



Post-Bid Surprises

by Michael C. Loulakis and Jeffrey G. Gilmore

Renovation contracts pose unique problems for a building contractor. In bidding a renovation project, a contractor cannot tell precisely what hidden conditions may increase its cost. It is possible to ensure that you are compensated for such unexpected contingencies, however. The best vehicle for this is the inclusion of a *differing site conditions* clause in the contract.

This clause allows the contractor to recover costs if he or she encounters either of two conditions while performing the work. The most common condition, called the "Type I differing site condition," is a latent physical condition at the site differing materially from the conditions indicated or represented in the contract documents. The second condition, appropriately called the "Type II differing site condition," is an unusual and unknown physical condition at the site differing materially from those gener-

inspect the work before bidding, but did not look into the crawl space because it would have required him to cut at least one access hole in a wall or ceiling. The contractor determined from the drawings that one worker could place the main feedline in the crawl space by moving through it from one end to the other.

Unfortunately, when the contractor started work, he found that the crawl space contained a series of beams blocking access to the space. The beams prevented a worker from entering the space and running the feedline as planned, so the contractor had to employ a much more costly method of running the lines. Alart sought recovery under the differing-site-conditions clause, alleging that the contract documents failed to depict the true conditions of the area above the crawl space. Despite the government's arguments to the contrary, the General Services Board found that the contractor was entitled to recovery and awarded him the additional costs he had incurred.

The government's prime defense was that the drawings were silent on what, if anything, was in the crawl space. Thus, because there was no "indication in the contract" that the crawl space was clear of obstructions, the Type I clause could not be used.

Although the drawings were silent about what was in the crawl space, the board ruled that this silence indicated that nothing in the crawl space would preclude the contractor from working as planned. In addition, the board noted that the specifications and drawings "bristled with all sorts of details." Notes were contained on all drawings that alerted the contractor to many local conditions and even gave the exact height of the crawl space. Given such exhaustive contract information, the board found that the government's silence about what was in the crawl space "was as good as a warranty that nothing was there."

The government also argued that if the contractor had performed a reasonable site investigation, he would have known that the beams existed. The board rejected this defense, stating that it would have been "unimaginable" for the contractor to have poked holes in the ceiling during his pre-bid inspection with personal working in the building.

The purpose of a differing-site-conditions clause is to avoid inflating a bid to account for contingencies that may or may not arise. By allowing the contractor to recover the actual costs of such contingencies, owners can benefit from lower, and more realistic, bids. Without such a clause in the contract, renovation contractors should include sufficient contingency factors in their bids to allow for the unexpected.

A further point to remember is that even with a differing-site-conditions clause, a contractor on a renovation project is charged with reasonably inspecting the site and determining the actual conditions. While what constitutes a reasonable site investigation will depend on the facts of a given case, courts will look very carefully at the extent of the contractor's site investigation before awarding any recovery based on a differing-site-conditions theory. ■

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ally recognized as inherent in the type of work specified in the contract.

A recent case before the General Services Board of Contract Appeals, *Alart Plumbing Company Inc.*, GSBGA Nos. 6487, 6690, 6923, 7123, 84-1, BCA Para. 17229 (1984), illustrates how a differing-site-conditions clause can protect a renovation contractor from unexpected contingencies. In the Alart case, the contractor agreed to install a sprinkler system in an existing government building. One portion of this system called for a main feedline to be installed in a crawl space above the ceiling.

The drawings indicated the height of the crawl space above the ceiling, but gave no indication of what, if anything, was in the crawl space. The contract documents also contained a clause stating that:

The drawings indicate the general arrangement of piping and the location of the sprinkler heads, but are not intended to establish or show actual or relative elevation of piping with respect to other piping, structure or ducts, nor are the drawings intended to find exact locations of cross mains and branch lines. The drawings are not intended to relieve the contractor of any responsibility for avoiding conflicts or obstructions or installing the number of sprinklers and supply piping thereto as are required. The contractor visited the site to