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Practical Legal Strategies: Contractor Remedies for Unforeseen Site Conditions Seemingly Precluded by Contract

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The bane of a contractor's construction performance can be unforeseen subsurface and other site conditions. Commonly referred to as changed or differing site conditions, they can cause both increased cost and time impacts, often early in a project's life.

Differing site condition provisions can afford a contractor relief if certain prerequisites are satisfied. Nevertheless, many contracts also include broad exculpatory disclaimers that insulate the owner from liability, transferring the onus to the contractor. For example, owner provided soil borings may be labeled preliminary, or for information or convenience only, leaving contractors totally responsible for their own pre-bid site investigations, and cautioned not to rely on any owner furnished site information. Faced with such foreboding contractual language, a bidding contractor may conclude that those words mean what they say, notwithstanding any differing site condition provisions, thereby precluding recovery entitlement in such circumstances. What relief, then, if any, is available to a contractor in that situation?

A fundamental principle here was succinctly stated many years ago by an eminent construction law attorney, in a celebrated speech to a group of engineers, concerning contract provisions which seemingly bar contractor damages for delay. In discussing the difference between an engineer's reading of contract "facts" that mean what they say, and a lawyer's reading of the same contract, but mindful of well-established rule of law exceptions to be taken into account, he concluded that "it ain't necessarily so."

As a general proposition, which can vary between jurisdictions as well as between government and private owner contracts, this principle also applies to disclaimers of responsibility for owner furnished pre-bid information. Those disclaimers are generally not favored by courts and boards, provided that the bidding contractor has made all contractually required and *reasonable* efforts in its own pre-bid site investigation. This might include attending a scheduled pre-bid conference and site walk-through; an examination of soil samples and driller's logs, if available from the owner; a contractor physical site inspection and appropriate measurements, where feasible; the examination of prior site investigation soil borings, plans and other documents made available by the owner for inspection, albeit not incorporated into the contract documents; a review of records of previous operations at the site, and perhaps as-built plans of existing structures to be incorporated into the work.

However, reasonable site investigation standards for contractors generally do not include detailed subsurface borings or coring into structures. This is particularly so when considering the limited period contractors are allowed to prepare their bids (which may also include impermissible site access to an in-use facility). The contrast is striking when comparing the many months to several years available to owners for their own site investigations, testing and analyses, with technical consultants, leading to the final design found in the bid documents. That hardly could be deemed a level playing field for site investigation, by any objective measure.

Some illustrations from the author's experience underscore owner extreme positions on contractor pre-bid site investigation responsibilities and the predictable outcomes:

A 150 Year Old Map Showing Underground Stream Below the Site

Foundation construction issues in a case arose from an undisclosed water layer trapped under pressure in the soils to be excavated, and known as an artesian condition which, when penetrated by excavation, created a flooded site due to the water pressure release. The owner's engineer unsuccessfully argued that an old survey map of Manhattan Island showed an underground stream near the location of this site. The contention was that the contractor should have so determined through its pre-bid site investigation, albeit that such 150 year old document was not referenced by the owner as an available source of information, nor was there any indication of such water condition in the contract documents. The suggestion to locate a century old map was recognized as an unreasonable burden for contractor pre-bid site investigation.

Existing Nests of Boulders Disappeared from Soil Boring Logs

Construction of a deep water tunnel shaft, utilizing driven brine pipes to freeze the soil, was stymied by the presence of nests of boulders. While not at all shown on the owner's furnished soil boring logs, the nests were evident from earlier driller's logs, required to be incorporated in the boring logs. An owner's position was unavailing that pre-bid site investigation would have revealed that omission, since the contractor rightfully relied upon the expected inclusion of driller log data in those boring logs.

Pre-Bid Roadway Deck Coring Not Possible under Live Traffic Conditions

A contractor's encountering of a much thicker than contemplated concrete deck to be replaced on an existing bus terminal ramp led to an owner engineer's argument that prudent pre-bid site investigation should have included deck coring, which would have disclosed that existing condition to be factored into the contractor's bid. Aside from the limited bid period making such site investigation impractical, the site was an active bus roadway and, hence, no site access until the contract was awarded. Recovery of the additional costs for this unforeseen site condition was the predictable outcome.

Clearly, this article is not intended to, nor could it, address the potential varying results in different state and federal forum for contractors on public and private projects faced with owner disclaimers and exculpatory contractual provisions as shields against unforeseen site condition provisions. Such individual analyses would also have to consider the extent of required and reasonable contractor pre-bid site investigation *actually undertaken*. In sum, the reader should recognize that such seemingly strong contractual bars to any recovery for unforeseen site conditions, do not automatically create contractor preclusion from relief, because "it ain't necessarily so"!

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