

Recovering Costs for Hidden Conditions

by Tim Fitzgerald

Increasingly, residential and commercial owners are choosing remodeling and expansion over new construction. Contractors working in this segment of the market are accustomed to planning for limited access to the site, odd working hours, and the unique problems of doing construction in a structure while it's in use. However, even the best remodeling contractors will encounter unexpected site conditions, for which they will seek additional compensation from the owner.

But owners are generally not responsible for physical conditions not indicated on the drawings. Typically, an owner provides drawings and specifications to the contractor and sets aside time for the contractor to inspect the building. During this inspection, the contractor is generally able to evaluate factors that may potentially affect the work, the most obvious of which is the fact that the building will be occupied during construction. Residential contractors are accustomed to arranging daily start times around the homeowner's schedule, and to making allowances for limited space available for material storage, site fabrication of components, and other constraints. In a commercial facility, limitations may also include operating equipment as well as the presence of employees and customers.

As long as the owner does not withhold information, the owner is normally not liable for unexpected conditions. However, if the project documents misrepresent what will be encountered, and if the contractor would not have reasonably been able to

detect the misrepresentation during the inspection period, then the owner may be liable.

When You Can Recover

For example, a residential contractor inspects a site for which the drawings indicate removal of a portion of concrete block wall. The drawings do not indicate that the blocks are filled with concrete or reinforced with steel, and during the visit, the contractor is unable to determine this visually and is prevented from destructive testing. During construction, however, it is discovered that the blocks are both reinforced and filled. The contractor would likely recover from the owner for the additional demolition costs because the drawings misrepresented the actual condition of the block wall.

In a similar example, a demolition company bids on removal of a loading area slab where the drawings show 6 inches of concrete. But the contractor is not reasonably able to verify this during the site visit because the loading dock is still in operation. During construction, however, it is discovered that the concrete averages 8 inches. Again, the contractor would probably recover the cost of additional concrete because the drawing misrepresented the actual thickness of the concrete and the contractor could not reasonably have detected the misrepresentation during the inspection period.

When You Can't Recover

Under different conditions, however, the contractor may not be able to recover additional costs. For instance, a contractor bids to renovate a manufacturing facility with full knowledge that the facility would continue to operate during the renovation period. During construction or after completion, the contractor seeks additional compensation because the level of disruption from the manufacturing operations was greater than anticipated. In this case, the contractor would not likely prevail because the owner gave the contractor full opportunity to witness and anticipate the effects of the ongoing operation.

Key to this argument is the fact that the owner gave full disclosure of all information. Where this is not the case, the contractor may recover additional costs. Each situation will depend on what the owner and contractor contemplated at the time of contract, and whether or not the contract addresses the issue. For example, should a hospital not inform a contractor renovating a patient wing that the vibrations and noise from the work would be a hazard to the operating room two floors away, the hospital would likely be responsible for this unexpected condition. The contractor could not reasonably be expected to anticipate that work would have to be organized around the schedule of people, equipment, and spaces in a part of the building that is relatively remote from the contract work. Nor could the contractor be reasonably expected to investigate all possible hospital-related functions not directly connected with the work.



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