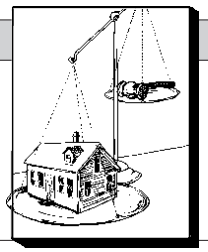
THE LEGAL COLUMN

Who's Responsible for Job Surprises?



by Reina A. Calderon, Esq.

Contractor A contracts with Owner B to erect a building on a certain lot and finds that he must excavate through more rock than he anticipated, substantially increasing his costs and the time he needs to complete the foundation. Can Contractor A shift his increased costs to Owner B without amending the construction contract? Contractor C engages to demolish a building built after the date that certain asbestos materials were prohibited, and finds that the building contains asbestos, requiring him to comply with certain federal and state standards regarding worker protection that increase Contractor C's costs substantially. Can Contractor C recover for the increase in his costs from Owner D?

The answer given to these questions by judges deciding such cases has traditionally been a resounding "no." The traditional rule, a rule that courts apply in the absence of a contractual provision to the contrary, is "facts existing when a bargain is made or occurring thereafter making performance of a promise more difficult or expensive than the parties anticipate do not prevent a duty from arising or discharge a duty that has arisen." *Restatement of Contracts* (Second) Section 467.

In other words, a contractor is not relieved of his duty to perform when he encounters conditions that increase his cost of performance or the time he needs to perform, even when neither he nor the owner anticipated those conditions, and no matter how substantially those conditions increase the contractor's costs and time needed to perform the work. Barring fraud or negligent misrepresentation on the part of the owner, or a mutual mistake on both the owner's and contractor's part regarding a condition which made it impossible—as distinguished from more difficult or more expensive—to perform, contractors A and C in the above examples were, under the common law rule, just out of luck.

Most owner-contractor contracts today contain some provision that attempts to allocate the risks of these unanticipated time and money costs. Not all such provisions, however, help a contractor to shift the risk of the unknown or unanticipated onto the owner. Even changed-conditions clauses, whose seeming purpose is to do this, must be carefully analyzed to ensure that their scope encompasses the particular unanticipated condition.

A careful contractor, before signing a construction contract, will read the whole contract thoroughly. Then he will read the changed-condition provision carefully to determine whether it truly protects him from unanticipated or changed conditions. He may be surprised to find that broad language that at first glance may seem to cover every unanticipated condition is limited significantly by references to the contract documents or the work the contractor is obligated to perform under the contract. Most construction contracts define the contract documents and the work. A changed-condition provision (such as Section 12.2 of the American Institute of Architects General Conditions to the Owner-Contractor contract) that bases its coverage on such defined terms will implicitly limit the types of unanticipated conditions from which the contractor is protected.

Site Investigation Clauses

A type of clause which a contractor should he on the lookout for, is a site-investigation clause. This clause, while it does not necessarily negate a changed-conditions clause, makes it more difficult for a contractor to recover. The A.I.A. Agreement provides, for instance:

> **2.2** *Each bidder, by making his bid, represents that he has visited the site and familiarized himself with the local conditions under which the work is to be performed.*

The A.I.A. General Conditions also say:

> **1.1.2** *By executing this Contract, the Contractor represents that he has visited the site, familiarized himself with the local conditions under which the Work is to be performed, and correlated his observations with the requirements of the Contract documents.*

Clauses such as these make it harder for the contractor to claim that the conditions he encounters while performing the work are really unforeseen or different than the conditions indicated by the contract documents. A contractor contemplating signing an owner-contractor contract with a site-investigation provision should make sure he visits the site and investigates it as a reasonable, experienced, and intelligent contractor would. According to the courts, however, these investigations need not extend to conducting independent subsurface boring and core sampling. See, e.g. *Ray D. Lowder, Inc. v. N.C. State Highways Commission,* 217 S.E.2d 682 (N.C.) *cert. denied,* 288 N.C. 392, 218 S.E.2d 467 (1975); *Kaiser Industries Corp., v. United States,* 169 Ct. Cl. 310 (1965).

The purpose behind a site-investigation clause is to shift the burden of site investigation onto the contractor. If the owner can successfully argue that a reasonable contractor would have discovered the condition upon a site investigation, the contractor will be in no better position than he would be under the common law—changed-conditions clause or not.

Interpreting Changed-Conditions Clauses

The changed-conditions clause of the 1987 A.I.A. Contract (Section 4.3.6., "Claims for Concealed or Unknown Conditions") provides an "equitable adjustment" in the Contract Sum and/or Price for: "...(1) subsurface or otherwise concealed physical conditions which differ from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents..."

In the first type of situation, an adjustment is available where the encountered conditions *differ from* the conditions that the Contract Documents indicated. The Contract Documents need not have affirmatively stated that the conditions were other than what they are; it is sufficient if they merely indicated that the conditions differed from the actual ones. For example, contractors have been afforded relief under "differing conditions" clauses where they encountered rock or large boulders in an excavation area that had not been indicated by logs or boring reports attached to the contract documents.

A contractor thinking about signing a contract with a provision such as Section 4.3.6. (1) should be aware that his ability to recover may be limited by "indications" of site conditions in the Contract Documents. Such "indications can work in his favor if they would lead a reasonable contractor to believe that site conditions were other than what they are. However, the flip side is that where existing conditions are merely "indicated," but not explicitly spelled out, a contractor may be held to knowing that such conditions existed. Thus, where the contract documents suggest conditions, but are not clear, the contractor would be wise to negotiate clearer language regarding site conditions, or obtain more information.

In the second type of situation in section 4.3.6, as opposed to an unfair adjustment, an adjustment is available where the contractor encounters a condition he could reasonably have anticipated. The idea is that no contractor can fairly be asked to bear the risk of performance under such conditions. If the *type* of condition can be anticipated, however, the contractor will not be entitled to an equitable adjustment. For instance, weather conditions alone will not ordinarily constitute a compensable changed condition. Neither will changes in wage rates, increases in costs of materials, or the inability to obtain materials. These are types of conditions that the contractor may reasonably anticipate, even if he cannot anticipate specific cases.

Examples of some compensable changed conditions include (and may vary with jurisdiction and with the facts): failure to approve shop drawings or samples within a reasonable period of time; owner's failure to coordinate the job where prime or separate contracts are awarded rather than awarding one contract to the general contractor; design deficiencies; failure of owner's engineer to inspect or perform his duties in a timely fashion; or excessive changes.

With this second type of changed condition the contractor must prove that the encountered condition differs materially from those "ordinarily" found to exist and "generally" recognized as inherent in the particular type of project. Establishing such general standards may be very difficult—more so than under section 4.36—particularly where the problems are unique.

Summary

A contractor reviewing a contract with a changed-condition clause should read the contract documents carefully, to understand what it is that contract documents indicate about a site. He must realize that any site-investigation clause will make it difficult to recover for a changed condition: He'll have to prove that he made a reasonable investigation of the site, and that it didn't reveal that condition. Finally, he must understand that most changed-condition clauses are limited in scope, and should not be relied upon to cover conditions that the contractor thinks might be present on the site, but which the site investigation and the contract documents do not indicate. In this latter case, the contractor's safest course is to negotiate a contingency in the contract covering the specific condition that the contractor suspects might be present. Don't generally rely on the changed-conditions clause. ■

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