

Concealed Conditions

by Quenda Behler Story

It's your first day on a new job, and your excavator is digging out for the foundation when he finds the biggest field rock in North America lurking just below the surface. With a sheepish grin, he informs you that this will add about \$10,000 to your job costs. Is there any way to pass on this unbudgeted cost to someone else?

If your contract doesn't specifically address concealed conditions, changed conditions, or differing site conditions, the default rule is that the bidder, whether that bidder is the general contractor or a subcontractor, is the one who must handle the problem. Bidders are supposed to make themselves familiar with all of the job-site conditions and bid accordingly. Unexpected problems are their headache.

Whose Problem Is This?

The default rule is that the excavating subcontractor is stuck with the problem. If he isn't, then the contractor has an extra cost that's not supposed to be passed on to the homeowner. But I'm calling this the default rule because that's probably not what's going to happen, assuming that everybody has good contracts in place.

The majority of up-to-date construction contracts have clauses that address concealed conditions, because breaking this kind of risk out from all of the other risks that a contractor assumes allows the property owner to get a lower bid. With a concealed conditions clause in place, the bidder doesn't have to factor extra money into the bid to cover things like those as-yet-undiscovered field rocks.

To Proceed or Not to Proceed?

Let's assume in this example that both you and the excavator have concealed

conditions clauses in your contracts to protect you from this very problem. Does this mean all you have to do now is tell the excavator to dig out the Mother of All Rocks and then include those extra digging and disposal costs in your next invoice to the property owner? In other words, does the presence of a concealed conditions clause mean that a contractor can blithely go ahead with the job?

Well, no, at least not if he or she expects to be paid for that extra work. There are some things that need to be done before you start finding a new home for that rock.

First, as the contractor, you should stop immediately and begin documenting everything. Start by writing the details of the discovery into your job-site log, so nothing is left to memory later. And take lots of photographs, maybe breaking out that videocam you got for the holidays.

Questions, questions. You need to do this because, somewhere down the road, certain questions will come up. Was the rock really a concealed condition, or was the rock a condition that would have been revealed if you had examined the site more carefully, or studied those engineering reports a little longer? In such a controversy, photographic evidence can make all the difference. I am assuming, of course, that closer examination of the site in the first place would not have revealed the presence of the boulder.

Required notice. You also need to take a moment to carefully review those contract documents before proceeding, because your claim for extra money may very well depend on giving proper notice to the right person. For example, almost every government contract, as well as the standard AIA contract,

requires any contractor or subcontractor to give immediate notice of concealed conditions to the architect and/or the property owner before proceeding.

Don't take chances. You need to give notice right away, by phone and by certified mail, to the property owner and the architect — a subcontractor should notify the general contractor — even if the contract doesn't actually call for it. In addition, you should give the property owner and architect (or the general contractor) time to look at the problem before it disappears in the construction process.

And you need to start negotiating the extra costs and establishing who is responsible for payment right away. Wait too long and you'll never receive the added cost, no matter what the problem was, or how wonderful your notice and your evidence were, because many contracts state that there won't be any cost adjustments after final payment is made.

One Other Option

A contractor is entitled to rely on the plans and specifications that are provided by the owner or architect. Depending on the details of the contract, this may be another way to pass along the cost of conditions that weren't in the plans or specs, but talk to your attorney about this. This will not be an option if it's a matter of the non-expert homeowner giving out incomplete plans or specs and relying on you, the expert contractor, to accept them as sufficient for bidding. You should have known better.

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