*., 552 N.W.2d 571, 574 (Minn. App. 1996), *review denied* (Minn. Oct. 15, 1996). When reviewing findings of fact for clear error, we recognize that it is the district court's exclusive responsibility to reconcile conflicting evidence. *Prahl v. Prahl*, 627 N.W.2d 698, 702 (Minn. App. 2001). Thus, even if the record can support a different finding, we are not at liberty to second-guess the district court's resolution of a factual dispute. *Id.* A finding is clearly erroneous when, after viewing the evidence in the light most favorable to the finding, we are nonetheless "left with the definite and firm conviction" that the district court made a mistake. *Id.* (quotation omitted). When there is reasonable evidence to support a finding of fact, we will not disturb it. *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999).

I.

The city challenges the district court's finding that it entered into a "bidding contract" with NewMech rather than a "construction contract." Alternatively, the city challenges the measure of damages used if NewMech breached a bidding contract.

[1] Both the city and NewMech moved to amend the district court's findings. The district court amended its findings to clarify various aspects of its earlier decision but denied the specific amendments and additional findings that the parties requested.

Contract interpretation presents a question of law, which we review de novo. *Borgersen v. Cardiovascular Sys.*, 729 N.W.2d 619, 625 (Minn. App. 2007). Whether a contract exists, however, requires a threshold determination that the parties agreed to be bound by specific contract terms, which presents a question of fact. *W. Insulation Servs., Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 460 N.W.2d 355, 358 (Minn. App. 1990) (noting that contractual intent is question of fact). Unless clearly erroneous, we defer to the district court's findings on the parties' intent when the existence or terms of a contract are in dispute. Minn. R. Civ. P. 52.01; *TNT Props. Ltd. V. Tri-Star Developers, LLC*, 677 N.W.2d 91, 101 (Minn. App. 2004).

The district court found that NewMech and the city agreed to what the district court referred to interchangeably as a "preliminary bid bond contract" or "bidding contract." But, the district court found, NewMech and the city did not intend to bind themselves to a "construction contract" unless NewMech timely furnished the executed contract documents and the performance bond. Because NewMech failed to furnish those items, the district court found, NewMech breached only the "bidding contract," entitling the city to the forfeited bid bond as the sole measure of damages. We will not disturb these findings unless they are clearly erroneous, *Untiedt*, 552 N.W.2d at 574, although we will exercise our independent judgment on any "purely legal" conclusions to be drawn from them, *Powell v. MVE Holdings, Inc.*, 626 N.W.2d 451, 457 (Minn. App. 2001), *review denied* (Minn. July 24, 2001).

A.

The city first challenges the district court's finding as to the particular contract formed. A "contract is a promise or set of promises for the breach of which the law gives a remedy or the performance of which the law recognizes as a duty." *Murray v. MINNCOR*, 596 N.W.2d 702, 704 (Minn. App. 1999) (quotation omitted), *review denied* (Minn. Sept. 28, 1999). A contract's enforceability is premised on mutual assent. *Id.* The elements of contract formation—offer, acceptance, and consideration—all flow from the principle that each party has voluntarily assumed some obligation in exchange for the obligations assumed by the other. *Id.*

Minnesota follows the objective theory of contract formation. *Riley Bros. Constr., Inc. v. Shuck*, 704 N.W.2d 197, 202 (Minn. App. 2005). This requires a district court to assess mutual assent by examining the parties' external, objective conduct, rather than their subjective intent. *Commercial Assocs., Inc. v. Work Connection, Inc*., 712 N.W.2d 772, 782 (Minn. App. 2006). Regardless of the specific words used, a party offers to form a contract only by objectively volunteering to make a promise legally binding if the other party assumes an equally binding duty in return. *Baehr v. Penn-O-Tex Oil Corp.*, 258 Minn. 533, 539, 104 N.W.2d 661, 665-66 (1960) (parsing logical form of contractual promise); *Glass Serv. Co. v. State Farm Mut. Auto. Ins. Co.*, 530 N.W.2d 867, 870 (Minn. App. 1995) (describing offer as promise objectively intended to be legally binding), *review denied* (Minn. June 29, 1995). Reciprocally, the other party can accept an offer only by outwardly manifesting its intent to be legally bound by the offer without any further attempt to "vary, add to, or qualify [its] terms." *Rose v. Guerdon Indus*., 374

N.W.2d 282, 284 (Minn. App. 1985) (noting that valid acceptance must unequivocally express intent "to create thereby, *without more*, a contract").

A contractor's bid for a public contract is an offer. 1 Samuel Williston, *Williston on Contracts* § 4:10, 338-39 (Richard A. Lord ed., 4th ed. 1990) (stating general rule that bid is considered offer). The city asserts that, by completing and submitting the bid form, NewMech offered to build a wastewater-treatment plant in exchange for $4.7 million. The city maintains that it unequivocally accepted NewMech's offer when it sent the Notice of Award. The city argues that the district court's distinction between a "bidding contract" and a "construction contract" is not recognized by Minnesota law. We disagree. What contract, if any, NewMech and the city formed is a question of the parties' objective manifestations of intent. If they objectively establish mutual assent to a particular set of binding promises, Minnesota law recognizes the terms of the bargain. *See Rossman v. 740 River Drive*, 308 Minn. 134, 136, 241 N.W.2d 91, 92 (1976) (refusing to interfere with inviolate freedom of contract unless "the particular contract violates some principle which is of even greater importance to the general public").

Here, the district court made two critical findings as to the parties' contractual intent: (1) the parties entered into a bidding contract, secured by the bid bond, under which NewMech was obligated to sign and deliver the construction contract and performance bond by September 30, 2003; and (2) the parties did not enter into the construction contract because NewMech never signed it. When the record is viewed in the light most favorable to those findings, we conclude that there is a reasonable evidentiary basis to support both of them.

The parties' intent to form a bidding contract, secured by NewMech's bid bond, can be reasonably inferred from the objective language of the bidding documents. By submitting the completed bid form, NewMech

> propose[d] and agree[d], if [its] Bid [were] accepted, to enter into an Agreement with [the city] in the form included in the Bidding Documents to perform all Work as specified or indicated in the Bidding Documents for the prices and within the times indicated in the Bid and in accordance with the other terms and conditions of the Bidding Documents.

As used here, the term "Agreement" is defined as "[t]he *written instrument* which is evidence of the agreement between [the city] and [NewMech] covering the Work." (Emphasis added.) The bidding documents included a blank contract form, aptly titled "AGREEMENT." Taken together, the record reasonably supports the district court's finding that the bid form was objectively intended as an offer "to enter into an Agreement . . . in the form included in the Bidding Documents" rather than an offer "to perform all Work as specified or indicated" in those documents. NewMech promised to sign and deliver a specific "written instrument" and performance bond to the city before a specific date, filling out specific blanks in the Agreement form with specific price and performance-time terms for the subject of that Agreement. NewMech also promised that it would provide a bid bond as security for the performance of its execution obligations. In return for making these promises legally binding, the city would promise to deliver a countersigned copy of the Agreement by a specific date, accompanied by a complete set of engineer-approved drawings. When the city sent the Notice of Award following the city-council resolution, it accepted NewMech's offer, creating a bilateral contract. *See*

Hartung v. Billmeier, 243 Minn. 148, 153, 66 N.W.2d 784, 789 (1954) (defining "bilateral contract" as contract supported by mutual exchange of promises). As we are not "left with the definite and firm conviction" that the district court made a mistake, we will not disturb these findings. *Prahl*, 627 N.W.2d at 702 (quotation omitted).

The finding that NewMech did not intend to enter into a construction contract without signing the Agreement is supported by reasonable inferences drawn from both the Notice of Award and the Agreement. The Notice of Award describes timely execution and delivery of the Agreement as a "condition[ ] precedent," implying that the parties did not intend the terms of the Agreement to become binding until that condition occurred. *See Black's Law Dictionary* 289 (7th ed. 1999) (defining "condition precedent" as "[a]n act or event . . . that must exist or occur before a duty to perform something promised arises"). Moreover, the Agreement states that it "will be effective" on the date listed on its final page in the blank immediately above the space for signatures. If, as here, the Agreement does not indicate a date,[2] the contract documents provide that the Agreement becomes effective when it "is signed and delivered by the last of the two parties to sign and deliver." If one of the parties does not sign and deliver the Agreement, it is not effective. Accordingly, there is evidence in the record that reasonably supports the district court's finding that these provisions objectively manifested the parties' intent to require the Agreement to be formally executed before assenting to its terms.

[2] Although the evidence introduced at trial includes the city's Notice of Award to NewMech, it does not include a dated copy of the Agreement for NewMech to sign.

The city argues that, although NewMech did not sign or deliver the Agreement, there is a "well-established rule that a municipality's acceptance of a contractor's bid results in a contract, regardless of whether the contract has been signed." Although it is true that parties *may* form a contract without a signed agreement, *Powell*, 626 N.W.2d at 462, the city's assertion that the parties here did form a contract without a signed agreement is unavailing because, like any other contract-formation rule, whether a signed writing is necessary is a function of the parties' intent.

"The general rule . . . is that 'the acceptance of a valid bid by the proper municipal authorities, where all legal requirements are observed, constitutes a binding contract.'" *Johnson v. City of Jordan*, 352 N.W.2d 500, 503 (Minn. App. 1984) (quotation omitted). But "the mere acceptance of a bid does not necessarily constitute a contract." 10 E. McQuillin, *The Law of Municipal Corporations* § 29.80 (3d ed. 1999). When a bid requires "certain formalities . . . , such as a written contract, or the furnishing of a bond," such language "often indicates that even after acceptance of the bid no contract is formed until the requisite formality has been complied with." *Johnson*, 352 N.W.2d at 503 (quotation omitted); 1 Williston, § 4:10, 343-44.

A contract, even with a municipality, cannot contradict the fundamental principle of contract law requiring mutual assent to reciprocal obligations. *See Baehr*, 258 Minn. at 538-39, 104 N.W.2d at 665-66 (explaining doctrine of consideration as evidence of whether parties intended promise to create legal obligation). Although NewMech's failure to sign and deliver the Agreement breached its duty to perform under the bid

contract, it objectively demonstrates that NewMech did not assent to the Agreement's terms.

In addition, several provisions suggest that the act of awarding the construction contract functioned as the city's acceptance of the bidding contract but not the construction contract. First, the city explicitly "reserve[d] the right . . . to negotiate contract terms with the Successful Bidder." Because the "Successful Bidder" is the bidder "to whom [the city] . . . makes an award," the city cannot exercise the right to negotiate before it awards the contract. And because the integrated written Agreement "supersedes prior negotiations," the city cannot exercise this right after the Agreement has been executed. The city has an expressly reserved right to negotiate the construction contract's terms between its award and execution; regardless of whether the city exercised that right, the terms were, therefore, subject to change during this period. From these provisions, one may reasonably infer that the city did not intend the award, by itself, to immediately create a binding construction contract. *See Rose*, 374 N.W.2d at 284 (noting that valid acceptance must express unequivocal intent "to create thereby, *without more*, a contract"). Rather, the award was a promise that, on NewMech's "timely compliance . . . with the conditions precedent listed [in the Notice of Award], [the city] will sign and deliver the Agreement."

The city also argues that NewMech cannot take advantage of its own decision to thwart a condition precedent. But the city misstates this rule by conflating conditions precedent to performance with conditions precedent to formation. A condition precedent to performance is something that must occur "before a duty of immediate performance

arises under the contract." *Nat'l City Bank of Minneapolis v. St. Paul Fire & Marine Ins. Co.*, 447 N.W.2d 171, 176 (Minn. 1989). When a party attempts to excuse a failure to fulfill a contractual duty by asserting that the condition required to trigger the duty did not occur, we consider the reason the duty did not occur. *Nodland v. Chirpich*, 307 Minn. 360, 366-67, 240 N.W.2d 513, 516-17 (1976). If the party's obligation would have been triggered but for the party's unjustifiable interference, we will not permit the party to take advantage of the failed condition. *See id.* (explaining equitable basis for rule).

But whereas a condition precedent to performance presupposes the existence of a contract to be performed, a condition precedent to formation goes to whether there is a contract at all. As the Minnesota Supreme Court explained:

> One may condition his entry into contract relations as he sees fit, resorting even to absurdity if he chooses. So, although there be complete agreement on terms, if one expresses the intention not to be bound until the signing of a formal contract, there is no contract if that condition is not fulfilled. Until it is fulfilled, the matter remains in negotiation, and either party may withdraw.

Massee v. Gibbs, 169 Minn. 100, 104, 210 N.W. 872, 874 (1926).

Under the bidding contract, NewMech voluntarily obligated itself to sign and deliver the Agreement. When NewMech refused to sign the Agreement, it breached its duty to perform under the bidding contract, but it also objectively demonstrated that it did not agree to enter into a construction contract. The city's argument essentially asks us to find that NewMech agreed to enter into a construction contract notwithstanding NewMech's refusal to manifest mutual assent. We conclude that the district court

correctly found that NewMech's refusal to sign the Agreement breached its obligation to perform under the bidding contract and that the parties never entered into a construction contract.

B.

The city next challenges the district court's finding that the parties intended to limit damages to the $245,500 bid bond rather than the additional $863,600 that the city was required to pay the second lowest bidder. The city argues that, even if the parties intended to form only a bidding contract, they did not intend to abrogate the city's common-law right "to recover the difference between NewMech's bid and that of the next lowest bidder."

It is well settled that "[t]he appropriate measure for breach-of-contract damages is the amount that will place the nonbreaching party in the same position he would be in had the contract been performed." *Kellogg v. Woods*, 720 N.W.2d 845, 853 (Minn. App. 2006). But the district court was required to determine the position the city would be in had NewMech performed the bidding contract as opposed to the position it would have been in had NewMech entered into and performed the construction contract.

Had NewMech performed the construction contract, the city would have paid $4,910,000 in exchange for a wastewater-treatment plant. But NewMech did not perform the construction contract, and the city was required to pay $5,773,600 for the same performance. Had NewMech breached the construction contract, the appropriate measure of damages would be the difference between these two bids. But as the district found, NewMech could not breach this contract because it never came into being. Rather,

NewMech breached only "the bidding contract for which the bid bond provided the security." The bidding contract was the bilateral contract in which the parties mutually promised to sign and deliver documents for another contract.

Had NewMech performed the bidding contract, the parties would have executed the construction-contract documents and the city would have been required to return the bid bond. NewMech had no construction-contract obligations unless it executed the Agreement. Therefore, NewMech incurred no liability for failure to perform at its quoted price. The bidding contract provided the city with both security that NewMech would ultimately execute the Agreement and a way to recover some of the additional costs in obtaining a substitute if NewMech did not do so.[3] *See Barber Asphalt Paving Co. v. City of St. Paul*, 136 Minn. 396, 399, 162 N.W. 470, 471-72 (1917) (noting that primary purpose of bid bond was to secure indemnity against city's extracontractual losses when low bidder refused to enter into contract).

After observing that neither "the bidding and award documents" nor "statutory or case law" directly addressed whether "recovery for a bidding breach may exceed the amount of the bid bond," the district court found that limiting recovery to the bid bond was "the more reasonable interpretation" of the parties' intent. Because the city did not have a common-law right to expectation damages on a contract that was never formed, the district court's determination was not erroneous.

[3] Indeed, Neil Jensen, who signed the Notice of Award on behalf of the city, testified that his "only intent was for the city to be able to recover the bid bond," which offers additional support for our conclusion on this point.

II.

NewMech challenges the district court's finding that it failed to establish its defense of unilateral mistake by clear and convincing evidence. It argues that the district court erred by finding that it acted recklessly and with culpable negligence in not withdrawing its bid within 24 hours of the bid deadline.

A party may not escape contractual liability for a unilateral mistake if the party bears the risk of that mistake. Restatement (Second) of Contracts § 153 (1981); *accord Bauer v. Am. Int'l Adjustment Co.*, 389 N.W.2d 765, 768 (Minn. App. 1986) (finding that insurance company bore risk of internal miscommunication between its own agents), *review denied* (Minn. Sept. 24, 1986). When a mistake causes "the type of loss that was clearly contemplated under the terms of the [contract,] . . . there is no reason why [those terms] cannot be given full force and effect." *N. Star Ctr., Inc. v. Sibley Bowl, Inc.*, 295 Minn. 424, 426, 205 N.W.2d 331, 333 (1973).

A party bears the risk of mistake if "he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient." Restatement (Second) of Contracts § 154 (1981); *accord Winter v. Skoglund*, 404 N.W.2d 786, 793 (Minn. 1987) (citing Restatement in context of mutual mistake). A party also may bear the risk of mistake if "the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so." Restatement (Second) of Contracts § 154.

Because its bid contained a "material and substantial mistake," NewMech could withdraw its bid without penalty during the 24 hours after the city opened the bids. The

district court found that, because NewMech became aware of that mistake but nonetheless declined to withdraw its bid, NewMech bore the risk that the mistake would be more serious than it had first anticipated. The record reasonably supports this finding.

Jordan became aware that there was an $863,600 difference between NewMech's bid and the next lowest bid when Chang called to congratulate NewMech on being the low bidder. Indeed, Jordan expressed his concerns about BNR's bid, advising Chang that he would "like to go back and sit down with [BNR]." When Jordan and the other NewMech executives met with Walde the following morning to discuss BNR's figures, they learned that Walde had mistakenly omitted a number of items and became aware that NewMech "had limited knowledge about the accuracy of BNR's subcontractor bid." Although NewMech did not discover the magnitude of BNR's mistake, NewMech knew of its existence.

Moreover, the NewMech executives were well aware that they had only until 2:00 p.m. that afternoon to withdraw NewMech's bid without penalty. Despite discovering that NewMech had incorporated a mistake of unknown magnitude into its bid, "NewMech decided to go forward and treat this limited knowledge as sufficient." Although the district court described NewMech's decision as "reckless" or "negligence," in the context of a unilateral-mistake defense, NewMech's decision demonstrates conscious disregard of contractual risk. NewMech gambled on the magnitude of BNR's mistake when it "assumed they would be able to resolve their differences and proceed with the project." Accordingly, the district court's finding that NewMech failed to meet its burden of proof on this affirmative defense is sound.

III.

BNR challenges the district court's finding that its negligent misrepresentations in its subcontractor bid caused NewMech's breach. Minnesota has adopted the Restatement (Second) of Torts § 552 (1976), which states:

> [O]ne who, in the course of his business, profession, or employment, or in [any other] transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss *caused to them by their justifiable reliance upon the information*, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Greuling v. Wells Fargo Home Mortgage, Inc., 690 N.W.2d 757, 760 (Minn. App. 2005) (emphasis added) (alteration in original) (quoting Restatement (Second) Torts § 552).

BNR argues that the district court clearly erred by finding that NewMech was justified in relying on its bid because, as an experienced contractor, NewMech should have realized that BNR's bid contained obvious errors. The district court, however, found that NewMech was initially justified in relying on BNR's bid despite these errors for two reasons. First, BNR delivered its bid less than one-half hour before NewMech's bid was due. Second, when Ptak contacted BNR because he was concerned about the disparity between the excavators' bids, Walde reassured him that BNR's bid was accurate and could be relied on. Indeed, Walde testified that he believed NewMech would be relying on BNR's bid. Therefore, BNR's claim of clear error is without merit.

BNR also argues that "the record is replete with BNR's subsequent efforts to timely apprise NewMech of errors in its bid," thereby preventing NewMech's reliance from being justified. But these later efforts are irrelevant because the district court found

that BNR's negligence was in submitting its original subcontractor bid. All of BNR's subsequent efforts occurred after the harm was done. NewMech had already relied on BNR's subcontractor bid by using it in its general bid.

IV.

NewMech challenges the district court's allocation of fault as divided equally between NewMech and BNR. Although NewMech attempts to characterize the issue as a question of law, the apportionment of liability for comparative negligence is left to the fact-finder, "except in those rare cases" when the evidence is undisputed, and, viewing it in the light most favorable to the prevailing party, the fact-finder "could come to only one conclusion." *Campion v. Knutson*, 307 Minn. 263, 269, 239 N.W.2d 248, 251 (1976) (quotation omitted). This is not such a case.

NewMech may have been reasonable in relying on BNR's bid during the rush to submit its bid to the city, but NewMech later became aware that BNR's bid contained mistakes of unknown magnitude. As such, the record reasonably supports the district court's determination that NewMech's continued reliance on BNR's bid, despite the opportunity to withdraw without penalty, was equally unreasonable. Thus, there is sufficient record support for the district court's finding that NewMech is at fault for one-half of the damages.

Affirmed.