

## If a Contract Requires a Field Inspection, Do It or Pay the Consequences

By Peter Goetz

A recent case brings to light the need for contractors to pay attention to contract provisions and responsibility for extra costs.

In *Rapid Demolition Co., Inc. v. State of New York*, the New York Appellate Division Second Department reversed a New York State Court of Claims decision in favor of a public works contractor (Rapid) in connection with a \$1.2 million claim for extra work due to unanticipated costs. On appeal, the court ruled the contract contained a disclaimer provision that barred Rapid's cause of action for breach of contract related to extra work.

In May 1999, Rapid entered into a \$3.2 million public works contract with the state of New York for the demolition and disposal of the Wantagh State Parkway Bridge located in Hempstead. Under the contract, Rapid agreed to demolish and dispose of the bridge's superstructure.

After Rapid began the demolition, it experienced difficulties removing the bridge's superstructure. The state-produced drawings and specifications showed the bridge deck's concrete overlay to be 2.95 inches thick, when in fact it was 6 inches thick. Rapid asserted a claim with the state in the amount of \$1.2 million for the additional costs incurred for the removal of the thicker overlay. The state denied Rapid's request for additional compensation, and litigation ensued.

The state disputed whether it should be liable to Rapid for the increased costs caused by inaccurate dimensions contained in the contract plans and drawings regarding the thickness of the bridge's concrete overlay. The court of claims found the state waived the notice requirements under the contract when a state employee wrote a letter to Rapid indicating a willingness to negotiate the additional payments for the extra work claim. However, on appeal, the Second Department reversed the court of claims' decision, finding the state did not waive the contract's notice requirements.

The Second Department took a different approach on the issue. When the state is a party to a construction contract, the contract alone determines whether the contractor will be compensated for an extra work claim. A review of the contract revealed several provisions existed under which Rapid disclaimed its right to be compensated for extra work incurred due to a change in the existing conditions. The contract expressly stated that Rapid agreed its information was secured by personal investigation and research, and not from the state's estimates or records.

Therefore, Rapid relinquished its right to claim extra work in connection with the difficulties it incurred due to the discrepancy between the conditions of the bridge represented in the drawings and the actual conditions. Additionally, the contract clearly stated it was not based on actual field conditions and warned the dimensions shown on the plans could vary from the actual field dimensions.

Rapid failed to investigate the thickness of the concrete deck overlay prior to executing the contract, and the evidence at trial demonstrated a visual inspection would have revealed the true thickness of the overlay. The court found the state was properly insulated from having to pay for the extra work.

The case serves as a reminder that the law cannot save a contractor from incurring unanticipated costs when it freely signs a contract disclaiming another party's liability in certain situations.

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