

A recent Minnesota Court of Appeals case turned on the important determination of whether a contract was a *lump-sum* contract or a *unit-based* (“unit price”) contract. This determination is important because if a contract is a lump-sum contract, the “lump sum” to which the contractor can demand payment can only be changed with a change order complying with the contract’s requirements. On the other hand, a unit-based contract allows the contractor to demand payment for the total number of units performed, times the agreed upon per-unit price. No change order is required for the contractor to demand payment for all of the work (units) provided, even if that full price is more than the amount contained on the original proposal or estimate.

The case *Stafne Construction & Aggregate, LLC v. Bambenek, et al*, A10-873 (Minn. Ct. App. filed April 19, 2011) involved a claim by Stafne Construction for payment for work it performed under contract with property owners Holt and Bambenek. Stafne Construction submitted a proposal to prepare building sites, grade and level campsites, install a septic system and provide roadwork for a campground in Pine County, Minnesota. Stafne Construction’s one-page proposal (not unusual in the construction industry) included a combination of typewritten provisions and handwritten information. The proposal contained several categories of work including: sewer lines, pool digging, parking areas, grade-level campsites, seeding and mulching, roadwork and gravel, septic mounds and tanks, and pole barn preparation.

Many, but not all, of the listed categories contained a per-square-foot cost followed by a footage number, which indicated an estimate of the units, i.e. the number of feet of each of the categories. The proposal indicated a total cost of \$289,523, and also had a provision stating that “deviation[s]” involving “extra costs” would be “executed only upon written order”. This type of a provision requiring changes to be in writing is standard in construction contracts.

The owners, Holt and Bambenek, without informing Stafne Construction, created a new LLC and transferred the land to the new LLC. Under the new LLC the project also dramatically increased in size, which resulted in a large increase in Stafne Construction’s scope of work.

Stafne Construction began performing its work, and continued working even when the financing dried up. Stafne Construction was not paid in full for its work and started a lawsuit to recover the entire sum it was owed—which after some partial payments resulted in a claim of \$232,000.

At trial, Holt and Bambenek argued that their contract with Stafne Construction was a “lump-sum” contract for the original \$289,523—nearly all of which was paid. Stafne Construction argued its contract was a “unit-based” contract, entitling it to claim another \$232,000.

The trial court (district court) ruled in favor of Stafne Construction, that the contract was a “unit-based” contract rather than a “lump-sum” contract. The Minnesota Court of Appeals affirmed that decision. The court found that the contract (Stafne Construction’s one-page proposal part typewritten and part handwritten) was a unit based contract on the basis that the proposal essentially listed the types of work to be performed along with a per-unit price for many of the types of work listed. The cost estimate, \$289,523, was essentially an estimate of the cost to

perform the estimated types and units contained on the proposal. The court also found it important that the contract did not include estimates for each category, and the scope of the work was too vague to support a total calculation. At the time of the proposal the plans were not definite enough to allow Stafne Construction to make a complete bid. The Court's conclusion that this was a "unit-based" contract rather than a "lump-sum" contract allowed Stafne Construction to succeed on a claim for approximately \$200,000 more than the original estimated amount, \$289,523.

The moral of the case is that if you don't want to be limited to the total amount indicated on your proposal, make sure the proposal contains a breakdown of items and unit costs for those items, so that it appears clearly that the contract price is based on unit prices. Alternatively, if the scope of work dramatically increases resulting in your doing more work than contained in the contract, follow clearly and promptly the change order requirements.

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