MEALEY'S CONSTRUCTION LITIGATION CONFERENCE

The Rittenhouse Hotel
Philadelphia, Pennsylvania

May 20-21, 2008

DIFFERING SITE CONDITIONS

PRESENTED BY:

Howard D. Venzie, Jr., Esquire

VENZIE, PHILLIPS & WARSHAWER
2032 CHANCELLOR STREET
PHILADELPIA, PA 19103
Telephone: (215) 567-3322
Email: hvenzie@venzie.com
Website: www.venzie.com

DIFFERING SITE CONDITIONS

I. INTRODUCTION

Differing site conditions claims focus on physical conditions at the project site which were not foreseeable and therefore were unexpected at the time of bid and contract. The site conditions which give rise to "differing site conditions" claims cover a range of surface and subsurface conditions which impact the time and/or cost of construction and were not provided for in the contract documents. As an unauthorized cost event, the unexpected (unforeseen, concealed, unknown) site conditions create a substantial contract performance risk which may impact the cost of construction for one or both of the parties. Therefore, for construction lawyers, the subject of "differing site conditions" becomes an evaluation of the allocation of such risks under the contract documents and entitlement to recover the additional costs and damages associated with the unforeseen site conditions including delay and any other schedule impacts.

II. THE ALLOCATION OF RISKS FOR DIFFERING SITE CONDITIONS

A. The Common Law Rule ("Sanctity of Contract")

In the absence of any contract clauses addressing the issue of differing site conditions, the common law rule is that a contractor is presumed to have assumed the risk of unforeseen contingencies arising during the course of performing the work ***unless performance is rendered impossible by an Act of God, the law or the other party***. ***See, Dermott v. Jones,*** 69 US 1,

17 L.Ed. 762**,** 1864 WL 6582 (1864)**.** ***See also, United States v. Spearin,*** 248 U.S. 132, 39 S.Ct. 59 (1918); ***O'Neill Const. Co. v. City of Philadelphia,*** 335 Pa. 359, 6 A.2d 525 (1939)**;** 4 BRUNER & O'CONNOR ON CONSTRUCTION LAW §§ 14:23-14:24 (2002). Over time the courts created exceptions to the strict application of the common law rule including:

(1) "Impossibility/Impracticability"

Condition not reasonably anticipated, which has significant cost impact making completion of the work a legal impossibility or a physical impossibility if the condition impedes completion of the work. ***See, e.g., Miller v. Mills Const. Inc.,*** 352 F.3d 1166 (8th Cir. 2003)***; Conner Brothers Construction Co., Inc. v. U.S.,*** 65 Fed. Cl. 657 (2005); ***William Miller & Sons Co. v. Homeopathic Medical and Surgical Hospital and Dispensary of Pittsburgh***, 243 Pa. 502, 90 A. 394 (1914). ***See also,*** 4 BRUNER & O'CONNOR ON CONSTRUCTION LAW § 14:44 (2002).

(2) "Constructive Fraud or Misrepresentation"

Owner made a materially false representation about site conditions, knew it was false or recklessly through gross mistake or arbitrary action made the representation without knowledge of its truth and contractor relied on the representation and suffered damage because of it. ***See, e.g., Hollerbach v. U.S.,*** 49 Ct. Cl. 686, 233 U.S. 165, 34 S. Ct. 553 (1914); ***Acchione and Canuso, Inc. v. Com., Dept. of Transp.,*** 501 Pa. 337, 461, A.2d 765 (1983).

(3) "Duty to Disclose"

Owner must disclose all material information in its possession bearing on the condition when such information is not otherwise reasonably available to the contractor including special or superior knowledge material to the performance of the work. ***See, e.g., Conner Brothers Construction Co., Inc. v. U.S.***, 65 Fed. Cl. 657, 687 - 690 (2005); ***Manuel Bros., Inc. v. U.S.,*** 55 Fed. Cl. 8, 35 (2002) (Superior Knowledge doctrine); ***R.J. Wildner Contracting Co., Inc. v. Ohio Turnpike Com'n***, 913 F. Supp 1031 (N.D. Ohio 1996); ***City of Indianapolis v. Twin Lakes Enterprises, Inc.,*** 568 N.E.2d 1073 (Ind. Ct. App. 1st Dist. 1991).

(4) "Mutual Mistake"

Both owner and contractor are in error as to actual site conditions after a good faith effort to ascertain actual conditions. The contract is reformed (equitable remedy) to provide compensation for cost overruns in excess of the reasonable variation in conditions expected by the parties. ***See, e.g., John Burns Const. Co. v. Interlake, Inc.,*** 105 Ill App. 3d 19, 433 N.E.2d 1126 (1st Dist. 1982); ***S.J. Groves & Sons and Co. v. State***, 50 N.C. App. 1, 273 S.E.2d 465 (1980).

(5) "Breach of Implied Warranty"

Owner impliedly warrants to the contractor that its design documents/details are suitable and adequate to accomplish the intended purpose and if followed will permit the successful conclusion of the work. ***See, e.g., U.S. v. Spearin***, 248 U.S. 132, 39 S. Ct. 59 (1918); ***Penn Bridge Co. v. City of New Orleans***, 222 F. 737 (C.CA 5th Cir. 1915); ***Big Chief Drilling Co. v. U.S.***, 26 Cl. Ct. 1276, 1992 WL

296265 (1992); ***Sherman R. Smoot Co. v. Ohio Dept. of Admin. Serv.,*** 136 Ohio App.3d 166, 736 N.E.2d 69 (10th Dist. Franklin County 2000).

B. Contract Risk Shifting Clauses

It is common in today's construction industry for construction contracts to contain various forms of disclaimers, waivers and exculpatory clauses which attempt to shift the risk of differing site conditions to the contractor by express agreement. These clauses: (1) put pre-bid site investigation responsibilities on the bidding contractor; (2) disclaim any responsibility or liability for any inaccurate or misleading subsurface information provided to the bidder in the form of a geotechnical report or other data and/or; (3) place the risk of unknown physical conditions on the contractor as "unclassified" sitework for which no additional compensation will be paid if unanticipated conditions are encountered. Some examples of such clauses are attached hereto as Attachments A-D.

(1) Site Investigation Clauses

These clauses are common and require the prudent contractor to perform a reasonable site investigation prior to bid and/or contract and are intended to shift the risk of differing site conditions to the contractor. The factors considered by the courts in evaluating the reasonableness of the contractor's site investigation are:

(a) Time allowed during the pre-bid period to conduct the investigation. ***See, e.g., North Slope Technical Ltd. v. U.S.*** 14 Cl. Ct. 242, 1988 WL 5080 (1988); ***Fehlhaber Corp v. United States,*** 138 Ct. Cl. 571, 151 F.Supp 817 (1957); ***Zontelli & Sons, Inc. v. City of Nashwauk,*** 373 N.W.2d 744 (Minn. 1985).

(b) The site access available to the contractor and the extent to which the differing conditions were reasonably discoverable without detailed site exploration or were otherwise apparent. ***See, e.g., Dept. of Transportation v. P. DiMarco and Co., Inc.***, 711 A.2d 1088 (Pa. Comwlth. Ct. 1998); ***Midwest Dredging Co. v. McAninch Corp.***, 424 N.W.2d 216. (Iowa 1988).

The failure of the contractor to conduct the contract required site investigation will preclude recovery of a differing site conditions claim if the conditions complained of were discoverable or pertinent information about the adverse conditions was reasonably ascertainable. ***See, e.g., Larry D. Barnes, Inc. v. U.S.,*** 45 Fed. Appx. 907; 2002 WL 1890798. (Fed. Cir. 2002); ***Renda Marine, Inc. v. U.S.,*** 66 Fed Cl. 639 (2005); ***Conner Brothers Construction Co., Inc. v. U.S.,*** 65 Fed. Cl. 657 (2005); ***Orlosky Inc. v. U.S.,*** 64 Fed. Cl. 63 (2005).

(2) Contract Disclaimers and Exculpatory Clause

It is also common to find clauses in today's public and private construction contracts which attempt to shift the risk of unforeseen site conditions to the contractor through disclaimers and waiver clauses (see Attachments A-D). These clauses affirmatively assign responsibility for such conditions to the contractor and deny such responsibility/liability on the part of the owner and its design professionals. ***See, e.g., Interstate Contracting Corp. v. City of Dallas, Tex.,*** 407 F. 3d 708 (5th Cir. 2005). Typically these clauses shift the risk of differing site conditions in one or more of the following ways:

(a) contractor expressly agrees to assume the risks of unanticipated soils and other site conditions;

(b) disclaimer of engineering opinions and conclusions (distinguished from factual data) such as those found in geotechnical reports and similar owner site investigation data;

(c) disclaimer of responsibility for the accuracy or completeness of the information provided to the contractor concerning existing conditions (test boring data, soil composition data etc.); (owner does not warrant a guarantee that conditions will be as requested); and

(d) disclaimers which seek to limit or prevent the contractor from establishing that it justifiably relied on the positive representations in the contract documents about the character, quality or quantity of site materials or conditions. Such disclaimers usually declare that the site information is; (1) for the convenience of the bidder; (2) for guidance only and not the best information available; (3) **not** representative of the conditions existing throughout the site; or (4) was for the limited purpose of design and other nonconstruction purposes.

See, 4 BRUNER & O'CONNOR ON CONSTRUCTION LAW § 14:56 (2002)

The success of contract disclaimers and exculpatory clauses is mixed and depends heavily on the facts pertaining to the differing site conditions and the material representations made by the owner about site conditions. Where the owner has made specific positive representations of fact about site conditions and/or the use of site materials or off-site materials such as borrow from outside borrow pits, the more specific factual conditions will be deemed to

have been justifiably relied upon by the contractor and the disclaimers will **not** protect the owner from liability to the contractor for differing site conditions. ***See, e.g., Jack B. Parson Const. Co. v. State By and Through Dept. of Transportation,*** 725 P.2d 614 (Utah 1986); ***Haggart Const. Co. v. State Highway Commission,*** 149 Mont. 422, 427 P.2d 686 (1967); ***E.H. Morrill Co. v. State,*** 65 Cal. 2d 787, 423 P.2d 551 (1967).

On the other hand, when the owner has shifted the risk of site conditions to the contractor by clear and unambiguous disclaimers, including a proper site investigation clause eliminating any "differing site condition" or "changed condition" and made an honest effort to provide the contractor with accurate and complete information, the disclaimers will generally be enforced. ***See, e.g., Empire Paving, Inc. v. City of Milford,*** 57 Conn. App. 261, 747 A.2d 1063 (2000); ***Costanza Const. Corp. v. City of Rochester,*** 147 A.D.2d 929, 537 N.Y.S.2d 394 (4th Dept. 1989); ***Green Const. Co. v. Kansas Power & Light Co.,*** 717 F. Supp. 738 (D. Kan. 1989).

Another factor affecting the enforcement of contract disclaimers and exculpatory clauses is the existence of a differing site conditions (or changed conditions) clause in the contract. Courts look at the differing site conditions clause as providing a remedy for unforeseen site conditions which is contrary to the intent of the disclaimers. When the contract does not contain a differing site conditions clause, the absence of it is consistent with an intent **not** to provide compensation for unanticipated site conditions and to shift the risk of those conditions to the contractor. ***See, e.g., Interstate Contracting Corp. v. City of Dallas, Tex.,*** 407 F.3d 708 (5th Cir. 2005); ***Ruby-Collins, Inc. v. City of Charlotte,*** 740 F. Supp. 1159 (W.D.N.C. 1990), *aff'd*, 930 F.2d 23 (4th Cir. 1991); ***Fattore Co. v. Metropolitan Sew. Com'n of Milwaukee County,*** 454 F.2d 537 (7th Cir. 1971); ***Jerome Bradford Const. Co., Inc. v. Pinkerton & Laws Co.,*** 174 Ga. App. 854, 332 S.E.2d 26 (1985). ***But see, Millgard Corp. v. McKee***

Mays, 49 F.3d 1070 (5th Cir. 1995) (claim based on soil report data excluded from the contract documents is subject to the contract disclaimer clause **not** the "concealed conditions" clause which is applicable to conditions not related to the soils investigation which was outside the contract).

C. Differing Site Conditions Clauses

Differing site conditions clauses (and their predecessor – the "Changed Conditions" clause) were incorporated into federal government contracts in 1926. Presently the standard differing site conditions clause used in fixed-price federal procurement is set forth in 48 C.F.R § 52-236-2 (2005) (see Attachment E). The notion of contractual relief for unforeseen site conditions developed over time as a result of the financial implications associated with the risk of the unknown and tension over who bears that risk.[1] In 1987, differing site conditions clauses were mandated by the Federal Highway Administration for use in federal and state (federal aid) highway contracts (local DOT's must include differing site conditions clauses in their procurement as required for federal funding by FHA). ***See,*** 23 C.F.R. § 635.109.

Most standard form private construction contracts such as AIA Document A201-2007 General Conditions (¶ 3.7.4 Concealed or Unknown Conditions) also contain similar differing site conditions clauses. The Associated General Contractor's of America and the Engineering Joint Contract Document Committee also have similar differing site conditions clauses in their standard form contract documents. ***See,*** 4 BRUNER & O'CONNOR ON CONSTRUCTION LAW § 14:46 (2002).

[1] ***See,*** 4 BRUNER & O'CONNOR ON CONSTRUCTION LAW § 14:45-14:47 (2002). The authors offer four (4) primary reasons for the creation of differing site condition clauses:

> "(1) alleviate the government's risk of misrepresented site conditions; (2) take the "gamble" out of subsurface conditions; (3) eliminate the need for contractors to include significant price contingencies to offset the risks of unanticipated site conditions, and (4) offer administrative relief for soil misrepresentation claims."

(1) "Type I" and "Type II" Claims

Differing site conditions clauses break the world of site conditions into two (2) categories. The following provisions of F.A.R. 52.236-2 (see Attachment E) provide the standard definition of "Type I" and "Type II" claims:

> **"(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."**

(2) "Type I" Differing Site Conditions

The key elements of the "Type I" claim are:

(a) ***"physical"*** conditions which are ***"subsurface or latent"***;

(b) must be ***"at the site"***; and

(c) must ***"differ materially"*** from those ***"indicated"*** in the contract.

Generally ***"physical conditions"*** include physical soils, structures, man-made obstructions, and materials. Nonphysical conditions such as labor problems, third party conduct or changes in government regulations are **not** covered. ***See, e.g., Olympus Corp. v. U.S.,*** 98 F.3d 1314 (Fed. Cir. 1996); ***D. Federico Co., Inc. v. New Bedford Redevelopment Authority,*** 723 F.2d 122 (1st Cir. 1983); ***Liles Const. Co. v. U.S.*** 197 Ct. Cl. 164, 455 F.2d 527 (1972). ***See also***, 4 BRUNER & O'CONNOR ON CONSTRUCTION LAW § 14:49 (2002). The ***"physical conditions"*** may be ***"latent"*** or concealed conditions above or below grade. ***See, e.g., Liles, supra; Bolander Co., Inc. v. U.S.,*** 186 Ct. Cl. 398, 1968 WL 9164 (1968); ("Changed Conditions" clause); ***Teodori v. Penn Hills School Dist. Authority,*** 413 PA. 127, 196 A.2d 306 (1964) ("latent condition").

The second major element of a "Type I" claim is that the physical condition at issue must be ***"at the site"*** and in existence at the time of the contract formation. ***"At the site"*** means at the site described in the contract documents so that outside borrow pits or quarries described in the contract documents are ***"at the site"***. ***See, e.g., L.G. Everist, Inc. v. U.S.,*** 231 Ct. Cl. 1013, 1982 WL 1450 (1982). ***See also, Olympus Corp. v. U.S.,*** 98 F.3d 1314 (Fed. Cir. 1996). ***"At the site"*** also creates parameters for soil conditions which must be within the planned zones of excavation; ***See, e.g., Weeks Dredging & Contracting Inc. v. U.S.,*** 13 Cl. Ct. 193 (1987), *aff'd,* 861 F.2d 728 (Fed. Cir. 1988) ("maximum pay template").

The remaining element of a "Type I" claim is that the physical condition must ***"differ materially"*** from those indicated in the contract documents. The materiality component of the "Type I" claim requires a careful analysis of the facts bearing on the nature of the condition(s) encountered and the financial impact on the contractor and its operations as compared to the conditions that the reasonably prudent contractor should have expected. ***See, e.g., T.L. James & Co., Inc. v. Traylor Bros. Inc.,*** 294 F.3d 743 (5th Cir. 2002); ***Kit-San-Azusa, J.V. v. U.S.,*** 32 Fed. Cl. 647 (1995), *aff'd as modified on other grounds and remanded,* 86 F.3d 1175 (Fed. Cir. 1996), *reh'g denied*; ***McCormick Const. Co., Inc. v. U.S.,*** 18 Cl. Ct. 259, 1989 WL 112237 (1989), *aff'd,* 907 F.2d 159 (Fed. Cir. 1990); ***Foster Const. C.A. & Williams Bros. Co. v. U.S.***, 193 Cl. Ct. 587, 435 F.2d 873 (1990).

The contract ***"indications"*** component of a "Type I" claim involves an analysis of both the explicit and specific assertions and representations contained in the contract documents (and the reasonable inferences to be drawn from them) and, where applicable, the absence of any affirmative expression that the character, quantity or quality of the conditions to be encountered would not be as indicated ("implied indication"). ***See, e.g., Shank-Artukovich v. U.S.,*** 13 Cl. Ct. 346 (1987), *aff'd,* 848 F.2d 1245 (Fed Cir. 1988); ***CEMS, Inc. v. U.S.,*** 59 Fed. Cl.

168 (2003); ***Servidone Const. Corp. v. U.S.,*** 19 Cl. Ct. 346, 1990 WL 8232 (1990); ***Foster Const. C.A. & Williams Bros. Co. v. U.S.,*** 193 Ct. Cl. 587, 435 F.2d 873 (1970); ***Metropolitan Sewerage Commission of Milwaukee County v. R.W. Const., Inc.,*** 72 Wis. 2d 365, 241 N.W.2d 371 (1976).

(3) "Type II" Differing Site Conditions

The key elements of a "Type II" claim are:

(a) ***"unknown"*** physical conditions at the site;

(b) of an ***"unusual nature"***;

(c) which differ materially from those ***"ordinarily encountered"*** and ***"generally recognized as inhering in work of the character"*** provided for in the contract.

The essence of the "Type II" claim is the comparison of the ***"known"*** and ***"usual"*** site conditions with the actual conditions which by definition must turn out to be both ***"unknown"*** and ***"unusual"***. ***See, e.g., Youngdale & Sons Const. Co., Inc. v. U.S.,*** 27 Fed. Cl. 516 (1993). "Type II" claims tend to be more difficult to prove because of the range of issues and the higher degree of subjectivity involved in the evaluation of these claims. ***See, e.g,. Charles T. Parker Const. Co. v. U.S.,*** 193 Ct. Cl. 320, 433 F.2d 771 (1970) ("Changed Conditions" clause).

Factors to be considered in determining whether unanticipated site conditions will qualify as a "Type II" condition include:

(a) the adequacy of the contractor's site investigation under its site investigation clause duties;

(b) whether the conditions could have been reasonably anticipated by a reasonable, intelligent contractor looking at the contract documents in conjunction with site inspection and general experience in the field of work and knowledge of the site conditions in the area; and

(c) whether the condition is generally recognized as inherent in the work required by the contract keeping in mind the ***"wide variety of materials ordinarily encountered when excavating in the earth's crust"***

Charles T. Parker Const. Co. v. U.S., 193 Ct. Cl. 320, 433 F.2d 771, 778 (1970). ***See also, Servidone Const. Corp. v. U.S.,*** 19 Ct. Cl. 346, 1990, WL 8232 (1990).

III. RECOVERING ADDITIONAL COMPENSATION UNDER DIFFERING SITE CONDITIONS CLAUSES

In addition to the requirement that an unforeseen site condition be either a "Type I" or "Type II" condition, most differing site conditions clauses also require that the contractor ***"shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer"*** (or owner). Such clauses also specify that the contractor's compensation shall be in the form of an ***"equitable adjustment"*** to the contract. ***See***, F.A.R. 52.236-2 (Attachment E).

A. Notice Requirement

F.A.R. 52 236-2 provides that the contractor ***"shall promptly and before the conditions are disturbed give a written notice to the Contracting Officer"***. It also provides that the Contracting Officer shall investigate the site conditions **"promptly"** after receiving such notice and further provides that if the contractor does not give such written notice, an equitable adjustment will not be allowed. The purpose of the notice is to give the government (owner) the

opportunity to observe the conditions at issue, suspend work if necessary and design changes to the contract requirements as may be necessary to accommodate the changed conditions. ***See, e.g., Fru-Con Const. Corp. v. U.S.,*** 44 Fed. Cl. 298, 312-313 (1999); ***Dawco Const., Inc. v. U.S.,*** 18 Cl. Ct. 682, 1989 WL 139643 (1989), *aff'd in part, rev'd in part on other grounds,* 930 F.2d 872 (Fed Cir. 1991).

The AIA-A201-2007 General Conditions differing site conditions clause (¶ 3.7.4.) contains similar parallel notice provisions (Attachment F). However, it also requires that the written notice must be given no later than 21 days after ***"first observance"*** of the differing site conditions.

The failure to comply with the notice requirements of a differing site condition clause can be fatal to the contractors claim. The notice is intended to give the owner the opportunity to verify the differing site condition and to mitigate the cost impact by changing contract performance requirements. ***See, e.g., Schnip Bldg. Co. v. U.S.,*** 227 Ct. Cl. 148, 645 F.2d 950 (1981). The failure to give such notice will be looked at as having "prejudiced" the owner unless the contractor can establish that the owner had actual knowledge of the condition and ample opportunity to investigate the conditions. ***See, e.g., Dawco Const., Inc. v. U.S.,*** 18 Cl. Ct. 682, 1989 WL 139643 (1989), *aff'd in part, rev'd in part on other grounds,* 930 F.2d 872 (Fed. Cir. 1991). The owner's post notice investigation is within its discretion and the owner has no obligation to conduct tests. ***See, Earth Burners Inc. v. U.S.,*** 43 Fed. Cl. 481 (1999). However, failure to respond to the notice and to investigate could place the owner in breach of contract for **not** addressing the conditions. ***See, e.g., Miller v. City of Broken Arrow, Okl.,*** 660 F.2d 450 (10th Cir. 1981).

B. Claim For Equitable Adjustment

Under standard form differing site conditions clauses, the contractor is entitled to recover its costs as an "equitable adjustment" to the contract. ***See***, 48 C.F.R. § 52-236-2 (2005); AIA-A-201 (2007), ¶ 3.7.4. After the contractor has established entitlement to recover additional compensation, the claim process shifts to quantification of the amount to be paid as compensation for the cost and impact of the differing site conditions. ***See, e.g., Dawco Const., Inc. v. U.S.,*** 18 Cl. Ct. 682, 1989 WL 139643 (1989), *aff'd in part, rev'd in part on other grounds*, 930 F.2d 872 (Fed. Cir. 1991); ***Metropolitan Sewage Commission of Milwaukee County v. R. W. Const., Inc.,*** 72 Wis. 2d 365, 241 N.E.2d 371 (1976). Generally the standard for recovery of costs is the difference between what it cost the contractor to do the work and what it would have cost if the conditions had never been encountered. ***See, e.g., Dawco, supra*** at 697**.** ***See also,*** 6 BRUNER & O'CONNOR ON CONSTRUCTION LAW §§ 19:49 - 19:50 (2002). It is also recognized that in pricing equitable adjustment claims, the contractor will be reimbursed its reasonable costs incurred (direct and indirect) plus a reasonable profit. ***See, e.g., J.F. Shea Co., Inc. v. U.S.,*** 10 Cl. Ct. 620 (1986). Courts have allowed various cost calculation methodologies to be used to determine the amount of an equitable adjustment including:[2]

(1) actual cost method using contemporaneous records recording actual costs (or increased costs) incurred in performing the differing site conditions work including cost associated with inefficiencies and delay. ***See, e.g., Dawco, supra*** at 687-689**;** ***Weeks Dredging & Contracting, Inc. v. U.S.,*** 13 Cl. Ct. 193 (1987), *aff'd*, 861 F.2d 728 (Fed. Cir. 1988)**.**

[2] In federal government claims, equitable adjustment pricing will be subject to compliance with applicable Federal Acquisition Regulations and standard contract provisions. ***See, e.g., Servidone Const. Corp. v. U.S.,*** 19 Cl. Ct. 346, 1990 WL 8232 (1990). ***See also,*** 6 BRUNER & O'CONNOR ON CONSTRUCTION LAW § 19.50 (2002).

(2) the "jury verdict" method has also been accepted as a proper methodology for quantifying increase costs due to differing site conditions. ***See, e.g., Dawco supra*** at 699-700.

(3) total cost and modified total cost methods can also be used to support a contractor's equitable adjustment claim. Total cost, however, is **not** favored and should be used only as a last resort. ***See, e.g., Youngdale & Sons Const. Co., Inc., v. U.S.,*** 27 Fed. Cl. 516, 540-541 (1993); ***Servidone Const. Corp. v. U.S.,*** 19 Cl. Ct. 346, 1990 WL 8232 (1990) (modified total cost)**.**

April 29, 2008