

Chapter IV CONTRACT CHANGES / DIFFERING SITE CONDITIONS

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CONTRACT CHANGES

In a perfect world, there would be no changes during a construction project. Until that time arrives, parties to the construction process must deal with the inevitable changes that occur during construction. There are generally three types of changes: Directed Changes, Constructive Changes and Cardinal Changes.

A. Directed Changes. Most construction contracts include a Changes clause, which gives the Owner the right to direct changes in the work during the course of a project. The Changes clause contains the procedure for ordering of changes and describes the type of changes which may be made by the Owner. *See*, AIA A201-1997 (General Conditions of the Contract for Construction). (Appendix A) Generally, changes must be made within the original scope of the contract. The Changes clause provides for an "equitable adjustment" to the contract amount or duration if the change increases or decreases the cost or time of performance of the work.

Beginning with the 1987 edition of the AIA General Conditions of the Contract for Construction (AIA A201-1987), the term "construction change directive" or CCD has been used to describe an order issued by an Owner to the contractor to perform additional work prior to there being an agreement as to the dollar amount. The CCD gives the Owner the unilateral right to modify the contract. However, to be valid, the work covered by a CCD (a) must be within the general scope of the contract, (b) the contractor must be compensated for the work; and (c) the contractor must be given additional time, where appropriate.

For federal construction projects, the Changes clause for fixed-price construction contracts is contained in the Federal Acquisition Regulations at FAR 52.243-4. For construction projects using a standard AIA form contract, the Changes clause is set forth in Article 7 of the General Conditions of the Contract for Construction (AIA A201-1997). A copy of these provisions is attached as Appendix A.

B. Constructive Changes. The Changes clause may also be used to process "constructive changes," which are changes resulting from owner actions or directives, that increase the time or cost of performing the work. "A constructive change generally arises where the Government, without more, expressly or impliedly orders the contractor to perform work that is not specified in the contract documents." *Lathan Co v United States*, 20 Cl Ct 122, 128 (1990)

Constructive changes frequently arise from shop drawing review comments, answers to requests for information (RFI), Owner clarifications, and written directives from the Owner or his design consultant.

Government contracts have provided for the concept of constructive changes under FAR 52.243-4, which provides:

- (b) Any other written order or an oral order (which terms as used in this paragraph (b) shall include direction, instruction, interpretation, or determination) from the Contracting Officer, which causes any such change, shall be treated as a change order under this clause, provided that the Contractor gives the Contracting Officer written notice stating (1) the date, circumstances, and source of the order and (2) that the contractor regards the order as a change order.

* * *

(d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing.

48 CFR § 52.243-4 (1994).

Not every change is a compensable change, however. Under the "Changes" clause of a standard government contract, a contractor may receive an equitable adjustment only when it shows three necessary elements: liability, causation, and resultant injury. *Servidone Constr Corp v United States*, 931 F2d 860, 861 (Fed Cir 1991).

C. Cardinal Changes. There is also a third class of changes, termed Cardinal Changes, which are changes of such a magnitude that they are deemed to be beyond the scope of the Changes clause. Cardinal Changes are not common, but should be considered in any discussion of changes.

It is sometimes difficult to ascertain exactly when a Cardinal Change has been directed. There are no hard and fast rules to courts in deciding whether a change or series of changes is of such a magnitude as to rise to the level of a Cardinal Change. In *Wunderlich Contracting Co v United States*, 351 F2d 956 (Cl.Ct.1965), the United States Claims Court described the parameters considered by the court in evaluating a cardinal change claim.

"There is no exact formula for determining the point at which a single change or a series of changes must be considered to be beyond the scope of the contract and necessarily in breach of it. Each case must be analyzed on its own facts and in light of its own circumstances, giving just consideration to the magnitude and quality of the changes ordered and their cumulative effect upon the project as a whole."

In *Wunderlich*, the contractor claimed that the owner's issuance of over 6,000 change orders on a hospital project amounted to a cardinal change. The court disagreed and denied the claim. The court explained its ruling thus:

"In this case, the changes did not materially alter the nature of the bargain into which plaintiffs had entered or cause it to perform a different contract. Plaintiff contracted to build a ... hospital ... and that is exactly what it built. The hospital, when it was completed, was in the same location, looked the same, had the same number of rooms and floors and the same facilities as the one shown on the original plans and specifications. Apart from the substitution of materials, it differed not at all from the building that had been contemplated when the contract was awarded."

In a case where the court found there to be a Cardinal Change, *General Contracting & Construction Co v United States*, 84 Ct Cl 570 (1937), the court determined that the elimination of a building from a contract to construct several buildings constituted a cardinal change. In other cases where cardinal changes have been determined by courts, the courts have called the changes "profound," "fundamental," "drastic," and "substantial."

In a case presenting a variation to the rule that the change must occur outside the scope of the original project scope, when a hangar collapsed during construction as the result of defective specifications, the court considered the government's directive to reconstruct the hangar to be a cardinal change, allowing "where drastic consequences follow from defective specifications, we have held that the change was not within the contract, i.e. that it was a cardinal change." *Edward R Marden Corp v United States*, 442 F.2d 364 (Ct Cl 1971)

It would appear that Michigan Courts have not addressed the theory of cardinal change, per se. However, Michigan law does provide for the essence of this doctrine by permitting contractors to obtain quantum

merit relief where the Owner makes changes to the work that are outside of the original contract scope, and benefits from the contractor's efforts. *Jarosz v Caesar Realty Inc*, 53 Mich App 402 (1974). In this same vein, Michigan Courts have sustained the concept that directed changes, outside the scope to the original contract, may constitute an abandonment of the contract, requiring an equitable restructuring of the business relationship. *Dault v Schulte*, 31 Mich App 698 (1971).

D. Written Notice. Most construction contracts require written notice in the event of a change to the contract and provide a time period within which to provide notice. In cases where there is no approved written change order or construction change directive are issued, it is essential for the contractor to demonstrate that the owner had knowledge that additional work was being performed which required additional compensation. *Cascade Electric Co v Rice*, 70 Mich App 420 (1976).

Contractors are strongly urged to provide written notice to the Owner and its consultant whenever extra work is being performed or where the contractor expects to be paid additional money. In addition, every request for additional money should include a request for time, or at least the reservation of the right to seek additional time. A written paper trail is critical to sustain a claim in case the contractor and owner cannot amicably resolve their differences.

DIFFERING SITE CONDITIONS

Another change that can occur on a construction project is when the contractor encounters a subsurface or latent condition that was not indicated by the contract documents or was not reasonably anticipated by the contractor. This sort of change is referred to as a "concealed condition" or a "differing site condition."

At common law, it has long been the rule that contractors bear the risk that performance of the contract will cost more than their bid estimate. If a contractor lacks specific information about the subsurface conditions for a proposed project, it faces the risk that unknown or unanticipated conditions may exist which could increase its costs to perform the work or make it impossible to complete the work. Faced with such risks, a contractor either has to spend its own money to investigate the site, or build a contingency into its bid price to cover the risk. Most contractors would opt for the latter alternative.

A common provision for allocating the risk of subsurface and latent conditions at a project is the Differing Site Conditions clause. A Differing Site Conditions clause lessens the contractor's risk of incurring additional costs for delays and additional work arising from unforeseen subsurface or latent conditions. It permits a contractor to base its bid in the information provided by the Owner (ie., soil boring logs, or waste characterization data), with the assurance that if the contractor encounters conditions which are materially different than those reasonably indicated, it can seek an adjustment to its contract to cover the increased cost to perform the work.

Almost every Differing Site Conditions clause found in a construction contract is modeled after the one in the Federal Acquisition Regulations (FAR):

"(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."

FAR 52.236-2 (Differing Site Conditions) (Appendix B). The two conditions are referred to as Type I or Type II Differing Site Conditions.

There is a well established body of federal contract law interpreting the Differing Site Conditions clause.

Olympus Corp v United States, 98 F3d 1314, 1316 (Fed Cir 1996).

A. Type I Differing Site Condition

In order to sustain a Type I Differing Site Conditions claim, a contractor must establish six elements by a preponderance of the evidence:

- i. The contract documents must have affirmatively indicated or represented the subsurface conditions which form the basis of the contractor's claim;
- ii. The contractor must have acted as a reasonably prudent contractor in interpreting the contract documents;
- iii. The contractor must have reasonably relied on the indications of subsurface conditions in the contract;
- iv. The subsurface conditions actually encountered, within the contract site area, must have differed materially from the subsurface conditions indicated in the same contract area;
- v. The actual subsurface conditions encountered must have been reasonably unforeseeable; and
- vi. The contractor's claimed excess costs must be shown to be solely attributable to the materially different subsurface conditions within the contract site.

Weeks Dredging & Contracting, Inc v United States, 13 Cl Ct 193, 218 (1987).

The threshold issue of whether the contractor is eligible for an equitable adjustment for a Type I Differing Site Condition depends on the conditions indicated in the contract. A contractor is not eligible for an equitable adjustment to its contract unless the contract indicated what those conditions would supposedly be. *P J Maffei Bldg Wrecking Corp v United States*, 732 F2d 913, 916 (Fed Cir 1984). "Determining whether a contract contained indications of a particular site condition is a matter of contract interpretation and thus presents a question of law" for the courts to decide. *H B Mac, Inc v United States*, 153 F3d 1338, 1345 (Fed Cir 1998).

B. Type II Differing Site Condition

A Type II Differing Site Conditions claim requires the contractor to prove three elements:

- i. The subsurface or latent physical condition was unknown;
- ii. The subsurface or latent physical condition was unusual and could not be reasonably anticipated based on a review of the contract documents and site inspection;
- iii. The encountered condition was materially different from that ordinarily encountered and generally expected in the type of work to be performed.

Youngdale & Sons Construction, Inc v United States, 27 Fed Cl 516, 520 (1993). See also, *Servidone Constr Corp v United States*, 19 Cl Ct 346 (1990), *aff'd*, 931 F2d 860 (Fed Cir 1991).

C. Damages

Whether the contractor asserts a Type I or Type II Differing Site Conditions claim, the contract provisions provide for an equitable adjustment of the contract amount. An equitable adjustment is supposed to compensate the contractor for the reasonable costs incurred in performing the unanticipated work. The calculation of the equitable adjustment is based upon the difference between the reasonable cost for

performing the work as changed and the reasonable cost for performing the work according to the original contract specifications. *J L Simmons Co v United States*, 188 Ct Cl 684, 704; 412 F2d 1360 (1969) (per curiam).

The significant difference between a Type I and Type II Differing Site Condition is that to sustain a Type I claim, the contractor must prove that the contract documents affirmatively represented some physical condition. *Stuyvesant Dredging Co v United States*, 834 F2d 1576, 1581 (Fed Cir 1987) (bid documents must contain "reasonably plain or positive indications" that subsurface conditions were different from what was actually encountered).

Between the two sorts of claims, a Type II condition is harder to sustain than a Type I condition because the owner has not (mis)represented the subsurface conditions. There is also a greater expectation that the contractor has investigated the project and is aware of potential problems in the case of Type II Differing Site Condition. Likewise, a successful claim is always based on delays or damages caused by a condition that was unreasonably encountered based on all facts and circumstances.

D. Michigan's Differing Site Conditions Law

Until recently, the use of a Differing Site Conditions clause was not common in Michigan outside of contracts with the Department of Transportation. *Gleason Constr Co, Inc v Cascade Charter Twp*, 2001 U S Dist LEXIS 4373, *19 (2001).

In 1998, however, with the support of various industry organizations, the Michigan legislature passed Public Act 57 of 1998, which effectively inserts a Differing Site Conditions clause into most public contracts. MCL 125.1591, et seq. (Appendix C) This clause is nearly identical to the federal differing site conditions provision noted above. Construction contracts with governmental entities that exceed \$75,000 now must include the statutory Differing Site Conditions clause. The clause is incorporated by reference, and by operation of law, into any contract that fails to include the provision. Originally set to expire at the end of 2001, the Michigan legislature repealed the "sunset" provision of the statute in June, 2001.

1. Written Notice. As with many other change provisions, the most important requirement under Michigan's differing site conditions statute is written notice – "before disturbing the physical condition, the contractor shall promptly notify the government entity of the physical condition in writing." MCL 125.1592(a). Failing to serve proper notice will bar a contractor's claim -- "the contractor cannot make a claim for additional costs or time because of a physical condition unless the contractor has complied with the notice requirements of subdivision (a)." MCL 125.1592(d). It is also good practice to document a differing site condition with photographs and video tape.

The purpose of the notice provision is to give the Owner the opportunity to investigate the site conditions before they have been altered by the contractor's activity. Although it may be difficult to identify a differing site condition – the United States Court of Claims noted once that "one aberrant rock or root does not necessarily constitute a differing site condition" *Dawco Construction, Inc v United States*, 18 Cl Ct 682, 693, *aff'd in part, rev'd in part*, 930 F2d 872 (Fed Cir 1991) -- contractors are advised to provide written notice as soon as they can reasonably determine that a claim might exist.

2. Owner's Duty to Investigate. Upon receipt of a written notice of a differing site condition, the governmental entity (Owner) is obligated to investigate the physical condition identified by the contractor. MCL 125.1592(b). If the Owner confirms that the physical condition discovered by the contractor is in fact materially different from that indicated in the contract, and it will cause an increase in the cost and time of the work, the Owner is required to provide an equitable adjustment to the contract. MCL 125.1592(c).

3. Dispute Resolution. If the Owner determines that the physical condition reported by the contractor is not a differing site condition, and the contractor disagrees, Section 3 of the statute gives the Owner the option of arbitrating the contractor's claim pursuant to the rules of the American Arbitration Association. Arbitration is at the sole option of the Owner. This provision does not limit any legal rights

or remedies available to the Owner or the contractor.

4. **Highway Contracts.** Highway contracts in Michigan are also governed the differing site conditions statute. However, the Michigan Department of Transportation (MDOT) has long employed a differing site conditions clause in its standard specifications. For example, under the 1965 General Specifications for Roads, Bridges and Miscellaneous Construction, the clause was termed "Alteration in Character of the Work" and addition work was paid for at contract unit prices. In the 1976 Standard Specifications it was called "Changed Physical Conditions." The current (2003) MDOT Standard Specifications for Construction, the Differing Site Conditions clause is found in Section 103.02. The MDOT provision also tracks the federal Differing Site Conditions clause.

5. **Other Contracts.** Industry standard contract forms also include Differing Site Conditions clauses, although they are sometimes referred as "concealed conditions" or "subsurface and physical conditions." See, AGC Document 200, Standard Form of Agreement and General Conditions Between Owner and Contractor, ¶ 3.16.02 (2000); EJCDC Document No. 1910-8, ¶ 4.2.3 (1990) (Notice of Differing Subsurface or Physical Conditions); and AIA Document A201, General Conditions, ¶ 4.3.4 (1997) (Claims for Concealed or Unknown Conditions).

E. **Owner Disclaimers.**

In an effort to shift the risk of unknown subsurface conditions back to the contractors, many Owners have taken to adding various disclaimers and requiring bidders to undertake their own site investigations. For example, Section 00100 (Instructions to Bidders) of the FORMSPEC® Model Specifications, developed by PMA Associates, Inc. for the State of Michigan and Detroit Water and Sewerage Department (DWSD) includes the following:

3.2 It is also the responsibility of each Bidder, in the preparation of its Bid, to (a) become fully acquainted with the physical conditions under which the Work will be performed and the condition of all existing facilities, including those which may not be a part of the Work. . . . Examples of such conditions include . . . (e) the character, quality and quantity of surface and subsurface conditions at the site, including but not limited to ground water variations, and the location, configuration and condition of existing facilities and Underground Utilities;

3.4 Section 00210, Information for Bidders, identifies (a) *reports of explorations and tests of subsurface conditions, and (b) drawings of physical conditions of existing surface and subsurface facilities* that have been used by DWP or DWP's Design Subcontractor(s) in the preparation of the Bidding Documents. Bidders may rely upon the general accuracy of any technical data contained in those reports and drawings, . . . but those reports and drawings *are not part of the Bidding Documents.* (emphasis added)

3.4.1 *Bidders may not rely upon the adequacy or completeness of those reports and drawings or of any such authorized technical data for the purposes of bidding or performing the Work.* Nor may Bidders rely upon non-technical information or data, interpretations or opinions contained in those reports or drawings. (emphasis added)

All of these measures are designed to avoid responsibility for unknown subsurface conditions, which may be encountered by the contractor during construction.

In addition to disclaimers, some owners have gone so far as to indicate in their bid documents that soil boring logs and other pre-contract site investigation reports not only cannot and should not be relied upon, but they are in fact not "Contract Documents." All of which begs the question: Why do Owners pay engineering and geotechnical consultants hundreds of thousands of dollars to perform tests and produce reports which cannot be relied upon by bidders?

Use of disclaimers and became more prevalent following a 1995 decision from the Fifth Circuit Court of

Appeals. In *Millgard Corp v McKee/Mays*, 49 F3d 1070 (5th Cir 1995), a case involving a Michigan foundation contractor and a Texas project, the appeals court reversed a judgment in favor of the contractor arising out of a differing site conditions claim. The Court reasoned that the actual subsurface conditions encountered were not materially different from what was represented by the Contract Documents because the soil boring logs provided to the bidders were not "Contract Documents," as that term was defined in the contract. The erroneous soil boring logs were provided to bidders "for informational purposes only" and were expressly excluded from the definition of "Contract Documents." Thus, the Owner had not represented anything about the subsurface conditions and effectively insulated itself from liability under the Differing Site Conditions clause.

While many contract drafters have seized upon the *Millgard* decision as a way of protecting the owner, the *Millgard* decision is at odds with well established case law which holds that disclaimer provisions in contracts cannot be used to "gut the concealed conditions clause." *Foster Construction v United States*, 435 F2d 873; 193 Ct Cl 587 (1970). The *Millgard* decision also works against the rationale for the Differing Site Conditions clause, which was to balance the risk between owner and contractor.

SUMMARY

Since changes are a fact of life and a feature of the construction process, it is important that contractors recognize and respond to change events as they arise. Regardless of what label a court might assign to a particular change, entitlement to additional money and time begins with written notice. Written documentation is critical for not only establishing entitlement to a change order or equitable adjustment, but in proving damages. When in doubt, send notice.

When reviewing bid documents, pay close attention to the referenced reports and pre-contract site investigations. Not only should contractors review such documents prior to bid time, but contractors should make sure they are not excluded from the definition of "Contract Document.

Appendix A

6.1.1 The Owner reserves the right to perform construction or operations related to the Project with the Owner's own forces, and to award separate contracts in connection with other portions of the Project or other construction or operations on the site under Conditions of the Contract identical or substantially similar to these including those portions related to insurance and waiver of subrogation. If the Contractor claims that delay or additional cost is involved because of such action by the Owner, the Contractor shall make such Claim as provided in Paragraph 4.3.

6.1.2 When separate contracts are awarded for different portions of the Project or other construction or operations on the site, the term "Contractor" in the Contract Documents in each case shall mean the Contractor who executes each separate Owner-Contractor Agreement.

6.1.3 The Owner shall provide for coordination of the activities of the Owner's own forces and of each separate contractor with the Work of the Contractor, who shall cooperate with them. The Contractor shall participate with other separate contractors and the Owner in reviewing their construction schedules when directed to do so. The Contractor shall make any revisions to the construction schedule deemed necessary after a joint review and mutual agreement. The construction schedules shall then constitute the schedules to be used by the Contractor, separate contractors and the Other until subsequently revised.

6.1.4 Unless otherwise provided in the Contract Documents, when the Owner performs construction or operations related to the Project with the Owner's own forces, the Owner shall be deemed to be subject to the same obligations and to have the same rights which apply to the Contractor under the Conditions of the Contract, including, without excluding others, those stated in Article 3, this Article 6 and Articles 10, 11 and 12.

6.2 MUTUAL RESPONSIBILITY

6.2.1 The Contractor shall afford the Owner and separate contractors reasonable opportunity for introduction and storage of their materials and equipment and performance of their activities, and shall connect and coordinate the Contractor's construction and operations with theirs as required by the Contract Documents.

6.2.2 If part of the Contractor's Work depends for proper execution or results upon construction or operations by the Owner or a separate contractor, the Contractor shall, prior to proceeding with that portion of the Work, promptly report to the Architect apparent discrepancies or defects in such other construction that would render it unsuitable for such proper execution. and results. Failure of the Contractor so to report shall constitute an acknowledgment that the Owner's or separate contractor's completed or partially completed construction is fit and proper to receive the Contractor's Work, except as to defects not then reasonably discoverable.

6.2.3 The Owner shall be reimbursed by the Contractor for costs incurred by the Owner which are payable to a separate contractor because of delays, improperly timed activities or defective construction of the Contractor. The Owner shall be responsible to the Contractor for costs incurred by the Contractor because of delays, improperly timed activities, damage to the Work or defective construction of a separate contractor.

6.2.4 The Contractor shall promptly remedy damage wrongfully caused by the Contractor to completed or partially completed construction or to property of the Owner or separate contractors as provided in Subparagraph 10.2.5.

6.2.5 The Owner and each separate contractor shall have the same responsibilities for cutting and patching as are described for the Contractor in Subparagraph 3.14.

6.3 OWNER'S RIGHT TO CLEAN UP

6.3.1 If a dispute arises among the Contractor, separate contractors and the Owner as to the responsibility under their respective contracts for maintaining the premises and surrounding area free from waste materials and rubbish, the Owner may clean up and the Architect will allocate the cost among those responsible.

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ARTICLE IV -- CONTRACT CHANGES / DIFFERING SITE CONDITIONS -- APPENDIX A / 1

ARTICLE 7 CHANGES IN THE WORK

7.1 GENERAL

7.1.1 Changes in the Work may be accomplished after execution of the Contract, and without invalidating the Contract, by AIA Change Order, Construction Change Directive or order for a minor change in the Work, subject to the limitations stated in this Article 7 and elsewhere in the Contract Documents.

7.1.2 A Change Order shall be based upon agreement among the Owner, Contractor and Architect; a Construction Change Directive requires agreement by the Owner and Architect and may or may not be agreed to by the Contractor; an order for a minor change in the Work may be issued by the Architect alone.

7.1.3 Changes in the Work shall be performed under applicable provisions of the Contract Documents, and the Contractor shall proceed promptly, unless otherwise provided in the Change Order, Construction Change Directive or order for a minor change in the Work.

7.2 CHANGE ORDERS

7.2.1 A Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect, stating their agreement upon all of the following:

- .1 change in the Work;
- .2 the amount of the adjustment, if any, in the Contract Sum; and
- .3 the extent of the adjustment, if any, in the Contract Time.

7.2.2 Methods used in determining adjustments to the Contract Sum may include those listed in Subparagraph 7.3.3.

7.3 CONSTRUCTION CHANGE DIRECTIVES

7.3.1 A Construction Change Directive is a written order prepared by the Architect and signed by the Owner and Architect, directing a change in the Work prior to agreement on adjustment, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive, without invalidating the Contract, order changes in the Work within the general scope of the Contract consisting of additions, deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly.

7.3.2 A Construction Change Directive shall be used in the absence of total agreement on the terms of a Change Order.

7.3.3 If the Construction Change Directive provides for an adjustment to the Contract Sum, the adjustment shall be based on one of the following methods:

- .1 mutual acceptance of a lump sum properly itemized and supported by sufficient substantiating data to permit evaluation;
- .2 unit prices stated in the Contract Documents or subsequently agreed upon;
- .3 cost to be determined in a manner agreed upon by the parties and a mutually acceptable fixed or percentage fee; or
- .4 as provided in Subparagraph 7.3.6.

7.3.4 Upon receipt of a Construction Change Directive, the Contractor shall promptly proceed with the change in the Work involved and advise the Architect of the Contractor's agreement or disagreement with the method, if any, provided in the Construction Change Directive for determining the proposed adjustment in the Contract Sum or Contract Time.

7.3.5 A Construction Change Directive signed by the Contractor indicates the agreement of the Contractor therewith, including adjustment in Contract Sum and Contract Time or the method for determining them. Such agreement shall be effective immediately and shall be recorded as a Change Order.

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7.3.6 If the Contractor does not respond promptly or disagrees with the method for adjustment in the Contract Sum, the method and the adjustment shall be determined by the Architect on the basis of reasonable expenditures and savings of those performing the Work attributable to the change, including, in case of an increase in the Contract Sum, a reasonable allowance for overhead and profit. In such case, and also under Clause 7.3.3.3, the Contractor shall keep and present, in such form as the Architect may prescribe, an itemized accounting together with appropriate supporting data. Unless otherwise provided in the Contract Documents, costs for the purposes of this Subparagraph 7.3.6 shall be limited to the following:

- .1 costs of labor, including social security, old age and unemployment insurance, fringe benefits required by agreement or custom, and workers' compensation insurance;
- .2 costs of materials, supplies and equipment, including cost of transportation, whether incorporated or consumed;
- .3 rental costs of machinery and equipment, exclusive of hand tools, whether rented from the Contractor or others;
- .4 costs of premiums for all bonds and insurance, permit fees, and sales, use or similar taxes related to the Work; and
- .5 additional costs of supervision and field office personnel directly attributable to the change.

7.3.7 The amount of credit to be allowed by the Contractor to the Owner for a deletion or change which results in a net decrease in the Contract Sum shall be actual net cost as confirmed by the Architect. When both additions and credits covering related Work or substitutions are involved in a change, the allowance for overhead and profit shall be figured on the basis of net increase, if any, with respect to that change.

7.3.8 Pending final determination of the total cost of a Construction Change Directive to the Owner, amounts not in dispute for such changes in the Work shall be included in Applications for Payment accompanied by a Change Order indicating the parties' agreement with part or all of such costs. For any portion of such cost that remains in dispute, the Architect will make an interim determination for purposes of monthly certification for payment for those costs. That determination of cost shall adjust the Contract Sum on the same basis as a Change Order, subject to the right of either party to disagree and assert a claim in accordance with Article 4.

7.3.9 When the Owner and Contractor agree with the determination made by the Architect concerning the adjustments in the Contract Sum and Contract Time, or otherwise reach agreement upon the adjustments, such agreement shall be effective immediately and shall be recorded by preparation and execution of an appropriate Change Order.

7.4 MINOR CHANGES IN THE WORK

7.4.1 The Architect will have authority to order minor changes in the Work not involving adjustment in the Contract Sum or extension of the Contract Time and not inconsistent with the intent of the Contract Documents. Such changes shall be effected by written order and shall be binding on the Owner and Contractor. The Contractor shall carry out such written orders promptly.

ARTICLE 8 TIME

8.1 DEFINITIONS

8.1.1 Unless otherwise provided, Contract Time is the period of time, including authorized adjustments, allotted in the Contract Documents for Substantial Completion of the Work.


8.1.2 The date of commencement of the Work is the date established in the Agreement.

8.1.3 The date of Substantial Completion is the date certified by the Architect in accordance with Paragraph 9.8.

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- (4) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.
- (5) Method of shipment or packing of supplies.
- (6) Place of delivery.
- (7) Amount of Government-furnished property.
- (b) If any change causes an increase or decrease in any hourly rate, the ceiling price, or the time required for performance of any part of the work under this contract, whether or not changed by the order, or otherwise affects any other terms and conditions of this contract, the Contracting Officer will make an equitable adjustment in any one or more of the following and will modify the contract accordingly:
- (1) Ceiling price.
 - (2) Hourly rates.
 - (3) Delivery schedule.
 - (4) Other affected terms.
- (c) The Contractor shall assert its right to an adjustment under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.
- (d) Failure to agree to any adjustment will be a dispute under the Disputes clause. However, nothing in this clause excuses the Contractor from proceeding with the contract as changed.

(End of clause) 

52.243-4 Changes.

As prescribed in 43.205(d), insert the following clause:
The 30-day period may be varied according to agency procedures.

CHANGES (AUG 1987)

- (a) The Contracting Officer may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including changes—
- (1) In the specifications (including drawings and designs);
 - (2) In the method or manner of performance of the work;
 - (3) In the Government-furnished facilities, equipment, materials, services, or site; or
 - (4) Directing acceleration in the performance of the work.
- (b) Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; Provided, that the Contractor gives the Contracting Officer written notice stating—
- (1) The date, circumstances, and source of the order; and
 - (2) That the Contractor regards the order as a change order.
- (c) Except as provided in this clause, no order, statement, or conduct of the Contracting Officer shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment.
- (d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for an adjustment based on defective specifications, no adjustment for any change under paragraph (b) of this clause shall be made for any costs incurred more than 20 days before the Contractor gives written notice as required. In the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.
- (e) The Contractor must assert its right to an adjustment under this clause within 30 days after (1) receipt of a written change order under paragraph (a) of this clause or (2) the furnishing of a written notice under paragraph (b) of this clause, by submitting to the Contracting Officer a written statement describing the general nature and amount of the proposal, unless this period is extended by the Government. The statement of proposal for adjustment may be included in the notice under paragraph (b) of this clause.
- (f) No proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract.

(End of clause)

52.243-5 Changes and Changed Conditions.

As prescribed in 43.205(e), insert the following clause:

CHANGES AND CHANGED CONDITIONS (APR 1984)

- (a) The Contracting Officer may, in writing, order changes in the drawings and specifications within the general scope of the contract.
- (b) The Contractor shall promptly notify the Contracting Officer, in writing, of subsurface or latent physical conditions differing materially from those indicated in this contract or unknown unusual physical conditions at the site before proceeding with the work.
- (c) If changes under paragraph (a) or conditions under paragraph (b) increase or decrease the cost of, or time required for performing the work, the Contracting Officer shall make an equitable adjustment (see paragraph (d)) upon submittal of a “proposal for adjustment” (hereafter referred to as proposal) by the Contractor before final payment under the contract.
- (d) The Contracting Officer shall not make an equitable adjustment under paragraph (b) unless—
- (1) The Contractor has submitted and the Contracting Officer has received the required written notice; or
 - (2) The Contracting Officer waives the requirement for the written notice.
- (e) Failure to agree to any adjustment shall be a dispute under the Disputes clause.
(End of clause)

52.243-6 Change Order Accounting.

As prescribed in 43.205(f), the contracting officer may insert a clause, substantially the same as follows:

CHANGE ORDER ACCOUNTING (APR 1984)

The Contracting Officer may require change order accounting whenever the estimated cost of a change or series of related changes exceeds \$100,000. The Contractor, for each change or series of related changes, shall maintain separate accounts, by job order or other suitable accounting procedure, of all incurred segregable, direct costs (less allocable credits) of work, both changed and not changed, allocable to the change. The Contractor shall maintain such accounts until the parties agree to an equitable adjustment for the changes ordered by the Contracting Officer or the matter is conclusively disposed of in accordance with the Disputes clause.
(End of clause)

52.243-7 Notification of Changes.

As prescribed in 43.107, the contracting officer may insert a clause substantially the same as the following in solicitations and contracts. The clause is available for use primarily in negotiated research and development or supply contracts for the acquisition of major weapon systems or principal subsystems. If the contract amount is expected to be less than \$1,000,000, the clause shall not be used, unless the contracting officer anticipates that situations will arise that may result in a contractor alleging that the Government has effected changes other than those identified as such in writing and signed by the contracting officer.

NOTIFICATION OF CHANGES (APR 1984)

- (a) *Definitions.* “Contracting Officer,” as used in this clause, does not include any representative of the Contracting Officer.
“Specifically Authorized Representative (SAR),” as used in this clause, means any person the Contracting Officer has so designated by written notice (a copy of which shall be provided to the Contractor) which shall refer to this paragraph and shall be issued to the designated representative before the SAR exercises such authority.
- (b) *Notice.* The primary purpose of this clause is to obtain prompt reporting of Government conduct that the Contractor considers to constitute a change to this contract. Except for changes identified as such in writing and signed by the Contracting Officer, the Contractor shall notify the Administrative Contracting Officer in writing promptly, within _____ (to be negotiated) calendar days from the date that the Contractor identifies any Government conduct (including actions, inactions, and written or oral communications) that the Contractor regards as a change to the contract terms and conditions. On the basis of the most accurate information available to the Contractor, the notice shall state—

- (1) The date, nature, and circumstances of the conduct regarded as a change;
- (2) The name, function, and activity of each Government individual and Contractor official or employee involved in or knowledgeable about such conduct;
- (3) The identification of any documents and the substance of any oral communication involved in such conduct;
- (4) In the instance of alleged acceleration of scheduled performance or delivery, the basis upon which it arose;
- (5) The particular elements of contract performance for which the Contractor may seek an equitable adjustment under this clause, including—

- (i) What contract line items have been or may be affected by the alleged change;
- (ii) What labor or materials or both have been or may be added, deleted, or wasted by the alleged change;
- (iii) To the extent practicable, what delay and disruption in the manner and sequence of performance and effect on continued performance have been or may be caused by the alleged change;
- (iv) What adjustments to contract price, delivery schedule, and other provisions affected by the alleged change are estimated; and

(6) The Contractor's estimate of the time by which the Government must respond to the Contractor's notice to minimize cost, delay or disruption of performance.

(c) *Continued performance.* Following submission of the notice required by paragraph (b) of this clause, the Contractor shall diligently continue performance of this contract to the maximum extent possible in accordance with its terms and conditions as construed by the Contractor, unless the notice reports a direction of the Contracting Officer or a communication from a SAR of the Contracting Officer, in either of which events the Contractor shall continue performance; provided, however, that if the Contractor regards the direction or communication as a change as described in paragraph (b) of this clause, notice shall be given in the manner provided. All directions, communications, interpretations, orders

(e) The Contractor agrees to insert the substance of this clause, including paragraph (e), in every subcontract issued in performance of this contract. (End of clause)

52.235 [Reserved]

52.236-1 Performance of Work by the Contractor.

As prescribed in 36.501(b), insert the following clause in solicitations and contracts when a fixed-price construction contract is contemplated and the contract amount is expected to exceed \$1,000,000. The Contracting Officer may insert the clause in solicitations and contracts when a fixed-price construction contract is contemplated and the contract amount is expected to be \$1,000,000 or less. Complete the clause by inserting the appropriate percentage consistent with the complexity and magnitude of the work and customary or necessary specialty subcontracting (see 36.501(a)).

PERFORMANCE OF WORK BY THE CONTRACTOR (APR 1984)

The Contractor shall perform on the site, and with its own organization, work equivalent to at least _____ [*insert the appropriate number in words followed by numerals in parentheses*] percent of the total amount of work to be performed under the contract. This percentage may be reduced by a supplemental agreement to this contract if, during performing the work, the Contractor requests a reduction and the Contracting Officer determines that the reduction would be to the advantage of the Government. (End of clause)

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)

52.236-3 Site Investigation and Conditions Affecting the Work.

As prescribed in 36.503, insert the following clause:

SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984)

(a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the availability of labor, water, electric power, and roads; (3) uncertainties of weather, river stages, tides, or similar physical conditions at the site; (4) the conformation and conditions of the ground; and (5) the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

(b) The Government assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Government. Nor does the Government assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract. (End of clause)

**CONTRACTS FOR IMPROVEMENT TO REAL PROPERTY
Act 57 of 1998**

AN ACT to require contractors to provide certain notices to governmental entities concerning improvements on real property; to allow for the modification of contracts for improvement to real property; to provide for remedies; and to repeal acts and parts of acts.

History: 1998, Act 57, Eff. Oct. 6, 1998.

The People of the State of Michigan enact:

125.1591 Definitions.

Sec. 1. As used in this act:

- (a) "Contractor" means a person who contracts with a governmental entity to improve real property or perform or manage construction services. Contractor does not include a person licensed under article 20 of the occupational code, 1980 PA 299, MCL 339.2001 to 339.2014.
- (b) "Governmental entity" means the state, a county, city, township, village, public educational institution, or any political subdivision thereof.
- (c) "Improve" means to build, alter, repair, or demolish an improvement upon, connected with, or beneath the surface of any real property, to excavate, clear, grade, fill, or landscape any real property, to construct driveways and roadways, or to perform labor upon improvements.
- (d) "Improvement" includes, but is not limited to, all or any part of any building, structure, erection, alteration, demolition, excavation, clearing, grading, filling, landscaping, trees, shrubbery, driveways, and roadways on real property.
- (e) "Person" means an individual, corporation, partnership, association, governmental entity, or any other legal entity.
- (f) "Real property" means the real estate that is improved, including, but not limited to, lands, leaseholds, tenements, hereditaments, and improvements placed on the real property.

History: 1998, Act 57, Eff. Oct. 6, 1998.

125.1592 Improvement contract exceeding \$75,000; provisions.

Sec. 2. A contract between a contractor and a governmental entity for an improvement that exceeds \$75,000.00 shall contain all of the following provisions:

- (a) That if a contractor discovers 1 or both of the following physical conditions of the surface or subsurface at the improvement site, before disturbing the physical condition, the contractor shall promptly notify the governmental entity of the physical condition in writing:
 - (i) A subsurface or a latent physical condition at the site is differing materially from those indicated in the improvement contract.
 - (ii) An unknown physical condition at the site is of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the improvement contract.

- (b) That if the governmental entity receives a notice under subdivision (a), the governmental entity shall promptly investigate the physical condition.
- (c) That if the governmental entity determines that the physical conditions do materially differ and will cause an increase or decrease in costs or additional time needed to perform the contract, the governmental entity's determination shall be made in writing and an equitable adjustment shall be made and the contract modified in writing accordingly.
- (d) That the contractor cannot make a claim for additional costs or time because of a physical condition unless the contractor has complied with the notice requirements of subdivision (a). The governmental entity may extend the time required for notice under subdivision (a).
- (e) That the contractor cannot make a claim for an adjustment under the contract after the contractor has received the final payment under the contract.

History: 1998, Act 57, Eff. Oct. 6, 1998.

CONTRACTS FOR IMPROVEMENT TO REAL PROPERTY

125.1593 Contract completion; performance; consent of governmental entity; arbitration; judgment rendered.

Sec. 3. (1) If the contractor does not agree with the governmental entity's determination, with the governmental entity's consent the contractor may complete performance on the contract.

(2) At the option of the governmental entity, the contractor and the governmental entity shall arbitrate the contractor's entitlement to recover the actual increase in contract time and costs incurred because of the physical condition of the improvement site. The arbitration shall be conducted in accordance with the rules of the American arbitration association and judgment rendered may be entered in any court having jurisdiction.

History: 1998, Act 57, Eff. Oct. 6, 1998.

125.1594 Incorporation of additional provisions.

Sec. 4. If an improvement contract does not contain the provisions required under section 2, the provisions shall be incorporated into and considered part of the improvement contract.

History: 1998, Act 57, Eff. Oct. 6, 1998.

125.1595 Rights or remedies.

Sec. 5. This act does not limit the rights or remedies otherwise available to a contractor or the governmental entity under any other law or statute.

History: 1998, Act 57, Eff. Oct. 6, 1998.

125.1596 Repealed. 2001, Act 28, Imd. Eff. June 22, 2001.

Compiler's note: The repealed section pertained to repeal of act.