

MAKING CLAIMS FOR ADDITIONAL MONEY UNDER A FIXED PRICE CONTRACT

Why it is so difficult, and what contractors can do about it

By Robert J. Kaler, Esq.

When a contractor bids a fixed price job, it has to make a series of assumptions about what its direct costs to complete the job will be, what portion of its fixed and variable indirect expenses should be allocated to the job, and what amount of profit, if any, should be included in its bid price, taking into account the competition it faces, and its need for the work. In theory, the contractor is either given, or is able to obtain, sufficient information about the job, and the restrictions under which it will have to be performed, to enable it to make correct assumptions, and to accurately estimate what its costs will be.

COST ASSUMPTIONS

There are many times, however, when a contractor's cost assumptions are based on incomplete information, or are based on reasonable but mistaken beliefs about what the owner will do to facilitate the performance of the work. When that happens, the contractor often incurs substantial additional costs that it did not anticipate, and wants to submit a claim for additional money to the owner. At that point, the issue is which party, the contractor or the owner, assumed the risk of the contractor's assumptions and beliefs, or the information on which they were based, being incomplete or wrong.

For example, if an aerial installation contractor bids a large contract to install cable along hundreds of miles of telephone poles owned by different utilities, it may assume, in the absence of specific information to the contrary, that its crews will be able to move along the line of telephone poles in a continuous



sequence. It may also assume—especially if the owner is required, during the project, to obtain the necessary licenses to use the poles—that the owner will obtain those licenses in a sequential manner such that contiguous segments will be made available to the contractor one after the other.

GENERAL PROVISIONS

Absent a specific contract provision requiring it to do so, however, the owner may very well not be intending to assume those obligations. Instead, it may be assuming that the contractor, having bid the work unconditionally and at a specific price, is required to be ready, willing, and able to perform it in whatever sequence is necessary, moving

installation crews from one available area to another as necessary. Often, the owner can be supported in such an assumption by general provisions in its agreement with the contractor providing that the contractor is deemed to have investigated the construction site and made itself aware of all conditions likely to affect the work, including that licenses may be obtained out of sequence.

Similarly, if a building contractor bids to excavate a site and construct the foundation for a 60-story skyscraper, but discovers, after it submits its bid, that the adjacent property is also being excavated and, at least for a period of time, will not provide the requisite lateral support to the site during the construction period, the contractor may assume that

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the owner bears responsibility for this problem—and should reimburse the contractor for any additional costs that it incurs as a result.

The owner, however, may well assume that the contractor, having bid the work at a specific price, and having had the chance to investigate the surrounding area, is charged with knowing about the planned excavation next door, and is required to be ready, willing, and able to perform the work with or without lateral support from the adjacent lot. It may argue, for example, that when it submitted its bid, the contractor was “on notice” of the plans for adjacent excavations because they had already been filed (if they were), and are a matter of public record. Or it may simply argue that the risk of inadequate or limited lateral support should have been factored into the contractor’s bid.

How can the contractor submit a persuasive claim for additional money under these kinds of circumstances? One key issue is always whether, at the time the contractor submitted its bid, the owner was actually aware of the relevant facts pertaining to the cost of construction that the contractor missed. If it was, then the next issue is whether those facts were so routine and obvious that the owner reasonably assumed that the contractor would also be aware of them. If they were not, the contractor’s strongest argument will often be that the owner had what is sometimes referred to as “superior knowledge,” and that it had an implied obligation to share that knowledge with its prospective contractors.

IMPLIED COVENANT

On this point, most jurisdictions hold that construction contracts impose on both owners and contractors what is referred to as an “implied covenant” of good faith and fair dealing—a commitment not to try to deprive the other party of the expected benefits of the contract to which both are parties. While the process of submitting a bid does not always result in a contract, there is a powerful argument that an owner also has an inherent obligation to provide bidders with whatever information it has that may significantly affect the cost of the work on which they are bidding. This is particularly the case if the owner has reason to believe that the bidders would not know about this information, or might have missed it.

IN SUMMARY

So in pursuing a claim for additional money based on unforeseen circumstances, apart from a traditional “differing site conditions” or “delay/disruption” claim, it is generally fruitful to focus at the outset on determining what the owner knew, and when it knew it, about the information that the

bidder missed. It is also important to show why the bidder missed the information, and that it was not acting unreasonably in failing to learn of it. Lastly, it is important to show that the bidder genuinely did “miss” the information, and is not belatedly just trying to present an excuse to justify more money. ■

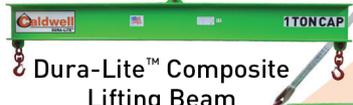
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