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Inevitably, most people involved in the heavy construction industry will at some point encounter a differing site condition (DSC) claim. It is important to note that every contract is different, so each party's obligations and risks are determined on a contract-by-contract basis. While this article is a general overview of typical construction contracts and has illustrative cases, any concerns on a particular matter should be addressed with an attorney.

DSC claims are governed by general contract law principles. Professor E. Allan Farnsworth writes in his treatise on Contracts that the law of contracts has as its basic underpinning a promise or set of promises that relate to future behavior. He writes that contract law consists of a framework where the parties create their own rights and duties. If there is a dispute as to the rights and duties, contracts are enforced by the Courts according to the parties' intent as it was expressed in the contract. The aggrieved party may seek the Court's ruling and be awarded damages that place it in the same position that it would have been had the other party fully performed under the contract at issue. Like other contract provisions, Courts interpret DSC clauses based on the parties' intent. Moreover, DSC clauses are just one small part of the overall obligations set forth in the contract.

The typical DSC clause in Federal contracts states that:

(a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of :

1) Subsurface or latent physical conditions at the site which differ materially from those indicated in this contract; or

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.Through usage, the first paragraph has become known as a "Type I" DSC clause and the second paragraph a "Type II" DSC clause. If the facts satisfy the DSC clause's requirements, then the contractor is entitled to extra payment for the costs associated with the DSC claim. Some contracts state that the owner is entitled to a deduction in contract price if the DSC decreases the contractor's performance costs.

The Type I DSC clause was first introduced into Federal contracts in 1926 and the Type II DSC clause in 1935. In 1937, the American Institute of Architects followed the Federal government's lead by incorporating similar provisions in its general conditions. Various other public owners have also adopted their own versions. There are some variations in the specific language — some clauses say that the conditions must be subsurface, some simply state that they must be site conditions. Since their inception, the contracting parties, engineers, architects, various Federal Contract Boards, and the Courts have struggled with the factual scenarios presented under the DSC clauses. There are cases where the presented facts lend themselves to a quick and clear outcome under the DSC clauses, while other cases are less predictable and lead to disputes.

Risk Theory — A Lawyer's View

DSC clauses are about assigning risk of the unknown between the owner and the contractor.

Without a DSC clause, and without any representation by the owner, the contractor assumes all of the risk for both the anticipated and unanticipated site conditions. At common law, Courts have ruled that even if the site belongs to the owner, the contractor is obligated to build the contracted structure whatever the actual conditions encountered.

With this legal baseline as a start, if the owner chooses to make a representation of an existing condition, the obligations may change. Courts examine the issue under a theory of contract misrepresentation. If the owner represents an existing foundation material, and the contractor relies on that representation in preparing its bid, the contractor may have a cause of action for contract misrepresentation if the material actually encountered varies from what the owner represented in the contract.

Owners also recognize that without pre-bid site condition information, prudent and capable contractors will increase their bids and add contingencies to their bid to account for the unknown. Site information, therefore, leads to lower and more accurate bids. Site information is also often readily available because the information was needed in the design phase.

Due to the mix of low bid requirements, sound procurement policy that states that risk should be allocated to the party that can best manage it, case law related to contract misrepresentation, and even some would argue basic fairness, most owners now provide a DSC clause to cover conditions that differ materially from those indicated in the contract (Type I) and unusual conditions not ordinarily encountered (Type II). The DSC clause helps the owner and contractor to better manage the allocation of the risk and allows for the designated authority to adjust the contract up or down based on explicit terms of the contract. Albeit, it is a rare instance that there is an adjustment down.

Cases have characterized the DSC clause as intended to take the gamble out of the unknown site condition part of the work. These cases have stated that:

The purpose of the Differing Site Condition Clause is to take the gamble on subsurface conditions out of the bidding. Bidders need not include a contingency for adverse subsurface conditions since faithful administration of the differing site conditions clause will insure that there will be no windfalls and no disasters. The government benefits from lower bids without inflation for supposed risks that may not occur. It pays for difficult subsurface work only when it is encountered and was not indicated in the logs.[1]

Type I Differing Site Condition Claims

A Type I differing site condition is a site condition that differs from what is represented in the contract documents.

Courts have generally identified six requirements a contractor must satisfy to establish a Type I claim. These are: (1) the contract documents must affirmatively indicate or represent the subsurface conditions which form the basis of the claim; (2) the contractor must act as a reasonably prudent contractor in interpreting the contract documents; (3) the contractor must have reasonably relied on the indications of subsurface conditions in preparing its bid price; (4) the subsurface conditions actually encountered must differ materially from the subsurface conditions indicated in the contract documents; (5) the actual subsurface conditions encountered must be reasonably unforeseeable; and (6) the contractor's claimed excess costs must be shown to be solely attributable to the different subsurface conditions.[2]

The case of *Sierra Blanca, Inc.*[3] before the Armed Services Board of Contract Appeals highlights a Type I claim. Sierra Blanca contracted to construct a facility at the Naval Weapons Center at China Lake, Calif., for testing motors for the Trident II missile. The facility was to be constructed in a small mountain. The bid package included core boring logs indicating that below a thin zone of weathered rock at the surface, the mountain consisted of granitic rock intruded by basalt, amphibolite and diorite dikes. The core boring logs also indicated the existence of closely spaced rock fractures with mixed indications as to the quality of the rock. While the core boring logs painted an unclear picture of the rock, the specifications and drawings painted a favorable picture. The specification required that excavations in rock, "shall be by pre-split blasting techniques in 10 ft. lifts that will leave the foundation rock in an unshattered and solid condition," and "excavation [to] proceed using pre-splitting methods to lessen disruption of the rock face." Use of the pre-splitting technique indicated tightly jointed rock. Furthermore, a contract provision implied that the spans of rock face in the missile test blast wall would remain stable without anchoring, and the contract drawings did not provide for rock anchors in the rock face.

When Sierra Blanca began contract performance, it encountered conditions at variance with the favorable indications in the specifications and drawings. For instance, pre-split holes drilled in the rock collapsed when charges in upper elevations were set off, blasting in the open-jointed rock caused shifting and movement of blocks, and poor material had to be cut away requiring separate forming of walls.

Sierra Blanca brought a Type I DSC claim asserting that specifications and drawings represented rock that would be "a mass of hard, tightly-jointed granite." The Board agreed. The Board found that because the specification and drawings required using pre-split blasting which would be successful only in conditions of tightly jointed rock, that the contract affirmatively represented such conditions. Further, the contract drawings showed a design for the missile test blast wall that omitted anchoring in the rock face, further indicating that the rock would be tightly jointed.

As shown by the Sierra Blanca case, a Type I DSC claim is basically a claim that there is a mistaken representation or "indication" in the contract documents that results in more difficult working conditions than anticipated.

It should also be noted that even without a Type I DSC clause, the owner may still be subject to a contract misrepresentation cause of action where actual site conditions differ

from those represented in the contract documents. While the contract misrepresentation analysis is often similar to a Type I DSC analysis, a misrepresentation claim should not be assumed identical to a Type I DSC claim.

Sometimes the borings and boring logs may be 100 percent accurate, but the soil or rock conditions between the actual boring locations may be unexpected. The more closely spaced the borings, the more likely it will be that owner has affirmatively represented the general nature of the soil conditions. In such a situation, a contractor may have a valid Type I or misrepresentation claim if actual conditions are not consistent with the general nature of soil conditions expected from the boring logs.

Type II Differing Site Condition Claims

A Type II differing site condition is a site condition that differs materially from what is usually encountered and expected. With Type II claims there is no dispute involving the drawings or specifications, the issue is merely whether the conditions encountered are unusual and unexpected. For Type II DSC claims, courts generally require that the contractor (1) prove an unusual physical condition at the work site, (2) prove the unusual physical condition actually exists, (3) prove that the conditions differed from the known and the usual, and (4) prove that the different conditions caused an increase in contract performance. [4]

Parker Excavating, Inc. [5], is a good example of a contractor's successful Type II claim. Parker Excavating contracted to place existing overhead electrical cables underground along a five-mile route at Fort Carson, Colo. The work involved directional boring. Parker Excavating claimed it was entitled to compensation for damage to its boring equipment when it encountered abandoned foundations and abandoned roadways that were not identified in the contract documents.

The Board agreed with Parker Excavating. The Board found that the "usual soil conditions were clay and occasional river rock with only a possibility of hard rock near the mountains. Asphalt, concrete, rebar and debris that were encountered in underground drilling differed materially from the soil conditions in the area. They were conditions unknown and unanticipated by experienced contractors."

The *Parker Excavating* case is the classic example of a Type II claim. It is a condition encountered that is not ordinary and is unexpected.

Exculpatory Provisions

Often what the owner gives with one hand it tries to take away with its other hand. Owners and their agents often try to get the best of both worlds by providing contractors with pre-bid site information but at the same time couching such information with "killer" disclaimers regarding the information's accuracy. For example, the owner might have a disclaimer in the contract that states that the contractors' use of the soil reports and boring logs is at the contractors' own risk, that the owner does not warrant the accuracy of the soil reports and boring logs, that the soil reports and boring logs are not to be relied upon in preparing the bid, and/or that the contract documents do not include the soil reports and boring logs. Through such disclaimers, the owner tries to prevent or limit Type I DSC claims.

To counter these "killer" disclaimers, contractors often argue that the DSC clause would lose all meaning and be superfluous if the disclaimers are given their literal meaning. Courts and Boards have struggled with the inconsistency.

In *Affholder, Inc. v. North American Drillers* [6], the court found the owner did not disclaim the underground information. In *Affholder* the owner provided bidders with rock core test data. The contract said rock core test data "is provided for your information only and does not guarantee actual conditions encountered during excavation," and all "subsurface data is for the convenience of the Contractor and represents no implied or actual conditions that may be encountered." The project involved construction of horizontal and vertical shafts from a water treatment facility to a lake. The bid documents called for using microtunneling. The engineer's rock core test data showed the rock's compressive strength between about 11 ksi and 16.5 ksi.

After the bid was awarded the contractor performed an independent test on the rock that revealed that the rock's strength was actually 27 ksi and above. It turned out that the engineer used the wrong ASTM test method. This made use of microtunneling impossible, requiring instead a combination of mechanical and drill-and-shoot methods.

In this case the contractor sued the engineer directly. The engineer defended itself by arguing that the above disclaimers protected the engineer from liability for the inaccurate rock core test data. The court disagreed. The court found that although the contract "states the Rock Core Test Data does not guarantee actual conditions, [the contract] gives no reason [why] that information should not be accorded some effect ..." Further, the court said the rock core information was clearly for bidders' uses and it was reasonable for bidders to rely on the engineer's test data.

By contrast, in *Millgard Corp. v. McKee/Mays* [7], the court enforced the disclaimer. Millgard was a subcontractor on a project to construct a jail. Millgard encountered wet soil while drilling caisson foundations. A soil report accompanying the bid documents indicated dry soil. The owner's consultant who prepared the soils report told bidders that the contractor would encounter dry, cohesive soil that was probably clay, and stated that there was no reason to anticipate a problem with water.

Millgard's drilling plans involved inserting temporary casings through a fill layer that would clear the way for drilling through dry clay until the drill reached a sand and gravel layer. Millgard, however, encountered a layer of wet soil that was quicksand-like between the fill area and the sand and gravel layer that made the drilling plans impractical.

Millgard's subcontract contained a differing site condition clause and the general contractor sought to recover Millgard's extra costs from the owner. The owner's contract documents, however, "disclaim[ed] any responsibility for the accuracy, true location and extent of the soils investigation," and stated that the soil report was not part of the contract documents.

The court found in the engineer's favor and enforced the owner's disclaimers. The court stated that, "if the soil report is not part of the contract documents, it cannot form the basis of a claim that conditions were 'at variance with the conditions indicated by the Contract Documents.' " The court further noted that the contract language clearly disclaims the soil report's accuracy.

As shown above, courts come to different conclusions regarding disclaimers. Whether a disclaimer will be enforced or limited depends on the particular disclaimer language and the legal jurisdiction reviewing the matter.

Pre-Bid Site Investigation

Pre-bid site investigation is also an issue that arises with respect to DSC

claims. Most contracts require the prospective bidders to conduct a pre-bid site visit to become familiar with local conditions. A contractor cannot claim an unanticipated site condition if a reasonable pre-bid investigation would have revealed the condition. What constitutes a "reasonable pre-bid investigation" is at the heart of the issue. As one court noted, it is "unreasonable to expect every bidder on a government contract to perform expensive job site investigations, which the government is in a position to perform once for the benefit of all bidders. To hold otherwise would reduce the number of bidders on government contracts, and increase the price of the few bids received." [8]

For example, in the *Affolder* case above, the court noted that it was unreasonable to expect the prospective bidders to conduct pre-bid rock strength tests. The court noted that "the site was heavily wooded," "the Corps of Engineers only allowed access to the site for subsurface investigations over an old trail road, in order to minimize damage to the trees and laurel on the site," "borings could not be taken along the actual tunnel alignment," and it "took the City months to get permission even to take the limited borings that were done."

Notice

Most construction contracts require as a pre-condition to submitting a DSC claim that the contractor make the claim within a certain time from when the contractor first discovers the conditions giving rise to the claim. Each contract is unique so it is important to know the time limits set forth in the notice provisions. Most contracts also say that the contractor is not to disturb the subject conditions. Some courts find that a contractor's failure to strictly abide by the notice requirements is fatal, deeming the contractor's DSC claim waived. Meanwhile other courts allow for late notice if no prejudice results to the owner or if the owner had actual or constructive notice of the condition at issue.

Conclusion

Every contract and set of subsurface or site conditions is unique. The reported cases number hundreds. To understand who bears the risks for differing site conditions one must understand the contract as well as the law for the particular jurisdiction. Fairly assessing the facts combined with an understanding of the contract and the law should help to resolve disputes over differing site conditions.

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1 *Foster Construction v. United States*, 193 Ct. Cl. 587, 614 (1970); J. F. Shea Co., Inc., IBCA, 82-1 BCA ¶15,705 (1982)

2 *Weeks Dredging & Contr. v. United States*, 13 Cl. Ct. 193, 218 (Ct. Cl. 1987).

3 ASBCA Nos. 30943 et al., 91-2 BCA ¶ 23,990 (1991).

4 *Parker Excavating, Inc.*, ASBCA No. 54637, 06-1 BCA ¶ 33,217 (2006).

5 ASBCA No. 54637, 06-1 BCA ¶ 33,217 (2006).

6 2006 U.S. Dist. LEXIS 79977 (S.D.W.V. November 1, 2006).

7 49 F.3d 1070 (5th Cir. 1995).

8 *Sherman R. Smoot Co. v. State*, 136 Ohio App. 3d 166, 177 (Ohio Ct. App. 2000).