

A general contractor and a subcontractor signed a contract under which the subcontractor agreed to pour a cement foundation for a building project for \$12,000. Before the subcontractor performed, it discovered that it had made an error in computing the size of the foundation and should have quoted the general contractor \$18,000 for the work. The subcontractor informed the general contractor of the mistake and asked whether the general contractor would agree to pay \$15,000 for the foundation, which would cover the subcontractor's costs. After determining that other subcontractors would charge at least \$18,000 for the work, the general contractor agreed in writing. When the work was completed, the general contractor tendered the subcontractor \$12,000. The subcontractor refused to accept the payment.

If the subcontractor prevails in a suit against the general contractor, how much will the subcontractor be likely to recover?

- A. \$12,000, because the contract modification was not supported by consideration.
- B. \$12,000, because the subcontractor's mistake was unilateral.
- C. \$15,000, because the contract modification was fair and equitable under the circumstances.
- D. \$18,000, because that is the value of the benefit the subcontractor conferred on the general contractor.

Correct

Collecting Statistics

39 secsTime Spent

2023Version

Explanation:

Modifying existing contracts

Governing law		Requirements
Common law	Traditional view	Parties' agreement New consideration
	Modern view	Parties' agreement New consideration <i>unless</i> modification is fair & equitable due to unanticipated circumstances
UCC		Parties' agreement Good faith (ie, honesty & observance of reasonable commercial standards of fair dealing) New consideration <i>not</i> required

UCC = Uniform Commercial Code.

At common law, **contract modifications** generally must be supported by new consideration to be enforceable. This requires both parties to alter their duties in some way. However, modifications are enforceable **without new consideration** if the modification:

rests on **circumstances not anticipated** by the parties when the contract was made* *and* is **fair and equitable** in light of those circumstances.

Here, the general contractor and the subcontractor originally agreed on a contract price of \$12,000. However, the subcontractor then discovered that it had made an error in computing the size of the foundation for which it was to pour cement. This unanticipated circumstance was going to increase the subcontractor's costs by at least \$3,000, so modifying the contract by that amount was fair and equitable under the circumstances. Therefore, if the subcontractor prevails in a suit against the general contractor, the subcontractor will likely recover \$15,000.

*Although the circumstances prompting the modification must have been unanticipated by the parties, they need not have been completely unforeseeable.

(Choice A) Although consideration is typically required for contract modifications, a modification is permissible if it is fair and equitable in light of changed circumstances.

(Choice B) The subcontractor's mistake was **unilateral** because the subcontractor alone made the error in computing the size of the foundation. However, the subcontractor is not asking for relief on the basis of its mistake but is instead seeking to enforce the contract modification.

(Choice D) **Restitutionary damages** are damages awarded to restore to the claimant the value of the benefit conferred upon the nonbreaching party. However, such damages are unavailable when, as here, the plaintiff has completed performance and the defendant's only outstanding obligation is to pay money for that performance.

Educational objective:

Under common law, contract modifications generally must be supported by new consideration—ie, each party must alter its duties in some way. But new consideration is not required if the modification is fair and equitable in light of unanticipated circumstances.

References

Restatement (Second) of Contracts § 89 (Am. Law Inst. 1981) (explaining that modification of a contract without new consideration is binding if it is fair and equitable in view of unanticipated circumstances).

Copyright © 2021 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.