

Differing Site Conditions – Type I

In order to recover for a Type I differing site condition, a contractor must establish that it encountered subsurface or latent physical conditions differing materially from those indicated in the contract documents. In essence, the underlying issue in a Type I claim is whether the contractor could reasonably have anticipated the conditions encountered from a knowledgeable interpretation of the contract documents, its inspection of the site, and its general experience as a contractor. It has been held that a compensable Type I condition is one that is "reasonably unforeseeable on the basis of all the information available to the contractor at the time of bidding."

Moreover, express representations regarding the nature of conditions to be encountered during performance are not essential to establishing entitlement to an equitable adjustment. Rather, all that is required is that there be enough information from which physical conditions can be inferred. Indeed, a contract indication may be proven by inferences or implications, and need only be "enough to impress or lull a reasonable bidder." Thus, a contractor may recover where it concludes on the basis of the available information that latent conditions will be more favorable than those ultimately encountered.

The Differing Site Conditions Clause, found in FAR 52.236-2, is as follows:

52.236-2 -- Differing Site Conditions

As prescribed in 36.502, insert the following clause:

Differing Site Conditions (Apr 1984)

(a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of --

(1) Subsurface or latent physical conditions at the site which differ materially from those indicated in this 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 investigate 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 result 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 paragraph (a) of this clause 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 after final payment under this contract.

(End of Clause)

