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Protect Your Rights to Payment for Changed Conditions

Submitted by: Robert Marconi of Stanislaw Ashbaugh, LLP

A very recent appellate case threatens the right of contractors to recover their extra costs for changed conditions, when the owner has included disclamatory language in the contract documents. In *Basin Paving Co. v. Mike M. Johnson, Inc.*, 107 Wn. App. 61, 27 P.3d 609 (2001), *petition for review pending*, the court declared that exculpatory clauses in the contract documents could negate a changed conditions claim as a matter of law, despite the subsurface conditions expressly indicated in the contract documents.

Basin Paving involved a waste water and water treatment system project that entailed substantial excavation work. The contract designated all of the excavation work as "unclassified excavation." The contract documents included all borings and geotechnical data available to the owner. But the contract documents also included recitals disclaiming responsibility for the reliability of the soils information indicated in the contract documents; requiring bidders to satisfy themselves as to the risk of adverse subsurface conditions; and defining the scope of the excavation as requiring removal of whatever material might be encountered during the progress of the work.
Based upon the indications in the contract documents, the contractor anticipated some rock, but ended up excavating far more of it than expected. Both the costs and time of the work increased substantially beyond what had been anticipated. The contractor made claim for a changed condition. But the owner opposed the claim, on the theory that although the amount of rock actually encountered may have exceeded what the contract indicated, the disclaimers prevented the contractor from relying on the indications in the contract documents.

The trial court ruled as a matter of law in favor of the owner, and Division 3 of the Court of Appeals affirmed. In its published opinion the appellate court declared that regardless of whether actual conditions differed from those the contractor reasonably anticipated based on indications in the contract documents, the mere fact that the presence of rock was foreseeable prevented rock -– *in whatever quantity might be encountered* – from constituting a changed condition.

The *Basin Paving* case may prove to be a substantial departure from pre-existing law on changed conditions in a least three respects. First, it changes the inquiry from whether actual conditions differed from what the contractor reasonably anticipated to whether the actual conditions were beyond what was reasonably foreseeable at all. Second, it allows exculpatory clauses to "trump" the contract's changed conditions clause, so that bidders may not be entitled to recover even when they reasonably rely on indications set forth in the contract documents. And third, *Basin Paving* permits determination of the absence of a changed condition to be made as a matter of law, thereby eliminating that notion of

measuring the reasonableness of the contractor's expectations based upon the totality of indications and clauses in the contract.

An effective response to the financial catastrophe that the *Basin Paving* ruling could mean to other contractors involves an understanding of why changed conditions clauses exist. Contrary to general belief, changed conditions clauses are for the benefit of *owners*, not contractors.

Changed conditions arise from the unpredictability of pre-existing site conditions, particularly subsurface conditions. The costs of constructing a project can vary wildly, depending on the physical conditions encountered during the course of the work. Pile driving through sandy soils is cheap and easy; driving through nested cobbles and boulders can be nearly impossible. Clay and silty soil may be ideal for foundation work when it is dry, but can be a nightmare to work in if saturated by unanticipated groundwater.