SITE VISIT
VS.
DIFFERING SITE CONDITIONS ISSUES

Knowing the Different Types and How to Handle Them Properly

INTRODUCTION

This article is in all probability one of the most important ever generated by Excell because the issues of Order of Precedence, Site Visit Responsibilities, and Differing Site Conditions, have just been ruled on in a most favorable light by the United States Court of Appeals for the Federal Circuit dated ***February 11, 2014.*** *There is not a reader that cannot make money by reading this case, which is included as an attachment to this document. (See Metcalf Construction Company v. US)*

Excell elected to address this subject matter because the combination of Site Visits and Differing Site Conditions provisions is an area of mass confusion for all contractors dealing with the Government, be it Construction, Operation & Maintenance, or even IT efforts. Because of the importance of this case, please consider this to be a snapshot concerning this subject matter.

Therefore, the conditions present on a job site can be quite different than those anticipated or even described by an owner or owner's representative. Contractors should always take advantage of any opportunity to visit and investigate site conditions prior to submitting a bid. A **failure** to perform a site visit when it was permitted will, in all probability, negate a Differing Site Conditions assessment. Differing site conditions are considered to be, as defined by Common Sense Construction Law:

> *"…a physical condition encountered in performing the work that was not visible and not known to exist at the time of bidding and that materially differs from the condition believed to exist at the time of pricing the contract. Often this condition could not have been discovered by a reasonable site investigation."(Definition)*

The purpose of the "Differing Site Conditions" clause is to transfer unknown risks to the Government as provided under FAR 52.236-2. *Id.* In the majority of cases, the "risk" pertains to any of the physical conditions mentioned above that were not known to exist at the time of bid. It is important to note that if the access to the site is not adequate or restricted, this clause becomes extremely important to a contractor bidding in such an environment. However, the contractor must protect himself, by notifying the Government, prior to the bid, of the restricted access or problems encountered as a result of a failure to be able to adequately undertake the site visit. This can occur because of a variety of reasons: A closed facility that should have been open; A restricted area within a facility that could not be accessed; Grounds that could not be reviewed due to weather conditions; and/or matters of a similar nature.

TYPES OF DIFFERING SITE CONDITIONS

There are at least two (2) different types of differing site conditions. The first is a Type I which consists of "…subsurface or latent physical conditions that differ materially from those indicated in the contract documents" and Type II which consists of "…unusual physical conditions that differ materially from those ordinarily encountered in similar work." *Id.*

The main difference between the two different types is that Type I focuses on what is "indicated" in the contract documents or in the plans or specifications. Type II, on the other hand, focuses on what is "encountered" instead of what is indicated in the contract documents.

TYPES OF RECOVERY

Just as there are different types of differing site conditions, the recovery available for each different type is also varied. Type I differing site conditions require that the contractor "**prove"** the following items, remembering that the "burden of proof" lies with the bidder:

1. Certain conditions are indicated by the plans, specifications, and other contract documents;
2. The contractor relied upon the physical conditions indicated in the contract;
3. The nature of the actual conditions encountered;
4. The existence of a material variation between the conditions indicated and the conditions actually encountered;
5. That notice, as required by the contract, was given; and
6. The changed condition resulted in additional performance costs, time, or both, as demonstrated by satisfactory documentation or proof. *Id.*

Under FAR 52.236-2, the contractor is required to report, in writing and before the conditions are disturbed, to the Contracting Officer, the conditions on the site that differ from those indicated in the contract or those conditions that differ from what is usually encountered. NOTE: There are exceptions and a good Contract Professional will know them and be able to use them effectively when they occur. **Ask yourself: Do you know the nuances? If not, you are losing money!**

This will require that the Contracting Officer investigate the site conditions and make any adjustments necessary based on the investigation. A contractor cannot make a request for equitable adjustment for differing site conditions if final payment has already been made. (See FAR 52.236-2 (a-d))

It is important to note that items such as test samples, borings, unsuitable excavation materials to be used for fill and any limitations on a contractor's access to the site, if properly referenced or incorporated as part of the contract documents, can be included as "indications" for purposes of recovery in Type I Differing Site Conditions. (*Conditions*)

Type II differing site conditions recovery can include simply showing that the conditions are "unknown and unusual." *Id.* The primary factor is the conditions encountered are compared to what is expected to be encountered. Items such as buried pipe or construction debris, utilities, or soil conditions that were not expected are considered Type II differing site conditions that could logically not be expected to occur on a particular job site. (See *Metcalf Construction Company v. US*) This case has comprehensive application: practically every problem encountered concerning a Differing Site Condition is addressed in this February 2014 case. It also addresses the areas of risk, the Government responsibility concerning risk, and the new treatment of the risk based upon this case - all dramatically in favor of the contractor.

This case starts out with an expansive soils issue, touches on notice requirements, and damages by the Government due to its failure to properly recognize the change to the contract and the delays occasioned by its inactions. This is mandatory reading in Excell's opinion. Excell believes there is real money buried in this case for all contractors to be aware of; not just construction contractors. It is basically new law supported by the overturning of prior cases.

CONCLUSION

Differing Site Conditions under FAR 52.236-2 are outlined specifically so that contractors can be aware of what is required of them to report any site conditions that are different from what was expected or otherwise "indicated". As found in *Metcalf (above),* the incorporation of FAR 52.236-2 is intended to "…take at least some of the gamble on subsurface conditions out of bidding." *Id.* Under Metcalf, owners cannot disclaim their findings and representations of site conditions to shift risk to the design-build contractor. Contractors should educate themselves about all of the terms and conditions included in Government contracts and any other rules or guidelines that are in place.

Thus, retaining the assistance of a professional consultant should be seriously considered to protect a contractor's interests properly and thoroughly. The experts at Excell Consulting International, Inc. have experience with the Differing Site Conditions clause and stand ready to assist and evaluate your company's position and provide valuable and cost-effective guidance for your business.

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

EXCELL CONSULTING: "HERE TODAY FOR YOUR TOMORROW."

Author's note: The information contained in this article is for general informational purposes only. This information does not constitute legal advice, is not intended to constitute legal advice, nor should it be relied upon as legal advice for your specific factual pattern or situation. – John G. Balch, CEO CPCM