Ask an Attorney

*The Legal Rights Committee expresses its appreciation to **Tim Woolford, Esq.**, of **Stevens & Lee**, Lancaster.*

Q: What is the legal standard pertaining to recovery for differing site conditions?

A: Despite the increasing breadth and sophistication of construction contracts, disputes still frequently arise regarding additional costs for unforeseen or differing site conditions. Many contracts contain provisions addressing recovery for differing site conditions, but these provisions often contain broad and imprecise terms and usually serve only as a starting point for negotiations concerning additional compensation. Often, the key to recovery depends upon whether the contractor acted reasonably and whether or not he should have anticipated the conditions.

Differing site condition claims are often characterized as either Type 1 or Type 2. A Type 1 claim occurs where the site conditions are significantly different than those that were indicated in the contract. Accordingly, in order for there to be a Type 1 claim, there must be affirmative representations in the contract concerning the nature of subsurface or site conditions. These representations are often contained in boring logs, soils reports or other geotechnical data made available for inspection or incorporated into the bid documents. If actual conditions differ from those indicated in these reports and documents, the contractor may have a valid Type 1 claim, and he may be entitled to additional time or damages, provided timely notice of the claim was given.

Recovery for a Type 1 claim, however, will depend upon whether the contractor reasonably relied on the information provided in the contract. In order to have reasonably relied, the contractor must have considered all information relating to the subsurface conditions either in the contract itself or in any other information made available. If, based on experience, a contractor knew or should have known that actual conditions would be different from those described in the contract documents, recovery will be denied. Also, recovery will likely be denied where there is obvious information which the contractor should have discovered that directly contradicts the information in the contract documents. Under these circumstances, courts and arbitrators often conclude that the contractor did not act reasonably and deny recovery.

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Even if the contractor encounters differing site conditions, the existence of exculpatory or disclaiming language in the contract may defeat recovery. Many contracts that provide information concerning the nature of subsurface conditions also contain clauses advising bidders that the information is for informational purposes only, that they may not rely on it, and that they should investigate the conditions themselves before submitting a bid. The disclaimers take several common forms, such as disclaiming the accuracy of plans and specifications, disclaiming the accuracy of geotechnical information such as boring logs and soils reports, disclaiming inferences from existing site information, or a combination of the above. Many courts, including some in Pennsylvania, have held that disclaiming language will defeat a Type 1 claim. J.E. Brenneman Co. v. Com. Dept. of Transp., 424 A.2d 592 (Pa. 1981) (bidders expressly advised not to rely on geotechnical information resulted in denial of claim). Whether or not the contract contains disclaimers, the prudent contractor should conduct a reasonable site investigation and analysis before bidding. Even if contractual disclaimers successfully preclude a Type 1 claim, the contractor who conducted a reasonable pre-bid investigation stands a better chance of proving a Type 2 claim (discussed below) if unusual site conditions are later encountered.

Upcoming Events

September 15: ABC on the Road,
Inn at Reading
September 25: ABC Construction Rodeo,
ABC Facility, Manheim
October 7: Fall Auction,
York Springs, Pa.
October 19: October Monthly Meeting,
Yorktowne Hotel, York

Another tool used by owners to prevent Type 1 differing site conditions claims is a contract requirement to investigate the site before submitting a bid. These provisions often state that the failure to conduct the investigation will result in denial of a claim. Additionally, it will prevent a claimant from recovering for a condition he reasonably could have discovered had he conducted an investigation. A full-blown subsurface analysis is usually not required, but the contractor is obligated to at least inspect the exposed ground. Even where the contractor failed to make a pre-bid investigation, some courts have allowed recovery where the amount of time provided prior to bid submission is not sufficient to permit a reasonably thorough analysis of the site. See e.g. Frederick Snare Corp. v. Maine-New Hampshire Interstate Bridge Authority. 41 F.Supp. 638 (D.C.N.H. 1941) (four days between issuance of bid documents and bid deadline not sufficient and failure to investigate did not defeat recovery). Accordingly, even if there is a pre-bid investigation requirement, contractors may be able to negotiate a successful resolution of claims by arguing that a meaningful investigation was not possible given the time constraints.

Even where the contractor did not act reasonably, in some situations, recovery may still be permitted. Some courts have held that a public owner has a duty to provide all information within its possession regarding a project site to bidders, and that the failure to disclose all information will preclude reliance on disclaimers, with the net result that the contractor can recover. See D. Frederick Co. v. New Bedford Red. Auth. 723 F.2d 122, 125 (1st Cir. 1983) (failure to disclose an engineering report revealing unusual subsurface material permitted recovery for additional excavation). Thus, the prosecution of a claim should always entail an investigation into all information that the owner had in its possession and whether it was all disclosed to bidders.

A Type 2 differing site condition exists when the contractor encounters conditions of an unusual and unforeseeable nature which are not ordinarily encountered. For a Type 2 claim to exist, the contract must be silent on subsurface conditions and contain no representations regarding what would be encountered. A buried petroleum tank might be an example of a condition giving rise to a Type 2 claim. In most cases, the claimant must prove that he conducted an adequate and reasonable site inspection, carefully reviewed the information in the contract, and had no way of anticipating that the subsurface condition would be found. If the conditions giving rise to the claim are unknown to the particular contractor, but actually common in the area, the claim will probably be

denied. A claimant with a Type 2 claim bears a heavy burden. First, he must present considerable factual data about what he actually knew about the site at the time of contracting; second, he must demonstrate why the condition encountered was unusual; and third, he must demonstrate that the differing site condition was significantly different from that which is considered ordinary.

Finally, many contracts distinguish between "classified" and "unclassified" conditions. A classified condition occurs when the contract makes a representation concerning the character of the subsurface conditions. Unclassified conditions occur where the contract makes no representations about the subsurface conditions. When the conditions are classified, a Type 1 claim might exist where the actual conditions differ materially from those indicated in the contract. Where conditions are unclassified, a Type 2 claim would lie where an unusual, unforeseeable site condition is found. Accordingly, the classification of subsurface conditions as classified or unclassified is only a starting point and does not itself determine whether a claimant can recover.

In summary, recovery for differing site conditions can involve several layers of analysis. The contract provisions should be read and understood. Also, available geotechnical information should be analyzed. A pre-bid investigation may be required and should be conducted if possible. Contractual disclaimers should be recognized and bid prices adjusted to reflect the risk being assumed. Finally, although some contractors have recovered even in the face of disclaimers, owners and higher-tiered contractors should rely heavily on these clauses in support of claim denials. Subcontractors, however, should vigorously contest the validity of such clauses and should alternatively pursue Type 2 claims. In any case, understanding the contractual and legal issues involved may help you negotiate an early resolution that all parties can accept and avoid the formal claims process.