WHAT TO DO IF YOU ENCOUNTER UNFORESEEN OR CONCEALED PHYSICAL CONDITIONS

PREVENTATIVE MEASURES

Unforeseen or concealed physical conditions can significantly increase the cost of performing work and may drastically reduce profits or wipe them out altogether. Although roofing contractors often have no opportunity to discover concealed conditions before executing contracts, they sometimes unwittingly assume the risks of such hidden conditions and may be held liable for the additional cost to overcome them, depending on the contract language. Many contracts drafted by owners require roofing contractors to accept responsibility for unanticipated costs that may result from site conditions. Many such contracts also require roofing contractors to acknowledge they have fully examined and analyzed all site conditions that may affect performance and to affirm no conditions exist that may affect the progress, performance or price of the work.

Examining a contract for such clauses before agreeing to sign it and changing these clauses so the duties mentioned are limited to visible conditions and responsibility for unforeseen or hidden site conditions is clearly disclaimed can save a roofing contractor from substantial liability. Therefore it is important a contract be reviewed

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prior to its execution to ensure no such liability is imposed on the roofing contractor unless the contractor has tested for such conditions by taking core cuts along with any other measures deemed prudent. If core cuts are taken, they should be taken from different roof areas and compared with data provided by the owner. In addition, a clause should be added to the contract stating the price is based on the core cuts and owner-provided data but if conditions prove to be different than those indicated by the core cuts and data, the roofing contractor will be entitled to an equitable adjustment.

When in doubt as to the effect or meaning of a particular clause or whether a contract imposes liability for unforeseen or hidden site conditions, roofing contractors should consult with their attorneys. Alternatively, they should compare the clause in their contract to Article 4.3.4 of the AIA A401 Standard Form of Agreement Between Contractor and Subcontractor. That clause, an example of a fair and reasonable differing site conditions clause, provides that if concealed conditions differ materially from those indicated in the contract documents (commonly referred to as “Type I Conditions”) or if physical conditions are of an unusual nature that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of that type (commonly referred to as “Type II Conditions”), provided written notice is given promptly and before the conditions are disturbed, the contractor may be entitled to an equitable adjustment in the contract sum, contract time or both.
DISCOVERING THE CONDITION BEFORE SIGNING THE CONTRACT

Where a hidden or unforeseen physical condition is discovered before a contract is executed, it should be brought to the attention of the owner and design professional through written notice. Simultaneously, roofing contractors should examine the effects the condition will have on the contract price, the time required to complete the work or both. If a change in the contract price or time to complete will result, that adjustment should be explained to the owner and the design professional in a letter confirming the existence of the hidden or unforeseen physical condition. The contract should not be executed until an extension and/or cost increase is agreed upon and the contract terms are adjusted.

If the unforeseen or hidden physical condition is discovered at a public project, the bid documents should be consulted to determine the proper course of action. Typically, written notice to the administering agency or architect is required within a specific time frame. Alternatively, unforeseen or concealed physical conditions may be raised at the pre-bid meeting. Depending upon the severity of the condition, the work may be rebid or a clarification may be sent to all prospective bidders.

WHAT IF THE WORK HAS ALREADY BEGUN?

Where the contract has been executed and the work has commenced before a
hidden or unforeseen physical condition is discovered, it is important not to disturb the condition and act quickly to provide written notice. Many contracts provide a small window, sometimes as little as 48 hours, for the roofing contractor to notify the general contractor of a condition it has discovered. Accordingly, upon discovery of a hidden or unforeseen physical condition, roofing contractors should immediately stop working in the area and consult the contract to determine their obligations. Usually, a contract will require written notice to identified parties within a specific period of time, as well as a statement as to the effect on cost and time to complete. After ensuring the condition is not disturbed, complying with the time limitation is the foremost concern and, within the identified time frame, roofing contractors should endeavor to provide as much information as is obtainable. If they are unable to collect or draft all of the required information in the time frame, they should send the information they have along with a note explaining what is missing and advising that they will supplement the notice as soon as they are able. Regardless of whether additional costs are approved as a result of the condition, ensure that separate cost codes are put in place for work performed as a result of, or to overcome, the condition. Accounting should be kept separate for this work to the greatest extent possible.

**WHAT IF THE CONTRACT SAYS THE ROOFING CONTRACTOR IS RESPONSIBLE FOR THE CONDITION? THEN WHAT?**

Although contract provisions requiring roofing contractors to assume the risk of
hidden or unforeseen physical conditions are usually enforceable, subtle aspects of the contract, such as the language used in the inspection clause and the detail with which the work is described, may render the clause unenforceable. Moreover, some states will grant relief to the roofing contractor if both parties shared an affirmative but incorrect belief as to the site condition. Accordingly, roofing contractors should always consult their attorneys for their opinion as to whether the clause is enforceable. If the notice provision does not allow sufficient time to wait for the attorney’s opinion, roofing contractors should proceed as if they were entitled to an extension, an increase in the contract price or both. Not all general contractors will stand on the contract and require roofing contractors to absorb the cost of the hidden condition simply because they are able to. If they keep the lines of communication open and honest, provide prompt written notice of the hidden condition and its effect on their work, a fair and reasonable general contractor may work with them to reach an equitable solution.

THE GENERAL CONTRACTOR DENIED THE REQUEST FOR A CHANGE ORDER. WHAT NOW?

Disputes over whether a change order is justified to correct for hidden or unforeseen site conditions usually are not grounds for suspending the work unless the consequences for proceeding would be grave (for example, it would force the company into bankruptcy). Instead, the contract will usually require that the general contractor’s
orders be followed with resolution of the dispute postponed. Where a roofing contractor is unable to reach an agreement with the general contractor as to a time extension or cost increase, the best course of action, before commencing the work, is to describe the dispute in writing and explicitly state they are performing the work under protest, with full reservation of their right to challenge the general contractor’s decision under the dispute resolution clause of the contract. In addition, separate accounting records should be kept as discussed. If the roofing contractor refuses to perform the work, the general contractor typically may proceed with the work at their expense and back charge them for its costs to complete, plus overhead and profit.

CONCLUSION

When faced with a hidden or unforeseen site condition, ensuring the conditions are not disturbed and providing prompt written notice of the condition, are of the utmost importance. Following the steps outlined in the contract as strictly as possible provides you with the best opportunity to obtain an extension and/or cost increase and to avoid liability for the condition. A close reading of the contract before it is executed is an important and effective method to help you avoid liability for such conditions, especially where you only have the opportunity to walk the site but not to take core cuts.

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