

*59th Annual*



WESTERN WINTER  
WORKSHOP

Pricing Deleted and Changed Work

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- Principal Claims Analyst, Arcadis
- Over 25 years of experience in transportation, public works, healthcare, and education construction sectors
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- AACE Certification Board and Education Board
- AACE Technical Board Contracts Subcommittee
- California Lawyers' Association Real Property Law Journal





# Outline

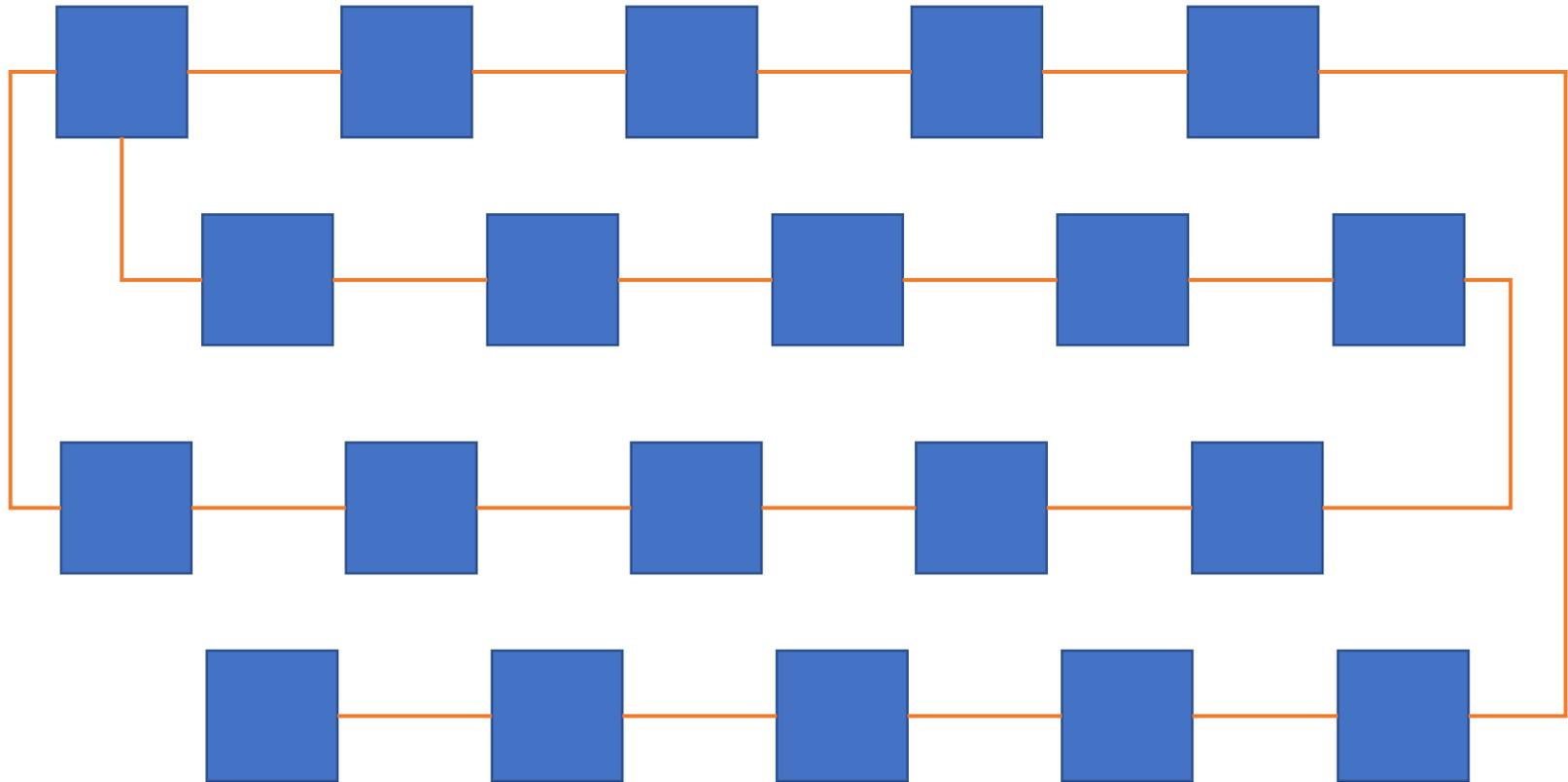
- Introduction & Fact Pattern
- Contract Requirements
  - Contract Provisions
  - FTA Circular 4220.1F
  - FTA Best Practices Procurement Manual (BPPM)
- BPPM Basic Pricing Formula
  - Application of FTA Basic Pricing Formula
  - Fairness of FTA Basic Pricing Formula Rules to Both Parties
  - Equity in Pricing Fire Rated Cable Changes
- Requested DRB Ruling



# Facts

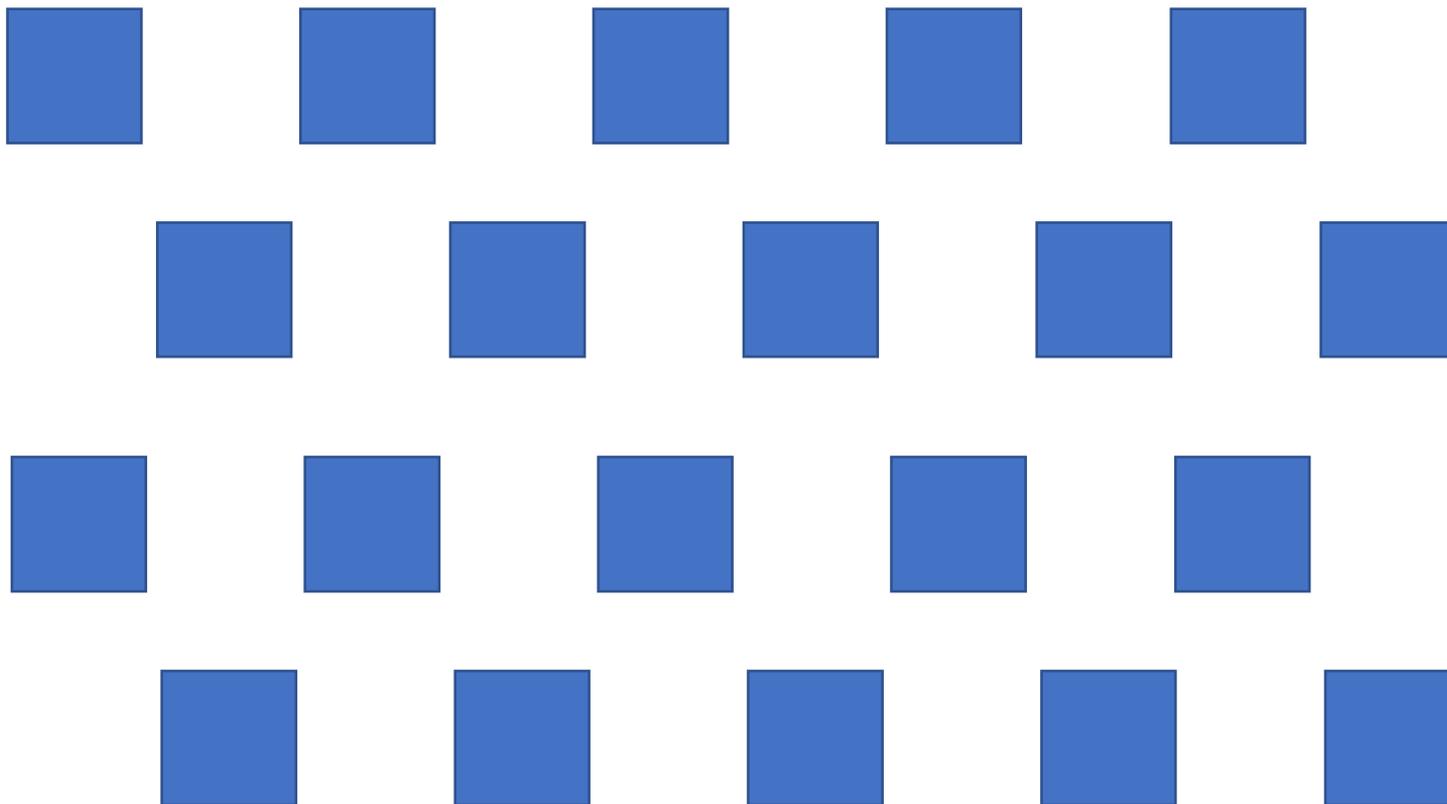
- Owner is a public agency and the project has Federal funds.
- The scope of work is installing power and control for emergency ventilation and lighting system in underground tunnels.
- There is a problem with the specified fire-rated Galvanized Rigid Steel conduit:
  - UL cancelled the certification of the GRS conduit
  - Contractor's suggested substitution is excessive
  - Owner's Engineer-of-Record states that the Contractor's solution is over-engineered and too expensive
  - Owner directs installation of fire-rate cable in lieu of original design
- The Contractor determines that the Owner-directed substitution is not to code.
- After months of negotiations...

# Original System



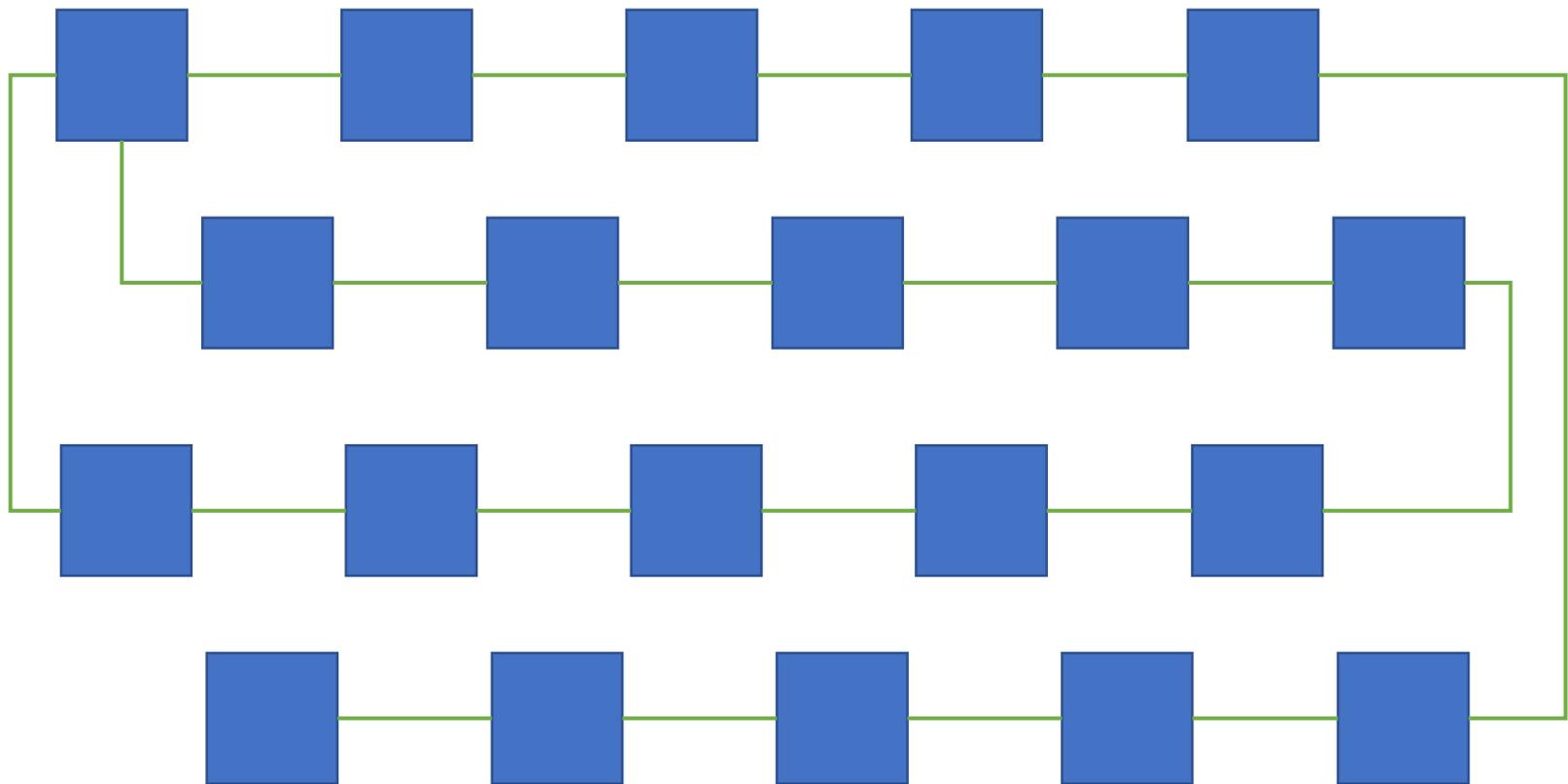


# System with Deleted Work



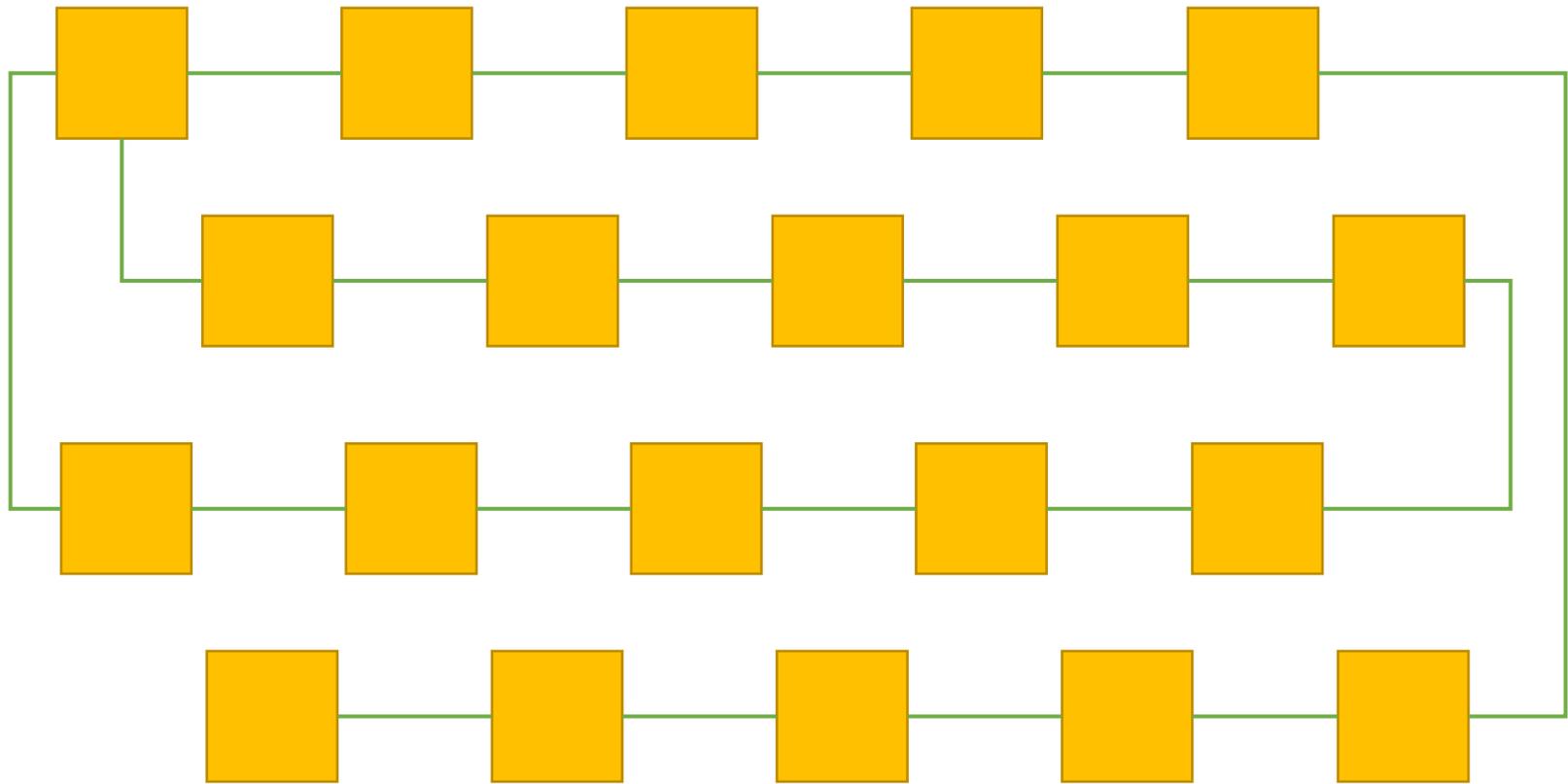


# Owner's Position: Same System with New Materials





# Contractor's Position: New Materials require a New System



# Questions To Answer

1. How should the credit to the Owner be priced for the value of the work deleted from the base contract by the change?
2. How should a Change be priced where some elements of a system are changed, such as different materials, but other elements of the work are not changed (such as installation of exposed electrical conduits in the bored tunnels)?



# Contract Provisions & FTA Circular 4220.1F





# Contract Provision

## General Conditions 31.6 Deleted Work

When a Change Order or Modification deletes Work from the Contract, the amount of the reduction in the Total Contract Price shall be based upon ***historical costs or estimated actual costs***, including a bill of material, a breakdown of labor and equipment costs, and overhead and profit associated with the deleted Work (pursuant to the provisions set forth in the Article entitled BASIS FOR ESTABLISHING COSTS ASSOCIATED WITH A CHANGE). Documented cancellation and restocking charges may be included in the determination of the costs.

[Emphasis added.]



# Contractor Misstates the Contract:

- “Contractor contends Deleted Work should be priced and credited per the contract Term GC-31.6, specifically based upon historical costs or estimated actual costs, ***at the time of bid.***” [Emphasis added.]
- “***At the time of bid***” does not appear in GC-31.6, *or anywhere else* in the General and Special Conditions.
- GP-32 BASIS FOR ESTABLISHING COSTS ASSOCIATED WITH A CHANGE, 32.2.2 Eligible Costs, (a) only allowable and reasonable ***additional cost that will be incurred...*** [Emphasis added.]

## SPECIAL PROVISIONS-36 FEDERAL FUNDING, INCORPORATION OF FEDERAL TRANSIT ADMINISTRATION (FTA) TERMS, AND FEDERAL CHANGES

- B. “This Contract includes, in part, certain standard terms and conditions required by DOT, whether or not expressly set forth in the Contract provisions. *All contractual provisions required by DOT, as set forth in FTA Circular 4220.1F, dated November 1, 2008 (including any changes, revisions or successor circulars) is automatically hereby incorporated by reference...*” [Emphasis added.]



# FTA Circular 4220.1 F

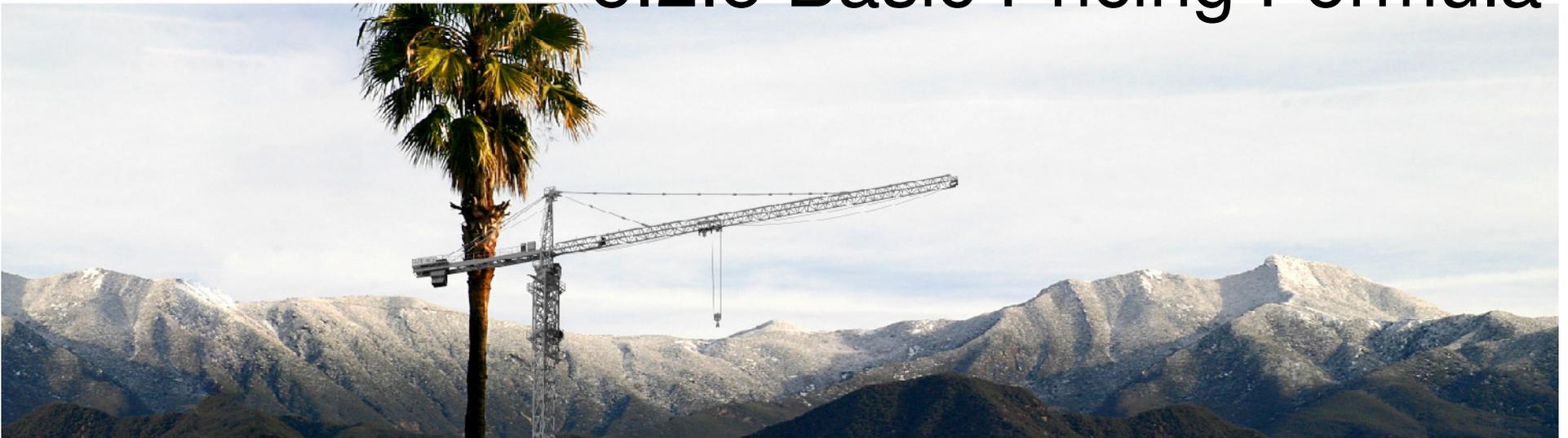
## “2. CHANGES AND MODIFICATIONS.

2) Cost Restrictions. To be eligible for FTA assistance under the recipient’s grant or cooperative agreement, *the cost of the change, modification, change order, or constructive change must be allowable, allocable, within the scope of its grant or cooperative agreement, and reasonable for the completion of project* scope.

A more extensive discussion on Changes and Modifications can be found in FTA’s *Best Practices Procurement Manual (BPPM)*. [Emphasis added.]



Federal Transit Administration *Best  
Practices Procurement & Lessons  
Learned Manual*  
5.2.5 Basic Pricing Formula



# Best Practices Procurement Manual (BPPM)

## TWO RULES FOR PRICING DELETED WORK

- “Leave Them Where You Find Them” Rule
- “Would Have Cost” Rule

“BASIC PRICING FORMULA”



## BPPM 5.2.5 BASIC PRICING FORMULA “Leave Them Where You Find Them”

“The basic pricing for an equitable adjustment is ‘the difference between what it would have **reasonably cost** to perform the work as originally required and what it would have **reasonably cost** to perform the work as changed.’”<sup>21</sup>

“When repricing as a result of a change order, courts have limited the repricing to the changed work, **without altering the original profit or loss position of the contractor**. This is known as the ‘**leave them where you find them approach**.’ This rule **would preclude a contractor from converting a loss to a profit and vice versa**.”[Emphasis added.]

<sup>21</sup>BPPM 5.2.5 citing *Modern Foods, Inc.*, ASCBA 2090, 57-1 BCA § 1229.



# BPPM 5.2.5 BASIC PRICING FORMULA

## “Leave Them Where You Find Them”

The purpose of an equitable adjustment:

*“is to **leave the parties in the same position** costwise and profitwise as they would have occupied had there been no change, preserving to each as nearly as possible the advantages and disadvantages of their bargain.”* [Emphasis added.]

The Appeal of *Montag-Halvorson-Cascade-Austin*, Eng. C&A 408 (Nov. 12, 1953); ASBCA 1990 (Oct 1, 1954); 141 CT. CL. 793 (Mar 5, 1958)<sup>1, 2</sup>

<sup>1</sup>see Duncan, *Equitable Adjustments Under Fixed Price Contracts*, The Federal Bar Journal. Vol. 22 No. 4, Fall 1962.

<sup>2</sup>see Nash, Government Contract Changes, 2<sup>nd</sup> Edition (1989) at § 16-3 *Repricing Changed Work*.



## BPPM 5.2.5 BASIC PRICING FORMULA “Would Have Cost” (1)

“The “**would have cost rule**” is applied to cases involving **deductive changes** or changes where **work is deleted**, and **other work is substituted** for the deleted work.”  
[BPPM, p. 124] [Emphasis added.]



## BPPM 5.2.5 BASIC PRICING FORMULA “Would Have Cost” (2)

“Pricing the Deleted Work - Under the basic pricing formula, the amount of the adjustment for the deleted work is *the cost the contractor would have incurred* had the change not been issued; i.e., *had the work been performed.*”  
[BPPM, p. 123] [Emphasis added.]

For the changes in this fact pattern, “*the cost the contractor would have incurred*” is at the time the work would have been performed, and *NOT* the estimate at the time of bid!



## BPPM 5.2.5 BASIC PRICING FORMULA “Would Have Cost” (3)

“The cost adjustment is **not** based upon the amount included in the contractor’s **original bid** if that amount is **not indicative** of the cost to **actually perform the work.**” [BPPM, p. 124]  
[Emphasis added.]



## “Would Have Cost” Rule Case Law

*Appeal of Modern Foods, Inc.* 57-1 BCA 1229 (1957) citing *S.N. Nielsen Company*, ASBCA No. 1990 (1954) and *Dibs Production & Engineering Company*, ASBCA No. 1438 (1954).

In order to make a proper equitable adjustment, the Board must compute *what would have reasonably been the cost of the contractor to perform* the contract *had it not been changed*. [Emphasis added.]



# Equitable Adjustment – Means Fairness to Both Sides

The “**Would Have Cost**” Rule works to the advantage of both parties:

These two cases—*Nielsen* and *Admiral*—show that the “would-have-cost” rule *may benefit either party depending on the circumstances* because it leaves both in basically the same position that they would have been in had the change not been issued. *Thus, as long as the [would have cost] rule is applied uniformly, it produces fair results.* [Emphasis added.]



# Equitable Adjustment – Owner’s Benefit

The “**Would Have Cost**” Rule works to the benefit of the Government:

The “would-have-cost” rule is essentially an application of the “leave them where you find them” principle discussed in § 16:2. Thus, *where the contractor is in a loss position on the entire contract because its original estimate of costs was low, the “would-have-cost” rule will force it to bear the loss that it would have borne had the change not been issued.* For example, in *Nielsen Co. v. United States*,<sup>1</sup> the contractor had included \$34,800 in its price for the cost of electrical work which was deleted from the contract by change order. The Government was able to prove that it **would-have-cost** the contractor \$60,800 to actually perform this work. The Court of Claims ruled that this was the correct amount of direct cost to deduct from the price.<sup>2</sup> [Emphasis added.]



# Equitable Adjustment – Contractor’s Benefit

The “**Would Have Cost**” Rule works to the benefit of the Contractor:

On the other hand, if the contractor has been able to find a way to perform the original work for an amount less than its original estimate, *it is entitled to retain the excess amount in the pricing of the adjustment*. An example of this side of the rule is *Admiral Corp.*,<sup>3</sup> where the contractor included \$12.48 in its estimate for a purchased item and later found that it could purchase it for \$7.52. The ASBCA held that the contractor was entitled to maintain its profit position on the work and ruled that the proper amount to be deducted was \$7.52 per item. A later ASBCA case has approved *Admiral Corp.*, stating that *it is “well settled” that a contractor under a fixed price contract is entitled to the benefit of any savings it can realize when it can secure components more cheaply than originally estimated*.<sup>4</sup> Subsequently, the ASBCA stated that the rule requires that “a contractor that is in a ‘profit position’ should not lose that ‘profit’ simply because there is a change in the contract work.”<sup>5</sup> [Emphasis added.]





# Consistent with GC-31.6 Deleted Work

- These rules are consistent with the contract.
- The question is simply what is the best and most reliable evidence of what the “actual cost” would have been.
- The “actual cost” of the deducted work is the “would have cost” at the time the work was to be performed.
- BPPM concludes: “...the cost adjustment is not based upon the amount included in the contractor’s original bid if that amount is not indicative of the cost to actually perform the work.”



# Consistent with GC Deleted Work

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# Equity in Pricing the Deleted Work

Allowing the Contractor:

- To use their bid price for the credit amount
- To re-price unaffected work

*Negates the fairness* of the procurement process.



# Owner's Requested Ruling

1. The credit to the Owner for the deleted work should be priced according to the “**Leave Them Where You Find Them**” and “**Would Have Cost**” rules
  - The credit should be based on the cost that the Contractor would have incurred had the deleted work been performed.
  - Is required by the Contract, is equitable and is supported by FTA guidance.
  - Does not allow the Contractor a second bite at the apple to correct its bid *on the deleted work*.
  - Allowing the Contractor to use their bid price for the credit negates the fairness of the procurement process.



# Owner's Requested Ruling

2. The pricing for the Change should be limited to the specific aspects of the system that have been changed:
  - Consistent with the “leave them where you find them” and the “would have cost” rules.
  - Unchanged work can and should be Isolated and priced (the Owner has prepared an ICE)
  - Does not allow the Contractor a second bite at the apple to correct its bid on *unaffected* work.



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*Thank you.*

