

Differing Site Conditions: An Ounce of Prevention...

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Contractors performing public sector site work or highway construction potentially face special challenges because above ground and subsurface site conditions present significant risk. Perceived site conditions as opposed to actual site conditions may bear no resemblance to each other. The extent of the difference, in practical terms, will be measured in inefficiencies including lost time, higher costs and financial damages. Who ultimately bears that risk is often decided based upon the enforcement of the Differing Site Conditions contract clause.

As a preliminary matter, contractors are subject to a rule articulated in *United States v. Spearin* which provides that where "one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered." The *Spearin* Rule resulted in contractors placing specific exclusions within their proposals concerning rock, unsuitable material and handling excessively wet materials and the like. Prescribing specific exclusions and insisting that the exclusions are incorporated in a final contract remains prudent in order to avoid differing site condition risk. This remedy is generally unavailable to contractors bidding on public work.

Contractors bidding for public work projects may not typically modify bid forms. Faced with this barrier to differing site condition risk management, contractors tended to include a financial cushion to protect themselves from the possibility of having to address unforeseen site conditions. This protected the successful bidder who encountered unforeseen site conditions. In addition, since most contractors tried to protect themselves, the successful bidder who completed a project without encountering differing site conditions reaped a windfall. In the end, the financial contingency in bids for differing site conditions added cost to project owners. As a consequence, owners began assuming these risks using Differing Site Conditions Clauses.

Assuming the risk of unforeseen site conditions inured to the benefit of owners by encouraging more rational bids from contractors. Specifically, a low bid from the contractor is less likely to be exposed to the risk of problematic subsurface conditions. This also alleviated the possibility that the additional costs arising from unforeseen conditions might wreak financial havoc on a contractor, thus impeding or perhaps even preventing completion of the work.

Differing Site Condition Clauses typically operate such that encountering either one of two distinct types of differing site conditions may entitle a contractor to additional compensation. These are commonly referred to as Type I and Type II Differing Site Conditions.

In a nutshell, Type I involves a subsurface or latent physical condition which differs materially from that indicated in the contract documents. For Type I to be implicated, the owner must have made some sort of representation about the project conditions. To recover, the contractor must demonstrate: (i) that the owner made a representation of the sited conditions in the contract documents; (ii) the representation was material to the means and methods to perform the work

and/or the cost of performing the work; (iii) the difference between the conditions represented and the actual conditions was material; and (iv) the contractor incurred increased costs as a direct result.

Type II Differing Site Condition involves an unknown physical condition that is unusual and materially differing from that ordinarily encountered and recognized as inherent in the work of the contract. Type II is not implicated by a representation of an owner; rather, the critical issue is whether or not the condition should have been anticipated under the circumstances. A fact finder will determine whether or not the condition is unusual based upon what an experienced local contractor would expect. A contractor unfamiliar with local subsurface conditions will generally not prevail on a Type II claim.

A Type II claim will likely be defeated: (i) if a reasonable inspection or survey would have revealed the condition; (ii) if other projects in the area have experienced similar problems; or (iii) for failing to heed the owner's suggestion that conditions should be inspected through a pre-bid investigation.

Once a contractor discovers an unforeseen condition, timely notice to the owner must follow to preserve a claim. Notice allows the owner to inspect the unforeseen condition, mitigate costs or at least consider options available and to witness the contractor's extra efforts first hand. Failing to give proper notice will, at a minimum, needlessly complicate recovery. In some instances constructive notice—where no notice is given but the owner knows of the conditions could be, but usually is not, enough. Relying on verbal notice is risky because some jurisdictions strictly enforce written notice requirements in contracts. In addition, time fades memories and witnesses may have very different recollections of what was said to whom and when.

We have many clients, who because they truly seek to please their customers, feel reluctant to serve written notice of differing site conditions. Some contractors worry they may be perceived by the owner as claim happy. These are understandable concerns. However, failing to provide timely written notice could result in a forfeiture of rights or a very costly court battle just to keep a claim alive.

Minimizing Potential Problems

At Bid Time

- The contractor must take steps to ensure that its estimators thoroughly review all contract documents to discern who has the risk for differing site conditions.
- If the owner is assuming the risk using a Differing Site Condition Clause, the Contractor must include in its bid provisions covering only those conditions represented by the owner in the contract documents or those normally expected to be inherent in the work. Normally, this will protect the contractor and pave the way for a work order or modification of the contract if unforeseen conditions emerge.

If the contract documents do not include a Differing Site Conditions provision, the contractor may include in its bid a list of exclusions for the scope of work that specifically address differing site conditions, exercising special care that any list be all-inclusive. Alternatively, if the contractor has no flexibility to alter the Owner's bid firm, it must include a contingency in its pricing to cover the unknown.

Minimizing Potential Problems

In the Field

- The contractor should alert project managers and other field personnel of the notice requirements in the contract.
- A notice letter should politely but clearly advise an owner that the contractor considers the conditions encountered beyond the scope of the contract, thus seeking additional compensation.

To minimize the possibility of an adverse reaction, the notice letter should refer to the notice provision in the contract.

Occasionally, a contractor will delay giving notice if the conditions appear minor at first. The better course is to immediately give notice and advise the owner that the extent of the conditions is unknown and that the contractor seeks to give the owner every opportunity to cooperatively assist with formulating an acceptable solution. If presented with the possibility that a diplomatically worded notice will poison relations with an owner, the wise contractor should assume that an owner with a short fuse will likely attempt to defeat a claim if no notice is provided.