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Ms. Jane Allen, P.E.
City of Ann Arbor Engineering Department
Larcom City Hall, Fourth Floor
301 East Huron
Ann Arbor, MI 48104

Sent by email and overnight mail
jallen2@a2gov.org

Re: **Barton Drive Resurfacing and Water Main Replacement Project**
Violation of MCL §§ 125.1591 - 1596

Dear Ms. Allen:

Butzel Long is General Counsel for the Michigan Infrastructure and Transportation Association ("MITA"). MITA is a statewide construction trade association that consists of nearly 600 Michigan companies representing construction disciplines such as road and bridge, sewer and water, utility, railroad, excavation and specialty construction throughout Michigan. On behalf of its members, MITA vehemently protests the City of Ann Arbor's attempt to contractually circumvent its statutory obligations to contractors and its taxpaying residents on the above referenced project. The City has advised bidders it is has completed testing on numerous projects which disclosed elevated levels of naturally-occurring, regulated, elemental metals above EGLE-regulated background levels within the City and Washtenaw County, but the soil boring logs are silent regarding any such soils on the project site. The City has not estimated the anticipated quantity of these soils expected to be encountered on the project, or provided an allowance for the cost to handle and to dispose of these soils. Instead, the City has advised contractors it is possible that they could encounter soils containing elevated levels of naturally-occurring, regulated, elemental metals above EGLE-regulated background levels. From this generic information, the City attempts to require the Contractor to assume the risk and responsibility for an unknown quantity of these elevated soils materials, and include a speculative contingency disposal cost in the bid while remaining competitive. This contractual risk shifting violates Michigan's Differing Site Conditions law, MCL 125.1592, PA 57 of 1998 (the DSC Act).

For that reason, I am offering these comments on applying Michigan's DSC Act to the Invitation to Bid in the hope these comments will facilitate the City reassessing its responsibilities to contractors and its tax-paying residents on the Barton Drive Resurfacing and Water Main Replacement Project. A brief background of the Differing Site Conditions clause may be helpful in gaining a thorough understanding of Michigan's DSC Act and its application to the Project.

The Federal Government developed the Differing Site Conditions clause to eliminate contingency costs, possible contractor windfall, and likely litigation costs. Recognizing the beneficial effects garnered from a Differing Site Conditions Clause, the Federal Government first introduced the Type I Differing Site Condition clause into Federal contracts in 1926 and the Type II Differing Site Condition clause in 1935. In 1937, the American Institute of Architects followed the Federal government's lead by incorporating similar provisions in its general conditions. Other associations drafting form contracts followed suit, and various other public owners adopted their own versions. The Michigan Department of Transportation has included a Differing Site Conditions Clause in its contractors since at least 1973 (See Michigan Department of Transportation 1973 Standard Specification for Construction, and every edition since then).

By providing contractors with equitable relief for unforeseen subsurface conditions, the Differing Site Conditions clause prevents contractors from bidding on a worst-case-scenario basis.[1] The Differing Site Conditions clause imposes upon the Government the risks for conditions that the contract documents fail to disclose, but leaves upon the contractor the costs of encountering conditions disclosed and described in the contract. Because the Differing Site Condition clause alleviates the need for contractors to insert speculative contingency costs in their bids, it reduces inflated bidding, and the Public Owner saves money by receiving lower bids. Public Owners only pay for the cost of construction in the actual subsurface conditions encountered on their projects – those accurately disclosed and those which differ materially from the contract representations which the contractor relied upon in formulating its bid. The purpose and benefit of the Differing Site Conditions clause is concisely and perhaps best stated in *Foster Construction v. United States*:[2]

> The purpose of the changed conditions clause is to take at least some of the gamble on subsurface conditions out of bidding.
>
> Bidders need not weigh the cost and ease of making their own borings against the risk of encountering an adverse subsurface condition, and they need not consider how large a contingency should be added to the bid to cover the risk. There will be no windfalls and no disasters. The Government benefits from more accurate bidding, without inflation for risks which may not eventuate. It pays for difficult subsurface work only when it is encountered and was not indicated in the logs.

In 1998, Michigan was one of the first states in the nation to enact legislation requiring that virtually every public works contract contain a Differing Site Conditions clause when PA 57 of 1998; MCL 125.1591 - .1595 (the DSC Act) was enacted into Michigan law. The DSC Act provides that a contract for improvements between a contractor and a governmental entity exceeding $75,000 "shall" contain these provisions: A contractor must promptly notify the government entity if it finds (1) that a subsurface or latent physical condition at the site differs materially from those indicated in the contract (this is known as a "Type I Differing Site Condition"), and/or (2) that an unknown physical condition at the site of an unusual nature

[1] *Gleason Construction Company v Cascade Township*, 2001 U.S. Dist. LEXIS 4373 (W.D. Mich., 2001); *Iacobelli Constr., Inc. v. County of Monroe*, 32 F.3d 19, 23 (2nd Cir. 1994).

[2] 435 F.2d 873, 887 (Ct. Cl. 1970), cited with approval in *Gleason Construction Company v. Cascade Township, supra.*

differing materially from that ordinarily encountered and recognized as in the work of the character envisioned in the improvement contract (known as a "Type II Differing Site Condition). A Differing Site Condition exists if either type of Differing Site Condition is encountered. If a governmental entity receives such a notice, it must promptly investigate the physical condition, and if it determines the physical condition is materially different and would cause an increase or decrease in cost or additional time to perform the contract, it must put its determination in writing and an equitable adjustment to the contract price and time must be made.[3] Underscoring the weighty public policy embodied in the DSC Act, the Legislature mandated that where contract documents do not contain a Differing Site Conditions clause, the Act incorporates the DSC Clause into the contract.[4]

Some public owners and their consulting engineers apparently do not understand the public policy, purpose and benefits inuring to public owners from the Differing Site Conditions Clause. Despite the sound public policy behind the Differing Site Conditions clause, project owners often attempt to circumvent its application by including various disclaimers and exculpatory clauses.

It has been routinely held, however, that where conditions materially differ from the conditions described in the contract, equitable relief under a Differing Site Condition clause will not be denied because the contract documents contain one or more disclaimers or exculpatory clauses. *Town of Longboat Key v. Carl E. Widell & Son*[5] ("It has been held that, when conditions are materially different from those contemplated by the contract, relief is not to be denied because of the presence in the contract of one or more various admonitory or exculpatory clauses, such as one requiring the contractor to examine the construction site."). To permit the Government to disclaim contract indications would destroy the policy and benefit behind the Differing Site Conditions Clause. *Metropolitan Sewerage Commission of Milwaukee County v. R. W. Constr.*[6] ("To allow such provisions to cancel out the changed-conditions clauses would destroy the whole equitable-adjustment procedure which the [Government] has agreed to when materially different conditions are encountered.").

Where there is a Differing Site Conditions clause, the disclaimers are uniformly viewed as conflicting with the clause's language allocating the risk based on what is "indicated in" the contract documents. Where the Differing Site Conditions clause is required by law (mandatory clause), as in federal government construction and in **every** Michigan public works contract over $75,000, conflict between the mandatory clause and the disclaimer provisions has been consistently resolved in favor of the mandatory clause and the disclaimers are adjudged ineffective. A general disclaimer of the government's responsibility for subsurface information is not enforceable to overcome a Differing Site Conditions clause in either a federal contract[7] or a state contract.[8]

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[3] Id.

[4] MCL § 125.1594.

[5] 362 So.2d 719, 722 (Fla. App. 2 Dist., 1978)

[6] 72 Wis.2d 365, 241 N.W.2d 371, 383 (Wis. 1976)

[7] See e.g., *Foster Construction, supra.*

[8] See e.g., *Gleason Construction, supra.*

Some public owners also attempt to avoid the Differing Site Conditions clause by including disclaimers or other provisions in the contract documents seeking to shift the risk of Differing Site Conditions to the contractor. Those disclaimers run the gamut from disclaiming the accuracy of soil conditions to disclaiming responsibility for conflicting utilities. Regardless of the Differing Site Condition for which the public owner seeks to disclaim and avoid responsibility or shift the risk of Differing Site Conditions to the contractor, those disclaimers and risk shifting provisions are consistently held to be unenforceable to deny a contractor its entitlement to the relief provided by a Differing Site Conditions clause.

For example, in *Fehlhaber Corp. v. U.S.*[9], the United States Court of Claims held invalid a disclaimer seeking to shift the risk of materially differing subsurface conditions to the Contractor.[10] There, the contractor agreed to provide pier and pile work on a bridge construction project. The Contract Documents included a Differing Site Conditions clause, and a log of soil borings taken near the locations for the pier construction. The contractor made its bid in reliance on the Contract Documents, including the soil borings log. During construction, the contractor encountered subsurface rock conditions which materially and substantially differed from those in the Contract Documents. The Government denied the contractor's request for an equitable adjustment to the contract price because the Contract Documents contained a disclaimer stating the contractor could not rely on the subsurface data provided by the Government. The disclaimer provided:

> The information and data furnished or referred to below are not intended as representations or warranties but are furnished for information only. It is expressly understood that the Government will not be responsible for the accuracy thereof or for any deduction, interpretation, or conclusion drawn therefrom by the Contractor.[11]

The Court rejected the Government's disclaimer defense because the contractor "had a right to rely on the Government's specifications and drawings and the Government is bound by any assertions made therein notwithstanding the fact that it was stated that that data would be for information only. This court has repeatedly held that the specifications cannot alter the effect of the specific language of the [Differing Site Conditions Clause] of the contract."[12]

In the presence of a Differing Site Condition clause, Courts invariably hold unenforceable disclaimers that state that a contractor may not rely on subsurface data provided by the Government. In *Foster Constr*., the Court ruled "Even unmistakable contract language in which

[9] 151 F. Supp. 817, 138 Ct. Cl. 571 (1957), cert. denied, 355 U.S. 877, 78 S. Ct. 141, 2 L.Ed.2d 108

[10] As Judge McKeague noted in the *Gleason o*pinion, unlike Michigan courts, federal courts-especially the Court of Federal Claims (formally the Claims Court and Court of Claims) and the Court of Appeals for the Federal Circuit-have extensive experience construing, interpreting, and applying Differing Site Conditions clauses and claims arising there under. Accordingly, the reported decisions of those courts are afforded great deference. *Gleason Construction, supra* at 21.

[11] 151 F. Supp. at 820

[12] *Id*. at 825 (Citations omitted).

the Government seeks to disclaim responsibility for drill hole data does not lessen the right of reliance."[13] Similarly, the U. S. Court of Appeals for the 7th Circuit ruled, "[I]n the presence of a 'Changed Conditions' clause . . . broad exculpatory clauses do not preclude the contractor-bidder from relying upon subsurface conditions of the nature indicated by the contract specifications."[14]

Michigan is no exception. Our Courts have repeatedly held disclaimers are not effective on public works contracts where the Owner supplies subsurface information as part of the bid documents, even where the contract does not contain a Differing Site Conditions Clause.[15] The source of this rule is grounded in the principles that a contractor may not negotiate terms of a competitively bid public works contract, and the government is expected to deal fairly with those whom it contracts. Owners may not validly disclaim the accuracy of the subsurface information furnished to bidders upon which they rely to determine their bid price, plan for the work and schedule.

In summary, the Differing Site Conditions clause directly applies to the Project and deemed included in the contract provisions by Michigan law and is supported by sound public policy and many decades of use in public works contracting. There is nothing murky or grey about the requirements of the Differing Site Conditions clause nor is there any uncertainty as to whether applying the Differing Site Conditions clause can be circumvented by contract disclaimers or other contract provisions seeking to shift the risk of Differing Site Conditions to the contractor. It cannot.

With this background in mind, it is now appropriate to address the problematic provisions in the Detailed Specifications for this Project. First, the City included soil boring logs in the contract documents which describe the strata of subsurface conditions expected to be encountered during excavation. Nothing in those boring logs describes naturally-occurring, regulated, elemental metals in the project soils.

The City inserted Detailed Specifications for In-Situ Soils and Removal and Disposal of Contaminated Soils in its contract documents, explaining the Detail Specification "governs the classification of existing in-situ soils that can be encountered during the performance of the work on this project." The specification explains all excavated material generated on the project becomes the property of the Contractor. Any excavated material that cannot be incorporated into the project work must properly disposed of off-site by the Contractor in a landfill, and the Contractor shall be responsible for all sampling and analysis required to determine and classify the excavated materials on the project.

If the analysis shows the material to be non-hazardous contaminated or hazardous contaminated soil, the material shall be disposed at a licensed Type I or Type II landfill as required by the Michigan Department of Environment, Great Lakes and Energy (EGLE) regulation. The

[13] *Foster Constr*., 435 F.2d at 888.

[14] *Fattore Co., v. Metropolitan Sewerage Commission of the County of Milwaukee*, 454 F.2d 537, 542 (7th Cir. 1972).

[15] See *Hersey Gravel v. State Hwy. Dept.*, 305 Mich. 334, 338-41 (1943); *Knapp v. State Hwy. Dept.*, 311 Mich 186 (1945); *Valentini v. City of Adrian*, 347 Mich. 530 (1956).

City will pay the Contractor for this handling and disposal at the unit price in the Contractor's bid proposal. The City assumes the risk the Contractor may encounter an unknown quantity of Non-Hazardous Contaminated Soil and Hazardous Contaminated Soil, and shall pay the Contractor for necessitated, resulting work. This is the proper method of handling unknown but anticipated subsurface conditions.

In sharp contrast, the specification also warns bidders that based upon completed testing on numerous projects, the soils within the City of Ann Arbor and Washtenaw County in general contain levels of naturally-occurring, regulated, elemental metals that may be dangerous if it comes into contact with humans or water course or ground water. Soils containing levels of naturally-occurring, regulated, elemental metals determined (after testing at the contractor's expense) to be above EGLE-regulated background levels are excluded from the definition of "Contaminated Soil." Despite the complete absence of any site specific information on the presence of soils containing levels of naturally-occurring, regulated, elemental metals above EGLE-regulated background levels in the project subsurface, the City advises the Contractor assumes the risk and the attendant costs of handling and disposing an unknown quantity of such soils. The City excluded those soils from the definition of "Contaminated Soil." Therefore the risk of characterizing as well as the cost of handling, managing, and disposal of these soils are not covered by the unit prices.

Despite failing to provide site-specific information about the expected quantity of naturally-occurring, regulated, elemental metals soils, the City includes this disclaimer:

> The Contractor's submittal of a bid for this project shall be considered prima fascia evidence that they have considered these facts and included all necessary resources to perform all work of this project and to properly dispose of excavated soils from this project off-site.
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> * * *
>
> During the performance of work on a project, if such soils are found or determined to exist after a course of testing and characterization, the off-site disposal of those soils shall not be paid.

The Contractor is obligated to rely on site specific subsurface information when confronted with conflicting "general area" soils information.[16] Without providing the Contractor with any data on the presence of soil containing naturally-occurring metals, the City requires the Contractor make management and cost decisions before work commences to determine the type of soil, where to dispose of the soil, and locate a landfill that will accept the disposal of that soil. The Contractor must then insert a contingency cost for that affected work, while attempting to be competitive with other Contractors submitting similar uninformed bids. The Contractor has no control over whether the soils will contain elevated levels of metals, let alone whether they are naturally occurring or "contamination". With no input or control over the decision, the Contractor is expected to flat out guess the quantity of soils that can and cannot be used as fill material, and the quantity of material that must be disposed at a landfill willing to take an unknown quantity of soils with elevated levels of arguably naturally occurring metals. This is the "blind guessing" bidding the DSC clause was developed to avoid. The City is in the best situation to investigate the soil it owns during the

[16] *Granite-Groves v. Washington Metropolitan Area Transit Authority*, 845 F.2d 330 (1988).

design stage and determine whether elevated metals are naturally occurring or contamination. In fact, the City admits it has subsurface information from testing on numerous projects, but has failed to provide that information to Contractors. Not only does that expose the City to liability for failing to disclose "superior knowledge," bidding under withheld information violates the underlying principle of the DSC Act. The information the City did disclose was that it detected naturally occurring metals in subsurface conditions on other projects in the area, but the site specific information does not reveal those soils on this project. While bidders must utilize all of the pre-award soils data presented by the owner, bidders must give more weight to site specific data than to generalized designations prepared to cover a much wider area. [17]

Ann Arbor also attempts to circumvent the Differing Site Conditions clause by placing responsibility on bidders to obtain additional or supplementary examinations, investigations, explorations, tests, studies or data, and to require bidders to conduct an on-site inspection to determine for themselves the actual subsurface conditions at the project site. An Owner, however, may not validly disclaim a Differing Site Conditions clause by requiring a Contractor to obtain additional information about conditions at the site beyond the information provided in the Contract Documents and a reasonable on-site inspection. The Owner must disclose the subsurface information in its possession. The bidders may rely upon that disclosed information, and to rely upon "fact" that the Owner possesses contrary information. See *Valentini v. City of Adrian*, 347 Mich. 530, 534 79 N.W.2d 885 (1956)(Government disclosed soil boring test results but failed to disclose that soil contained quicksand and excessive water.)

Although an Owner may obligate a Contractor to conduct a reasonable prebid inspection of a construction site, the requirement of a reasonable inspection cannot validly disclaim site information in the Contract Documents that conflict with the actual condition of the site and that are not readily apparent through a reasonable, non-invasive site inspection. *Foster Constr*., 453 F.2d at 883-884, 886-888 ("Faithful execution of the policy requires that the promise in the changed conditions [Differing Site Conditions] clause not be frustrated by an expansive concept of the duty of bidders to investigate the site."). In *Foster Constr*., the Court recognized that obligating contractors to conduct their own pre-bid inspections would lessen their reliance on the specifications in the Contract Documents and reestablish the very practice sought to be eliminated -- "the computation of bids on the basis of the bidders' own investigations, with contingency elements often substituting for investigation." *Id.* at 887. It is unreasonable to expect every bidder on a public works contract to perform expensive job site investigations, which the public Owner is in a position to perform once for the benefit of all bidders. To conclude otherwise would reduce the number of bidders on public works projects, and increase the price of the few bids received.

In keeping with this policy, any provision requiring a contractor to conduct a pre-bid site investigation requires bidders only to ascertain such conditions as may be "readily determined by inspection and inquiry, such as the location, accessibility and general character of the site." *Id*. at 888. The mandatory prebid "site" investigation is only a "sight" investigation. In short, a "contractor is unable to rely on contract indications of the subsurface only where relatively simple inquiries might have revealed contrary conditions." Id.; cf., *McCormick Constr. Co., Inc., v. U.S.*, 18 Cl. Ct. 259, 263 (1989) (contractor not entitled to equitable relief where a simple, non-invasive

[17] *Granite-Groves, supra.*

on-site inspection should have revealed the presence of cobbles and boulders). A reasonably prudent bidder, giving the site specific data more weight than the general area-wide representation, combined by a sight investigation, may conclude the site does not contain naturally occurring elevated levels of metals in the spoils. If the City intended to communicate otherwise, it should provide the site specific information and provide contractors the opportunity to estimate the true cost of construction in the expected soil conditions.

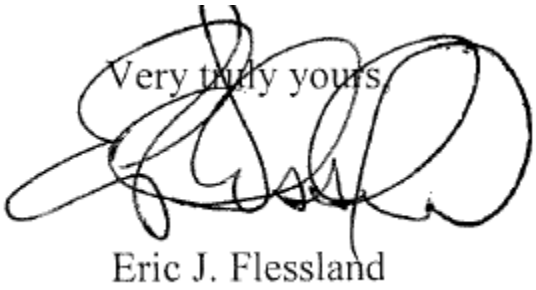
Ann Arbor cannot avoid the Differing Site Conditions clause by stating that the Contractor's compensation is limited only to the original contract amount, and there will be no cost adjustments allowed for claims relating to variance of existing soil conditions from the contract indications. The Detailed Specification diametrically conflicts with the equitable adjustment feature of the Differing Site Conditions Clause. This provision is unenforceable because it defeats the beneficial public policy behind the Differing Site Conditions clause. This provision purports to prevent a contractor from obtaining an equitable adjustment no matter what unanticipated subsurface conditions are encountered. To avoid the disastrous financial consequences of this provision a contractor would be forced to include a very large contingency in its bid and, therefore, increase the costs of the project. *S&M – Taylor,* 82-1 B.C.A. ¶ 15,484 (Eng. B.C.A. 1981). (Where Contract contains a Differing Site Conditions Clause, no matter what other clauses the owner puts in the Contract, it cannot make the contractor an insurer to perform whatever is necessary to achieve result regardless of conditions.). Michigan courts reject state government attempts to disclaim the accuracy of the information furnished to construction contractors. *See Hersey Gravel, supra*; *Valentini, supra*; *W. H. Knapp, supra*.

Because this is a public works project, Ann Arbor prepares the bid documents and Contract Documents with no input from the successful bidder. There is no negotiation regarding terms between the contractor and the Government. This fact makes Ann Arbor's attempt to circumvent the Differing Site Conditions clause even more unconscionable.

CONCLUSION

The Detailed Specifications for In-Situ Soils and Removal and Disposal of Contaminated Soils are an ineffective attempt to shift the risk of encountering materially different subsurface conditions back onto the Contractor, and are repugnant to the public policy in the Differing Site Conditions Act. The provision is legally unenforceable, and given the likelihood to confuse or to discourage contractors from obtaining and relying upon the City's information, the City should take immediate steps to rectify the situation. We strongly suggest that the City voluntarily and promptly issue an addendum deleting the pernicious provisions and reaffirm the City's commitment to follow the dictates of MCL §§ 125.1591 - 1596.

I am available to discuss questions you might have after reading this letter. Otherwise, MITA expects that you will take corrective action immediately.



Eric J. Flessland

cc: Michigan Infrastructure and Transportation Association