



NUCA Contracts Risk Management Manual

Differing Site Conditions

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NOTES

INTRODUCTION

A major risk for all utility contractors is the cost to alleviate site conditions materially different from those contemplated at the time the contract was bid. Unanticipated site conditions not only generate increased costs, they can also substantially delay and disrupt the project's schedule. These delays frequently occur at the start of a project, which increases the overall impact on the project schedule.

DIFFERING SITE CONDITIONS DEFINED

A differing site condition – or *changed condition*, as it is sometimes called – is a physical condition encountered while performing the work that was not visible and not known to exist at the time of bidding, that is materially different from the conditions thought to exist at the time of bidding, and that could not have been discovered by a reasonable site investigation. Examples of “changed conditions” or “differing site conditions” include unanticipated groundwater (static or percolating), quicksand, muck, rock formations (or excessive or insufficient quantities of rock); and artificial (man-made) subsurface obstructions.

RESPONSIBILITY FOR DIFFERING SITE CONDITIONS

Under a traditional contract risk allocation analysis, a prudent contractor would be expected to protect itself against unforeseen

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conditions by including a contingency factor in its bid. The basic flaw in this approach is that a contractor cannot accurately value a true unknown. Even if included, the bid contingency may end up being totally inadequate, or, alternatively, grossly conservative. The one constant is that including any contingency increases bid prices and thus works to the detriment of the owner if adverse conditions are not encountered. In other situations, the contingency may prove wholly inadequate to cover the contractor's actual increased costs.

To alleviate some of the problems associated with unexpected subsurface conditions, "differing site condition" clauses have become a common feature in many construction contracts.

STANDARD DIFFERING SITE CONDITIONS CLAUSES

Virtually all of the "standard" form contracts between owners and contractors contain some type of differing site conditions clause. The first such standard clause appeared in 1927 in the federal government's standard fixed-price construction contract. Its purpose was, and is today, to place the risk of reasonably unexpected site conditions on the federal government—granting a price increase and time extension to contractors required to deal with such conditions.

FEDERAL GOVERNMENT

The text of the differing site conditions clause used in federal government contracts is set forth in the Federal Acquisition Regulations (FAR at § 52.236-2) which states:

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(Apr 1984)

(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.

(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 written 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.

OTHER STANDARD FORMS

The American Institute of Architects (AIA) and Engineer's Joint Contract Documents Committee (EJCDC) [consisting of: ACEC (American Consulting Engineers Council); ASCE (American Society of Civil Engineers); CSI (Construction Standards Institute); and NSPE

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(National Society of Professional Engineers)] standard contract forms also contain differing site condition provisions:

AIA A201 (1997 ed.)

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 twenty-one (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 the Contractor in writing, stating the reasons. Claims by either party in opposition to such determination must be made within twenty-one (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 the Contractor cannot agree on an adjustment in the Contract Sum or the Contract Time, the adjustment shall be referred to the Architect for initial determination, subject to further proceedings pursuant to Paragraph 4.4.

EJCDC Product No. C-700, 2002 ed.

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4.02 Subsurface and Physical Conditions

Reports and Drawings: The Supplementary Conditions identify: those reports of explorations and tests of subsurface conditions at or contiguous to the Site that Engineer has used in preparing the Contract Documents; and those drawings of physical conditions in or relating to existing surface or subsurface structures at or contiguous to the Site (except Underground Facilities) that Engineer has used in preparing the Contract Documents.

Limited Reliance by Contractor on Technical Data Authorized: Contractor may rely upon the general accuracy of the “technical data” contained in such reports and drawings, but such reports and drawings are not Contract Documents. Such “technical data” is identified in the Supplementary Conditions. Except for such reliance on such “technical data,” Contractor may not rely upon or make any claim against Owner or Engineer, or any of their Related Entities with respect to: the completeness of such reports and drawings for Contractor’s purposes, including, but not limited to, any aspects of the means, methods, techniques, sequences, and procedures of construction to be employed by Contractor, and safety precautions and programs incident thereto; or other data, interpretations, opinions, and information contained in such reports or shown or indicated in such drawings; or any Contractor interpretation of or conclusion drawn from any “technical data” or any such other data, interpretations, opinions, or information.

4.03 Differing Subsurface or Physical Conditions

Notice. If Contractor believes that any subsurface or physical condition at or contiguous to the Site that is uncovered or revealed either: is of such a nature as to establish that any “technical data” on which Contractor

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is entitled to rely as provided in Paragraph 4.02 is materially inaccurate; or is of such a nature as to require a change in the Contract Documents; or differs materially from that shown or indicated in the Contract Documents; or 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 the subsurface or physical conditions or performing any Work in connection therewith (except in an emergency as required by Paragraph 6.16.A), notify Owner and Engineer in writing about such condition. Contractor shall not further disturb such condition or perform any Work in connection therewith (except as aforesaid) until receipt of written order to do so.

Engineer's Review. After receipt of written notice as required by Paragraph 4.03.A, Engineer will promptly review the pertinent condition, 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.

Possible Price and Times Adjustments

The Contract Price or the Contract Times, or both, will be equitably adjusted to the extent that the existence of such differing subsurface or physical condition causes an increase or decrease in Contractor's cost of, or time required for, performance of the Work; subject, however, to the following:

such condition must meet any one or more of the categories described in Paragraph 4.03A; and

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 9.07 and 11.03. Contractor shall not be entitled to any adjustment in the Contract Price or Contract Times if:

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Contractor knew of the existence of such conditions at the time Contractor made a final commitment to Owner with respect to Contract Price or Contract Times by the submission of a Bid or becoming bound under a negotiated contract; or

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

Contractor failed to give the written notice as required by Paragraph 4.03.A. If Owner and Contractor are unable to agree on entitlement to or on the amount or extent, if any, of any adjustment in the Contract Price or Contract Times, or both, a Claim may be made therefor as provided in Paragraph 10.05. However, Owner and Engineer, and any of their Related Entitled shall not be liable to Contractor for any claims, costs, losses, or damages (including but not limited to all fees and charges of engineers, architects, attorneys, and other professionals and all court or arbitration or other dispute resolution costs) sustained by Contractor on or in connection with any other project or anticipated project.

CITY OF COLUMBUS, OHIO - WASTE WATER TREATMENT PLANT

12.7 DIFFERING SITE CONDITIONS

A. Should the Contractor encounter subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications or differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this Contract, he shall immediately give notice to the Construction Manager of such conditions before they are disturbed. The Construction Manager and the Design Consultant shall thereupon promptly investigate the conditions and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once make such changes in the drawings and/or specifications as he may find necessary. Any increase or decrease of cost resulting from such changes shall be adjusted in the manner provided herein for

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adjustments as to extra and/or additional work and changes. However, neither the Owner, Construction Manager, nor the Design Consultant shall be liable or responsible for additional work, costs or changes to the work due to material differences between actual conditions and any geotechnical, soils and other reports, surveys and analyses made available for the Contractor's review.

TYPES OF CONDITIONS COVERED

While the FAR, and EJCDC clauses define differing site conditions as “subsurface” or “subsurface or latent physical conditions,” the AIA clause uses the phrase “concealed conditions ... below the surface of the ground or ... concealed or unknown conditions in an existing structure.”

While these clauses cover similar types of situations, it is possible to imagine conditions where the differences in wording would make a difference. It is crucial to review the exact language of a differing site conditions clause to determine what conditions are covered. For example, where actual grade elevations turn out to be lower than those shown on the contract drawings (requiring additional fill to meet the grade requirements), a contractor should be able to recover under the FAR clause’s “latent physical conditions” language. But recovery under the AIA clause’s “concealed conditions ... below the surface of the ground or ... in an existing structure” language might be more difficult.

TYPE I AND TYPE II CHANGED CONDITIONS

The AIA, EJCDC, and the FAR provisions identify two distinct types of unanticipated conditions that are compensable. These are usually designated as Type I and Type II changed conditions.

A Type I changed condition is a condition that is different from what is indicated by the Contract Documents. For example, the FAR

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clause describes a Type I change condition as “differing materially from those indicated in the contract.”

The FAR describes a Type II changed condition as an unknown physical condition at the site, of an unusual nature, that differs materially from what is ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract. The language in the AIA and EJCDC provisions are quite similar.

NOTICE REQUIREMENTS

The standard clauses also differ with respect to notice requirements. The FAR requires a contractor to stop work and give written notice upon encountering an unexpected condition, and before disturbing it, so that the owner’s representative will have an opportunity to inspect and evaluate the condition. The EJCDC clause, with its “promptly after becoming aware thereof and before further disturbing” language, appears is similar to the FAR. In contrast AIA Document A201 requires only that notice of a claim for equitable adjustment be given to the owner within 21 days after “first observation of the condition.” Regardless of the exact language, it is always preferable that the owner (or its agent, such as the project architect or engineer) be notified immediately when unforeseen conditions are encountered. By giving the owner the option of investigating the condition and, if appropriate, determining how best to proceed, the contractor greatly increases the likelihood of resolving any resulting claim in an expedient and mutually acceptable manner.

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OPERATION OF THE DIFFERING SITE CONDITIONS CLAUSE

A differing site conditions clause provides a mechanism for dealing with an adverse unforeseen situation. However, a contract adjustment is not automatic. To obtain an increase in the contract price, a contractor must show that its condition falls within the coverage of its particular clause. However, a contractor is not required to prove fault, bad faith, or defective design by the owner or its representative. Unforeseen site conditions are an inherent risk in utility construction. The purpose of a differing site condition is to apportion that risk, not find fault.

The presence of a differing site conditions clause allows a contractor to be reimbursed for its reasonable additional costs, regardless of the owner's knowledge or ignorance of actual conditions. By including a differing site condition provision, the owner assumes a part of the risk of such conditions with the expectation that the contractor will not include a contingency in its bid.

RECOVERY FOR A TYPE I CHANGED CONDITION

To recover for a Type I changed condition—where actual conditions are at variance with conditions “indicated” by the contract documents—a contractor must show the following:

- (1) that certain conditions are indicated by the plans, specifications, and other contract documents;
- (2) its reliance on the physical conditions indicated in the contract documents;
- (3) the nature of the actual conditions;
- (4) the existence of a material difference between the conditions indicated and the conditions actually encountered;

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- (5) that notice, as required by the contract, was given; and
- (6) that the change resulted in increased costs and/or time.

The first thing that must be shown is that specific conditions were “indicated” by the contract. Some statement or representation must be contained in the contract documents concerning the conditions to be expected.

It is not absolutely required that the specific nature of site conditions be affirmatively expressed on the plans or in specific contract provisions. Such indications may be based on a reasonable inference drawn from reading the contract as a whole.

In certain situations, a contract indication may be found from documents that are not a part of the contract. For example, one federal court of appeals held that soil borings were a “contract indication” even though the borings were not a part of the contract documents. This court held:

The test boring logs do not have to be strictly considered “a part of the contract documents” (which the Appendix states they are not) to be binding on the [owner] to the extent of their own accuracy. We can accept the [owner’s] argument that the Appendix is not an item listed in the Table of Contents (but is in addition to the Table of Contents) and therefore the Appendix is not a part of the contract. However, the differing site conditions clause need not be interpreted to limit reimbursements to situations where the logs themselves are necessarily a part of the contract. The clause entitles the contractor to reimbursement when there are “conditions at the site differing materially from those indicated in this contract.” Even though the logs may not be included in the contract, they are “indicated” in the contract. . . .

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Examples of situations where express representations of conditions in the contract documents were found to have differed materially from the actual conditions encountered, include:

(1) *Muddy vs. Dry Conditions*: The contract documents stated that when “test holes were drilled in the area, no water was noted in any of the test holes.” During construction, the contractor encountered “subsurface mud covered by a cracked and deceptively dry looking surface . . .” The Supreme Court of Idaho found the subsurface mud to be materially different from the dry conditions indicated by the contract documents and affirmed the contractor’s recovery for a Type I differing site condition. *Beco Corp. v. Roberts & Sons Construction Co.*, 760 P.2d 1120 (Idaho 1988).

(2) *Hard Clay vs. Soft Mud*: The contract specifications required the contractor to remove soft mud, silt, and sand in a river dredging project. When the contractor encountered hard, undisturbed clay instead of the soft materials specified, the contractor was entitled to an equitable adjustment for a Type I differing site condition. *C. J. Langenfelder & Son, Inc.*, Maryland Department of Transportation 1000 (August 15, 1980).

(3) *Suitable Equipment for Work*: The Armed Services Board of Contract Appeals has found that “compaction, and clearing and grubbing” requirements are sufficient contract indications. The board held that, while the contract documents made no express representation regarding subsurface conditions, the compaction and clearing and grubbing requirements led the contractor to reasonably believe it could use heavy equipment to perform its work. The board stated that “where, as here, design requirements cannot be met and procedures

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and equipment reasonably anticipated cannot be used, the situation represents a classic example of a Type I differing site condition.” *Kinetic Builders, Inc.*, ASBCA No. 32627, 88-2 BCA ¶ 20,657. Similarly, courts have found an implied representations by requirements in the plans for a specific dredging technique [*Midwest Dredging Co. v. McAninch Corp.*, 424 N.W.2d 216 (Iowa 1988)], where a grouting specification stated that groundwater could be controlled to a certain level during construction [*S.A. Healy Co. v. Milwaukee Metropolitan Sewerage Dist.*, 50 F.3d 476 (7th Cir. 1995)], and where the contract documents indicated that “trench footings” could be used when in fact the soils on site would not support them [*Sherman R. Smoot Co. v. Ohio Dept. of Administrative Services*, 736 N.E.2d 69 (Ohio App. 10th Dist., Franklin)].

(4) ***Unanticipated Sloughing of Soils:*** A tunneling contractor who encountered “running” ground conditions that were not disclosed by the contract soils information was granted relief under the differing site conditions clause for encountering a Type I condition. The contractor was required to grout in order to stop the sloughing. *Shank-Artukovich v. United States*, 13 Cl. Ct. 346 (1987).

(5) ***Dry Conditions Implied by Specified Construction Procedures:*** When the construction procedures and design requirements set forth in the contract documents, read as a whole, indicated subsurface conditions permitting excavation “in the dry,” but actual conditions made it impossible or impracticable to excavate in this manner, a changed condition was held to have been encountered. *See Foster Constr., C.A. v. United States*, 193 Ct. Cl. 587 (1970). *But see, Tricon-Triangle Contractors*, ENG BCA No. 5113, 88-1 BCA ¶ 20,317 (denying a Type I differing site condition claim where the presence of

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groundwater was implied by a contract provision requiring the contractor to maintain a dewatering system).

RECOVERY FOR A TYPE II CHANGED CONDITION

It is possible to recover for a Type II changed condition even where the contract is silent about the nature of the condition. To establish a Type II changed condition, one must show that the conditions encountered were unusual and differed materially from those reasonably anticipated, given the nature of the work and the locale.

To qualify as sufficiently “unknown and unusual,” the condition encountered by a contractor should not have to be in the nature of a geological freak – for example, permafrost in the tropics. *See, e.g., Ruff v. United States*, 96 Ct. Cl. 148 (1942); *Western Well Drilling Co. v. United States*, 96 F. Supp. 377 (D. Cal. 1951) All that is generally required is an unknown physical condition that was reasonably unanticipated, based on examination of the contract documents and the site.

The key to recovery for a Type II changed condition is the comparison of actual conditions with what was reasonably expected at the time of bidding. This inquiry into reasonable expectations will raise questions of the contractor’s actual and constructive knowledge of working conditions in the particular area. For example, awareness of a condition at the site that is common knowledge to other contractors working in the area, and thus reasonably ascertainable by inquiry, may be attributed to the contractor. Moreover, a contractor’s failure to visit the work site, particularly when alerted to potential problems by the plans and specifications, and the resulting failure to discover obvious physical conditions, may indicate that the bidder’s judgment was

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simply a “guess . . . premised in error,” which forms no basis for recovery as a Type II changed condition. See *L.B. Samford, Inc.*, GSBCA No. 1233, 1964 BCA ¶ 4309.

The following are examples of Type II changed conditions:

(1) **Subsurface Water:** A water table found to be much higher than reasonably could have been anticipated has been held to be a changed condition, where dry and stable subsurface conditions were reasonably anticipated (but not indicated). *Loftis v. United States*, 110 Ct. Cl. 551 (1948).

(2) **Buried Timber/Rubble:** In leveling land which had been cleared, a contractor was held to have had no notice of buried timbers, although the contract required the disposal of surface stumps, roots, and other trash encountered. The buried trees thus constituted a Type II changed condition, *Morgan Construction Co.*, IBCA No. 299, 1963 BCA ¶ 3855. Submerged piling in a dredge-filled land area warranted changed conditions relief, *Caribbean Construction Corp.*, IBCA No. 90, 57-1 BCA ¶ 1315. On another project the presence of buried stumps should have been anticipated because the site was in a fill area that contained some protruding stumps, new sprouts, and new branches – indicating growth from buried stumps, *Gilloz Construction Co.*, W.D. BCA ¶ 826 (1944).

(3) **Utilities:** An undisclosed sewage line encountered in attempting to dig a manhole has been judged a changed condition, *Neale Construction Co.*, ASBCA No. 2753, 58-1 BCA ¶ 1710.

Similarly, a differing site condition was found to exist when a contractor installing conduit pipe under an airfield perimeter road encountered a sewer line that was not indicated on the contract

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documents and was not a condition that would generally be expected, *Unitec, Inc.*, ASBCA No. 22025, 79-2 BCA ¶ 13,923. However, in a different case where a contractor encountered sewers, gas lines, water lines, and coaxial cables that were not shown on the plans, a changed conditions claim was denied because the site was in a heavily built-up area and manholes were shown on the plans, *H. Walter Schweigert*, ASBCA No. 4059, 57-2 BCA ¶ 1433.

(4) *Toxic Substances*: Where a contractor encountered creosote and other tar-like substances in an environment in which they were not anticipated, a Type II changed condition was found, *Reliance Insurance Co. v. County of Monroe*, 604 N.Y.S.2d 439 (N.Y.S. 4 1993).

A Type II differing site condition may also result from the unusual performance of an anticipated material. On a project where clay was expected to be encountered, percolating water caused the clay to behave in an erratic fashion, with an unexpected tendency to slide, there was a changed condition, *Paccon, Inc.*, ASBCA No. 7643, 1962 BCA ¶ 3546. Unexpected soil shrinkage that materially increased the number of cubic yards of earth in a dam was found to be an unexpected property of the soil that constituted a changed condition, *Guy F. Atkinson*, IBCA No. 385, 65-1 BCA ¶ 4642. A contractor was allowed to recover the additional cost of handling subsurface water, even though subsurface water was anticipated, because the place where water was encountered and the rate of flow were unusual and unforeseeable, *Norair Engineering Corp.*, ENG BCA No. 3568, 77-1 BCA ¶ 12,225.

STUMBLING BLOCKS TO RECOVERY

While many owners put a differing site conditions clause in their

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contracts, they may also include other clauses intended to limit claims for differing site conditions. These include clauses requiring site inspection, notice, and various other clauses which seek to limit the ability of contractors to rely on information provided to them during the bidding process. Whether or not these contract clauses will limit or bar recovery under a differing site conditions clause depends on a variety of factors.

SITE INVESTIGATIONS

Bid invitations commonly require contractors to visit the site prior to submitting their bids. Construction contracts routinely require the contractor to warrant that it has made a site inspection. One example of this type of clause reads as follows:

The Contractor shall be fully aware of all conditions that might affect successful completion of the work. Before submitting his proposal he shall examine the site and compare the actual conditions on site with those shown or represented by the plans and specifications, and shall determine the existence of all physical features, obstructions above or below the ground, ground elevations, etc., on or adjacent to the site, that might affect the work. No allowance will be made for the Contractor's failure to adequately familiarize himself with all conditions and no claim will be permitted for relief due to unforeseen conditions.

Such a requirement does not automatically nullify the effect of a differing site conditions clause if one is present, and does not necessarily obligate the contractor to discover hidden conditions at its peril. A contractual requirement that the contractor make a site investigation does not obligate bidders to discover hidden subsurface conditions that would not be revealed by a reasonable preaward inspection, *Warren Painting Co., Inc.*, ASBCA No. 18456, 74-2 BCA ¶ 10,834; *Maintenance Eng'rs*, ASBCA No. 17474, 74-2 BCA ¶ 10,760; *John*

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G. Vann v. United States, 190 Ct. Cl. 546, 573 (1970). See also *Warren Bros. Co. v. NYS Thruway Authority*, 309 N.Y.S.2d (1970), *aff'd*, 314 N.E.2d 878 (1974); *L.J. McNulty, Inc. v. Village of Newport*, 187 N.W.2d 616 (1971).

The adequacy of the site investigation is measured by what a reasonable, intelligent contractor, experienced in the particular field of work involved, could be expected to discover – not what a highly trained expert might have found, *Stock & Grove, Inc. v. United States*, 493 F.2d 629 (Ct. Cl. 1974); *Commercial Mechanical Contractors, Inc.*, ASBCA No. 25695, 83-2 BCA ¶ 16,768.

The term “site investigation” is generally interpreted to mean a surface investigation and to not extend to making an independent subsurface investigation, See, e.g., *Condon-Cunningham, Inc. v. Day*, 258 N.E.2d 264 (Ohio Misc. 1969). However, this is not always the case. A contractor is expected to be aware of all information reasonably available to it, as well as all information that could be gained by a “reasonable” site inspection under the circumstances. For example, in *Cook v. Oklahoma Board of Public Affairs*, 736 P.2d 140 (Okla. 1987) the Oklahoma Supreme Court overturned a contractor’s recovery on a differing site conditions claim where the contractor had neglected to attend prebid conferences where site conditions were discussed and only made a cursory drive-through of the site. See also *Mega Construction Co., Inc. v. United States*, 29 Fed. Cl. 396 (1993)

In addition to requiring that a contractor conduct a reasonable site investigation, some bid solicitations also require a contractor to review documents concerning the site conditions that are made available for inspection prior to bidding but are not provided to the contractor in the bid package. If the contractor fails to review the

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available documents before submitting its bid, it may later be precluded from recovering for conditions that are different than expected, but that could have been determined from a review of the documents made available. For example, a contractor's differing site conditions claim was denied on the ground that the contractor had failed to review records of previous dredgings that contained information regarding the nature of the materials to be dredged and that were available to the contractor prior to bidding, *Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576 (Fed. Cir. 1987).

EXCULPATORY CLAUSES

Contracts frequently contain broad exculpatory clauses that disclaim any liability for the accuracy of plans, specifications, borings, and other subsurface data. An example of such a clause reads as follows:

Boring logs and results of other subsurface investigations and tests are available for inspection. Such subsurface information, whether included in the plans, specifications, or otherwise made available to the bidder, was obtained and is intended solely for the owner's design and estimating purposes. This information has been made available only for the convenience of all bidders. Each bidder is solely responsible for all assumptions, deductions, or conclusions which he may make from his examination of this information.

Many courts have held that these clauses do not have the sweeping effect the drafter of the clause may have desired. Courts normally will not allow such clauses to eliminate the relief provided to the contractor by the differing site conditions clause. For example, in *Woodcrest Construction Co. v. United States*, 408 F.2d 406 (Ct. Cl. 1969) the United States Court of Claims allowed a contractor to recover under the changed conditions clause despite the extremely broad exculpatory

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provisions in the contract. The court explained its decision as follows:

The effect of an actual representation is to make the statements of the Government binding upon it, despite exculpatory clauses which do not guarantee the accuracy of a description. . . . Here, although there is no (express) statement which can be made binding upon the Government, there was in effect a description of the site, upon which plaintiff had a right to rely, and by which it was misled. Nor does the exculpatory clause in the instant case absolve the Government, since broad exculpatory clauses . . . cannot be given their full literal reach, and, “do not relieve the defendant of liability for changed conditions as the broad language thereof would seem to indicate.” *Fehlhaber Corp. v. United States*, 151 F. Supp. 817, 825 (Ct. Cl.), *cert. denied*, 355 U.S. 877 (1957) [G]eneral portions of the specifications should not lightly be read to override the Changed Conditions Clause . . . *United Contractors v. United States*, 368 F.2d 585, 598 (Ct. Cl. 1966).

However, in some states, courts have taken a more literal approach in upholding such disclaimers. In Virginia, for example, one court held that a disclaimer concerning subsurface conditions was to be strictly enforced, *McDevitt & Street Co. v. Marriott Corp.*, 713 F. Supp. 906 (E.D. Va. 1989). Other jurisdictions have come to similar conclusions, *Stabler Construction, Inc. v. Commonwealth Dept. of Transportation*, 692 A.2d 1150 (Pa. Cmwlth 1997); *Brown Bros. v. Metropolitan Government of Nashville and Davidson Co.*, 877 S.W.2d 745 (Tenn.Ct.App. 1993).

NOTICE REQUIREMENTS

The purpose of a notice requirement is to alert the owner to the existence of the condition and provide the owner an opportunity to evaluate its potential impact on the project. Such an evaluation may cause the owner to make changes in the design or alter the contractor’s method of performance.

It is always important for a contractor to comply fully with the notice provisions of the contract to the greatest extent possible.

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However, a lack of strict compliance may be excused by the courts. The underlying purposes of the notice requirement may be satisfied by substantial compliance with the terms of the notice requirement, or by the owner's actual knowledge of the condition, or if the owner has suffered no prejudice from the contractor's failure to give notice.

In *Brinderson Corp. v. Hampton Road Sanitation District*, 825 F.2d 41 (4th Cir. 1987), the contractor encountered extremely wet subsurface conditions that it contended differed from the soil conditions presented in the contract documents. However, the contractor failed to give written notice in accordance with the contract until after the wet soils had been disturbed and at least partially removed. An owner's representative was present on-site at the time the unusual conditions were first encountered and inspected the conditions. The court found that the owner had actual knowledge of the conditions and, therefore, the purpose of the notice requirement was satisfied. The court held that the contractor should be allowed to proceed to the merits of its differing site conditions claim, despite the lack of timely written notice.

In *Pat Wagner*, IBCA No. 1612-A-82, 85-2 BCA ¶ 18,103, the contract called for the installation of water meters and additional service lines to an existing water system. After the contractor began work, it realized that the existing lines were copper rather than galvanized steel as indicated by the contract documents. The contractor was forced to tie into the existing system with more expensive copper pipe. Although the contractor failed to provide written notice, the federal government's inspectors were fully aware of the discovery of copper pipe in the existing system. Because the owner was not prejudiced by lack of written notice, recovery was allowed.

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In *Leiden Corp.*, ASBCA No. 26136, 83-2 BCA ¶ 16,612, the board allowed recovery under the differing site conditions clause where the contracting officer had constructive notice of the conditions at the site because actual knowledge of the changed conditions was imputed to the contracting officer's construction representative on-site and thereby to the contracting officer.

RECORD-KEEPING REQUIREMENTS: PROVING DAMAGES

Even when a differing site conditions clause is present in the contract, the contractor still must prove how much the unanticipated condition cost in order to be compensated. The importance of good record-keeping and the level of detail that may be required by a court are illustrated by *Ray D. Lowder, Inc. v. North Carolina State Highway Commission*, 217 S.E.2d 682 (N.C. Ct. App. 1975).

In *Lowder*, the contractor's first job superintendent had kept daily reports showing the progress of the work, the number of men, and the equipment on the job. The second superintendent did not show this information on his daily reports. When the contractor was preparing a differing site conditions claim, it rehired the first superintendent to go over the daily reports and prepare a cost summary.

The court held that this cost summary was inadmissible, and would not let the contractor use it to prove damages. Further, the court held that the daily reports themselves were incomplete and unreliable because even the ones that the first superintendent had filled out did not show how many hours each machine was in operation, whether any machines were broken down for part of the day, or even if any had been used that day at all.

Differing Site Conditions



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The *Lowder* case emphatically demonstrates the need for complete, detailed, and accurate cost records. It is almost certain that, because of the differing site conditions it encountered, the contractor in *Lowder* spent a great deal more money than it was able to prove with reasonable certainty under the criteria set down by that particular court. A complete and detailed record-keeping system would have provided the very proof that the court found lacking. Remember that the law does not grant recovery for “possible” losses; it requires “reasonable certainty” as to amount.

BID DOCUMENT CHECKLIST

- Does the contract contain a "Differing Site Conditions" or "Changed Conditions" clause?
- Does it cover "concealed conditions," as well as "subsurface conditions"?
- What are the contract's notice and cost documentation requirements?
- Are the soil borings and any geotechnical reports part of the Contract Documents?
- Are the soil borings and any geotechnical reports expressly excluded from the Contract Documents?

Differing Site Conditions



NOTES

PROJECT SITE RISK ASSESSMENT

Yes	No	?	
_____	_____		1.Has there been an adequate pre-bid site and subsurface investigation?
_____	_____		2.Is there a changed conditions clause in the contract?
_____	_____		3.Do the design documents reflect that environmental permits have been obtained and environmental restrictions observed?
_____	_____		4.Are existing utilities clearly located on design documents?
_____	_____		5.Are there site access restrictions?
_____	_____		6.Have we requested that the owner furnish all site, subsurface and environmental site assessment information available to the owner?
_____	_____		7.Is there any prior history of environmental hazards on or near the site?
_____	_____		8.Have we evaluated the likely impact of conditions effecting the site (e.g., weather, traffic, work restrictions, storage problems, etc.)?

NOTE: All **negative** responses to any of the qualification questions above must be reviewed, and signed off on, by _____
_____ (Senior [Risk] Management) prior to bid or proposed submission. If the question (?) column is checked, that uncertainty must be resolved by Senior Management prior to bid or proposal submission.

Differing Site Conditions



NOTES

SITE INVESTIGATION RECORD

Project: _____ Inspection Date: _____

Location: _____ Inspected By: _____

On this date, the undersigned inspected the project site and found the following:

- _____ 1. We thoroughly viewed the proposed site of the project, looking at all visible conditions at the site and surrounding the site.
- _____ 2. We made a (photographic) (video) record of the site conditions.
- _____ 3. We saw no unusual site or subsurface conditions which might affect our work.
- _____ 4. We saw no site conditions which appear to affect access to our work.
- _____ 5. We saw no site conditions which threaten to impact our labor productivity.
- _____ 6. The site of the project (does) (does not) afford suitable storage area.
- _____ 7. The project site (does) (does not) appear particularly susceptible to the impact of adverse weather.
- _____ 8. We verified the existence and accessibility of the following utilities:
 - _____ a. temporary power
 - _____ b. conditioned air
 - _____ c. water
 - _____ d. temporary lighting
- _____ 9. We (will) (will not) need to provide toilet facilities.
- _____ 10. We (will) (will not) need to provide a job trailer.
- _____ 11. There (is) (is not) adequate parking on site.
- _____ 12. We made a photographic record of any and all notices (e.g., permits, notices of commencement, etc.) posted at the site.

Differing Site Conditions



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- _____ 13. We did not see any evidence of environmental hazards.
- _____ 14. We (did) (did not) make a thorough investigation of any pre-existing construction.
- _____ 15. We (did not) request as-built drawings for any pre-existing construction.
- _____ 16. Our request for as-built drawings (was) (was not) granted.
- _____ 17. We (did) (did not) review all available geotechnical information.
- _____ 18. We (did) (did not) obtain records of typical climatic conditions at the site.
- _____ 19. We (did) (did not) request scheduling information showing the sequence and timing of all trade work.

Unusual site or subsurface conditions observed:

The following existing structures or work in place was observed:

Geotechnical information, reports, surveys or analyses furnished or requested:

Discussions during or following the site investigation:

The photographic/video record of the site visit is maintained:

This report completed by: _____