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Site conditions are a critical component to any contract bid, whether the work be new construction, remodeling or remediation of an existing structure, or even simply demolition. Traditionally, a contractor performing under a fixed-price or lump-sum contract bears the risk of any unusual or differing site conditions encountered on a project. For example, if a contractor anticipated excavating a site with fairly simple soils, but instead encountered unknown rock formations that made the excavation materially more difficult and more costly, the contractor assumed the risk of such conditions and will not be compensated for additional costs encountered.

Recognizing that such risks may lead contractors inflate bids to cover such contingencies that may or may not occur on a project, many owners, particularly government owners, include a differing site conditions clause in the contract. The typical differing site conditions clause will provide that, so long as the contractor gives the owner timely notice, if conditions encountered differ materially from those indicated in the contract and bid documents, and cause an increase in the contractor's cost or time required to perform the work, then an equitable adjustment shall be made to the contract price.

As recently noted by the Colorado Court of Appeals in *URS Group, Inc. v. Tetra Tech FW, Inc.*, Court of Appeals Nos. 06-CA-1243 and 06-CA-2220 (Feb. 7, 2008), a differing site conditions clause "encourages more accurate bidding, a benefit to the party seeking bids, because the contractor does not have to inflate its bid to account for contingencies that may not occur."

In the *URS* case, the Colorado Court of Appeals upheld a differing site conditions clause, reversing a trial court that had concluded that URS was not entitled to recover for additional costs incurred due to unforeseen subsurface conditions. The trial court ruled that URS had assumed the risk of such conditions by entering into a fixed price contract. In reversing the trial court, the Court of Appeals noted that where there is a differing site conditions clause, the contractor does not assume the risk of unknown and unforeseen subsurface conditions. In other words, the differing site conditions clause is a mechanism for shifting a risk that is ordinarily borne by the contractor to the owner. Such risk shifting makes good economic sense because it means that owners need to pay the additional costs of such unforeseen conditions only when they are encountered, rather than

paying an uncertainty premium on every contract into which they enter.

While it goes without saying that "contractors have a duty to review information that is explicitly mentioned and made available for inspection by the contract documents, they have no duty to conduct an independent investigation or review documents not mentioned in the contract." Of course, this means that an owner should make available to contractors whatever information regarding the site is available. Failure to do so may very well result in a differing site conditions claim, even if there was information available that suggested the specific site conditions encountered, if that information was not specified or otherwise made available to the contractor. It might also result in a claim of breach of contract based on the owner's "superior knowledge."

If a contractor encounters differing site conditions, it is critical that the contractor comply with the notice provisions of the differing site conditions clause. Most typically, a differing site condition clause requires the owner to be notified promptly, generally before conditions are disturbed. In the *URS* case, the Colorado Court of Appeals noted that the "notice need not be in any particular form. All that is necessary is that the [owner] be generally informed of the facts surrounding the claim. The communication need not be accompanied by detailed documentary evidence." The principal purpose of the notice requirement is to allow the owner to mitigate costs that might result from the differing site condition, and while the failure to provide timely notice may not necessarily doom a claim (for example, there may be nothing the owner can do to mitigate the situation), it is foolhardy for a contractor to fail to provide notice as soon as it is aware of a differing site condition, including notice of anticipated delays or extra costs to the extent practicable.

Finally, in the *URS* case, the Colorado Court of Appeals spelled out what is required to establish a differing site condition claim (relying on a "Type I" claim): In order to recover, a contractor must prove that "the conditions indicated in the contract differ materially from those actually encountered during the performance; the conditions actually encountered were reasonably unforeseeable based on all information available to the contractor at the time of the bidding; the contractor reasonably relied upon its interpretation of the contract and contract-related documents; and the contractor was damaged as a result of the material variation between the expected and encountered conditions."

No one wants to encounter unforeseen conditions on a project, but it is inevitable that such conditions will from time to time be encountered. Contractors should protect themselves in a fixed-price or lump-sum setting by insisting on a differing site conditions clause. And, if such conditions are encountered, contractors should promptly communicate with the owner. Failure to follow this advice may result in another unforeseen condition: greatly increased but unrecoverable project costs.

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