TOP SHEET

Differing Site Condition Claims: What Is Below the Surface of Exculpatory Clauses or Other Disclaimers?

By Owen S. Walker

It is a well-settled proposition that the purpose of a Differing Site Conditions clause is to shift the risk of unknown physical conditions to the owner of the site by allowing a contractor to seek an equitable adjustment in the contract price when the contractor encounters unanticipated conditions.[1] Ideally, the corollary benefit to the owner is that a contractor does not inflate its bid price to accommodate for the possibility of encountering unanticipated conditions. Thus, a Differing Site Conditions clause serves to prevent "turning a construction contract into a gambling transaction."[2]

Typically, subsurface data such as boring logs or a geotechnical report are made available with solicitations to facilitate accurate bidding. Nevertheless, even when a Differing Site Conditions clause is incorporated into a contract, the government owner may still attempt to reduce its own liability for any such unanticipated conditions by inserting broad exculpatory language or other disclaimers in or about the subsurface data provided to a contractor. This occurred recently in *Drennon Construction & Consulting, Inc.*, decided by the Civilian Board of Contract Appeals (CBCA).[3]

In *Drennon*, the Department of Interior contended, *inter alia*, that certain disclaimers contained in the geotechnical report precluded a contractor from forming a reasonable reliance as to certain physical conditions of the site expressed in the report. The contractor, Drennon Construction & Consulting, Inc., argued that defective specifications and inaccurate information about the site conditions were the fundamental problems on the project. The CBCA agreed with Drennon on both points and awarded Drennon its damages flowing from those issues.[4] Using the decision in *Drennon* as the backdrop, this article will address the effect of broad exculpatory clauses and other disclaimers on the Differing Site Conditions clause.[5]

Types of Differing Site Conditions Claims Generally

Differing site conditions claims can take one of two forms, or "types." A Type I claim exists where the actual site conditions differ from the conditions indicated in the contract documents.[6] Importantly, under a Type I claim, "it is not necessary that the 'indications' in the contract be explicit or specific; all that is required is that there be enough of an indication on the face of the contract documents for a bidder reasonably not to expect subsurface or latent physical conditions at the site differing materially from those indicated in [the] contract."[7] Admittedly, whether a contract includes "indications" of anticipated latent subsurface conditions depends upon the particular facts of each case. Further, to prevail on a Type I claim requires the contractor to prove four elements: (i) that a reasonable contractor reading the contract documents as a whole would interpret them as making a representation as to the site conditions; (ii) the actual site conditions were not reasonably foreseeable to the contractor, with the information available to the particular contractor outside the contract documents, i.e., that the contractor "reasonably relied" on the representations; (iii) that the particular contractor in fact relied on the contract representation; and (iv) the conditions differed materially from those represented and that the contractor suffered damages as a result.[8]

In contrast, a Type II claim exists where the actual site conditions differ from those reasonably anticipated based on the nature of the work and locale.[9] Prevailing on a Type II claim generally requires satisfying three conditions. Specifically, "the unknown physical condition must be one that could not be reasonably anticipated by the contractor from his study of the contract documents, his inspection of the site, and his general experience [,] if any, as a contractor in the area."[10] Establishing a Type II claim does not require proving that a reasonable contractor would interpret the contract documents as making a representation of the site

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conditions. Therefore, exculpatory clauses and disclaimers of site conditions generally do not have any bearing on establishing a Type II claim.

In *Drennon*, the CBCA acknowledged the existence of a Type I claim based on the fact that the site conditions were materially different from what was described in the geotechnical report included in the solicitation. The Department of Interior's Bureau of Land Management (BLM) wanted to have a road, which accessed the Tangle Lakes Campground located in central Alaska, widened from one lane to two and to have a blind curve in the road eliminated. In August 2009, BLM awarded a $127,688.23 contract to the engineering firm USKH, Inc. (USKH) to design the project. At the outset, the limited amount of available funds for the project required BLM to "keep modifying the scope of work to fit within that budget constraint."[11]

During the design phase, USKH determined that the digital terrain model used to design the road contained inaccurate control points. USKH's request for an additional $25,000 to perform a survey from which an accurate design could be made was denied by BLM, as BLM contended that the digital terrain model was sufficiently accurate.[12] In an attempt to avoid potential additional costs resulting from inaccuracies in the design, a USKH engineer proposed adding "weasel words" (his phrase) to warn potential bidders of the possible inaccuracies in the model.[13]

USKH was also tasked with performing a geotechnical investigation of the site. USKH contracted with Shannon & Wilson, Inc. (S&W) to perform subsurface investigations including making soil borings, geotechnical analysis, and the preparation of geotechnical design and construction report.[14] S&W's report contained information about eight soil borings taken under the existing road, generally described the soil conditions of the existing area, and addressed some preferred construction techniques.[15] S&W's report, including the soil borings and geotechnical analysis was included as part of the solicitation. The solicitation and contract also incorporated Federal Acquisition Regulation (FAR) clause 52.236-2 (Differing Site Conditions) (Apr. 1984), among various other standard government contract clauses.

Shortly after Drennon commenced excavation into the hillside adjacent to the road, it became apparent that the soils were "at or near [its] angle of repose, so every scoopful that is excavated from the slope causes a landslide of material from above."[16] Drennon concluded that the hill was not going to stabilize and would continue to unravel. Thereafter, the contracting officer issued a stop work order. Ultimately, BLM decided to scale back the project, limited only to the installation of a gabion wall along the existing one lane road.

The Effect of Disclaimers on Type I Claims

The CBCA concluded that the S&W report clearly made representations as to the anticipated site conditions.[17] Specifically, the report contained information about the soil borings that depicted the soil as containing "5.1 and 10.7% fines" and described the hillside as containing similar soils.[18] The results of soil test borings are often considered the most reliable reflection of subsurface conditions.[19] However, the report also included a reference to "esker soils" on the hillside (the area that Drennon was required to excavate to widen the road) as "non-cohesive" and "[a]lthough temporary excavation slopes may initially stand steep they may slough and cave if they … are subjected to equipment vibrations."[20]

BLM's expert witness asserted that Drennon's reliance on the soil borings was misplaced as the esker soils are "flower rock material, which has no cohesion" and Drennon was on notice of that fact by virtue of the disclaimer in S&W's report.[21] The CBCA, however, was persuaded by Drennon's expert witness's explanation that while a geotechnical engineer should know the term "esker," it would be unreasonable to expect the same of a construction contractor.[22]

Although Drennon prevailed in its claim, not all contractors have been as fortunate. Certain disclaimers have been found to prevent a contractor from establishing the first element of a Type I claim. For example, in *Metcalf Construction Co., Inc. v. United States*, a contractor undertook a design-build housing project for the Navy.[23] During construction, the contactor encountered "expansive soils," which required a substantial amount of additional excavation.[24] The contractor sought an equitable adjustment for its additional costs and relied upon a soil report provided by the Navy as evidencing conditions materially different from those actually encountered. The court, however, found that the contractor failed to establish the first element for a Type I claim, because the contract required the contractor to "perform post-award site design and engineering work, including the retention of a geotechnical engineering firm to conduct soil investigations to ensure that the contractor's design addressed relevant geotechnical issues."[25] As such, the court determined that the contractor could not reasonably rely on the soil report that was expressly labeled "information only."[26]

Instructions to Review Available Data Can Operate as a Form of Disclaimer

When a solicitation or contract includes instructions to review available subsurface data and a contractor fails to undertake a review of the available subsurface data, it becomes increasingly difficult for such contractor to establish reasonable reliance on subsurface data set forth in the contract documents.

In *Stuyvesant Dredging Co. v. United States*, the Corps of Engineers let a contract to perform maintenance dredging of the Corpus Christi Entrance Channel. Stuyvesant Dredging Company, the dredging contractor, anticipated removing material of a certain density, but the actual material had a significantly higher density and was, therefore, more difficult to remove.[27]

Stuyvesant filed a Type I claim based on a representation of the material in the contract documents. However, the contract contained a provision stating, "[b]idders are expected to examine the site of the work and the records of previous dredging, which are available ... and after investigation decide for themselves the character of the materials."[28] Stuyvesant had recently performed two other projects on the Texas Gulf Coast and decided that a pre-bid investigation was unnecessary. Further, Stuyvesant failed to visit the site to take its own readings of the dredge material's density and did not review the records of previous dredges. The court found that the subsurface information provided in the contract on which Stuyvesant relied were to serve as "'guides only [,]' and did not 'reach the level of estimates and [were] clearly not facts upon which [the contractor] could rely.'"[29] Hence, the contractor could not establish a Type I differing site conditions claim.

In *Randa/Madison Joint Venture III v. Dahlberg*, the Army Corps of Engineers (Corps) let a contract for work that included the construction of a sewage pumping station.[30] The Corps contracted the design out to a separate firm, but the Corps performed the geotechnical investigation. The pump house foundation was to extend forty feet below the surface, so it was necessary to determine whether any subsurface water would have to be removed. The Corps entered into a contract with Randa/Madison Joint Venture III to perform the required dewatering work.

However, prior to submitting its bid, Randa reviewed the boring logs but failed to inspect certain other subsurface test results made available by the Corps. Randa's contract included the Site Investigation clause (FAR 52.236–3), among other standard government contract clauses. After Randa experienced difficulty dewatering the site, it filed a claim for a Type I differing site condition, relying upon the information contained in the boring logs. The court held that the Site Investigation clause placed on the contractor the risk of not inspecting "exploratory work" performed by the Corps.[31] Finding that the contactor had a duty to review the available subsurface data, whether in the contract documents or not, the court upheld the denial of the contractor's differing site conditions claim.[32]

The Differing Site Conditions Clause Prevails

The predominant view as expressed in *Drennon* is that broad exculpatory clauses cannot be given any effect, as they would render the Differing Site Conditions clause meaningless as to Type I claims. In *Drennon*, the CBCA stated, "broad exculpatory language does not relieve the agency, which provided the report to prospective bidders with the expectation that they would rely on it, from liability resulting from conditions which are materially different from those described specifically."[33]

As to the three other elements of a Type I claim, in *Drennon*, the CBCA found that the actual conditions were not reasonably foreseeable as the only available information was the S&W report. Drennon could not access the site to see firsthand the conditions as the area was covered with snow and inaccessible to bidders during the period of time that bids were accepted. In light of the absence of any other available subsurface information, Drennon was able to establish reliance on the subsurface data in the S&W report. Lastly, with the aid of expert testimony, Drennon established that the actual site conditions differed materially from those represented.

In *Travelers Casualty & Surety Co. of America v. United States*, the Army Corp of Engineers entered into a contract with Red Samm to improve a small boat harbor in King Cove, Alaska, part of the Aleutian Island chain.[34] The contract required the performance of work in two stages.

The initial phase consisted of the construction of a breakwater followed by dredging of the harbor behind the breakwater. Red Samm encountered copious amounts of "cobbles" (rounded or ragged stone between three and twelve inches in diameter) during the performance of the second phase of the contract. Red Samm planned on employing a hydraulic dredge, based on its interpretation of the site conditions represented in the contract documents. The presence of the cobbles, however, forced Red Samm to employ more costly and time-consuming means to complete its dredging work. The court held that the contractor's "differing site conditions claim turns primarily on determination of the contract's representations."[35]

The government, relying on FAR 52.236–3, contended that the contractor was at fault based on its incorrect interpretation of the subsurface data contained in the contract. The court strongly disagreed and found that based on the government's argument, "FAR § 52.236–3 would in essence vitiate Section 02222, the contractual provision describing the conditions at the site."[36] Further, "if the government is permitted to disavow through exculpatory language any responsibility for its representations, a showing of a differing site condition becomes impossible and therefore superfluous."[37] Thus, the court concluded that in order to "effectuate the underlying policy of a differing site condition clause as laid out in *Foster,* the Court will not interpret the exculpatory language of the Site Investigation Clause [FAR 52.236–3] excessively broadly."[38]

In *Whiting-Turner/a.l. Johnson Joint Venture*, the General Services Administration (GSA) awarded a contract for the construction of a building at the Centers for Disease Control in Atlanta, GA. The GSA was responsible for providing "[c]omplete Geotechnical and Soils information."[39] However, accompanying the bid package for the foundation work was the following disclaimer,

> A geotechnical report has been prepared for this Project and is available for information only. The report is not part of the Contract Documents. Opinions expressed in this

> report are those of the geotechnical engineer and represent interpretations of subsoil conditions, tests, and results of analyses conducted by the geotechnical engineer. Government will not be responsible for interpretations or conclusions drawn from this data by Contractor.[40]

The contractor performing the foundation work encountered unanticipated groundwater and a Type I differing site conditions claim was made against the government. The contractor's claim was premised on certain representations in the contract documents, including soil boring logs, regarding the anticipated subsurface conditions for the project. The government argued that the subsurface information contained in the bid was labeled for "information only" and the bid package expressly stated the information was "not part of the Contract Documents."[41] Further, the government argued that the contract instructed bidders to make their own borings. The board disagreed, stating that the disclaimers in the bid were not controlling. The board also held that "the Government cannot provide borings, so that bids can be based on them, and at the same time disclaim the validity of those logs."[42] Thus, the board found that such disclaimers are not effective because they would render the differing site conditions clause meaningless as to Type I claims.[43]

Conclusion

Based on established legal precedent, it is likely that courts and boards will continue to prevent broad exculpatory clauses or other disclaimers from eroding contractors' rights to pursue Type I differing site condition claims. However, in order to preserve the right to seek recovery for a Type I claim prudent contractors, prior to submitting a bid, will review all available subsurface data. As *Randa* instructs, it is imperative to review not only the documents that form the contract, but also any subsurface reports referenced in the contract and made readily available for inspection. PL

Endnotes

1. *See, e.g.*, HSG Technischer Serv. GmbH, 2009-2 B.C.A. ¶ 34,177 (June 16, 2013) ("[a] well established purpose of the Differing Site Conditions clause is to eliminate inclusion of contingencies to cover the possibility of encountering conditions more adverse than the indicated and usual.")
2. J.F. Shea Co., Inc. v. United States, 4 Cl. Ct. 46, 50 (1983) *citing* Peter Kiewit Sons' Co. v. United States, 109 Ct.Cl. 517, 522–23, 74 F.Supp. 165, 168 (1947).
3. Drennon Constr. & Consulting, Inc., 13-1 B.C.A. ¶ 35213 (Jan. 4, 2013).
4. *Id.* at 13-14.
5. *See* FAR 52.236-2, Differing Site Conditions clause (April 1984).
6. *See id.* at (a)(1).
7. Foster Constr. C. A. & Williams Bros. Co. v. United States, 435 F.2d 873, 875 (Ct. Cl. 1970). *See also J.F. Shea Co., Inc.*, *supra*, at 51 (Bidding schedules can have legal significance as contract "indications" in the absence of express contract provisions disclaiming their significance.); Cont'l Drilling Co., ENGBCA No. 3455, 75-2 B.C.A. ¶ 11,541 (Sept. 9, 1975) (ruling that bidding schedule estimates served as "indications" of subsurface conditions.).
8. Metcalf Constr. Co., Inc. v. United States, 102 Fed. Cl. 334, 354 (Fed. Cl. 2011) *quoting* Int'l Tech. Corp. v. Winter, 523 F.3d 1341 (Fed.Cir.2008) (the term "representation" referenced in the first element of Type I claim is consistent with *Foster's* use of the term "indication").
9. *See* FAR 52.236–2 (a)(2).
10. Randa/Madison Joint Venture III v. Dahlberg, 239 F.3d 1264, 1276 (Fed. Cir. 2001) *quoting* Perini Corp. v. United States, 180 Ct.Cl. 768, 381 F.2d 403, 410 (1967).
11. *Id.* at 2.
12. *Id.*
13. *Id.*
14. *Id.* at 3.
15. *Id.*
16. *Id.* at 6.
17. *Id.* at 10-11.
18. *Id.* at 10.
19. Whiting-Turner/a.l. Johnson Joint Venture, 02-1 B.C.A. ¶ 31,708 (Dec. 5, 2001).
20. *Id.* at 11 (finding that the "[t]he value of this last disclaimer was made dubious, however, by the recommendation that the contractor use equipment which creates a significant amount of vibration.").
21. *Id.* at 4.
22. *Id. See also* Shank-Artukovich v. United States, 13 Cl. Ct. 346, 354 (1987) *aff'd*, 848 F.2d 1245 (Fed. Cir. 1988) ("While it is true that a contractor has a duty to consider all of the specifications, he has no duty to conduct his own investigation, and is not bound to know that which only an expert could derive from the contract.").
23. *Metcalf Constr. Co.*, *supra*.
24. *Id.* at 352.
25. *Id.* at 349.
26. *Id.* at 354.
27. Stuyvesant Dredging Co. v. United States, 834 F.2d 1576 (Fed. Cir. 1987).
28. *Id.* at 1579.
29. *Id.* at 1581 (Fed. Cir. 1987) *citing* Stuyvesant Dredging Co. v. United States, 11 Cl. Ct. 853, 858 (1987).
30. *Randa/Madison Joint Venture III*, *supra*.
31. *Id.* at 1268.
32. *Id.* at 1267 ("The actual contract documents included the boring logs, but not the gradation curves or other test results. The gradation curves and other test results, as well as the soil samples themselves, were made available for inspection at a Corps office.").
33. *Drennon Constr. & Consulting, Inc.*, *supra*.
34. Travelers Cas. & Sur. Co. of Am. v. United States, 75 Fed. Cl. 696 (Fed. Cl. 2007).
35. *Id.* at 712.
36. *Id.* at 714.
37. *Id.*
38. *Id.*
39. *Whiting-Turner/a.l. Johnson Joint Venture*, *supra*, at 156,607.
40. *Id.* at 156,610.
41. *Id.*
42. *Id.* at 156,618.
43. *Id.*