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Dealing with Unforeseen Conditions

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Different Types of Conditions

- We're talking about physical conditions
 - Rocks, Caves, Graves, Asbestos, Old Utilities
- Know your contract rights
- Be diligent about documentation and formality



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The Contract

- CSP - Fixed Price for a Fixed Scope (as depicted in Contract Documents)
- CMAR - GMP for a Fixed Scope (as depicted in Contract Documents)
- Contract Documents:
 - Contracts
 - Specifications
 - Drawings
 - Addenda
 - Modifications
- ***Caveat*** - All contract references here refer to standard AIA A201. You should never sign a standard AIA A201, but the structure will be very similar.



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What is in the “Fixed Scope”?

§ 1.2 Correlation and Intent of the Contract Documents

§ 1.2.1 The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all; performance by the Contractor shall be required only to the extent consistent with the Contract Documents and **reasonably inferable** from them as being necessary to produce the indicated results.



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Contractor's Duties When Accepting Contract (standard AIA)

§ 3.2 Review of Contract Documents and Field Conditions by Contractor

§ 3.2.1 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become generally familiar with local conditions under which the Work is to be performed, and correlated personal observations with requirements of the Contract Documents.

§ 3.2.2 Because the Contract Documents are complementary, the Contractor shall, before starting each portion of the Work, carefully study and compare the various Contract Documents relative to that portion of the Work, as well as the information furnished by the Owner pursuant to Section 2.3.4, shall take field measurements of any existing conditions related to that portion of the Work, and shall observe any conditions at the site affecting it. [...]

§ 3.2.4 If the Contractor believes that additional cost or time is involved because of clarifications or instructions the Architect issues in response to the Contractor's notices or requests for information pursuant to Sections 3.2.2 or 3.2.3, the Contractor shall submit Claims as provided in Article 15. If the Contractor fails to perform the obligations of Sections 3.2.2 or 3.2.3, the Contractor shall pay such costs and damages to the Owner, subject to Section 15.1.7, as would have been avoided if the Contractor had performed such obligations. If the Contractor performs those obligations, the Contractor shall not be liable to the Owner or Architect for damages resulting from errors, inconsistencies or omissions in the Contract Documents, for differences between field measurements or conditions and the Contract Documents, or for nonconformities of the Contract Documents to applicable laws, statutes, ordinances, codes, rules and regulations, and lawful orders of public authorities.



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Contract Provisions for Concealed Conditions (standard AIA)

§ 3.7.4 Concealed or Unknown Conditions

If the Contractor encounters conditions at the site that are

- (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Contract Documents or
 - (2) unknown physical conditions of an unusual nature that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents,
- the Contractor shall promptly provide notice to the Owner and the Architect before conditions are disturbed and in no event later than 14 days after first observance of the conditions.

The Architect will promptly investigate such conditions and, if the Architect determines that they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend that an equitable adjustment be made in the Contract Sum or Contract Time, or both.

If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall promptly notify the Owner and Contractor, stating the reasons. If either party disputes the Architect's determination or recommendation, that party may submit a Claim as provided in Article 15.



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Central Question

- Who bears the risk of an unforeseen condition?
- Contract allocates risk among both parties by imposing duties



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First Steps After Hearing About an Issue

- Document, document, document
 - What has the contractor said?
 - What are the next steps?
 - What is the impact to the schedule?
- Insist on formality
 - Consider how this dispute might look a year or two (or five) later, when all the relevant personnel have moved on
- Let the process play out, but do not kick the can down the road
- Expect decision from Architect



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Potential Impacts

- Time
 - Time lost waiting for decision/revised scope
 - Additional time for implementing revised scope
- Cost
 - More labor/materials
 - e.g., additional soil stabilization/drilling
- All agreed time/cost modifications must be effectuated via a Change Order (or available contingency)



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Disputes

- Owner should not be afraid to challenge Architect's decision on a good-faith basis.
 - If your contract requires a Claim by the Owner, be aware of the process
- If Contractor disagrees with Architect's decision, next step is the Claims process



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The Claims Process

- Contractual mechanism by which a party asks for something
 - i.e., time and/or money

§ 15.1 Claims

§ 15.1.1 Definition

A Claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, a change in the Contract Time, or other relief with respect to the terms of the Contract.

- In the contract, you will identify someone as the “Initial Decision Maker” (typically the Architect)



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The Claims Process – Notice and Deadlines

- Claims are initiated by **written** notice to Owner/Contractor and Architect (IDM)
- You want your contract to have a modified Claims process, not just the standard AIA clause
- There will be a deadline for claims
 - 21 days is standard AIA
 - Courts may require a longer timeline before a claim is waived



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The Claims Process – Contents of Notice

- Contractor must proceed with work during Claims process
- Claims for additional money:

§ 15.1.5 Claims for Additional Cost

If the Contractor wishes to make a Claim for an increase in the Contract Sum, notice as provided in Section 15.1.3 shall be given **before proceeding to execute the portion of the Work that is the subject of the Claim**. Prior notice is not required for Claims relating to an emergency endangering life or property arising under Section 10.4.

- Claims for additional time:

§ 15.1.6 Claims for Additional Time

§ 15.1.6.1 If the Contractor wishes to make a Claim for an increase in the Contract Time, notice as provided in Section 15.1.3 shall be given. The Contractor's Claim shall include an **estimate of cost and of probable effect of delay on progress of the Work**. In the case of a continuing delay, only one Claim is necessary.



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The Claims Process – Initial Decision

§ 15.2.2 The Initial Decision Maker will review Claims and within ten days of the receipt of a Claim take one or more of the following actions:

- (1) request additional supporting data from the claimant or a response with supporting data from the other party,
- (2) reject the Claim in whole or in part,
- (3) approve the Claim,
- (4) suggest a compromise, or
- (5) advise the parties that the Initial Decision Maker is unable to resolve the Claim if the Initial Decision Maker lacks sufficient information to evaluate the merits of the Claim or if the Initial Decision Maker concludes that, in the Initial Decision Maker's sole discretion, it would be inappropriate for the Initial Decision Maker to resolve the Claim.



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The Claims Process – Initial Decision

§ 15.2.5 The Initial Decision Maker will render an initial decision approving or rejecting the Claim, or indicating that the Initial Decision Maker is unable to resolve the Claim. This initial decision shall (1) be in writing; (2) state the reasons therefor; and (3) notify the parties and the Architect, if the Architect is not serving as the Initial Decision Maker, of any change in the Contract Sum or Contract Time or both. The initial decision shall be final and binding on the parties but subject to mediation and, if the parties fail to resolve their dispute through mediation, to binding dispute resolution.



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After the Claims Process

- If a party is still dissatisfied, then mediation/litigation is next.



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Hazardous Materials

§ 10.3 Hazardous Materials and Substances

§ 10.3.1 The Contractor is responsible for compliance with any requirements included in the Contract Documents regarding hazardous materials or substances. If the Contractor encounters a hazardous material or substance not addressed in the Contract Documents and if reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl (PCB), encountered on the site by the Contractor, the Contractor shall, upon recognizing the condition, immediately stop Work in the affected area and notify the Owner and Architect of the condition.



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Hazardous Materials – What Happens Next?

- Owner obtains verification/abatement services from qualified laboratory
- **Change this:** “By Change Order, the Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor’s reasonable additional costs of shutdown, delay, and start-up.”
- **Change this:** § 10.3.3 To the fullest extent permitted by law, the Owner shall indemnify and hold harmless the Contractor, Subcontractors, Architect, Architect’s consultants, and agents and employees of any of them from and against claims, damages, losses, and expenses, including but not limited to attorneys’ fees, arising out of or resulting from performance of the Work in the affected area if in fact the material or substance presents the risk of bodily injury or death as described in Section 10.3.1 and has not been rendered harmless, provided that such claim, damage, loss, or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), except to the extent that such damage, loss, or expense is due to the fault or negligence of the party seeking indemnity.



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Hazardous Materials – Additional Provisions

§ 10.3.5 The Contractor shall reimburse the Owner for the cost and expense the Owner incurs (1) for remediation of hazardous materials or substances the Contractor brings to the site and negligently handles, or (2) where the Contractor fails to perform its obligations under Section 10.3.1, except to the extent that the cost and expense are due to the Owner's fault or negligence.

§ 10.3.6 If, without negligence on the part of the Contractor, the Contractor is held liable by a government agency for the cost of remediation of a hazardous material or substance solely by reason of performing Work as required by the Contract Documents, the Owner shall reimburse the Contractor for all cost and expense thereby incurred.



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What Often Happens

- Contractor mentions the unforeseen condition in a meeting
- No formal documentation is generated
- Months after the fact, Contractor shows up asking for a Change Order
- You've lost the opportunity to make informed decisions during the course of the Project



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A Note About Contingencies

- First, a Contingency is not an Allowance
- Second, your Contingency does not have to be in your contract



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Any Questions?



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The information in this handout was prepared by Eichelbaum Wardell
Hansen Powell & Muñoz, P.C. It is intended to be used for general
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