DIFFERING SITE CONDITIONS: TYPE II

DIFFICULTY IN THE FIELD DOES NOT ESTABLISH DIFFERING SITE CONDITION

INTRODUCTION

Contractors who experience, and can prove, differing site conditions can recover certain costs associated with the impact of working around that site condition. A recent decision by the Armed Services Board of Contract Appeals ("ASBCA") recently established that a contractor's unexpected difficulty in performing at the site did not, of itself, prove that a Type II Differing Site Condition existed. This note will briefly discuss the elements of a Type II Differing Site Conditions claim, and highlight the example case listed above.

TYPE II DIFFERING SITE CONDITIONS, GENERALLY

The standard clause FAR 52.236-2 "Differing Site Conditions" is included in federal construction contracts. The 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.

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.

Conversely, Type II conditions are those that are not generally encountered at a similar site during similar work, but were discovered at *this* site. A contractor must show three elements in proving its Type II claim:

(1) That the contractor did not know about the physical site condition,
(2) That the contractor could not have anticipated the condition from inspection or general experience,
(3) That the condition varied from the norm in similar contracting work. [*Lathan Co. v. Unites States*, 20 Cl. Ct. 122 (1990).]

Stated otherwise, the contractor must show that the condition was *unknown*, *unforeseeable*, and *unusual*. See *Kos Kam, Inc.*, ASBCA 34037, 88-3 BCA ¶ 21,100. The physical condition cited in a Type II claim must have predated the contract and may be a weather condition or "act of God," a man-made condition, or a combination of the two. Type II conditions are also typically more difficult to prove than Type I

conditions, because with no description of the site conditions in the contract to use for comparison, the contractor must show that the actual conditions encountered at the site differed from *its* general expectations. Accordingly, a contractor must have conducted a reasonably more thorough site investigation to be successful in its Type II claim.

INSUFFICIENT EVIDENCE TO PROVE TYPE II CONDITION

A Type II Differing Site Conditions claim must be supported by sufficient evidence of the physical condition(s) at issue in order to be successful. The ASBCA recently ruled that a contractor's difficulty in performing the work, in itself, was not sufficient evidence to prove a Type II condition, and that independent evidence of the subsurface conditions was required. See *Appeal of C. R. Pittman Constr. Co. Inc.*, 57387, 15-1 BCA ¶ 39,201.

In *Pittman*, the contractor C.R. Pittman ("Pittman") contracted with the United States Army Corps of Engineers ("USACE") to widen an existing drainage canal in Jefferson Parrish, Louisiana. In order to dewater the canal before laying new concrete, Pittman installed 70-foot temporary sheet pilings along each side of the canal, at specified intervals. Pittman encountered problems, was not able to remove 75 of the pilings, and eventually left them in the ground. Pittman claimed that its inability to extract the pilings from the ground was due to an abnormally adhesive quality of the subsurface soils. After Pittman used the same equipment, methods, and materials as it typically did to remove the pilings, it concluded that the adhesive soils were unusual for the area and therefore must have been a Type II differing site condition.

The Board disagreed. After the Government's expert concluded that the physical conditions of the subsurface soils were "not uncommon nor…unexpected" for Southeast Louisiana, Pittman's expert testified that the soils must have been materially different from the normal conditions in that area, based on the fact that Pittman was not able to remove the pilings with its usual procedures. Notably, neither expert's opinion was based on actual soil samples or testing from the site.

The Board ultimately reasoned that Pittman's circular argument – that the pilings were stuck because of unusual site conditions, and that unusual site conditions existed because the pilings were stuck – was an unpersuasive one. Noting that Pittman's claim lacked independent evidence of that actual soil conditions, the Board denied Pittman's claim.

One is left to speculate that if Pittman would have produced other evidence of the subsurface soil conditions, it may have been more successful in its claim. The lesson to contractors in similar situations is to produce evidence that the physical conditions at the site are different from those expected: provide soil borings, historical evidence, or some other type of proof.

CONCLUSION

A contractor may have a Type II Differing Site Conditions claim when physical conditions at the site are not described in the contract, but are unexpected or different from what is usual in the surrounding area, and additional costs result from the difference. When such is the case, knowing what information to gather and what must be proved is vital to successfully recovering related costs. The Contractor should first duly inspect the site at the outset of the contract, and then report any suspected differences to the owner. Then, the contractor must gather sufficient evidence of the condition in order to support its claim.

Enlisting a consultant to ensure your bases are covered is an important step in the process. Failure to do so can result in unrecovered costs – as shown in the *Pittman* appeal.

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

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