

V. HANDLING CHANGES TO JOB SITE CONDITIONS

Unexpected or “differing” site conditions on a construction project can significantly increase costs for owners and contractors. As one might expect, the resolution of such issues depends on several factors: (i) whether the owner or the contractor had superior knowledge regarding conditions on the jobsite as they existed at the time the contract was made; (ii) whether the owner made any representations in contract or related documents that the site conditions were different than those encountered by the contractor; (iii) whether the site conditions that were actually encountered differed substantially from those reasonably contemplated by the parties at the time of contracting; and (iv) how the owner and contractor allocated the risk of unexpected conditions in their agreements.

These materials discuss the two types of differing site conditions, different types clauses that are standard in the construction industry, how those clauses are typically applied, how courts deal with conditions that do not fall within coverage of those clauses, and how courts treat differing site conditions claims under contracts that do not allocate risk.

1. Types of Differing Site Conditions

a. Type I Conditions: Erroneous Contract Indications

Conditions that differ from those indicated in the contract documents, which may include plans, specifications, geotechnical and boring logs are referred to as “Type I” conditions. It is important to note that a failure to disclose certain information regarding site conditions can be considered a “contract indication” just as easily as an affirmative representation.

To succeed on a Type I differing site conditions claim, the contractor must demonstrate the following by a preponderance of the evidence: “(1) the conditions indicated in the contract differ materially from those actually encountered during performance; (2) the conditions actually encountered were reasonably unforeseeable based on all information available to the contractor at the time of bidding; (3) the contractor reasonably relied upon its interpretation of the contract and contract-related documents; and (4) the contractor was damaged as a result of the material variation between expected and encountered conditions.” *Travelers Cas. & Surety Co. of Am. v. United States*, 75 Fed. Cl. 696, 703 (Fed. Cl. 2007); *URS Group, Inc. v. Tetra Tech FW, Inc.*, 181 P.3d 380, 388-89 (Colo. Ct. App. 2008) (citing 48 C.F.R. § 52.236-2);

In *Ace Constructors, Inc. v. U.S.*, 70 Fed. Cl. 253 (Fed. Cl. 2006), for example, the court held that the contractor, which had been hired by the federal government to construct an airfield at Fort Bliss in El Paso, Texas, was entitled to an equitable adjustment under the contract based upon its encounter of Type I differing site conditions. The contractor relied on contract documents that indicated specific jobsite elevations that were markedly higher than those actually encountered during construction. The contractor notified the Government that the changed conditions required hundreds of thousands of additional cubic feet of fill, at a cost of almost \$3 million and seven weeks of additional work. The court held that the contractor had reasonably relied on the contract documents, that the changed conditions were unforeseeable at the time of bidding, and that the contractor had been damaged as a result. *Id.* at 271-72.

In another case, the United States Court of Claims found in favor of the contractor on its differing site conditions claim, even though the Government had arguably disclosed the presence

of certain groundwater conditions that impeded the project. *United Contractors v. United States*, 368 F.2d 585 (Ct. Cl. 1966). The project involved the construction of underground utilidors, the boring logs and sole profiles for which did not indicate that high levels of groundwater would be encountered. The specifications, however, disclosed that “high groundwater exists in the area.” When the contractor began work, it encountered high levels of groundwater that disrupted and delayed the work significantly. In ruling upon the contractor’s claim for equitable adjustment, the court found that the term “high groundwater” was not sufficiently definite to put the contractor on notice that the groundwater would pose a problem because high groundwater could have existed below the lowest depths of excavation and still fit within the contract’s meaning. *Id.* at 598.

As the cases illustrate, Type I conditions may exist where plans and specifications are simply incorrect or where the terminology used in the contract documents is found to be ambiguous (and where the contractor’s interpretation was reasonable).

b. Type II Conditions: Conditions Unknown to the Owner

Type II conditions differ from Type I conditions in that the essence of the claim is not a deficient “contract indication,” but rather conditions that differ significantly from conditions that should be expected (based on generally available knowledge) for that particular area—unusual conditions that are not indicated in the contract documents. To prevail on a Type II claim, the contractor must demonstrate the following by a preponderance of the evidence: (1) it did not know about the physical condition; (2) it could not have anticipated the condition from inspection or general experience; (3) the condition varied from the norm in similar contracting work; and (4) resulting damages. *See Lathan Co., Inc. v. United States*, 20 Ct. Cl. 122, 128 (Ct. Cl. 1990).

The contractor, as distinct from the owner, must be without knowledge of the alleged changed condition to successfully demonstrate that such condition falls under Type II. *See, e.g., Neal & Co., Inc. v. U.S.*, 36 Fed. Cl. 600, 623 (Fed. Cl. 1996); *Hardwick Bros. Co., II v. United States*, 36 Fed. Cl. 347, 410 (Fed. Cl. 1996). The contractor’s burden in this regard is a heavy one, however, because the courts will deem the condition to be unknown or unusual only if it were considered so by a “reasonable, intelligent contractor, experienced in the particular field of work.” *Servidone Constr. Corp. v. United States*, 19 Ct. Cl. 346, 373 (Ct. Cl. 1990); *Foster Constr., C.A. & Williams Bros. Co. v. United States*, 435 F.2d 873, 887-88 (Ct. Cl. 1970).

The law imposes several requirements on a contractor asserting a Type II claim. First, the contractor must “study” the contract documents. *All Power, Inc. v. United States*, 60 Fed. Cl. 679, 685 (Fed. Cl. 2004). Second, the contractor must inspect the site to determine whether any unknown conditions exist. *Id.* Third, the contractor’s actions will be evaluated in comparison with a reasonable, experienced contractor in the particular field of work and in the particular geographic area. *Id.*; *Servidone Constr. Corp.*, 19 Ct. Cl. at 373. In applying these factors, courts generally take into account local customs and the type of job being performed.

c. Conditions Not Considered to be “Differing”

Differing site conditions do not include economic or governmental impacts to a project, or atmospheric site conditions or acts of God. *See, e.g., Renda Marine, inc. v. United States*, 66 Fed. Cl. 639, 715 (Fed. Cl. 2005) (material shortage); *Manuel Bros., Inc. v. United States*, 55 Fed. Cl. 8, 44-45 (Fed. Cl. 2002) (rainfall); *Hallman v. United States*, 80 F. Supp. 370, 373 (Ct. Cl. 1948) (governmental conditions). As the Court of Claims noted in *Walser v. United States*, 23 Ct. Cl.

591, 595 (Ct. Cl. 1991), “case law indicates that the differing site conditions clause generally does not cover weather conditions, which are deemed to be acts of God, when neither party assumed the risk for acts of God.” Absent contractual allocation of risk for conditions arising after the time of contracting, therefore, a claim for changed conditions related to the occurrences described above will be unsuccessful.

So, then, what are the rules governing the allocation of risk of differing site conditions? And how have owners and contractors attempted to allocate risk among themselves by contract?

2. The General Rule of Differing Site Conditions Liability and Contractual Vehicles for Allocating Risk

In the absence of a contractual provision to the contrary, the owner bears the risk of increased costs of construction based upon differing site conditions because the additional work associated with the changed conditions will be considered a change that is not part of the contractor’s scope of work. *See Bellon Wrecking & Salvage Co. v. Rohling*, 81 S.W.3d 703, 711-12 (Mo. Ct. App. 2002). The owner’s submission of plans and specifications to the contractor carries with it an implied warranty that if the contractor adheres to the provided specifications, the work will yield the expected result. *Rhone Poulenc Rorer Pharmaceuticals Inc. v. Newman Glass Works*, 112 F.3d 695, 697 (3d Cir. 1997) (citing *United States v. Spearin*, 248 U.S. 132, 137 (1918)). If the owner fails to disclose the existence of conditions that cause extra work for the contractor, the plans and specifications submitted by the owner may be deemed inadequate and require payment of additional money to the contractor. *See Big Chief Drilling Co. v. U.S.*, 26 Cl. Ct. 1276 (Cl. Ct. 1992).

In an attempt to avoid the risks of differing site conditions, therefore, owners typically include contractual provisions that allocate the risk of unexpected site conditions. Courts interpret such provisions in accordance with general contract principles to determine which party will bear responsibility for unanticipated costs. Several boilerplate provisions have been developed by the government and private associations such as the American Institute of Architects (“AIA”) and the Engineers Joint Contract Documents Committee (“EJCDC”), to provide a contractual mechanism for handling differing site conditions:

a. The United States Government Differing Site Conditions Provision: 48 C.F.R. § 52.236-2

(a) The Contractor shall promptly and before such 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.

(b) The Contracting Officer shall investigate the site conditions promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.

(c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the notice required; provided, that the time prescribed in (a) above for giving written notice may be extended by the Contracting Officer.

(d) No request by the Contractor for an equitable adjustment to the contract for differing site conditions shall be allowed if made after final payment under this contract.

(2) The AIA Contract Clause (AIA Document A201, 1997): [UPDATE]

4.3.4 Claims for Concealed or Unknown Conditions. If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions. The Architect will promptly investigate such conditions and, if they differ materially and cause an increase or decrease in the Contractor's cost of, or time required for, performance of any part of the Work, will recommend an equitable adjustment in the Contract Sum or Contract Time, or both. If the Architect determines that the conditions at the site are not materially different from those indicated in the Contract Documents and that no change in the terms of the Contract is justified, the Architect shall so notify the Owner and Contractor in writing, stating the reasons. Claims by either party in opposition to such determinations must be made within 21 days after the Architect has given notice of the decision. If the conditions encountered are materially different, the Contract Sum and Contract Time shall be equitably adjusted, but if the Owner and Contractor cannot agree on an adjustment in the Contract Sum or Contract Time, the adjustment shall be referred to the Architect for initial determination, subject to further proceedings pursuant to Paragraph 4.4.

(3) The EJCDC Contract Clause (EJCDC No. 1910-8, 1990): [UPDATE]

4.2.3. Notice of Differing Subsurface or Physical Conditions: If CONTRACTOR believes that any subsurface or physical condition at or contiguous to the site that is uncovered or revealed either:

4.2.3.1. is of such a nature as to establish that any "technical data" on which CONTRACTOR is entitled to rely as provided in paragraphs 4.2.1 and 4.2.2 is materially inaccurate, or

4.2.3.2. is of such a nature as to require a change in the Contract Documents, or

4.2.3.3. differs materially from that shown or indicated in the Contract Documents, or

4.2.3.4. is of an unusual nature, and differs materially from conditions ordinarily encountered and generally recognized as inherent in work of the character provided for in the Contract Documents; then

CONTRACTOR shall, promptly after becoming aware thereof and before further disturbing conditions affected thereby or performing any Work in connection therewith (except in an emergency as permitted by paragraph 6.23), notify OWNER and ENGINEER in writing about such condition. CONTRACTOR shall not further disturb such conditions or perform any Work in connection therewith (except as aforesaid) until receipt of written order to do so.

4.2.4. ENGINEER's Review: ENGINEER will promptly review the pertinent conditions, determine the necessity of OWNER's obtaining additional exploration or tests with respect thereto and advise OWNER in writing (with a copy to CONTRACTOR) of ENGINEER's findings and conclusions.

4.2.5. Possible Contract Documents Change: If ENGINEER concludes that a change in the Contract Documents is required as a result of a condition that meets one or more of the categories in paragraph 4.2.3, a Work Change Directive or a Change Order will be issued as provided in Article 10 to reflect and document the consequences of such change.

4.2.6. Possible Price and Times Adjustments: An equitable adjustment in the Contract Price or in the Contract Times, or both, will be allowed to the extent that the existence of such uncovered or revealed conditions causes an increase or decrease in CONTRACTOR's cost of, or time required for performance of, the WORK; subject, however, to the following:

4.2.6.1. such condition must meet any one or more of the categories described in paragraphs 4.2.3.1 through 4.2.3.4, inclusive;

4.2.6.2. a change in the Contract Documents pursuant to paragraph 4.2.5 will not be an automatic authorization of nor a condition precedent to entitlement to any such adjustment;

4.2.6.3. with respect to Work that is paid for on a Unit Price Basis, any adjustment in Contract Price will be subject to the provisions of paragraphs 9.10 and 11.9; and

4.2.6.4. CONTRACTOR shall not be entitled to any adjustment in the Contract Price or times if:

4.2.6.4.1. CONTRACTOR knew of the existence of such conditions at the time CONTRACTOR made a final commitment to OWNER in respect of Contract Price and Contract Times by the submission of a bid or becoming bound under a negotiated contract; or

4.2.6.4.2. the existence of such condition could reasonably have been discovered or revealed as a result of any examination, investigation, exploration, test or study of

the site and contiguous areas required by the Bidding Requirements or Contract Documents to be conducted by or for CONTRACTOR prior to CONTRACTOR's making such final commitment; or

4.2.6.4.3. CONTRACTOR failed to give the written notice within the time and as required by paragraph 4.2.3.

If OWNER and CONTRACTOR are unable to agree on entitlement to or as to the amount or length of any such equitable adjustment in the contract Price or Contract Times, a claim may be made therefor as provided in Articles 11 and 12. However, OWNER, ENGINEER and ENGINEER'S Consultants shall not be liable to CONTRACTOR for any claims, costs, losses or damages sustained by CONTRACTOR on or in connection with any such project or anticipated project.

Modern construction contracts typically contain a variation of one of these provisions, which, of course, are the subject of negotiations prior to contracting on private jobs (there is no bargaining on public works projects). Although each clause generally allocates the risk of changed conditions to the owner, the contractor must take specific steps to perfect its right to a claim for extra work. For instance, each clause contains a notice provision, with the federal and EJCDC clauses requiring "prompt" notice, and the AIA clause requiring notice within 21 days after the conditions are first observed.

Although the purpose of these provisions is substantially similar, there can be significant variations in application. First, the EJCDC clause allocates more risk to the contractor in the event Type II conditions are encountered than do the federal and AIA provisions. Second, the federal provision and the EJDC provision arguably treat conditions that are open to view, such as the elevation of the jobsite, the slope of a hill, or a property line as differing site conditions, whereas such conditions would probably not fit within the AIA provision. Despite these differences, however, federal and state courts have interpreted these clauses similarly, resulting in a certain degree of predictability for contractors who perform a variety of federal and state governmental contracts, as well as private contracts.

3. Allocation of Risk and Application of Differing Site Conditions Clauses

The incorporation of a differing site conditions clause that allocates the risk to the owner allows bidders to remove risk contingency pricing from their bids. *See, e.g., Traveler's Cas. And Surety Co. of Am. v. United States*, 75 Fed. Cl. 696, 720 (Fed. Cl. 2007). Since the risk associated with differing site conditions is allocated to the owner, contractors can more accurately price their bids based on "known" conditions, plans and specifications.

Courts have tended to view this arrangement as sensible one because of the increased accuracy in bidding that results. *See Renda Marine, Inc.*, 71 Fed. Cl. at 388; *H.B. Mac, Inc. v. United States*, 153 F.3d 1338, 1343 (Fed. Cir. 1998) ("The purpose of the Differing Site Conditions clause is to allow contractors to submit more accurate bids by eliminating the need for contractors to inflate their bids to account for contingencies that may not occur.") In the long term, this is a beneficial arrangement for all parties involved: the owner receives more accurate bids and the contractor is provided with reasonable assurance that it will be compensated for additional work.

It is also important to remember that the owner bears the risk for liability associated with differing site conditions without regard to fault, sometimes referred to as “strict liability.” Of course, the contractor must prove the elements of a claim for differing site conditions to be entitled to recovery, but, unlike traditional tort claims, no showing of negligence is required. This does not mean, however, that a contractor may receive a windfall from a differing site condition that works in its favor. The provisions discussed in these materials allow for a credit to the owner under such circumstances. Imagine, for example, that the contractor expects to encounter a certain number of “boulder” sized rocks in every 10 cubic yards of excavation, and prices his bid accordingly. If, once excavation has begun, no boulders are encountered, the owner may be entitled to a credit or equitable adjustment.

a. **A Closer Look at Notice Requirements**

The notice requirement imposed upon the contractor is designed to allow the owner to investigate the claim, take appropriate remedial steps to the extent possible, and, if required, to revise the applicable schedules and plans and specifications to account for the changed conditions. *See Miller v. City of Broken Arrow*, 660 F.2d 450 (10th Cir. 1981). As discussed above, most provisions require prompt notice to the owner. The courts, however, do not always construe notice requirements strictly.

In *Dawco Constr., Inc. v. United States*, 18 Ct. Cl. 682, 693-94 (Ct. Cl. 1989), for instance, the court recognized that, under some circumstances, it may take a contractor some time to investigate the condition and determine whether it is indeed a substantial change. The contractor in *Dawco Constr.* was engaged to perform landscaping work and was delayed by numerous subsurface impediments. The government objected to the contractor’s claim on the basis that notice had not been timely provided in accordance with the contract. The court did not agree, holding that, under the facts of the case, the contractor had to take time to determine whether the debris it encountered was isolated or so pervasive as to constitute a changed condition requiring notice under the contract. *Id.*

Some government (or even private) contracts may require the contractor to carefully record and document all costs associated with differing site conditions. *See Centex-Rodgers Constr. Co. v. Wake County*, 993 F.2d 228 (Table) (4th Cir. 1993) (distinguishing *Blankenship Constr. Co. v. North Carolina State Hwy Comm’n*, 222 S.E.2d 452, 462 (N.C. Ct. App. 1976)). Even if not required by the contract, contractors should keep detailed, accurate records of their delays and expenditures to assist the owner in evaluating claims. In the event of litigation, this information becomes vital.

b. **Site Investigation Clauses**

Construction contracts often require the contractor to perform an inspection of the job site prior to submitting a bid. Unless provided otherwise in the contract, this requirement has been interpreted by the courts to require a reasonable visual investigation of the site and review of information provided by the owner. *See* 48 C.F.R. 52.236-3 (requiring federal contractors to warrant that they have reviewed all subsurface exploratory work performed by the government and all drawings and specifications). Failure to perform a site investigation may defeat a differing site condition claim or entitle the owner to a setoff by the amount the bid would have increased based

upon a site inspection. *Cook v. Oklahoma Bd. of Public Affairs*, 736 P.2d 140 (Okla. 1987); *D. Federico, Inc. v. New Bedford Redevelop. Auth.*, 723 F.2d 122 (1st Cir. 1983).

4. Exculpatory Clauses and Contracts Lacking Differing Site Conditions Clauses

The owner and contractor are always free to modify or exclude differing site conditions provisions from their contract (unless a government contract or other public works project is involved). Depending on the circumstances, the contractor and the owner may elect to share the costs, rather than making a complete allocation to one party or the other. In some circumstances, however, the owner may attempt to absolve itself of liability for differing site conditions altogether through the use of an exculpatory clause or similar contractual disclaimers.

Owners may include contractual provisions that allocate the risk of subsurface conditions to the contractor. In *Camo Constr. Co., Inc. v. Town of Vidalia*, 966 So. 2d 796, 807-09 (La. Ct. App. 2007), the court denied the contractor's claim for additional compensation due, in part, to underground utilities encountered during construction. In that case, the contract provided that the "Contractor shall make his own investigations of subsurface conditions. No claims for extra compensation due to unusual conditions or development[s] that **19 are found to exist underground will be allowed." In earlier cases, however, the absence of a differing site conditions provision in conjunction with a contractual duty imposed on the contractor to inspect the site has been held to shift the risk of unknown subsurface conditions to the contractor. See, e.g., *Flippin Mat. Co. v. United States*, 312 F.2d 408, 415-16 (Ct. Cl. 1963); *Anderson v. Golden*, 569 F. Supp. 122, 142-43 (S.D. Ga. 1982).

In *Anderson*, for example, the contractor was required to provide fill and grading for a shopping center. The contract required the contractor to visit the site and correlate the drawings and specifications with existing conditions. In performance, the contractor was required to expend substantial sums on off-site fill, for which it later sought compensation. The court denied recovery to the contractor, holding that absent a changed conditions clause, the risk of subsurface conditions fell upon the contractor, not the owner. *Anderson*, 569 F. Supp. at 143.

Similarly, disclaimers have been successfully used by the federal government to shift responsibility for changed conditions to the contractor. Under these circumstances, courts have required the government to take steps to determine the risk of such conditions, disclose all available information to the contractor, and provide an express disclaimer related to the problems encountered. See, e.g., *Trafalgar House Constr., Inc. v. United States*, 77 Fed. Cl. 48, 55 (Fed. Cl. 2007) (discussing disclaimers in the context of the False Claims Act); *Hardwick Bros. Co., II*, 36 Fed. Cl. at 407.

If the owner provides data or specifications to the contractor that are clearly intended to be used in bid formulation, however, a disclaimer or general exculpatory clause purporting to absolve the owner from liability for incorrect information have been held unenforceable. *Hollerbach v. United States*, 233 U.S. 165, 172 (1914). Notwithstanding this general rule, as a practical matter, contractors should take appropriate steps to identify and evaluate the potential risks of differing subsurface conditions. Moreover, contractors and owners involved in private contracts should take great care in negotiating contracts to address these issues.

Without provisions addressing differing site conditions in the contract, the courts (and the parties) may be forced to rely upon common law remedies. For instance, absent such a provision,

the contractor who encounters an unforeseen condition may be forced to rely upon a fraud theory to recover based on the owner's misrepresentation. This can be difficult, however, because, as is often the case, the owner may not have made any representation regarding subsurface or other unknown conditions in the contract. Withholding information can be grounds for a fraudulent concealment claim (failure to disclose). Under most states' laws, proof of fraud requires a representation and detrimental reliance by the contractor. Thus, where there has been no representation, false or otherwise, or withholding of information, there may be no recovery for fraud.

Courts have also addressed this problem under the related common law doctrine of "mutual mistake." Under this doctrine, the court make reform the contract equitably or simply declare it void based on the notion that both parties were mistaken as to a particular, essential fact. *See URS Group, Inc. v. Tetra Tech FW, Inc.*, 181 P.3d 380, 390 (Colo. Ct. App. 2008). This doctrine also presents significant problems, especially where the contract is voided, because the court must then determine the value of the services provided, which may differ greatly from the contract price.