Differing Site Conditions
Clauses and Risk Allocation

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Differing Site Conditions or Changed Conditions Clause

• Project risk allocation purpose
• Commonly used in industry
• Reduces contractor risk of uncertainty
• Produces lower bid prices
Sources of Integrated Contract Documents

- WSDOT / APWA
- EJCDC ~ Engineers Joint Contract Documents Committee
- AIA ~ American Institute of Architects
- DBIA ~ Design-Build Institute of America
- AGC ~ Associated General Contractors
Frequent Problems or Disputes

• Impact of other contract clauses
• Contractor didn’t expect actual conditions encountered
• Risk of inaccurate or incomplete geotech info
• Specs or drawings which shift risk to contractor
Dissecting the Differing Site Conditions Clause

- Pre-existing subsurface or latent physical conditions (1-04.7)
- Differing materially from those indicated in contract
- If preexisting condition unknown physical conditions of unusual nature, differing materially from those ordinarily encountered at site
- Party discovering conditions shall promptly notify other party in writing before conditions disturbed and before affected work is performed
Dissecting the Differing Site Conditions Clause

- Engineer will investigate
- If conditions materially differ and cause increase or decrease in cost or time, an adjustment (excluding loss of anticipated profits) will be made
- No contract adjustment which benefits contractor unless required written notice provided
- Equitable adjustment will be by agreement. If no agreement, price will be determined by Engineer using unit prices or other means to establish costs
- Equitable adjustment will not include consequential damages or delay damages for concurrent contractor and owner delay (1-09.4)
Key WSDOT Clauses that Affect Contractor Claims

- No Claim for Known or Patent Ambiguity 1.02.4(1)
- Duty to Investigate Site and Project Conditions *Failure May Bar Claims* 1-02.4(1)
- Duty to Coordinate with Other Contractors 1.05.14
Two Step Claim Evaluation Process

• **Step 1**: Entitlement under the contract or at law for any damages (quantified in step 2)
• **Step 2**: Determination of amount of price and schedule extension
• **Practice Tip**: Most owner representatives and consultants overlook or pay inadequate attention to Entitlement Step 1.
Case Study ~
Entitlement Phase Overlooked

- Contractor files $421,000 claim late and not in compliance with notice and documentation requirement.
- CM regularly requests supporting documentation to substantiate claim.
- Settlement discussions focus on merit of costs and delay portions of claim only.
Case Study ~
Potential Outcomes

• Deny entire claim based on failure to provide timely notice and documentation – *Mike Johnson case*

• Ignore late notices and approve acceptable expenses - $150,000

• Approve acceptable expense less a reduction due to late notice
Case Study ~ Actual Settlement

Settlement of $195,000 did not consider validity of non-compliance to bar or reduce claim
Geotech Report Issues

- **WSDOT 1-02.4(2):** Boring logs are part of contract
- **EJCDC 4.2.2:** Limited reliance on technical data
- Technical data which contractor can rely upon is identified in supplemental conditions
- Recommended dewatering plans in Geotech Report
Drawing Notes

Exact inverts and slope of the existing 18-inch-diameter pipe at MH1 and MH3 are unknown. The inverts shown assume the pipe slope is constant between IWS-B88A and the south lift station. TV-ing of the pipe indicated the slope may not be constant. Contractor to pothole MH1 and MH3 locations prior to procuring the manholes for construction. The contractor shall pothole to determine actual pipe inverts and slopes in the vicinity of MH1 and MH3. Note that slope at each location may be the same. Adjustments to the manhole depths and knockouts may be necessary if the pothole results indicate pipe inverts or slopes are other than those shown. Notify engineers immediately if potholing shows inverts or slopes other than those shown on these drawings.
“The exact location of the natural gas line shown near MH1 is not known. Extreme care should be taken to locate the natural gas line without damaging line”.
QUESTIONS?