

DIFFERING SITE CONDITIONS - WHO BEARS THE RISK?

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The Problem

A construction bid package typically contains plans, specifications and possibly a geotechnical report. When contractors put together bids based upon the information in the bid package, they typically have limited time to investigate site conditions and assume that the site information reflected in the bid package is generally correct and that the project can be constructed pursuant to the plans and specifications. Everyone knows, however, that construction does not always proceed as planned. All too frequently contractors encounter subsurface conditions that differ from the information contained in the geotechnical report, or other conditions in the field that differ from what was expected or shown on the plans, in ways sometimes minor and sometimes significant.

Who Bears the Risk?

As between an owner and a contractor, who bears the risk of the additional costs associated with differing site conditions? Generally, a court will first look to the contract documents; and, if they are unambiguous, the Court will assign the costs associated with the differing condition to the party to whom they are assigned by the contract. In the context of fixed price contracts, the general rule, with some exceptions, is that a contractor assumes the risk of additional costs associated with differing site conditions of which neither party was aware. In some jurisdictions, and particularly with respect to publicly-owned projects, the traditional allocation of differing site conditions risks may be altered by an owner's misrepresentation of site conditions or concealment of site information from the contractor.

In many construction contracts, attempts to alter the common law allocation of risks are made by a variety of contract terms. Consider the possible impacts of the frequently encountered contract clauses discussed below.

Geotechnical Information Disclaimers

Some owners attempt to avoid responsibility for unexpected site conditions by including in the contract exculpatory clauses disclaiming liability for the accuracy of site condition and subsurface data presented in the contract documents or in geotechnical data made available to the contractor. For example, a standard geotechnical disclaimer might read as follows:



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Subsurface information shown on these drawings was obtained solely for use in establishing design controls for the project. The accuracy of this information is not guaranteed and it is not to be construed as part of the plans governing construction of the project. It is the bidder's responsibility to inquire of the [owner] if additional information is available, to make arrangements to review the same prior to bidding, to conduct whatever site investigation or testing may be required, and to make his own determinations as to all subsurface conditions.

Such broad exculpatory clauses are increasingly common in construction contracts. In some jurisdictions, these exculpatory clauses have been enforced by the courts to the detriment of the contractor encountering unknown site conditions. In other jurisdictions, courts have been less willing to give unqualified effect to such clauses, especially if the contract also contains a differing site conditions clause allowing for the recovery of unanticipated costs. Nevertheless, the contractor encountering such an exculpatory clause must consider at least the following:

- A possibly contingency in its bid;
- A pre-bid letter to the owner requesting all site information available to the owner; and
- A site inspection which goes beyond the traditional "sight" inspection conducted by most contractors.

Differing Site Condition Clauses

A number of standard contracts, such as the American Institute of Architects' contracts, contracts governed by the Federal Acquisition Regulations, and the Engineers' Joint Contract Documents Committee contracts contain differing site condition clauses. In such contracts, the differing site conditions for which a contractor may be compensated generally fall into one of two types: (1) a "Type I" differing site condition, which is a site condition that is materially different from what is shown or indicated in the contract documents; or (2) a "Type II" differing site condition, which is an unknown physical condition, of an unusual nature, and which differs materially from those ordinarily encountered and generally recognized as inherent in the type of work encompassed by the contract. If a differing site condition is neither a Type I nor a Type II condition, it is unlikely that additional compensation will be forthcoming from the owner.

Adding a differing site condition clause to a construction contract introduces some uncertainty for an owner regarding the ultimate cost of a project. However, this uncertainty may be offset by lower bids from contractors who will not have to account for unknown conditions by including contingencies in their bids. The inclusion of a changed site conditions clause also may decrease the potential for project disputes and litigation.

Site Inspection Clauses

Some contracts contain provisions requiring the contractor to perform its own site inspection and satisfy itself that it has an understanding of the conditions to be encountered on the project. An example of such a provision follows:

The contractor further covenants and warrants that he has had sufficient time to . . . examine the site of the project to determine the character of the subsurface materials and conditions to be encountered; that he is fully aware and knows of the character of the subsurface materials and conditions to be encountered; that he has compared the actual site conditions with those reflected in the contract documents; . . . and that no additional compensation will be paid as a result of unforeseen site conditions.

Where the parties' contract contains a differing site conditions clause, the site inspection clause may not successfully transfer to the contractor the risk of an unanticipated site condition. Nevertheless, absent a differing site conditions clause, this type of site inspection clause is particularly dangerous for the unsuspecting contractor. In some jurisdictions, and even in the face of a broad site inspection clause, courts have held that bidders are obligated only to discover conditions that would have been revealed by a "reasonable" pre-contract investigation. And, that "reasonableness" determination will be influenced by the amount of time allowed for the preparation of the bid, the accessibility of the site, and the cost of performing more than a "sight" investigation. Typically, in construing a site inspection clause, a court will impose upon the contractor the standard of care which a reasonable, experienced contractor could be expected to live up to, but not the standard which might be applied to a highly trained expert in site and subsurface conditions. Nevertheless, the clear trend in the industry is to expand upon, and make more onerous, the risk-shifting language in such site inspection clauses.

Practical Suggestions

In conclusion, we offer the following practical suggestions for owners and contractors struggling with the risks of differing site conditions.

For Owners

To avoid liability for unknown or unforeseen site conditions, it may be wise to:

- a. Disclose all known conditions prior to the submission of bids.
- b. If you include a differing site conditions clause in the contract; impose strict notice requirements and consider limiting the reimbursable costs to only direct job site costs incurred by the contractor.
- c. Exculpatory clauses may not avoid liability when the contract documents make positive representations about the site or subsurface conditions. Avoid such representations—within the contract documents or otherwise.

- d. If there is a desire to disclaim geotechnical information provided to bidders, be sure the contract clearly states that the geotechnical reports are not part of the contract documents.
- e. Prior to letting a project, be certain that you understand how the contract allocates the risk of unknown or differing site conditions.

For Contractors

Prior to bidding on a project it is wise to:

- a. Carefully review the contract and understand how it assigns the risk of differing site conditions.
- b. Search the contract for onerous exculpatory clauses or contract language disclaiming the accuracy of site information reflected in the bid documents.
- c. Perform a reasonable site inspection and make a written and photographic record of your site investigation. Notice the physical characteristics of the surrounding property.
- d. If a differing site condition is encountered, follow carefully the contract notice requirements and wait for instructions from the owner before disturbing the site conditions.
- e. Keep careful and separate cost records of your additional costs flowing from differing site conditions.
- f. Understand that the law varies greatly, from state to state, with respect to the allocation of site conditions risk. Before bidding work in an unfamiliar jurisdiction, check with your construction lawyer.