DIFFERING SITE CONDITIONS: TYPE I

Who Bears the Risk of Differing Site Conditions?

INTRODUCTION

Differing Site Conditions are commonplace in the construction arena. Contractors can potentially incur significant increases in costs and time when addressing and working with these newly discovered physical conditions at the project site.

While the government generally bears the risk of Differing Site Conditions, contractors must overcome certain stumbling blocks to recover its costs that stem from the differing physical condition. This post briefly summarizes Type I Differing Site Conditions, then discusses three of the more common stumbling blocks: site investigations, notice requirements, and exculpatory clauses.

TYPE I DIFFERING SITE CONDITIONS, GENERALLY

Federal construction contracts contain the standard clause FAR 52.236-2 "Differing Site Conditions." This clause authorizes additional compensation for: (1) "subsurface or latent physical conditions at the site which differ materially from those indicated in this contract (referred to as…Type I conditions);" and (2) "unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract (referred to as…Type II conditions)." See previous discussion of Differing Site Conditions here.

As I mentioned last week, Type II conditions are those that are not generally encountered at a similar site during similar work, but were discovered at *this* site.

Conversely, Type I conditions are those that are different from the conditions described in the contract documents, and which were not discovered or discoverable in the contractor's site visit. A contractor must show six elements to prove its Type II claim:

(1) That certain conditions are indicated by the plans, specifications, and other contract documents;
(2) That it relied on the physical conditions indicated in the contract;
(3) The nature of the physical conditions actually encountered at the site;
(4) That a material variation exists between the listed conditions and the conditions actually encountered;
(5) That notice was given to the owner, as required by the contract; and
(6) That the changed condition resulted in additional costs, time, or both, to the contractor in its performance, as sufficiently documented. (See Common Sense Construction Law, pg. 259, Smith Curry & Hancock, John Wiley & Sons, Inc. (2009)).

The requirement that the physical conditions be "indicated by the plans" has been interpreted to mean both express indications as written in the contract, and implied indications. Some examples of implied indications of physical conditions include a hidden roof system that was not disclosed, the thickness of a concrete floor that was implied by

the length of piping called for in drawings, and dry soil conditions that were implied by specified construction procedures. See *Id* at pg. 262.

OVERCOMING STUMBLING BLOCKS TO RECOVERY

Once the six elements of a Type I Differing Site Conditions claim are met, a contractor must still overcome three common stumbling blocks in order to recover its related costs: site investigations, notice requirements, and exculpatory clauses in the contract.

First, contracts commonly require the contractor to make a pre-bid site visit to investigate the physical conditions at the site. (See FAR 52.236-3 "Site Investigation and Conditions Affecting the Work.") The contractor will then be responsible to discover any physical conditions that a reasonable, intelligent and experienced contractor would discover (not what a trained geologist would discover). Notwithstanding this "reasonableness" standard, the contractor is considered to have knowledge of any information provided to it during the pre-bid process, unless it has identified and questioned any potential issues or discrepancies. Failure to adequately investigate the site conditions may preclude the contractor's recovery of associated costs.

Second, the contractor is required to "promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer" of the Type I condition. FAR 52.236-3(a). The government then must promptly investigate the condition in question, determine if the condition is a changed condition, suggest a change in design or performance, and determine whether it will make an appropriate adjustment in light of the changed condition.

The term "promptly" is generally interpreted as enough time to allow the government the opportunity to investigate the condition in question and recommend the appropriate action. Therefore, the question of whether notice was given and government investigation was conducted promptly is determined on a case-by-case basis. In some instances, the notice requirement may be waived if the contractor substantially complied with the requirement, or if the government had actual knowledge of the changed condition or would not be "prejudiced" by waiving the notice requirement. Nevertheless, the best practice is to notify the government in writing as soon as a suspected differing site condition is discovered.

Finally, contracts may contain exculpatory clauses that are intended to shift the risks associated with differing site conditions from the government to the contractor. For example, some clauses have stated that poor soil conditions *may* be encountered, that the data furnished is only general information and the contractor must conduct its own testing, or that the government does not guarantee the data provided in its soil reports. The courts and boards of contract appeals have held that these attempts to relieve the government risk are generally overridden by the Differing Site Conditions clause.

However, contractors cannot completely ignore these types of exculpatory clauses because some exculpatory language may be enforced. For example, contract language stating that drawings depicting electrical conduit were general and not in complete detail; as well as government representations where contractual language applied to permafrost only for areas specified in the drawings, have both been enforced as valid defenses to Differing Site Conditions claims.

The key is to carefully examine pre-bid documents and contract language before signing the contract in order to determine how much risk exposure the contractor may have as it relates to Differing Site Conditions. Accordingly, enlisting the help of an expert can be valuable in navigating the nuances of this clause.

CONCLUSION

Type I Differing Site Conditions can pose significant problems to a construction project and expose the contractor to a great amount of financial risk. Knowing the contract language, the applicable FAR clauses, and the prescribed procedures for dealing with a Differing Site Condition are vital to recovering the costs and time incurred. When a contractor discovers a potential Differing Site Condition, it is wise to consult with an expert who can help navigate the administrative and procedural processes involved in recovering their costs. An uninformed contractor runs the risk of unintentionally precluding their recovery during pre-bid review, contract review, or performance of the contract.

In the end, you will be glad you made the call; by the way, it's a FREE CALL.

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