



## BIDDERS BEWARE: NYC, UNANNOUNCED, REMOVES THE CHANGED CONDITIONS CLAUSE FOR ITS STANDARD CONSTRUCTION CONTRACT.

In reviewing two construction contracts recently issued by the NYC Department of Sanitation for major projects, we were surprised to observe that the changed condition clause typically found in the Information for Bidders had been omitted, and in one contract, replaced with provisions in the specifications that place the risk of changed subsurface conditions on the bidder and provide that no claim can be made for changes in subsurface conditions anticipated by the contractor. We fear that our clients may not be aware of this omission having assumed the existence of the standard clause and not factoring such risks into their bids. If you are bidding on any NYC projects, you should make a careful review of the terms to determine how the risks of unanticipated subsurface conditions are addressed and calculate your bids accordingly. The following is a brief explanation of the background of this type of clause and some of the possible effects of a shifting of the subsurface risks. However, the legal effect of not having the protection of the clause is complex, fact dependent and outside the purview of this alert.

The phrase “changed conditions” is misleading. It generally does not refer to a change in condition but to a change of knowledge about an existing condition- a condition which existed at the time the contract was executed but of which the contractor was unaware or which was not reasonably to be expected by either party. Some government contracts refer to them as differing site conditions, while the American Institute of Architects (AIA) refers to them as concealed or unknown conditions. They might also be referred to as unforeseen conditions or unanticipated conditions.

Despite many contractors' beliefs to the contrary, there is no implied right to extra compensation for changed conditions. A changed conditions claim exists only by express contract or in the event of fraud or misrepresentation by the owner.

The purpose of a "Changed Conditions" clause (sometimes called a “Differing Site Condition” clause) is to prevent bidders from adding high contingency factors to protect themselves against unusual subsurface conditions encountered during construction. Since a contractor normally assumes the risk of unexpected costs, this clause is expressly designed to take some of the gamble out of subsurface operations. The rationale behind the

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changed conditions clause is that contractors will have no windfalls and no disasters; and the owner will benefit from more accurate bidding without increased costs for risks which may not occur.

There are two basic types of changed conditions, often referred to as Type I and Type II. These designations are derived from federal law. Type I changed conditions involve a misrepresentation in the contract documents as to site conditions by the owner, the misrepresentation may be innocent or intentional, the contractual representations express or implied. Type II changes involve surprise; the physical site conditions are not what one normally expects to encounter.

The typical changed conditions clause previously found in the Information for Bidders in contracts for The City of New York provides:

*Should the Contractor encounter during the progress of the work, subsurface conditions at the site materially differing from any shown on the Contract Drawings or indicated in the specifications or such subsurface conditions as could not reasonably have been anticipated by the Contractor and were not anticipated by the City, which conditions will materially affect the cost of the work to be done under the Contract, the attention of the Commissioner must be called immediately to such conditions before they are disturbed. The Commissioner shall thereupon promptly investigate the conditions. If he finds that they do so materially differ, or that they could not reasonably have anticipated by the Contractor and were not anticipated by City, the Contract may be modified with his written approval. . .*

Many contracts contain various disclaimers, usually relating to inspection of the site and knowledge of local conditions. However, the courts have held that exculpatory clauses cannot alter the effect of the Changed Conditions clause or deprive a contractor of its benefits. Those types of disclaimer must yield to the Changed Conditions clause.

The specifications for one new DOS contract that omits the changed condition clause, in the sections entitled Excavation Support and Protection and Earthwork, state:

*Borings are available for the Contractor's review. The City makes no predictions or representations regarding the character or extent of soil, rock, or other subsurface conditions to be encountered during the work. The Contractor shall make his own deductions of the subsurface conditions which may affect the methods or cost of construction of the work hereunder, and he*



*agrees that he will make no claims for damages or compensations, except as are provided under the agreement, should he find conditions during the progress of the work different from those as calculated and/or anticipated by him. Additional borings and other exploratory operations may be performed by Contractor, at the Contractor's option and following the City's approval. No change in the Contract Sum will be authorized for such additional exploration undertaken by the Contractor. (emphasis added)*

(Similar language is found in the sections for piles)

This same contract is also part of the “Damages for Delay Pilot Program” instituted by the City as a departure from the no damage for delay clause in the standard City contract. This program modifies the contract to allow the contractor to make claims for delay damages in limited circumstances, one of which is:

*“Differing Site Conditions that were not known or reasonably ascertainable on a pre-bid inspection of the site or review of the bid documents or other publicly available sources and that are not ordinarily encountered in the project's geographical area or neighborhood or in the type of work to be performed.”*

Thus, it appears that a contractor experiencing certain “changed conditions” during earthwork would be permitted to recover impact costs resulting from delays caused by these changed conditions, but, at the same time, would be prohibited from recovering the consequential additional direct costs! The City may come up with an even more limiting interpretation. How a court would interpret these seemingly inconsistent provisions is beyond the scope of this alert. Let us leave it at this: bidders for these new contracts should be aware that, on one hand, your risks of delays may be reduced somewhat, but, on the other hand, you are assuming risks that were previously accepted by the City. You should adjust your bids accordingly.