

Preserving Historic and Archeological Materials Found During Construction

Development of all types requires thoughtful analysis of existing conditions to ascertain its total potential impact on existing historic buildings, site features, and archeological materials. Concern for the preservation of specific buildings can be traced back to 1813, when a group of concerned citizens banded together in an attempt to stop the sale of the Pennsylvania State House, now known as Independence Hall. Beginning with the Antiquities Act of 1906 and continuing with the Historic Sites Act of 1935 and the National Historic Preservation Act of 1966, the United States government established the conceptual framework for preserving our nation's cultural heritage. However, federal, state, and local regulations are not enough to prevent the loss of valuable historic material. Where construction activities are concerned, this is best addressed in a contractual manner. This is particularly important for unseen conditions such as archeological remnants, hidden early structural systems, or decorative finishes that have been subsequently covered over.

An intricate network of interrelated documents and contracts regulate the activities required at a construction project site. The Drawings and Specifications describe the designers' vision; Codes and Standards stipulate the minimum health, safety, and welfare requirements; Correspondence, Field Reports, Change Orders and similar written information clarify and enumerate other project requirements; the Construction Contract and related General Conditions for Construction provide the terms under which the work is to be performed and the responsibilities of all the various parties involved. While at times all of this documentation may appear to be excessive, each performs a vital role in establishing the rights and responsibilities of all involved parties.

It has been established that the single greatest cause of contractor claims for damages and

changes to the contract sum arise from requests for compensation for work that was required but not clearly stated in the contract documents. Most project requirements can be fixed before construction activity begins; however, virtually every project has the potential for unforeseen circumstances developing that require changes to the project requirements. Of all of the various documents that specify the project requirements, it is the Construction Contract that defines what actions are to be taken in the event any unforeseen circumstances arise. Because a contract is a two-way agreement, there is both a benefit to the owner whereby the contractor becomes sensitized to the site and the potential for unforeseen discoveries, and also to the contractor whereby he gains the assurance that he will be compensated if the work schedule changes to address the discovery.

Researchers from the University of Florida College of Architecture conducted a study of over 50 different construction contracts currently used by various federal, state, and local agencies plus key private sector organizations. The contracts were examined and a list of contract provisions that would provide increased protections for historic material was compiled. The following is guidance for the creation of clauses that are recommended to be included within a construction contract. The exact language may vary, but together they will greatly increase the level of protection afforded the historic material.

Establish That the General Contractor Must Immediately Stop Work if Historic or Archeological Materials Are Discovered During Construction. Once historic or archeological materials are found, or it is suspected that they are present, it is important that the contractor immediately stop work to prevent further potential damage to the integrity of the site. It should not be left up to the contractor to decide if the discovery is noteworthy; rather, the work should simply stop until an appropriate person can make an informed evaluation of the discovery. This

clause will head off the contractor “digging a little more” to determine the extent of the discovery and in the process destroying any materials that may be present.

Establish the Required Procedure for Giving Notice When Historic or Archeological Materials Are Discovered. It is not sufficient for the contractor to stop work when historic or archeological materials are discovered. The contract should also establish the requirement that proper notification of the find be made to the appropriate responsible party: contract officer, owner’s representative, design professional, project archeologist, or agency staff member. This clause should establish the contractor’s obligation to provide proper notification of the discovery, the person(s) to be notified, the time period within which the notification is to be given, and the form of the notification. It is normally desirable to have the contractor notify the contract’s officer in person or by telephone within a relatively short time of the discovery (perhaps eight hours) and that this action should be followed within a day or two by written confirmation.

Establish the Maximum Duration of the Work Suspension. If the contractor is required to stop work when historic or archeological materials are discovered, it is only reasonable to stipulate a time frame in which the evaluation of the discovery will be made. It should be noted that the suspension of work activities could be costly to a contractor. By stipulating a reasonable limit for the suspension period, the risk to the contractor can be greatly reduced. Seventy-two hours is a common maximum period for work suspension. This allows adequate time for preliminary archeological or other investigations that may be required to confirm the significance of the discovery.

Establish the Contractor’s Obligations for Protecting Historic or Archeological Materials.

While it may appear self-evident that historic properties, archeological sites, and paleontological findings are not to be destroyed, clear contract language to that effect can avoid any ambiguity on this subject.

Establish the Ownership of any Discovered Historic or Archeological Materials. Much confusion and disagreement can be avoided if the contract establishes ownership of any historic or archeological materials discovered on the project site. This is done to make it absolutely clear to

the construction crews that looting will not be tolerated. It is common for the owner of the property to claim ownership of all materials discovered on the property. However, since the nature of the discovery may not be specifically known at the time of contract development, it may not be possible to be more specific about exact and final ownership or entitlement to historic materials, until after the discovery is made. This is particularly the case with Native American sites.

Establish the Contractor’s Obligation to Participate in Any Salvage Operation, When So Directed. Some construction contracts contain clauses that stipulate the contractor may be obligated to assist in the excavation and salvage efforts. Such contract clauses are worthwhile and pose little concern. It is simply left up to the owner to later decide if this provision is to be enforced. The specific circumstances of the discovery will undoubtedly play a major role in determining if the contractor has the necessary skills and resources to be beneficial in the salvage and preservation of the historic or archeological materials.

Establish the Conditions for Resuming Construction Activity Following a Work Suspension. Just as the contract clearly states the conditions under which the construction work is to be suspended, similar clarity should be used concerning the resumption of the construction activities. Specifically, the contract should be clear as to the nature of communication that the contractor must receive from the owner, or owner’s representative, prior to resuming construction. It is advisable that the notification be written to eliminate any ambiguity over the owner’s intent.

Establish the Terms for Contract Adjustments Due to Work Suspension. There should be no doubt that this is perhaps the most important issue to address in the contract. If the contractor is obligated to stop work when a discovery is made, then there needs to be provisions in the contract for adjustments to the contract time period and contract sum in order to reimburse the contractor for any losses resulting from the work suspension. If the contractor does not have any promise of reimbursement for any schedule delays and added expense associated with the work suspension then the contract may be viewed as one-sided and the discovery of his-

toric or archeological resources poses a potential economic liability. As a result, a discovery may become “unnoticed” by the contractor to avoid the uncompensated burden that the discovery brings.

The Owner’s Right to Terminate the Contract for the Purpose of Protecting Significant Historic or Archeological Materials.

There is always the possibility that a discovery is of such magnitude that the entire project may have to be canceled. For example, the discovery of burial grounds would pose a sensitive problem. Therefore, the contract should reserve the owner’s right to terminate the contract should a significant archeological or paleontological site be found. While the power of such provisions is seldom exercised, it is considered appropriate to address such a possibility.

Establish Any Other Project Specific Provisions. When drafting the contract, it is wise to consider any other information that might be appropriate for inclusion. For example, if significant historic or prehistoric sites were located in the vicinity of the construction site, it would be appropriate to give some particulars such as a site map indicating areas with high archeological potential, or photographs illustrating examples of

the types of historic material that may be found. In this way, the construction personnel would be alerted to watch for archeological evidence. This material should be reviewed at the pre-construction conference as an orientation for the key on-site personnel.

Conclusions and Recommendations. While pre-construction historic and archeological assessments of project sites have proven to be an invaluable tool for safeguarding the integrity of some sites, the process is not infallible and unanticipated discoveries are routinely found after construction has begun. A few simple provisions can be added to most standard construction contracts to mitigate the potential for damage to or total destruction of the site’s historic, archeological, and paleontological integrity. It is not sufficient, however, to simply include a comment about potential discoveries of historic and archeological materials in the construction contract, instead, contract clauses must be carefully crafted, or the effort will be in vain.

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Discover the Places that Make America Great!

The definitive guide to the country’s national historic landmarks is now available. *NATIONAL LANDMARKS, AMERICA’S TREASURES: The National Park Foundation’s Complete Guide to National Historic Landmarks* was written by S. Allen Chambers, Jr., with a foreword by Hillary Rodham Clinton.

National historic landmarks are nationally significant buildings, structures, sites, districts, and objects officially designated by the Secretary of the Interior. Chambers writes:

The diversity that characterizes our nation’s heritage is documented by nearly 2,300 National Historic Landmarks in the 50 states and seven U.S. jurisdictions, reflecting almost every imaginable important aspect of our nation’s history. The range of properties represented in the program reflects changing perceptions about which events, ideas, and experiences have most influenced American history.... They are places where significant historical events occurred, where prominent Americans worked or lived, that represent the ideas that shaped the nation, that provided important information about our past, or that are outstanding examples of design or construction.

Read about such nationally significant places as the Mark Twain House (Connecticut), Helen Keller’s childhood home (Alabama), the Little Tokyo Historic District (California), and the site of the first detonation of a nuclear device (New Mexico). *NATIONAL LANDMARKS, AMERICA’S TREASURES* was based on information in the National Park Service’s nomination files for each national historic landmark. Organized by state and county, the book describes each national historic landmark, and includes 385 illustrations. For more information about this book, contact John Wiley & Sons at 1-800-225-5945 or custser@wiley.com. For more information about the National Historic Landmarks Program, see <http://www.cr.nps.gov/nhl/>.

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