

WILL A DUTY TO INSPECT THE SITE ADVERSELY AFFECT A DIFFERING SITE CONDITIONS CLAIM?



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Will a Duty to Inspect the Site Adversely Affect a Differing Site Conditions Claim?

Last month, we discussed why utility contractors should insist on the inclusion of a differing site (changed) conditions (“DSC”) clause in their contracts. A DSC clause allocates to the owner the risk that actual physical conditions at the site are materially different from the expected physical conditions at the site, along with establishing a procedure for adjusting the contract price and time for DSCs. Absent a properly drafted DSC clause, the doctrine of sanctity of contract normally places the risk on the contractor if the work is more difficult, costly, or time consuming than expected due to a DSC.

DSCs fall into two categories: Type I, which are physical conditions encountered during the performance of the work that differ materially from those indicated in the contract documents, and Type II, which are unknown physical conditions encountered during the performance of the work that differ materially from the conditions normally encountered when performing such work.[\[1\]](#)

An owner is normally not liable to a contractor for a Type I DSC claim unless “the conditions actually encountered were reasonably unforeseeable based on all the information available to the contractor at the time of bidding.” An owner is normally not liable to a contractor for a Type II DSC claim unless “the contractor could not reasonably have anticipated the actual condition at the site from inspection or general experience.” These standards generally obligate a contractor to conduct a reasonable inspection of the site and other available

information at the time of bidding, even if the contract does not expressly require such an inspection.

In addition to the general obligation to conduct a reasonable inspection, most construction contracts expressly require that the contractor represent that it conducted an inspection of the site and other available information before contracting. For instance, a typical site inspection clause represents that "...the Contractor has visited the site, become generally familiar with the local conditions under which the Work is to be performed and correlated personal observations with requirements of the Contract Documents."[\[2\]](#)

Reasonableness of a site inspection is based upon the scope, level, and amount of inspection that an ordinary, prudent contractor doing the same type of work would conduct under the same or similar circumstances. A contractor is not held to the standard of an expert in any particular discipline, such as a geologist or engineer. Factors such as the time available to bidders, access, and other relevant facts and circumstances will affect whether a particular inspection is deemed reasonable.[\[3\]](#)

In addition to visiting the site, a contractor is responsible for considering all relevant information reasonably available to the contractor. For example, the Court in *Cook v. Oklahoma Board of Public Affairs*[\[4\]](#) held that a contractor's inspection was not reasonable because it failed to attend pre-bid conferences where site conditions were discussed, and it only made a hasty drive-through of the site.

A reasonable inspection also requires that the contractor understand and correlate the requirements of the contract documents with its observations of the site and other information. The subcontractor

in *Hoffman Constr. Co.*[\[5\]](#) learned this lesson the hard way when it was denied recovery on a Type I DSC claim to recover the cost to remove 12,000 feet of hidden ductwork not shown in the plans for a renovation project. The specifications required the removal of all ductwork. The subcontractor visited the site, but it did not review the original plans for the building, which were available upon request. The court held that a reasonable, prudent contractor would have discovered the ductwork upon reviewing the original plans, and observing the ceiling grilles and registers connected to the ductwork during a site visit, which were in plain sight.

Interestingly, a contractor's failure to conduct an inspection will not, in all cases, preclude a contractor from recovering on a DSC claim. To recover on a DSC claim, the contractor must show, "...that the conditions actually encountered were reasonably unforeseeable based on all the information available to the contractor at the time of bidding," which includes information the contractor would have gained by visiting the site.[\[6\]](#) Thus, a contractor can recover on a DSC claim, even if it failed to conduct an inspection, by showing that an ordinary, prudent contractor would not have discovered the DSC upon a reasonable inspection.[\[7\]](#)

Contractors should be aware that some owners include both a DSC clause and a disclaimer (avoidance clause) in their contracts in an attempt to narrow or even eliminate their risk for DSCs. These avoidance clauses range from requiring an overly broad inspection to exculpating the owner from any liability for DSCs. A typical avoidance clause would provide as follows:

Any representation in the Contract Documents purporting to indicate the physical conditions at the Site, including sub-surface and latent

conditions, is for Contractor's information only. In no event does Owner warrant the accuracy of such indications or that the actual physical conditions encountered will not vary from those indicated. All risk of differing subsurface conditions shall be borne solely by Contractor.

This type of clause could be interpreted to either narrow or conflict with a DSC clause. To be enforceable, avoidance clauses must be clear and unambiguous. An avoidance clause that conflicts with a DSC to such an extent that it completely precludes recovery under a DSC clause is normally found unenforceable.

The Court in *Metcalf Constr. Co., Inc. v. United States*[\[8\]](#) explained that a DSC clause "... exists precisely in order to 'take at least some of the gamble on subsurface conditions out of bidding': instead of requiring high prices that must insure against the risks inherent in unavoidably limited pre-bid knowledge, the provision allows the parties to deal with actual subsurface conditions once, when work begins, 'more accurate' information about them can reasonably be uncovered. For that reason, even requirements for pre-bid inspection by the contractor have been interpreted cautiously regarding conditions that are hard to identify accurately before work begins, so that 'the duty to make an inspection of the site does not negate the changed conditions clause by putting the contractor at peril to discover hidden subsurface conditions or those beyond the limits of an inspection appropriate to the time available'." [\[9\]](#)

Similarly, the Court in *Foster Construction C.A. v. United States*, held that "[e]ven unmistakable contract language in which the Government seeks to disclaim responsibility for drill hole data does not lessen the right of reliance. The decisions reject, as in conflict with the changed

conditions clause, a 'standard mandatory clause of broad application,' the variety of such disclaimers of responsibility – that the logs are not guaranteed, not representations, that the bidder is urged to draw their own conclusions." [\[10\]](#)

The analysis undertaken by the courts in *Metcalf* and *Foster* will not apply if the owner includes an avoidance clause in a contract without a DSC clause. In such an event, a court should enforce the avoidance clause as written, so long as it is clear and unambiguous, and not unlawful or a violation of public policy.

In sum, contractors should carefully review DSC, site inspection, and avoidance clauses in their contracts, attend pre-bid meetings, and review all information that is either provided or made available to the contractor before submitting a bid, or they run the risk that they may be responsible for DSCs.

[\[1\]](#) Unforeseen hazardous materials could be considered a third category of DSC, as most form contracts treat the discovery of hazardous materials different from the discovery of a Type 1 or Type 2 DSC. See, e.g., AIA Document A201-2007, §10.3; ConsensusDocs 200-2011 (revised July 2012), §3.13; DBIA Document no. 535-201, §4.1; EJCDC Document C-700-2013, §5.06.

[\[2\]](#) Section 3.2.1, AIA Document A201-2007.

[\[3\]](#) See, e.g., *Robert E. McKee, Inc. v. City of Atlanta*, 414 F. Supp. 957 (N.D. Ga. 1976) (bidder did not have sufficient time or access to conduct an adequate inspection); *W.F. MaGann Corp. v. Diamond Mfg. Co., Inc.*, 580 F. Supp. 1299, 1313-14 (1984) (insufficient time to perform inspection).

[\[4\]](#) 736 P.2d 140 (OK 1987)

[\[5\]](#) 40 Fed. Cl. 184.

[\[6\]](#) *Stuyvesant Dredging Co. v. United States*, 834 F.2d 1576, 1581 (Fed. Cir. 1987)

[\[7\]](#) See, e.g., *Top Painting Co., Inc.*, ASBCA No. 57333, 12-1 BCA 35,020 (2012) (contractor denied recovery for a differing site condition to paint certain equipment because a site visit would have disclosed that substantial prep work was required); *D&M Grading, Inc. v. Dept. of Agriculture*, CBCA No. 2625, 12-1 BCA 35,021 (2012) (contractor denied recovery for a DSC claim because a site visit would have indicated that the roads it was required to maintain were in poor shape); *Orlosky, Inc. v. United States*, 64 Fed. Cl. 63, (2005).

[\[8\]](#) See, e.g., *Metcalf Constr. Co., Inc. v. United States*, 742 F.3d 984 (Fed. Cir. 2014).

[\[9\]](#) *Id.* (citing *Foster Constr. C.A. & Williams Bros. Co. v. United States*, 193 Ct.Cl. 587, 435 F.2d 873, 887-88 (Ct.Cl.1970)); *H.B. Mac, Inc. v. United States*, 153 F.3d 1338, 1343 (Fed.Cir.1998); *Hollerbach v. United States*, 233 U.S. 165, 170-71, 49 Ct.Cl. 686, 34 S.Ct. 553, 58 L.Ed. 898 (1914).

[\[10\]](#) *Foster Construction C.A. v. United States*, 435 F.2d 873, 888 (Ct. Cl. 1970). See also *Woodcrest Constr. Co. v. United States*, 408 F.2d 395 (Ct. Cl. 1969) ("... 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... General portions of the specifications should not lightly be read to override the Change Conditions Clause...").

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