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TO: MTA BOARD OF DIRECTORS
FROM: STANLEY G. PHERNAMBUCO 
SUBJECT: PROGRAMWIDE
DESIGN CONSULTANT RESPONSIBILITIES
AND POTENTIAL LIABILITIES REGARDING
QUANTITY ESTIMATING

ISSUE

MTA Board Members are concerned about design consultant responsibilities and potential liabilities regarding estimating. When and how does the MTA have recourse to recover excess costs resulting from erroneous design consultant estimates?

BACKGROUND

As part of its scope, the Engineering Management Consultant (EMC) prepares bid forms and pay items and quantities to be included in the construction contract bid packages. Drawings in the contract documents specify the corresponding physical boundaries of the construction pay items.

The Engineer's Estimate, prepared by the EMC, provides the final quantities that are included in the bid documents. The Contract General Conditions item GC-3-K instructs the contractor to verify consistency in the contract documents and if the contractor finds a nonconformity, the contractor has the responsibility to notify the MTA and await specific written instructions prior to commencing the work.

Construction contracts specify that as built quantity variances within 25% of the original contract amounts of a given line item are to be priced at the original rate bid by the contractor. Variances, either plus or minus, that exceed 25% are subject to price renegotiation with the contractor.

When it is determined by the contractor and verified by the construction manager and the MTA that the quantities provided by the EMC in the Schedule of Quantities and Prices vary by more than 25% from the as built quantities and a higher unit price has to be paid then the MTA has recourse, through Errors and Omissions, to recover the cost increase, based on the higher unit price, from the consultant.

When such conditions exist, the Board item requesting approval of the change to the contractor also notes that cost recovery of the higher unit price cost increase is being pursued from the consultant.