



CONSTRUCTION LAW E-UPDATE

WHEN AN OVERRUN RESULTS IN AN INCREASED UNIT PRICE

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Although counter-intuitive to experienced public construction professionals, it does happen that an overrun will justify an increase in the contract unit price for certain work.

One type of occurrence where this might happen involves a “composite” line item of work. For example, the New York State Department of Transportation’s (“NYSDOT”) Standard Specifications often include composite line items such as (1) “unclassified” excavation, and (2) “trench and culvert” excavation. Under Section 104-04D of the current version of the NYSDOT Standard Specifications, a contractor can seek a price adjustment for quantity overruns regarding these two types of composite line items. Note that this specification, however, only allows for such an adjustment if the composite line item is a major item of work. (The “200% rule” for minor items under 104-04C will not apply.)

These composite line items are made up of “rock” and “non-rock” components. Where the rock component of these composite line items overruns by more than 125% of the quantity stated in the Earthwork Summary Sheet, the contractor may request an “equitable adjustment” of the contract unit price. The adjustment in this situation should be an increase in the unit price caused by the overrun.

An overrun in quantity typically means that equipment and overhead costs can be spread over a larger amount of work, thereby decreasing the overall unit price for performing the work. However, for these composite line items, an increase in the unit price is justified because the rock component of the composite excavation item is more costly work, as compared

to the excavation of soil or similar materials. If more rock is involved, more time and effort is expended in performance. More or different equipment may also be needed. If a different type of rock is encountered that is physically harder or otherwise more difficult to break and remove, the cost of the work will also increase. The end result is that, because the nature and/or quantity of the actual work is significantly different than that shown in the contract documents, the contract unit price that was based upon the original contract documents or quantity estimates is no longer justified or sufficient for the actual work. In this regard, be prepared to provide your price breakdown of the bid price of the composite item for the rock and non-rock components.

A prudent contractor will carefully examine the facts and the terms of its contract to determine if a request for a price increase is justified under the particular facts at hand. As always, be careful to comply with your contract’s notice and recordkeeping requirements with particular attention being given and records being carefully kept with regard to the actual quantities of the various individual components of the composite item. This includes daily submittals under the NYS-DOT MURK requirements or daily submissions required under contract requirements of other owners such as, for example, NYC Standard Construction Contract’s Article 28.

Accordingly, do not summarily dismiss seeking a price increase simply because an overrun is involved. A careful examination of the facts, and consultation with your legal advisor, might prove well worthwhile.