ADDITIONAL COST IS THE APPROPRIATE MEASURE FOR DIFFERING SITE CONDITIONS

The Civilian Board of Contract Appeals recently considered the appropriate measure for claims under the differing site conditions clause of the Federal Acquisition Regulation ("FAR"). *Tucci and Sons, Inc. v. Dept of Transportation,* CBCA 4779, Feb. 18, 2016. The appeal presented the question of whether a contractor is entitled to any increase where there is a differing site condition but no increase in its total contract cost. Tucci maintained that its entitlement was based on the additional cost incurred as a result of the differing site conditions. The Board agreed with Tucci, without making a decision on quantum.

The FAR requires that a differing site conditions clause be included in all fixed price construction or demolition/dismantling contracts if the contract exceeds the simplified acquisition threshold. The clause states:

> FAR 52.236-2 -- Differing Site Conditions (Apr 1984)
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> (a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of --
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>> (1) Subsurface or latent physical conditions at the site which differ materially from those indicated in this contract; or
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>> (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.
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> (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. []

Note that there are two categories of compensable differing site conditions: category I (site conditions which differ materially from those indicated in the contract), or category II (conditions which are unknown and unusual and differ materially from those generally encountered in the type of work being procured)

Tucci was performing a construction contract awarded by the Department of Transportation to reconstruct a highway and install utility conduits in a utility trench in a national park. When Tucci began to excavate the utility trench, it encountered numerous large boulders whose unusual size and concentration were unanticipated at the time of the bid. Tucci notified its contracting officer of the differing site conditions.

The Agency disputed the existence of a differing site condition, and moved to dismiss Tucci's appeal arguing that even if a differing site condition was encountered, Tucci couldn't recover because it didn't experience an increase in contract costs due to the alleged differing site conditions.

The Board refused to dismiss the case, although it did not rule on Tucci's quantum claim. The Board noted that the appropriate way to measure damages was the "additional cost incurred by the contractor as a result of the differing site condition. More specifically, the equitable adjustment for differing site condition is the difference between what it cost it to do the work and what it would have cost if the unforeseen conditions had not been encountered."

The board noted that the bid estimate should not be the basis for an equitable adjustment when there are differing site conditions. The object of pricing an equitable adjustment "is to maintain insofar as practicable the cost/profit relationship existing at the time of the change. Equitable adjustments may not be used as a device for repricing or reforming the bargain the parties originally made" *Citing Am. Elec., Inc.* ASBCA 15152, 73-1 BCA ¶ 9787.

So the Board held that Tucci's reasoning was valid, and the Agency's was not. It noted, however, that Tucci bears the burden of proving three things: (1) that it encountered a differing site condition; (2) that the differing site condition caused an increase in the cost of performance of its work; and (3) the amount of that increase.