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A Cautionary Tale for Penny Bidding

The Contractors that practice "penny bidding" when bidding on public construction projects in the Commonwealth should take heed of the Massachusetts Appeals Court's recent decision in Celco Constr. Corp. v. Avon, 2015 Mass. App. LEXIS 20 (2015). In Celco, the Appeals Court rejected a public contractor's request for an equitable adjustment for rock removal, for which the contractor had used a unit price of one penny. The Appeals Court held, in essence, that the mere fact that the quantity of rock removal increased did not warrant an equitable adjustment. If the contractor had included in its bid a unit price that was a reasonable approximation of the cost of the rock removal, the increased quantity would not have been an issue.

The contractor in Celco had included in its bid a unit price of $ .01 per cubic yard for rock removal. The Town's bid documents indicated that the quantity of rock to be removed may be 1,000 cubic yards, but clearly indicated it was an indeterminate estimate. The actual quantity turned out to be 2,524 cubic yards. The contractor requested an equitable adjustment under M.G.L. c. 30 § 39N and the Town denied the request. The contractor subsequently filed suit in Superior Court. Upon the Town's motion, the Superior Court entered judgment for the Town thereby rejecting the contractor's request for an equitable adjustment. The contractor then appealed that decision to the Appeals Court.

The Appeals Court agreed with the Superior Court that the contractor was not entitled to the equitable adjustment under M.G.L. c. 30 §39N. Section 39N provides for an equitable adjustment in the contract price "[i]f, 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." The Appeals Court pointed out that the intent of this law "is to remove unknown risks from the competitive bidding process. The contracting authority is thereby able to obtain bid prices stripped of amounts incorporated by bidders to cover the risk, and bidders are able to bid with the assurance that they will be compensated for subsurface or latent site conditions that impose greater costs than reflected in the bid documents."

In Celco, the contractor claimed that the presence of 2,524 cubic yards of rock on the project site, when the project bid documents estimated only 1,000 cubic yards, qualified for an equitable adjustment for the increased costs it incurred to remove the additional rock. The Appeals Court disagreed, holding

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that: (1) the bid documents clearly stated the quantity was “indeterminate” and “the estimate appeared solely for the purpose of allowing comparison of the submitted bids;” and (2) the contractor failed to show that the nature of the rock was different and that more costly means/methods were required to remove it than were anticipated in the bid documents. In emphasizing its second point, the Appeals Court stated that, for unit price items, a mere change in quantity does not automatically warrant an equitable adjustment.

The Appeals Court concluded by pointing out that “[h]ad [the contractor] 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, § 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. In such circumstances, it defies logic to invoke ‘equity’ as a basis for adjustment to the contract price.”

Contractors that bid on public projects and use penny bids for certain unit prices must realize that they may incur increased costs with no chance of additional compensation if the quantity increases, and should carefully consider how they price their bids.

If you have any questions regarding the above information, please contact an attorney in our Construction Law Group.