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WHEN REQUESTED UNIT PRICE ADJUSTMENTS DUE TO EXTREME VARIATION IN UNIT QUANTITIES INVOLVE PENNY- BID ITEMS: ONE COURT'S DECISION

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INTRODUCTION:

One issue commonly encountered in Massachusetts public bid protests is what effect does penny bidding have on whether any particular bidder's bid is responsive and not a counter-offer. This is often a controversial topic and in various bid protests, I have been on the side of the angels and won. And, at other times, I have been on, uh, the side *not* of the angels!

Over the years, a variety of authorities have said that penny bidding can be upheld as long as the bid itself is not unbalanced or front-end loaded. As stated by the Attorney General in a decision in the most recently reported bid protest decision on penny bidding: "A "front-end-loaded" bid contains abnormally high prices for items that the owner pays for first, so the bidder gets paid more in the beginning than the actual value of the work that has been done." And, because of this: "Where the contractor receives too much of its profit and overhead early on in the project, one of the incentives to satisfactorily perform remaining work is lost."

Now, as to public projects, by statute one is entitled to present claims for differing site conditions. As stated in MGL C. 30, s. 39N:

> "If, during the progress of the work, the contractor or the awarding authority discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those shown on the plans or indicated in the contract documents either the contractor or the contracting authority may request an equitable adjustment in the contract price of the contract applying to work affected by the differing site conditions. A request for such an adjustment shall be in writing and shall be delivered by the party making such claim to the other party as soon as possible after such conditions are discovered. Upon receipt of such a claim from a contractor, or upon its own initiative, the contracting authority shall make an investigation of such physical conditions, and, if they differ substantially or materially from those shown on the plans or indicated in the contract documents or from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the plans and contract documents and are ***of such a nature as to cause an increase or decrease in the cost of performance of the work*** or a change in the construction methods required for the performance of the work which results in an increase or decrease in the cost of the work, the contracting authority shall make an equitable adjustment in the contract price and the contract shall be modified in writing accordingly." (Emphasis added)

And, there have been a variety of legal authorities over the years that have suggested that when there has been a significant overage or underage of unit price items actually performed as

compared with the estimated quantities, either the contractor or the owner might seek an adjustment in the unit price. As an example, the June 15, 2012 MassDOT Supplemental Specifications, Subsection 4.06 Increased or Decreased Contract Quantities provides, in pertinent part:

". . . Where the actual quantity of a pay item varies by more than 25 percent above or below the estimated quantity stated in the Contract, an equitable adjustment in the Contract Price for that pay item shall be negotiated upon demand of either party regardless of the cause of the variation in quantity."

But, what happens when there is a claimed differing site condition involving a dramatic increase in the number of a unit price item when that item was penny-bid? This was the subject matter of the recently-decided Massachusetts Appeals Court case of Celco Construction Corp. v. Town of Avon, a decision handed down in March, 2015. (If you would like to see a copy of this decision, send us an email and we'll send it to you at no cost by email.)

With regard to that case, for a certain public works project, the bid documents stated that an estimated quantity for excavation and disposal of rock would be 1000 cubic yards. At the bottom of this bid document page was the statement that this is an "(i)ndeterminate quantity assumed for comparison of bids." A general bidder and the ultimate general contractor penny bid this item, as did thirteen other general bidders. Several other bidders, however, bid this item from between $40 to $125 per cubic yard. Rather than the 1000 units estimated, the actual amount of units encountered was 2524 cubic yards. The general contractor twice requested an equitable adjustment as to the unit price for this item where the actual quantities were 150% more than the bid documents indicated. The first request was to increase the unit price from one cent to $220 per cubic yard. The second request was to increase the unit price from one cent to $190 per cubic yard. The basis of the requested equitable adjustment was that because of these increased units, the contractor encountered a 50% reduction in production. No evidence was submitted by the contractor that the character of the rock was different or that the actual unit cost to remove the rock was greater. The Town refused the request and the contractor sued. The superior court granted summary judgment in the Town's favor and the contractor appealed. The Appeals Court affirmed the superior court judgment (meaning that the contractor would get no unit price adjustment).

DISCUSSION :

The first justification for this decision was that the bid documents expressly disclaimed the accuracy of the stated amount. Namely, that the amount of rock was "indeterminate." But, how could any bidder determine in advance of submitting a bid what an unseen subsurface condition would be? If the design professionals couldn't accurately determine this with the advantages of designating what boring samples would be taken coupled with a comparatively unhurried examination of the issue coupled with presumably greater book knowledge, how was a contractor going to determine this when the contractor would have to consider this issue during the bidding process in a period of between 30 and 60 days or less?

As with so many things in the law, a determination of what a bidder's reliance on indicated quantities can be is quite complex. There is case law, for example, saying that there is implied in a set of construction plans and specifications a warranty that they are accurate as to descriptions of the kind and quantity of work required. Additionally, there is case law saying that an owner's non-disclosure of boring information it has coupled with its positive representations regarding the amount of unsuitable material at the site constitute a breach of warranty, justifying an award to the contractor of damages. There is case law stating, however, that while Massachusetts cases have recognized the possibility of an implied warranty of estimates in some circumstances, this would not apply where the contract terms specifically precluded warranty of, or reliance on, the furnished estimates.

The second justification for the decision is much harder to explain away. The Court said that C. 30, s. 39N was to address situations where the subsurface or latent physical conditions caused an increase or decrease in the cost of the work. As stated by the Court:

> "Had Celco in its bid assigned to rock removal a unit price reasonably approximating its estimated cost for such removal, instead of assigning the wholly artificial and unrealistic value of one penny, it would be in no need of adjustment to the contract price. Put another way, G. L. c. 30, s.39N, is designed to protect contractors from unknown and unforeseen subsurface conditions, not from the consequences of their decisions to bid a unit price for the performance of work that is wholly unrelated to their anticipated cost to perform the work."

Of apparent telling significance to this decision was the following sentence from the decision:

> "However, Celco submitted no evidence suggesting that the character of the rock discovered on site was different, **or that the actual unit cost to remove it was greater**, by reason of the increased amount or any other concealed condition." (Emphasis added)

CONCLUSION :

What can be learned from this case? I'll make **seven** comments.

First, let's get it out of the way quickly. **O**ne might say that no one should penny bid an item. But, that wouldn't be realistic. After all, it's not an ideal world, business or otherwise. The competition for public work has never been fiercer and bidders are keen to pursue any advantage that they can perceive. That is until, as occurred here, it doesn't turn out to be such an advantage.

Secondly, one of the two keys to this decision is the statement from the decision that Celco did not submit evidence 'that the actual unit cost to remove it was greater'. From a practical standpoint, Celco had not proved that there was a compensable differing site condition, for if the differing site condition had no costs associated with working with that condition, it was simply not an extra. According to the rationale of the decision, not only had Celco *not* proved its case but it failed to even submit evidence to *support* its case.

Thirdly, if the contractor made an error with regard to this job subsequent to bidding it, it may have been in the way it *characterized* its increased costs. Arguing that the increase in units only decreased the amount of productivity but did not actually increase the costs of performing an individual unit of work seems to be something that the court hung its hat on.
One wonders whether or not that was actually the case or, merely, how the issue was presented. Hindsight is, as they say, 20-20. When the contractor was putting together its claim/claim rationale, it may have felt that it would make more sense for the primary focus of the justification to be from the standpoint of productivity rather than from the standpoint of increased costs, possibly seeing that issue as being less tenable because of the fact that the item was penny-bid. Admittedly, there is a certain logic there. But, from a *practical* standpoint, the effects of the increase in units may have also impacted the costs of performing an individual unit of work, particularly when considering the *number* of units there turned out to be. Also, it just may not have occurred to the contractor that presenting the issue in that manner (i.e. increased cost per cubic yard of rock) was necessary to accomplish the result of an equitable adjustment or as useful as arguing productivity. Put another way, there may have been more than one way to present this and the way that it was presented, unfortunately, didn't resonate with either the superior court or with the Appeals Court.

Fourthly, part of the problem here might have been in attempting to increase the unit price from one cent to $220 per unit (the first try for an equitable adjustment) or from one cent to $190 per unit (the second try for an equitable adjustment). Penny bidding an item that innately is quite expensive – excavation and removal of rock – was a business decision which necessarily, even unavoidably, included a real element of risk. Namely, what would happen if the contractor's judgment as to the number of units of rock that would be encountered turned out to be wrong? Asking the owner to absorb the *entire* consequences of this decision was probably not a good idea and maybe not even fair. Where other bidders attributing a bid value to this work at between $40 to $125 per cubic yard, asking for something between $65 to $95 *more* than the highest bid value received from another bidder possibly gave the owner the impression that this bidder was not only trying to cover its costs but to also make money on this item. And, wouldn't it have been more likely that the awarding authority might have better responded to such a request if the adjustment sought was to $120 per unit or to $90 per unit, rather than for a value exceeding these numbers by $100 more per unit? Possibly. Had the contractor exhibited a willingness to absorb *some* of the consequences of its unilateral penny-bidding decision itself – meeting the owner half-way (if only in the owner's eyes) – its attempt at an equitable adjustment might have been more successful. From the owner's standpoint, why should it have been asked to bear the *entire* consequences of a bidder's bidding decision that was based on either an erroneous assumption as to the actual number of units to be encountered or, possibly, from the decision that exists in some of this type of situation based on the hope to (better) front-end load the job?

Nearly everyone has a 'boss' of some kind or another. In a town, this would be a board of selectmen and/or the town administrator. Or, in a city, this would be the city council and/or the mayor. This bidder may have made it more difficult for the town to justify giving this bidder more money for the increased number of units, given the amounts of money involved and the circumstances of the bidder's election to penny bid. Other than the fact that the town might not

have a construction contingency sufficient to cover this, from a practical standpoint, how would it have looked had the town done so? And, for that matter, why should the town have depleted any construction contingency it might have had to fund this claim, when there may have been more worthy and necessary claims requiring funding?

Fifthly, the efficacy of taking this type of risk might involve considering the effects of making such decisions across a number of jobs, rather than just within the context of one particular job. So, for the sake of argument, let's assume that a bidder has made the determination for a number of similar-type jobs that owners may have a tendency to over-exaggerate or over-report the possibility of a certain thing happening, such as, in this case, the removal and disposal of rock. It goes without saying that if a bidder is more aggressive in estimating the value of a unit it doesn't expect to encounter in the amount indicated, this may give it a real market advantage. So, if over the course of five or ten relatively similar jobs, the bidder might have gotten a job or two it might not have gotten without the penny bid, perhaps the profit earned on such a job(s) has to be applied to the (hopefully) rare occurrence where this type of assumption doesn't work out. Put another way, if over ten jobs a bidder either benefitted from making such a decision or wasn't, at least, penalized for making such a decision, that it didn't work out for one particular job doesn't mean that it wasn't the right judgment to make when considering such decisions over the long haul.

Sixthly, if nothing else can be learned from this decision, many would argue that construction has not really recovered presently from the economic difficulties of 2007-2008 and subsequent. This can be seen in many different ways including where public project after public project is ostensibly being bid under the bare labor and material costs. Where public dollars are at a premium, one might draw an inference from decisions such as this one that in a close call between a contractor and a public owner, more decisions will go to the public owner.

Lastly, when an important action is being contemplated, the results of which might be irrevocable, getting professional (legal) help before the action is taken may save a whole boatload of hurt (and expense) down the road. We see this day in and day out with parties who improvidently enter into construction contracts that are wholly inadequate or insufficiently thought-out or hopelessly one-sided. We see it also where subcontractors and general contractors sign lien waivers or lien waivers/releases which s/he do not really understand. We see it in how a bidder presents to an awarding authority its reasons for withdrawing its bid on a public project without penalty. Assuming the proper grounds exist to support such a request, there is a right way to do this and a wrong way to do this. We also see this in evaluating making the decision to file a bid protest or *when* such a decision should be made. (Sometimes, the best way to win a bid protest is to not file it as the first action out of the box.)

You read articles such as this one because you want to get better at what you do, hopefully, making more money in the process and, additionally, possibly reducing your present and future legal costs. Those costs can often be reduced, sometimes greatly, by smaller, earlier legal involvements before the die is cast rather than with later legal involvements after the damage, sometimes irrevocable, has already occurred.

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