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Municipal Client Alert
March 2015

CELCO CONSTRUCTION CORP. vs. TOWN OF AVON

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On March 2, 2015, the Appeals Court issued a decision in a case handled by Murphy, Hesse, Toomey & Lehane, LLP, which significantly impacts communities across Massachusetts. In Celco Construction Corp. v. Town of Avon, Appeals Court No. 13-P-1880 (slip op.) (March 2, 2015), the Appeals Court upheld the Town of Avon's decision to deny an equitable adjustment claim for latent defects where the bidder had engaged in so-called "penny bidding" - artificially pricing a particular bid category at one cent ($.01) in order to achieve a bidding advantage. The Court held that the "indeterminate" amount of the item does not automatically give rise to a latent defects claim where the nature of the work was contemplated and the awarding authority was clear that only the amount was unknown."

For decades, Massachusetts law has contained M. G. L. c. 30, § 39N, which requires all public building and all public works contracts to contain a provision allowing for an adjustment in the contract price for so-called latent defects or changed sub-surface conditions. Either party may request an equitable adjustment under the statute 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."

The Town of Avon, in conducting a water main reconstruction project, solicited competitive sealed bids in 2008. During the bidding process, the Town specified that the estimated quantity of excavation and rock removal was estimated to be 1000 cubic yards. However, it clarified that statement with an asterisk, also noting that the quantity was provided solely for bid comparison, and that the actual quantity of rock present was unknown.

Celco responded by submitting a bid that contained a so-called "penny bid" for excavation and rock removal. Essentially, its bid contained a unit price of $.01 per cubic yard for excavation and disposal of rock from the project site. Although Celco had the overall lowest responsible and eligible bid, and was awarded the contract, it discovered that the quantity of rock requiring removal substantially exceeded 1,000 yards. Celco sought an "equitable adjustment" under the provisions of M.G.L. c. 30, §39N, based upon a "material change" from the information provided in the Town's specifications. The Town denied Celco's request, citing the quantity provided as "indeterminate."

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Affirming the decision of the Norfolk Superior Court, the Appeals Court cited the purpose of the so-called statutory "equitable adjustment" provisions. According to the Court, the purpose is to assure contractors that they will be compensated for unknown risks discovered during the construction process. The Appeals Court emphasized that the nature of the rocks themselves, as well as the cost to remove them, did not differ during the construction process in any material respect from their state during the procurement process. The Town had been fully transparent in stating that the actual quantity of rock was "indeterminate" and that the estimate to be used was for purposes of bid comparison only.

The Appeals Court offers some comfort for municipalities and for other public sector awarding authorities. Especially in cases in which quantities of subsurface materials are indeterminate, bidders have a duty to offer unit prices they will honor. Only in cases where the subsurface conditions differ in character from those portrayed in the procurement documents or where there is a greater cost to remove an excess of a particular item will a statutory equitable adjustment be required. Public sector awarding authorities are also comforted that contractors will not be able to bootstrap miscalculated penny bids into equitable adjustment claims. The Appeals Court's opinion serves as an admonition to general contractors to be wary in their use of "penny bidding":

> *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, § 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.*

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