Legal Considerations Concerning the Performance of Extra Work by Consulting Engineers

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Consulting engineers are often placed in a situation in which they must perform work that was not planned at the time when their contract was concluded. If they are governed by a fixed price contract and the contractual procedure is not followed to the letter, they may find themselves in a position where it will be difficult for them to get paid for that additional work. In order to avoid such a situation, a number of legal considerations must be kept in mind.

The Fixed Price Contract

A fixed price contract is a contract for services or of enterprise whereby the client and the provider of services agree on a fixed price for which the work or the services will be performed or provided. In that type of contract, the price may not be altered, even if the scope of the services rendered is extended or narrowed, unless otherwise agreed by the parties.1

The fixed price contract therefore differs from contracts in which an hourly compensation model is provided for. It must be noted, however, that even under a contract stipulating an hourly rate of pay, if the price for the services in question has been estimated, the service provider must justify any price increase. The client will then not be bound to pay for any such increase, unless it results from work, services or expenses that were not foreseeable at the time the contract was entered into.2

Amending a Fixed Price Contract

It has long been established by the Supreme Court that compliance with the contractual procedure is an essential condition for altering the price of a fixed price contract 3, except where there has been an express or tacit waiver of that stipulation by the parties.4

Indeed, fixed price contracts generally include a detailed description of the procedure to be followed where the scope of the work is being modified. That procedure will provide, for example, for sending a notice and for the signing of amendments (“change orders”).

Apart from that procedure for amending the agreement, fixed price contracts should ideally also include a detailed description of the work, a schedule of deadlines, a list of "deliverables" and a dispute resolution procedure.

Even where the contract is silent as to the procedure for altering it, in order to ensure that the performance of any extra work will be paid for, it is recommended that the following best practices be adopted:

- Notify the client as soon as possible of any change to the scope of the work;
- Submit a price for the additional work requested;
- Enter into a written agreement for the additional work (a "change order").

To the extent possible, all these measures should be taken before any extra work is carried out.

Contracts with Municipalities

An additional difficulty arises with municipal contracts. Both doctrine and jurisprudence have repeatedly recognized that those who contract with a municipality must make sure not only that it is acting within the limits of its powers, but also that all the conditions required by statute have been observed. Otherwise, the municipality is not bound toward them.5

For example, in *Roy LGL Ltée*c.*Corporation du village de McMasterville*6, an engineering firm was denied payment for work it had carried out, since the municipal council resolution authorizing that work was not accompanied by the required treasurer's certificate. More recently, in *Ville de Montréal* c.*Octane Stratégie*7, the Court of Appeal confirmed that only the municipal council is empowered to bind the municipality. The decision, however, opens the door to the compensation of service providers by way of the principle of restitution for performance where a legal deed is null and void. It should be noted that this decision is now under appeal by the City of Montréal to the Supreme Court.

What Recourses are Available?

Where the client fails to pay for additional work, the following legal recourses may be considered:

- An action on an account. This is a suit for unpaid fees. The action has the disadvantage of entailing significant costs and long delays.
- The legal construction hypothec. That mechanism is relatively unused by engineers, but registering such a hypothec is advantageous in terms of costs and delays. However, such registration could eventually also lead to legal proceedings.
- Mediation or arbitration, which may be provided for by the contract and which should always be considered before instituting any legal proceedings.

Lastly, we will conclude with a warning about the right of retention provided for by the Civil Code of Québec. 8 It has already been held that this practice is contrary to the *Code of ethics of engineers* 9. Therefore, prudence is recommended before taking any action, for example, withholding plans on grounds of non-payment of fees.

Regardless of which legal remedy is selected, compliance with the contractual procedure is the best possible guarantee of a successful outcome.

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1 Article 2109 C.C.Q.

2 Article 2107 C.C.Q.

3 *Corpex (1977) Inc.*c *Canada,*[1982] 2 S.C.R. 643.

4 *Régie d'assainissement des eaux du bassin de La Prairie*c. *Janin Construction (1983) ltée*, REJB 1999–11611 (C.A.).

5 *Beaudry* c *Cité de Beauharnois*, [1962] B.R. 738;*Roy LGL Ltée*c.*Corporation du village de McMasterville,*[2000] C.S. AZ-0002197.

6 [1962] B.R. 738

7 2018 QCCA 223.

8 Article 1591 C.C.Q.

9 *Alaurent* c *Deschênes, Comité de discipline de l'Ordre des ingénieurs du Québec,*22-94-0011, February 17, 1995.

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