DIFFERING SITE CONDITIONS

1. **Introduction.** Early on in construction contracting, there was no Changed Condition or Differing Site Condition clause in contracts. Contractors often put significant contingencies in their proposals to cover the possibility of onerous subsurface conditions and just as often those conditions did not materialize. So the contractors simply realized a windfall profit. The Corps of Engineers, I believe, was the first agency which wizened up to the fact that it was paying out maybe as much as 3 to 5% more in construction payments due to these windfall contingencies and came up with a clause which was aimed at protecting both the owner and the contractor. The idea was to either provide a soils report to the contractors bidding the project with a clause that entitled the contractors to additional cost only if the conditions characterized in the report differed from the actual conditions. Or simply to label the conditions to be "soils" and anything encountered different from what would normally be classified as "soils" would entitle the contractors to additional cost. As usual, lawyers and the trend toward muddling the waters of risk allocation have created enough grey in the interpretation of changed conditions clauses that claims based on changed conditions have become quite frequent and often very large. And contentious. These issues will be discussed further along.
2. **A Word to the Wise at the Outset. Differing Site Conditions Can Balloon into Huge Financial Issues.** Before delving into these clauses, let's address up front a **very real danger**. So often the contractor encounters what he believes to be a changed condition early in the project (after all, site work and excavation are the first two activities that occur on most projects; and on renovation projects we start discovery of the stuff we couldn't see pre-bid). If the contractor requests a time extension due to the changed condition because of its impact on the critical path, and if that time extension request is denied by the owner, then **a changed condition may be morphed into a constructive acceleration** (the scenario in which

the contractor is entitled to a delay, makes a timely and justified request for a schedule extension which is denied by the owner.) In a constructive acceleration, the contractor must often both add labor and equipment, and impact the productivity of both in order to attempt to buy back (or attempt to buy back) the time that has been requested but denied. These are difficult claims for the contractor because lost productivity is seldom well proved by the contractor and because of various legalisms which will be discussed hereafter. Thus, a changed condition claim is one which both parties will want to prevent, and if one is encountered, to especially be diligent to the justification for additional time to avoid an acceleration. One of the anomalies of an acceleration is that often, no matter how much effort and resources expended, we find not only an acceleration but a project delay as well. So all that money spent and still the end date of the project is missed!**Thus, be prepared for three cost impacts of a changed conditions: the actual cost associated with handling the differing condition, the potential labor and equipment impact to the balance of the project if a time extension is denied, and the possibility of delay damages.**

a. **For Owners –** Try This on For Size. The Corps of Engineers has a great publication regarding geologic investigations. **It is COE Manual EM 1110-1-1804.** It contains the various processes and approaches for conducting an effective pre-bid **soils investigation**. (Changed conditions are not limited to soils issues, but in new construction, they are the most common; in renovation, everything from asbestos and toxic materials, to structural conflicts are possibly involved.) Our recommendation is for owners, government and private, to spend the extra dollars on doing a prudent investigation rather than trying to duck liability through the various disclaimer clauses we will be discussing**. Good project management is a function of thorough and accurate information, not ambiguity and evasion**. Two of my favorite charts in the COE procedure are set forth in the attachment.

b.. Stand Down. Many contracts today have **two notices to proceed**. The first notice to proceed is often termed an administrative NTP and

for sixty or so days, the contractor develops its schedule, various management and quality plans, does desk top reviews to attempt to discover various conflicts and issues in the office and get them resolved before they are field problems. In addition, in both greenfield and renovation projects, the contractor is provided a **discovery or investigative period** to discover potential hidden or concealed conflicts. In a renovation project, perhaps check out what is in the overhead or behind those walls, or in the crawl space. And then develop a remediation plan which is implemented at the beginning of the project rather than perhaps having a series of stop and goes as these issues are discovered along the way.

3. **Another Word to the Wise**. **Changed Conditions claims are often complex**. Most of the texts and articles on construction claims will list in bullet form examples(just a few words or a short sentence) of changed conditions which have been allowed or not by the various courts and administrative agencies. Those bullet lists will not be set forth herein-a couple of illustrations but nothing more. The reason is that changed conditions are often so contract provision and fact driven and convoluted (and sometimes equity driven) that it is often misleading to provide a very limited summary of the issue without providing all the detail which went into that decision. These are issues where it really pays to consult with a **construction attorney experienced in these issues**. The lawyer which is experienced in bonds and liens may not have the technical background to really help you on changed condition.
4. **The Duty to Investigate.** Before we get into the changed condition clauses, there are major issues to be discussed and thresholds to be crossed. The bid documents invariably **impose a duty on the bidders to conduct a pre-bid site investigation**. **(Disclaimer clauses** are to be discussed later on, so don't jump ahead.). In essence, what comprises a pre-bid site investigation:

a. **First,** the contractor should be aware of conditions and duties set forth in the **contract specifications and drawings**, such as de-watering, shoring of trenches, drainage issues, etc. Specifications may describe excavation techniques from which characteristics of soil conditions may be inferred (for example, if the specifications prescribe machine excavation techniques, one might assume that the materials are such that drilling and shooting will not be required; specifying shoring tells us something about the subsurface conditions that will be encountered.) This will be repeated, but remember that the contract is to be read as a whole, meaning that the soils report, if one is set forth, must be read in context with the rest of the documents, including specifications, general and special conditions. And in the private sector, it must be read in context of risk shifting clauses such as the no damages for delay one.
b. **Second,** the contractor should review and be aware of the contents of site investigation reports which are listed as contract documents or are referenced. **And determine if the reports are listed as contractdocuments, or are they merely referenced or listed as "for information only".** As we shall see, the potential risk for "changed conditions" may very well hinge upon this distinction.
c. **Third,** the contractor should visit the site and see what a **reasonably prudent contractor should see.**That would include traffic issues, site access, material handling issues, obstructions on or near the site, site conditions which need remediation, potential drainage and site protection issues, utility availability, among others.**A pre-bid site investigation checklist is attached.**
d. **Fourth,** the contractor is expected to **know** what the reasonably prudent contractor should **know**. The previous requirement was to **see** what he should **see**. This requirement is for the contractor to **know what he should know**. For example, he is expected to determine foreseeable weather conditions; if the contractor has worked on this site or a similar one he is expected to rely on that experience (a pile driving contractor in Charleston or a tunneling

contractor in the Piedmont of South Carolina who have worked in these areas previously should know what to expect). He has seen the site and should know material handling and transportation limitations.

e. **Fifth,** the pre bid clause, as stated, is generally not limited to site or subsurface conditions. In the case of an existing building to be renovated, the contractor's inspection should probably reveal the windows that are out of square, floors that are not level. (It's an old building, for goodness sakes, so don't expect everything to be perfect and maybe be prepared for a few surprises along the way.) But as to concealed conditions, such as pipe inside walls not revealed on the plans, other physical interferences that a normal walkthrough would not have revealed, the issue becomes rather gray. In a prescription or advertised contract, the level of inspection is probably less than that of a negotiated contract where the contractor had plenty of opportunity to check out such issues.**But check the specific language of the contract clauses: if the contract specifically states that the contractor is responsible for determining certain conditions (such as potential conflicts in the overhead or plenums and that the owner is not responsible for those issues, those clauses may very well be enforceable against the contractor. The more specific the duty for the contractor to inspect, the more likely that it will be enforced.) A separate article will deal with renovation projects as well as steps that can be taken by both the owner's team and the contractor to prevent downstream obstacles and delays.**

f. **Sixth,** the pre-bid site investigation clause imposes on the bidder the duty to understand **levels of difficulty and risks** associated with the work depicted in the documents and inherent in the site; potential strikes; labor availability and competence; material and equipment availability; height issues; tightness of the construction schedule; and other risk and difficulty issues which would flow from such a in such a project and the contract documents. As previously indicated, the bidders have access to weather information from the local weather service and are

bound to consider foreseeable weather conditions (for example, a concrete contractor may need to use techniques for placing concrete in January that are different from July.) And lately, the owner is specifying the number of weather days to consider each month. In the section on Scheduling, we will discuss how the contractor should include weather days in its schedule.

g. **Seventh,** the contractor is entitled to **make reasonable inferences** from the data set forth in the contract documents and from a site visit, but he must support those inferences. But the risk of unreasonable inferences, of course, belong to the contractor. (And further, in the Federal Government Physical Data clause, it is stated that the government is not responsible for any interpretation the contractor may make so this further tends to muddy the water as the owners, including the federal government, continue to attempt to hold themselves immune from as many risks as possible.) A six mile sewer line may have log borings only at the pump stations spaced two miles apart . . .does that mean that the subsurface conditions in between will be the same as shown on the borings at the pump stations? Probably not, depending upon the terrain. (So in this case, the contractor could rely on a soils report that is a contract document indicating conditions at the pump stations but may need to do an independent investigation of the soils in between the pump stations.) If the subsurface investigation was conducted during a period of drought, can one expect that the water table will be much higher if the work is performed after a monsoon? Can one expect that elevations done by an aerial survey, with no ground control, will be precise? And what if the bidder walks the site and notices elevations which are obviously much different than the top in the contract documents . . .Can he rely on the topo or does he have a duty to seek clarification?

   i. **A Word of Caution.** Those who deal with soils conditions know that subsurface conditions may vary vastly in just a few hundred feet, or even less. A contractor had just completed the construction of a very long water line where it had

encountered basically clays, some thin layers of rock and pebbles. It was able to machine excavate with no difficulty. Because of a huge property damaging storm, a drainage contract was soon thereafter let, which would be just about parallel with the water line. The same contractor was awarded the new line and estimated on the basis of machine excavation, the same as the line he had just completed; the estimated used the actual productivity rates from that previous project. And soon after excavation began it turned out that the subsurface conditions were largely pahoehoe which was a porous form of magma. Because of its hardness, it was difficult to machine excavate and because of its porosity, it was difficult to drill and shoot. The point of the example is simply to highlight the fact that one must be very careful in the interpretations one makes from the characteristics of the soil in one location to another. This is one of the reasons for the Federal Clause stating that the government is not responsible for contractors interpretations of physical data contained in reports which it provides the bidders.

h. **Eighth,** this will be repeated but it is worth doing so. If there is a soils or site report and it is made **a contract document**, the contractor does not have to assume that it is incorrect, or conduct his own subsurface survey as the owner impliedly represents that contractual information is reliable and accurate. But the contractor is bound by what he already knows so if the contractor has knowledge that the report is incorrect, it probably has a duty to bring this to the attention of the owner's representative and seek clarification prior to the bid. If the report **is only referenced**, and not a contract document, we believe the best practice is to get a copy and then perhaps do some verification of that report. The big thing is to avoid the differing site condition if at all possible because of the potential damage is can cause to a project. However, this is again contract and fact driven so talk to your construction attorney.

i. **Ninth: Document the pre-bid site investigation (and by the way, take and retain those pictures)! Keep in the files. Convey to the project team at estimate turnover.**
    i. **Remember that in a claim for differing site conditions, the first hurdle for the contractor to clear is that it performed a pre-bid site investigation and that it met the previous criteria. The contractor must be able to demonstrate that: 1) he read the pre bid clause; 2) that he performed the prudent and reasonable things in response to the clause; 3) that the basis of the bid, and the benefit of his low bid to the owner, was conditioned on these prudent and reasonable acts he understood in compliance with the clause. That's a necessary start!**
    ii. **Remember also that differing site condition claims can be very complex; exculpatory and disclaimer clauses which will be discussed are not for first year law students to dissect, so have an experienced construction attorney advising you.**

5. **Disclaimer and Exculpatory Clauses:** We haven't discussed the changed condition clause yet and already we are talking about disclaimer and exculpatory clauses. These are clauses in which the owner (or general contractor) attempts to insulate themselves from changed condition claims. A disclaimer clause is a risk shifting clause, and the contractor must be aware during the estimate of what risks it undertakes to perform and appropriately price and manage. Although the disclaimer and exculpatory language in various contracts may differ, basically the intent of these clauses is all the same (Note: these are presented as generalizations to get the idea across): "The Owner takes no responsibility for the accuracy of the information contained in the report and the contractor takes full responsibility for the character of soils or subsurface conditions and will receive no compensation for any difficulties associated therewith." Or in a contract for rehabilitation of an existing structure, the owner may state that the "contractor acknowledges that it has conducted an investigation adequate for the purpose of determining issues relating to safety, conflicts and other conditions which are inherent in the rehabilitation of such a project, and that the cost associated with these conditions are contained in

the contractor's bid." The federal government as well as the private sector frequently include such clauses and the question becomes their enforceability. There are a few states which do not enforce them. Others do so rigidly. Others take a "let's look at all of the information and decide if the basis of the contractor's bid and interpretation was reasonable under the circumstances." The following points are important:

a. **If the soils report is a contract document, the concept of the Spearin**

   Doctrine should prevail. That is, the owner, by incorporating the soils and site report into the contract, is warranting its accuracy and the contractor need not assume it is inaccurate unless there is a patent reason for doing so. And attempts to "gut" that clause by exculpatory or disclaimer clauses is a "dog that normally doesn't hunt." That doesn't mean the owner will agree with your claim. He has inserted these disclaimer clauses because he doesn't want the risk which he is trying to shove off to others. In my own opinion this is unconscionable but this is the world in which we live. But if the contractor can demonstrate through its estimate folder and pre-bid site investigation documents that it relied on the information set forth in the soils report, that the Spearin Doctrine concept applies in its jurisdiction, and that the owner will have unfairly received a benefit that is unjust if fair compensation is denied, the contractor should prevail.

b. **If the soils or site investigation report is not a contract document, but merely referenced even if it is attached to the bid documents, the contractor has a higher bar. In some states, he probably will not prevail; in others, depending upon the circumstances, he may very well.** For example, if the contractor obtains a copy of the referenced soils report and notes that it indicates the subsurface soils are consistently lean clays, and then goes to the site with a back hoe and digs a few holes to confirm what he is seeing in the soils report, and then later encounters boulders not indicated in the soils report, he may very well be able to prevail in a changed condition claim because his prebid site investigation and interpretations therefrom were prudent and

to deny a claim would be manifestly unfair. But this isn't clear. The point is that the more the contractor does to demonstrate it use best practices during the pre-bid phase, was reasonable and prudent, the higher its odds of recovery. (There is another basis of potential recovery to be discussed later as well. As we shall see, there are two Differing site clauses. One is where the owner warrants or represents certain conditions but the actual conditions turn out to be materially different. The second clause is where the actual conditions encountered vary materially from those which are normally encountered.) But what if there is a soils/site report that is referenced and is not made a part of the contract; is the bidder obliged to obtain a copy and review it? On the one hand, if it is not a contract document, the contractor would not be bound by its contents; on the other hand, is obtaining it a part of a reasonable pre-bid site investigation? **Talk toyour lawyer**. I personally believe the best practice is to get a copy, do some checking as indicated above to see if your physical investigation is consistent with the report. This way you will know what conditions and risks you will be encountering. But not everyone would agree with me.

c. **Means and Methods Specified.** In either event, if the contract documents specify a means and method, the contractor in a prescription specification, should be able to be able to produce the required results by following those means or methods. I For example, in the case of a sewer line, the specification stated that the "RCP would be laid in the dry". To the contractor, the reasonable assumption was that the soil conditions and inflow of water was such that the RCP *could* be laid in the dry. When the specification sets forth the precise method of compaction (depth of lifts, watering, number of passes by compactor, et al) , the contractor should be able to rightfully assume that following that method of compaction will result in the specified density of the soils. If the plans and specifications indicate that this is a "balanced site", is this an indication that the soil conditions are such that borrow will not be required?

Certainly, it is a fact that should be given real consideration. These are not issues of subsurface conditions, but representations by the Owner that carry the weight of Spearin.

d. **Quantities.** In addition, owners often have disclaimers as to the **accuracy ofquantities** that are set forth in the bid schedule, stating that "the estimated quantities are not guaranteed but are provided solely for the purpose of determining approximate amounts for making estimates." And indeed, such quantities are never found to be absolute. In unit price contracts, there is normally a variation in quantity clause which gives the contractor a right to an equitable adjustment when a variation is of a given percentage. However, if the reason for a variation is a changed condition or a change order, then the disclaimer would not apply. It only applies to variations within the scope of the original contract documents.

If all the foregoing is not entirely clear to you, and you feel the need to discuss these issues with your attorney, then GREAT! I have achieved my goal!

6. **The Clauses:** Only the Federal clause is cited below as the AIA, and AGC clauses are pretty similar. Those clauses are set forth at the end of this chapter.

Federal Differing Site Condition

(a) The Contractor shall **promptly** and **before the conditions aredisturbed**, give a **written notice** to the Contracting Officer of **(1)** subsurface or latent physical conditions at the site which **differ materially** from those i**ndicated** in the **contract**, or **(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.

(b) The Contracting Officer **shall investigat**e the site conditions **promptly** after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the contractor's cost of, or the time required for, performing any part of the work under this contract, **whether or not changed** as a part of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.

(c) **No request** by the Contractor for an equitable adjustment to the contract under this clause **shall be allowed unless** the Contractor **has given the written notice required**; provided, that the time prescribed in (a) above for giving written notice may be extended by the Contracting Officer.

(d) **No request** by the Contractor for an equitable adjustment to the contract for differing site conditions shall be allowed **if made afterfinal payment under this contract**.

So, let's dissect the Differing Site Condition Clause. As seen, **there are two separate** conditions which come within this clause:

Clause I – Misrepresentation

The first basis of **Clause I** which entitles the contractor to an equitable adjustment is **Misrepresentation**. This doesn't mean fraud or bad faith. Let's remember the **Spearin Doctrine** which basically states that the contractor has the right to rely on the accuracy and correctness of the representations set forth in the contract documents. This is the meaning of Clause I Misrepresentation. If the report is a contract document as opposed to "information only", the owner has represented that the contents set forth therein are correct; if not, then the owner (even if totally innocently) has "misrepresented" the contents of the document to the contractor.

- The clause states that the actual conditions must be **materiallydifferent** from those **indicated** in the contract documents.
  - First, material difference indicates that **some tolerance** between the actual conditions and those set forth in the contractual documents probably goes with the territory. If the soils conditions in the contract document indicates CL (or

lean clays) at a given elevation and there are a few lenses of CH (fat clays) along the way, this may not be "material". The contractor always has the duty of proving its entitlement position so it would need to demonstrate in each case that the materials of which it complains are indeed more than just a tad different but truly different to the point that the difference is measureable objectively.

- Second, the operative word in this clause is "**indicated**". The contract documents need not specifically set forth the characteristics of the physical conditions to be encountered. The test is whether the contractor, has used a "simple logical process" in evaluating all of the contract documents reasonably deduce the conditions it will encounter. This is another way of saying that if the contractor's evaluation is based upon a full review of the technical specifications, soils report, pre-bid site investigation and other contract documents, reasonably concludes given characteristics of the material or conditions it will encounter. Another way of also adding a contract interpretation discussed earlier which is to read the contract as a whole. For example, in a drilled pier configuration, assume the soils report does not indicate water conditions and the log borings indicate CH (or fatty clay) all the way from the surface to the invert elevation of the piles. Assume further that the technical specifications have no requirement for caissons or casings to be placed in the hole prior to the placement of a rebar cage and concrete which will be tremied into the structure. The ***indication*** from reading the soils report and log borings, in connection with the technical specifications would probably be that the soils would be stable and there would be no cave-ins due to water or other subsurface conditions. The contract documents did not expressly represent that the soils would not be saturated with water and would not cave in during the drilling for the installation of the pier, **but the documents taken as whole did indicate that condition.**

- **But** the contractor by this clause is not protected from its failure to properly consider the **degree of difficulty** associated with the soils or site conditions. If a tunneling contractor uses twice as many rock bolts than anticipated because of the blocky or fragmented rocks, all of which were indicated in the soils report, it would not have a claim. The physical conditions must be different, not how difficult it is to deal with those conditions, which is the test.
- **At the time of the contract.** The soils report contains representations made at the time of the contract. If conditions occur subsequent to the contract, these would not be covered as misrepresentations. For example, a water table that rises after the contract is not a changed condition under the contract.
- **Physical conditions.** Remember, these clauses relate to physical conditions. Labor supply, strikes, price escalation, material availability or economic conditions are not physical conditions covered by the changed condition clause. For example in the 1970s during the great oil embargo, prices of petroleum based products shot up significantly. The contractors had no relief under the changed condition clause.

- **Interpretation** is the devil in differing site condition claims. Reasonable men do differ and so do unreasonable men. Nevertheless, the contractor's interpretation regarding the meaning of the soils reports and technical specifications must be **reasonable.And the contractor in a changed condition claim must demonstrate that its interpretation consistent with that of the fictitious reasonably prudent contractor.** However, the contractor is not an engineer, not a geotechnical specialist or a scientist. Thus, the contractor's interpretation will be judged within the context of his construction knowledge, and not scientific knowledge. For example, to an engineer, a log boring stating "water at" may indicate rising water or water under pressure, whereas to a contractor it would mean static water. To a contractor, "water to" might mean rising water. It is important for engineers to write specifications and

site reports in the language of contractors, not in the language of geotechnical engineers.

- **But** if the log borings are spaced a mile apart, can the contractor rely on those borings to postulate what the soil conditions will be in between those borings? That would probably depend upon the terrain one is in; for example there are many areas in the United States where changes in the subsurface conditions may vary every few feet. In some areas, not so much. Again, the differing site condition claims are driven by the contract as well as the unique facts of each project. That is the reason that being a guardhouse lawyer as opposed to using the services of an experienced construction lawyer doesn't make much sense.

- **Reliance.** The contractor must also demonstrate that it relied on the "reasonable interpretation" of the conditions it is claiming. If the contractor claims that its interpretation of the log borings was such that unshored trenches were acceptable, but there is a line item in the estimate for trench boxes, the contractor may have a hard time the pursuing a claim successfully. The estimate and the pre-bid site investigation documents are vital in proving the contractor's position.
- **Notice.** The notice requirements are very clear. However, in the real world, it is not uncommon for the contractor to be dealing with a very difficult situation without immediately realizing it is a changed condition. An illustration is the discussion below of a contractor which encountered rock which turned into a slurry when it became exposed to air and water. The contractor spent several months attempting to handle the problem before it finally realized that it had encountered changed conditions. Normally, if the contractor's daily reports are indicating clearly the contractor's work activities, and these are further discussed at progress meetings, this should be adequate preliminary notice, to be followed up by a formal notice under the clause when it is reasonably determined that the conditions are different from those which formed the basis of the contractor's bid.

- **The clause normally only applies to conditions in contract site area.**
- **Documentation.** Take pictures, enter effects in daily reports, update schedule.
- **Expert.** Often it is necessary to enlist the services of an expert to determine not only whether these are changed conditions, but to provide assistance in developing an approach to handling the changed conditions. This will be discussed in greater detail when the owner's responsibilities are reviewed below.

Clause I – Concealment/Superior Knowledge

The second basis under Clause I of the Differing Site Condition Clause is **Concealment or the concept of Superior Knowledge**. Note that the title of the AIA and AGC clauses contains the word "concealment". Obviously, the owner needs not provide everything it knows to the contractor. It has the right to not have a soils report done, or if one is done, to make it a "reference only" document. But if the owner has information which is significant and can have a material effect on the contractor's operations, it should indeed make that information available to the contractor. Its failure to do so could be the basis of a successful claim by the contractor.

For example, in a Federal irrigation project (bringing water from Los Banos, California to Gilroy, the garlic capital of the United States), the soils report indicated that much of the excavation would have to be by blasting because of the rock which characterized the entire depth and length of the project. The contractor also expected some water intrusion because the trench was at the base of a mountain range and water migrates down into the lower reaches of the valley and enter the excavated trenches. This was expected. But it turns out that when the rock was exposed to air and water, it turned into a slurry like substance, almost like a molasses. Instead of using a 330 excavator to remove rock the contractor now had to figure out how to dip molasses out of a trench 20 feet deep. After some investigation it was learned that the government knew that this rock was actually known as "metagraywacke" and would morph from rock to

molasses when exposed to the elements. It didn't inform the contractors which bid the project. This is an example of concealment. Concealing conditions about which the contractor should be able to inform himself through an adequate pre-bid site investigation is one thing, but concealing information which is highly specialized and about which reasonably prudent contractors are unlikely to have knowledge is quite another.

For the concept of concealment or superior knowledge to prevail, the contractor must demonstrate that the information which was not provided was material. The criteria for such a claim are:

- That the contractor did not know of the information withheld from it and as a reasonably prudent contractor who performed a site investigation would not have learned of such information.
- But the owner was aware of such information and would be aware that bidders did not have the information or a reason to have it.
- That the information, had it been provided to the contractor, would have affected its bid.
- That the owner did not provide either the information or indications in the technical specifications which would have led the contractor to at least be on notice as to a potential problem.

Clause II – Unforeseeable

Clause II protects the contractor from the financial risks of encountering physical conditions which differ materially from those ordinarily encountered. In the example above, who ever would expect dense rock to melt into molasses when exposed to the elements. So the contractor would have had a basis for a claim under Clause I, the concept of concealment if the owner knew of this condition and failed to provide the information to prospective bidders, as well as Clause II under the concept of unforeseeability. We also see Clause II used by contractors in renovation projects as they encounter in-wall, of subfloor conditions and obstructions which were not shown on the drawings and which they could not have located during a reasonable pre-bid site investigation. The criteria for a Clause II Differing Site Condition is:

- The physical condition was unknown
- It was unusual and could not be reasonably be either known or deduced from a site inspection and the contract documents.
- The actual condition was different from that ordinarily encountered or expected in the type of work to be performed.

OWNER'S DUTIES

Here's the rub. Remember that the owner is to investigate a claim made promptly by the contractor that it has encountered a changed condition. The Owner (true in Federal and AIA alike) **shall investigate promptly**. If the owner lives up to its duty, and there is a collaborative approach to how to proceed with a solution and a justified time extension is given, then often the impact to the project is minimum. If the owner fails to act promptly, simply says to the contractor: "Hey, big guy, you have a problem, take care of it. And by the way, I still want this project built on time", then we have a major problem and often at the front end of the project. And this is too often what happens, an owner refusing to accept its responsibility, then the project ends up with a constructive acceleration and a large labor impact claim which the owner then denies because the contractor hasn't done a good job or proving productivity losses.

We know what to do **if** the owner fulfills its duties. We:

- Give written notice
- Promptly (and per the contract)
- We document what we have found
- We may need to get an expert to provide guidance
- We work with the owner to develop an acceptable plan for dealing with the changed condition
- We price the work associated with the changed condition
- We update the schedule
- We ask for a time extension if one is due.
- If changes to the specification are required, the owner and architect undertake to prepare a change order.

- The Owner and architect reasonably evaluate the contractor's proposal for extra compensation and additional time.

If the **owner fails** to perform its duties, the contractor must still perform its responsibilities including written notice, updating its schedule, field documentation that depicts the impact of the changed condition. It may proceed under written protest, reserving its rights when it does so. It must be very careful that it undertakes design responsibility when it comes up and implements its solutions without the collaboration and direction of the owner. These are the complex ones which are for the most part preventable, but where unfortunately the lawyer must become involved and the spirit of cooperation on a project is either destroyed or dampened.

Design Versus Changed Condition

A contractor had almost completed a recreational dam for the USBR in Colorado. The site was at the base of a mountain. One morning when the contractor's crews came to the site, it discovered that part of the mountain had slipped down and totally covered the dam. The Owner (USBR) came to the conclusion that the mountain slide was an Act of God for which the government is not responsible for in damages. Time extension, but not the damages of cleaning up a huge site inundated with a half of a mountain, nor the damage to the mostly completely dam. The contractor initially tried to argue that this was a Type II Changed Condition, that is, it is not foreseeable that mountains slide down onto dams in this manner; a position contested by the Government as mountain slides are not that uncommon. However, an expert brought in by the contractor noticed shown on the plans and in the specifications was an access road cut right through the girth of the mountain, and that this road undercut the band of material providing the strength for the top half of the mountain to stay in place. When that access road was cut out of the mountain, it was just a question of time before the material above it came tumbling down. **Thus, the reason for the slide was a design problem, for which the USBR was responsible, and not a changed conditionor an act of God.**

In the case of a football stadium being constructed in a valley which was the confluence of drainage of thousands of acres, the contract provided that the

contractor would provide for temporary drainage and protection of the site. The location of the stadium was in an area where rain is quite frequent. The contractor built temporary berms and took other precautions to protect the site but these were inadequate, especially since there was unusual rainfall during the construction period, which damaged parts of the site and delayed progress significantly. The owner's position was that the contractor had specific responsibility for site protection, including temporary drainage control, and that the owner also had no responsibility for weather. The contractor's expert determined that because of the location and nature of the site, that it was virtually impossible to protect the site through temporary measures and that a permanent drainage system should have been installed prior to the construction of the stadium itself**. In other words, the issue was design deficiency and not a construction responsibility or changed condition.**

Summary

The role of the pre-bid site investigation is enormous in changed condition claims.

Document the pre-bid site investigation.

Having an experienced attorney by your side is essential in many, if not most, cases.

As shown in the two illustrations above, the evaluation of all the circumstances by an objective and qualified expert is often the difference between success and failure.

All of the parties should strive to prevent changed conditions.

If changed conditions do occur, the parties should work together collaboratively to mitigate damages and prevent equipment and labor impact due to an acceleration.

Update schedule using the TIA approach. Properly using the schedule as a tool to mitigate damages is of utmost importance.

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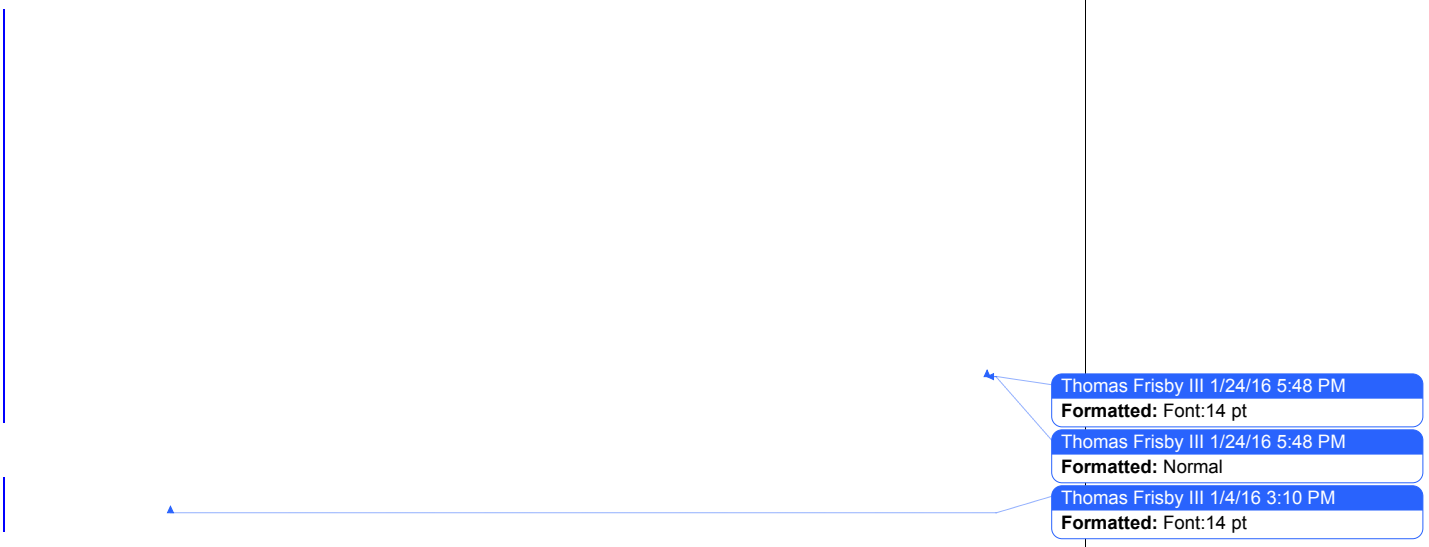
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