TECHNICAL ARTICLE

Changing Trend in Risk Allocation — Differing Site Conditions

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Abstract: This article has been prepared by the Navigant Construction Forum™ authors in order to explore a series of court and Board of Contract Appeals decisions concerning coverage of the differing site conditions clause. While preparing an earlier paper entitled, *Trends in Construction Claims and Disputes* [1], the authors noted that there have been a series of decisions issued by courts and Boards of Contract Appeals over time which seem to be increasing contractor risk under the differing site conditions clause. This article explores such decisions and highlights the risks for contractors concerning differing site condition claims. The article also draws conclusions and sets forth some practical recommendations for both owners and contractors in dealing with the risks of differing site conditions. This article was first presented at the 2015 AACE Annual Meeting in Las Vegas as CDR.1868.

The Differing Site Conditions clause is one of the oldest clauses used in construction contracts, having been created by the U.S. Federal government in 1926. It is generally accepted that the object of the clause is to transfer the risk of latent site conditions to the owner, thus enticing contractors to reduce their contingency cost at the time of bid. The promise of the clause is that if the contractor encounters a "materially different" condition during the execution of the work, the owner will compensate the contractor for the resulting cost and/or time. For nearly 90 years this standard clause has been used widely in both public and private contracts. Most practitioners in the construction industry think they know what the clause means and how it operates. But, in the words of one of the mid-20th century "deans" of construction law, Max E. Greenberg, "It ain't necessarily so!" [2] Over the years, the courts and Boards of Contract Appeals have been slowly changing the interpretation of risk allocation under the clause. A series of court and board cases have *increased* the contractor's risk concerning differing site conditions.

This article discusses the definition of a differing site condition and why there is a need for a Differing Site Conditions clause in a construction contract. The article sets forth the history and purpose of the clause, examines the modern Differing Site Conditions clauses, and provides a discussion of the terms "indications" and "material difference," as well as an overview of the impact of contract disclaimers related to differing site conditions. The article explores what conditions are generally *not* covered by the clause and conditions that are *sometimes* included within the scope of the clause.

This article goes on to list the six part test for a successful differing site condition claim and also lists five additional contractual requirements contractors must comply with in order to prevail. The contractor's duty to continue work is also examined.

A brief discussion of the "reverse differing site condition claim"—an owner claim that may be asserted against a contractor seeking recovery of funds from the contractor when they encounter conditions "materially better than anticipated." The article goes on to explore a number of court and Board of Contract Appeal decisions that appear to be slowly eroding the traditional risk allocation commonly accepted under the Differing Site Conditions clause, along with lessons learned from each case. Finally, the article provides a list of practical recommendations for both owners and contractors dealing with the risks of differing site conditions.

The purpose of the article is to summarize these legal decisions and reach a conclusion on whether they represent a new trend in the scope of coverage concerning differing site condition claims. If so, this trend should be of concern to many in the industry.

Definition of a Differing Site Condition

Differing site conditions (also often referred to as changed conditions or unknown conditions) are generally defined as latent (i.e., hidden) physical conditions at the project site which differ from those conditions identified to the contractor during the bidding period. Put another way:

> "A *differing site condition* (also called a *changed condition*) is a physical condition other than the weather, climate, or another act of God discovered on or affecting a construction site that differs in some material respect from what reasonably was anticipated." [3]

> "A differing site—or changed condition as they are sometimes called—is a physical condition encountered in performing the work that was not visible and not known to exist at the time of bidding and that is materially different from the condition believed to exist at the time of bidding." [4]

In the first instance, the difficulty with encountering a differing site condition is that it was not anticipated during bid preparation. As such it was neither planned for nor budgeted. Accordingly, there is nothing in the project plan, the construction schedule, or the project budget to deal with this problem other than typical bid and schedule contingencies. Second, since most differing site conditions involve underground conditions and since underground work most often occurs at the outset of a project, encounters with differing site conditions have a high potential to delay the entire project.

The Concept of Contractual Relief

The concept of contractual relief is frequently employed in construction contracts. Generally, contractual relief involves an assignment of risk to one of the parties to the contract. Such contract clauses specifically identify what risk events are assigned under the contract; to which party the risk is assigned; the conditions under which the other party is entitled to relief; and what steps the affected party must take to activate the contractual relief promised. Thus, if such an event arises and the affected party complies with the terms and conditions of the contract, the party to which the risk is assigned is obligated to compensate the other party for the resulting damages—time and/or cost. The Differing Site Conditions clause promises contractual relief in the event a differing site condition is encountered and the contractor complies with the requirements of the clause.

What Is the Purpose of A Differing Site Conditions Clause? Why Do We Need A Differing Site Conditions Clause In A Construction Contract?

One author outlined the need for a Differing Site Conditions clause in the following manner [5]:

> "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. Ideally, the corollary benefit to the owner is that the 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.' [6]"

The question arises, why do owners deliberately assign the risk of latent site conditions to themselves? Why not just leave the risk with the contractor? It is because when contractors are faced with unknown conditions they are unable to properly estimate the cost, leaving contractors with only two possible choices during the bidding period. First, if they deem the risk too high, they may walk away from the project by not submitting a bid. While this protects the contractor, it is of little help to the project owner if "good" contractors decide not to bid, leaving the project to less experienced or "less savvy" contractors. Second, if the contractor decides to accept the risk of latent site conditions, the only way they can possibly budget for this risk is to add a contingency [7] (sometimes a substantial contingency) to their bid. Again, while this may protect the contractor in the event they encounter a differing site condition (assuming that the cost impact of the differing site condition is less than the amount of the contingency) it does not help the owner as the initial bid prices are higher than they would have been absent the contingency for differing site conditions.

In order to avoid either situation, owners frequently incorporate a Differing Site Conditions clause into their contract documents, assigning to themselves the risk of encounters with unanticipated site conditions. The theory underlying this assumption of risk is that if the contract contains a Differing Site Conditions clause the bidders will reduce that portion of their bid contingency centered on the risk of latent site conditions, thus reducing their bids. This results in a lower contract value at the outset of the project, leaving the owner to pay only the actual, documented cost of encounters with latent site conditions via change order or contract modification. If no differing site conditions are encountered, the owner pays no extra costs.

In discussing this risk assumption by the project owner, one author noted the following.

> "…for this risk allocation to apply in the 'real world,' the law

must be clear as to the precise risk that is shifted to the owner. As stated by one court,

> 'In practice … a contractor may not always accurately anticipate the rather esoterical legal standard by which the contract representations will be judged. As a result, what a contractor might have thought were reliable and viable affirmative contract indications/representations … could, as here, turn out to be no representations at all. As a result, the contractor in such case is left both without a substantive remedy and also without having noted and provided for such a contingency amount in its bid.' [8]

Thus, unless the "esoterical legal standards" become more explicit, a rational contractor may still include a contingency for differing site conditions in its bid or, alternatively, may include no contingency on the mistaken assumption that the owner bears all risks associated with unanticipated site conditions. In either event, the purpose of the DSC clause would be defeated." [9]

Therefore, to keep the "good" contractors in the chase for a project; to make the risk allocation clear; to establish standards for measuring when the risk allocation clause will operate; and to reduce bid costs, a thorough and well crafted Differing Site Conditions clause is necessary.

History of Differing Site Condition Clauses

Traditionally, common law placed all risks of unknown, unanticipated site conditions on contractors. The practical result of this traditional risk assignment follows:

> "If contractor were required to assume the full risk of increased costs of unfavorable and unforeseeable physical site conditions, they would have to choose between (1) undertaking a costly pre-bid analysis of subsurface site conditions; or, (2) including sizable contingencies in their bids. Either alternative would prove unnecessarily costly to the owner and the contractor in the long run." [10]

The U.S. Department of Transportation, Federal Highway Administration, summarized the history of the Differing Site Conditions clause in U.S. Federal contracts in the *Geotechnical Engineering Notebook, Geotechnical Guideline No. 15, Geotechnical "Differing Site Conditions"* [11]. This document notes that in 1926, the Federal Board of Contracts and Adjustments started requiring a Differing Site Conditions clause in all federal construction contracts. The document notes that this board initiated the requirement, "…to eliminate the contingency factor for subsurface conditions and to limit the latent cost incurred by contractors for pre-bid subsurface explorations." This document noted that the original Differing Site Conditions clause included only conditions that differed materially from indicated conditions. However, in 1935, the clause was modified to include, "…situations where the contract is silent regarding subsurface conditions but the contractor encounters unforeseen, unusual conditions which differ materially from conditions ordinarily encountered." (Underscoring provided.)

Another author noted that the U.S. Federal government began using a Changed Conditions clause widely in 1927, on all firm fixed price contracts in order to eliminate bid contingencies related to subsurface conditions [12]. This author noted that advocates of the Changed Conditions clause argued the use of the clause would eliminate the "element of gambling" from federal construction contracts. Without this clause, they claimed, the contractor would, "…presumably include in every bid a contingency amount based on a worst case scenario, resulting in increased bid prices." The author cited a 1942 Court of Claims case, *Ruff v. United States* [13] wherein the court stated that:

> "…the alternative is that the bidders must, in order to be safe, set their estimates on the basis of the worst possible conditions that might be encountered."

The most recent change to the U.S. Federal Differing Site Conditions clause was made in 1963, when the title of the clause was modified from Changed Conditions to Differing Site Conditions. Otherwise, this contract clause has remained virtually the same since the 1935 modification.

Modern Differing Site Conditions Clauses

As noted earlier, the original 1926 Differing Site Conditions clause included only one type of differing site condition, "…conditions materially different from those indicated." The 1935 version of the clause included a second type of differing site condition, "… [where] the contractor encounters unforeseen, unusual conditions which differ materially from conditions ordinarily encountered. [14]" These two conditions became known colloquially as Type 1 and Type 2 differing site conditions. More recently, many Differing Site Conditions clauses have added a Type 3 differing site condition that included encounters with hazardous and/or toxic waste not reported to be or identified in any site conditions report provided during the bidding period.

Most modern standard form contracts in the U.S. contain some form of a Differing Site Conditions clause. And, most of these clauses contain both a Type 1 and a Type 2 differing site condition. Type 1 differing condition claims are more frequently asserted because most

contracts contain information on or representations concerning site conditions. Type 2 differing site condition claims are certainly possible but considerably less frequent than Type 1 claims as Type 2 differing site conditions are not predicated on a material difference between pre-bid information and actual conditions.

Although the Differing Site Conditions clause was created by the federal government, it has been widely adopted in the U.S. construction industry. For example, the standard contract documents issued by the American Institute of Architects, ConsensusDocs, the Construction Management Association of America, the Design Build Institute of America, and the Engineers Joint Contract Documents Committee all resemble each other closely when describing the conditions included as follows.

Type 1 Differing Site Conditions

Type 1 differing site conditions typically refer to situations where the contractor encounters unanticipated physical conditions in the field that are "materially" (i.e., substantially or considerably) different than those identified in the owner provided documents available during the bidding period. The description of a Type 1 differing site condition is fairly uniform across all of the standard contract documents as follows:

- The Federal Acquisition Regulation, the American Institute of Architects and ConsensusDocs all use the following language, "…subsurface or latent physical conditions at the site which differ materially from those indicated in this contract…" [15]
- The Construction Management Association of America describes the Type 1 differing site condition in the following manner, "Any physical condition uncovered or revealed at the site differs materially from that indicated or referred to in the contract documents…" [16]
- The Design Build Institute of America describes this type of differing site condition as, "Concealed or latent physical conditions or subsurface conditions at the site that (i) materially differ from the conditions indicated in the contract documents…" [17]
- The Engineers Joint Contract Documents Committee defines a Type 1 differing site condition as, "…any subsurface or physical condition that is uncovered or revealed either…differs materially from that shown or indicated in the contract documents…" [18]

Type 2 Differing Site Conditions

Type 2 differing site conditions are generally described at unknown physical conditions at the site of an unusual and unpredictable nature. The U.S. Federal Highway Administration describes Type 2 differing site conditions in their *Geotechnical Engineering Notebook* as, "…situations where the contract is silent regarding subsurface conditions but the contractor encounters unforeseen, unusual conditions which differ materially from conditions ordinarily encountered." [19] (Underscoring provided.)

The contractual language describing a Type 2 differing site condition is, again, fairly consistent across all of the standard contract documents as follows.

- The Federal Acquisition Regulation describes a Type 2 differing site condition as, "… 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 in the contract." [20]
- The American Institute of Architects documents describe a Type 2 differing site condition in nearly identical language, as, "… unknown physical conditions of an unusual nature that differ materially from those ordinarily recognized as inherent in construction activities of the character provided in the contract documents." [21]
- ConsensusDocs describe a Type 2 differing site condition similarly as, "… unusual and unknown physical conditions materially different from conditions ordinarily encountered and generally recognized as inherent in work provided for in the contract documents." [22]
- The Construction Management Association of America document differ in great degree when it comes to a Type 2 differing site condition recognizing only, "… an underground facility…not shown or indicated in the contract documents and was not a facility of which a contractor could reasonably have been expected to have been aware and the underground facility is uncovered or revealed at or contiguous to the site…" [23]
- The Design Build Institute of America documents describe Type 2 differing site conditions similar to the Federal Acquisition Regulation and the American Institute of Architects document by stating, —"… are of an unusual nature differing materially from the conditions ordinarily encountered and generally recognized as inherent in work…" [24]
- The EJCDC documents describe a Type 2 differing site condition similarly, "… 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." [25]

Type 3 Differing Site Conditions

Type 3 differing site conditions are relatively new in the construction industry. Some contract documents specifically include encounters with previously unidentified "hazardous waste" materials as a type of differing site condition different than the classic

Type 1 and Type 2 differing site conditions. As with Type 1 and Type 2 conditions clauses, a contract that incorporates a Type 3 differing site condition clause assigns the risk of encounters with unanticipated hazardous waste to the owner, unless the hazardous material is material brought on site by the contractor or one of their subcontractors. Since Type 3 differing site conditions language is relatively new, it is not nearly as standardized as the language of Type 1 and Type 2 language. Some examples of Type 3 contract clauses include:

- The Los Angeles County Metropolitan Transportation Authority describes Type 3 differing conditions as, "Unidentified substances that design builder believes may be hazardous materials that are required to be removed to a Class I, Class II, or Class III disposal site in accordance with governmental rules. Hazardous materials that are included in the work, as identified in the contract for design builder to handle, mitigate, and remediate, shall not be construed in any way to be a Type 3 condition." [26]
- Similarly, the *Standard Specifications for Public Works Construction* (the *Greenbook*) widely used by public works entities throughout Southern California describes a Type 3 differing site condition as, "Materials differing from that represented in the contract documents which the contractor believes may be hazardous waste, as defined in *Section 25117 of the Health and Safety Code*, that is required to be removed to a Class I, Class II, or Class III disposal site in accordance with the provisions of existing law." [27]

While neither the Federal Acquisition Regulations nor the Construction Management Association of America contract documents (2004 edition) have been modified to include a Type 3 differing site condition, other standard contract documents have, in one form or another, including the following:

- The American Institute of Architects documents include a form of Type 3 conditions as, "… a hazardous material or substance not addressed in the contract documents and if reasonable precautions will be inadequate to prevent foreseeable bodily injury or death to persons resulting from a material or substance, including but not limited to asbestos or polychlorinated biphenyl…" [28]
- ConsensusDocs deals with the Type 3 differing conditions as, "A hazardous material is any substance or material identified now or in the future as hazardous under laws, or other substance or material that may be considered hazardous or otherwise subject to statutory or regulatory requirement governing handling, disposal, or cleanup. The contractor shall not be obligated to commence or continue work until any hazardous material discovered at the worksite has been removed, rendered, or determined to be harmless by the owner…" [29]
- The Design Build Institute of America addresses the issue of a Type 3 differing conditions very succinctly, "Unless otherwise expressly provided in the contract documents to be part of the work, design builder is not responsible for any hazardous conditions encountered at the site." [30]
- The EJCDC contract documents address the Type 3 differing site condition with the clause, "The contractor shall not be responsible for any hazardous environmental condition uncovered or revealed at the site which was not shown or indicated in drawings or specifications or identified in the contract documents to be within the scope of the work." [31]

Conditions Typically Covered By Differing Site Condition Clauses

Modern Differing Site Condition clauses generally cover unforeseen, hidden or latent physical conditions at the work site, not indicated in or materially different from the information available at bid. The three key elements at the outset of a differing site condition claim are the following.

- **Unforeseeability**—The contractor must be able to demonstrate that the condition encountered was unforeseeable based on all information available at the time of bidding. The unforeseeability test extends to site investigations also. That is, provided the owner offered a site investigation prior to bidding, the contractor making this sort of claim will also have to demonstrate that the condition encountered was unforeseeable even during the pre-bid site walk. However, "[i]n interpreting site investigation clauses, the term '*site*' is often interpreted to mean, essentially, '*sight*', and to not extend to requiring an independent subsurface investigation..." [32] Basically, the condition encountered must not have been anticipated by the contractor from a study of the contract, inspection of the site, and their general experience. [33]
- **Physical Condition**—The condition encountered must be a physical condition. The condition may be either a natural condition (i.e., change in soil characteristics, encountering rock, etc.) or a manmade condition (i.e., unidentified utilities, buried structures, etc.). In any event, the condition complained of cannot be an economic, political, governmental or business condition (i.e., shortage of qualified craft labor, inability to get equipment or materials to the site, increased material costs or ordinances that restrict performance of the work, etc.). [34]

- **At the Site**—The condition complained of must be at the project site. Typically, the "site" is the location where the project is being constructed. However, if the owner provides a remote lay down area or if the owner designates a borrow pit several miles from the site then the Differing Site Conditions clause will cover differing site conditions at these remote locations because the owner's actions incorporated these locations into the term "site" for the purposes of the clause. [35]

Based in U.S. case law [36] , assuming the contractor complies with the terms of the clause, the conditions shown in Table 1 are generally covered by the Differing Site Conditions clause.

What Are Indications?

Indications, for the purposes of the Differing Site Condition clause, may be either expressed or implied indications. [37] Express indications are more easily demonstrated than implied indications. Examples of express indications include:

- Rock at specific elevations
- Perched water
- Specific soil types
- Utility locations shown on drawings
- Etc.

With respect to express indications one court commented that:

> "There must be reasonably plain or positive indications in the bid information or contract documents that such subsurface conditions would be otherwise than actually found." [38]

Concerning express indications, courts have noted that contractors should not only be able to compare express indications with actual conditions, but also with all reasonable inferences and implications that can be drawn from the information provided. One court noted that it is not required that express indications be:

> "… explicit or specific, but only enough to impress or lull a reasonable bidder not to expect the adverse conditions actually encountered." [39]

Implied indications are indications that are uncertain or ambiguous. The contractor claiming an implied indication must be able to demonstrate that the indication was reasonably inferable from the contract documents, upon which a reasonable contractor can be expected to rely. Basically, the board concluded that an indication need not be an affirmative statement or representation, that it may be proven by inferences or implications. The board went on to state the following:

> "The causes of an erroneous indication in the contract – whether simple error, negligence or other – are no longer important. An 'indication' may be proven, moreover, by inferences and implications which need not meet the test for a 'misrepresentation' or 'representation,' concepts which have a long common law history associated with fraud." [40]

One commentator concluded that it is sufficient to justify relief if indications concerning expected conditions at the project site can be established from reasonable inferences and implications that can be drawn from the contact documents [41]. Based upon this approach to the issue of implied indications, boards and courts may look for design requirements that cannot be met or construction methods that cannot be employed because of the conditions encountered [42]. Or, lack of detail in the description of the condition referenced in the contract documents may be found to imply a certain condition exists when, in actuality, the condition does not exist [43].

Soil bearing capacity and unstable soils	Unsuitable fill
Rocks, boulders, debris and other subsurface obstructions	Unanticipated water conditions, perched water, artesian water
Groundwater and subsurface water	Undisclosed concrete piles
Failure of designated borrow pits or quarry sites to produce	Inaccurate quantities of materials or substances to be removed
Undisclosed utilities and structures	Undisclosed ductwork
Archeological and paleontological sites	Multiple roofs to be removed
Endangered species	Thickness of a concrete floor
Hazardous wastes	Excessive, large subsurface boulders
Incorrect disposal site area	Inaccurate rock elevations
Inaccurate borings	Unanticipated weathering of rock
Inaccurate moisture retention qualities	Undisclosed conduits in floors or walls
Hard or cemented soils	Limitations on site access

Figure 1 – Conditions Generally Covered by the Differing Site Conditions Clause

What is a Material Difference?

The term "material difference" is a term of the legal art. One cannot look in *Black's Law Dictionary* under "M" for material difference and find a standard definition. The term "material" is defined as, "Important; … having influence or effect…[44]" As such, to determine if a "material difference" has been encountered for the purposes of the Differing Site Conditions clause requires a situation specific analysis. It is entirely dependent upon the facts of each such encounter. Each individual claim of material difference must be examined from the perspective of whether the condition encountered had, or will have, a substantial impact on the contractor's work as well as the time and cost of the work.

One author noted the following when discussing what constitutes a material difference:

> "Materiality usually turns upon the unique facts existing on the particular job. Facts that often bear on the question of materiality are: (a) differences in the quality of substances encountered; (b) differences in the quantity of work required as a result of the condition; (c) changes in the construction techniques required in order to deal with the condition. Regardless of whether the word 'material' appears in the differing site conditions clause, the difference must be material to invoke the clause or for denial of the claim to amount to a breach of contract. (*Murray's Iron Works, Inc. v. Boyce* [2008] 158 CA 4th 1279, 1298). [45]"

Based on the above, it appears that the boards and courts have been very reluctant to define the term "material difference" preferring, instead, to perform a case by case analysis. Generally, decisions simply declare whether or not the claimed condition is materially different or not without giving any reason. What is clear, however, is that a contractor has an easier job of demonstrating a material difference if the claim is based on a Type 1 differing site condition. In this situation, the contractor can compare actual conditions with those indicated in the bidding documents—both expressed and implied. If the claim is a Type 2 differing site condition, the burden of proving the material difference is substantially greater. The contractor will first have to prove what conditions they anticipated at the time of bidding and why this was a reasonable expectation, as Type 2 claims are typically filed in the absence of any owner provided information. Next, the contractor will have to document the conditions actually encountered. Finally, the contractor will have to be able to articulate and demonstrate the material difference between the two conditions.

The Impact of Contract Disclaimers

As the Differing Site Conditions clause became more common the number of differing site condition, or changed condition, claims grew. Owners began to take defensive actions to shield themselves from differing site condition claims. Amongst these actions were:

- Site investigation clauses
- Unit priced contracts declaring some aspects to the work "incidental" to placement of the work
- Contractual disclaimers

Examples of disclaimers follow:

- 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, deduction, or conclusions which he/she may make from an examination of this information.
- Some drawings of some of the existing conditions are available for examination at [another location]. These drawings are for information only and will not be part of the contract documents. The quantity, quality, completeness, accuracy and availability of these drawings are not guaranteed. Prospective bidders shall telephone…for an appointment to examine drawings of the existing conditions.
- The owner makes no representation and denies any responsibility for the accuracy of any subsurface data furnished and expects each bidder to satisfy itself as to the character, quantity, and quality of subsurface materials to be encountered.
- The subsurface data furnished to bidders does not constitute a part of the contract and is furnished solely for information. Bidders must make their own investigations as to subsurface conditions and no claim for additional compensation will be allowed regardless of the subsurface conditions actually encountered.

The obvious purpose of such disclaimers is to insulate owners from differing site condition claims. That is, owners employing such disclaimers attempt to transfer the risk of both unknown site conditions as well as the various representations made in the contract documents to the contractor.

> "Most government contracts contain boilerplate clauses and special conditions which contain disclaimer and exculpatory language intended to relieve the government of liability under certain stated circumstances. If literally applied, they could

frustrate the intended purposes of the Differing Site Conditions clause. [46]"

The authors do not believe that, "most government contracts contain boilerplate clauses" any longer, however in our experience there are still a large number of contracts that do attempt to disclaim responsibility for owner furnished information in one form or another. It has also been shown that boards and courts often refuse to enforce such disclaimers when they are challenged [47].

Boards and courts seem to take the position that owners cannot give with one hand (by including a Differing Site Conditions clause in a contract and reaping the benefit of lower bids) while taking away with the other hand (by trying to disclaim responsibility for information provided and undercutting the contractor's right of reliance on the clause) [48]. Broadly worded, general disclaimers are unlikely to survive a U.S. Federal Board of Contract Appeals or court challenge. An example U.S. Federal Court ruling on broad based disclaimers follows:

> "Even 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." [49]

In another case, centering on a broadly worded exculpatory clause, the court commented:

> "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" [citation omitted] General portions of the specifications should not lightly be read to override the Changed Conditions Clause…" [Citation omitted]" [50]

Conditions Generally Not Included Under the Differing Site Condition Clause

Certain conditions encountered on a construction site, that many contractors characterize as "changed conditions" have been specifically excluded from coverage under the Differing Site Conditions clause by the boards and courts. Typically, such excluded events are deemed to not be 'physical conditions' which is clearly required by the Differing Site Conditions clause. Among the conditions excluded from coverage are the following:

- Weather conditions [51]
- Acts of God – Fires, floods, hurricanes, typhoons, earthquakes, etc. [52]
- Economic, governmental or political conditions [53]
- Delays caused by other contractors [54]
- Acts of the government in its sovereign capacity [55]
- Acts of War [56]
- Acts of third parties [57]
- Labor disputes [58]
- Civil unrest [59]
- Impact of local ordinances [60]

Conditions *Sometimes* Included Under the Differing Site Conditions Clause

The plain language of the Differing Site Conditions clause does not restrict recovery to those conditions that existed prior to bid submittal. However, the Armed Services Board of Contract Appeals has interpreted the clause to cover only those conditions which pre-existed the time of bidding [61]. Other boards and courts have accepted this limitation likewise.

There are, however, at least three situations where post award conditions may, under the proper circumstances, gain coverage under the Differing Site Conditions clause. They are the following:

- **Government Had a Duty to Correct or Prevent the Situation:** In situations where the government had the ability to prevent the pre-existing condition from being damaged or changed to the detriment of the contractor, and failed to do so, then under the theory that the government had a duty not to hinder performance, Boards and Courts have allowed recovery under the clause. [62]
- **Variations in Estimated Quantities:** Typically, construction contracts include a quantity variation clause which provides for an adjustment to contract price in the event a quantity substantially overruns or underruns the estimated quantity carried in the bidding documents. This clause alleviates the need for a contractor to file a quantity variation claims under the Differing Site Conditions clause. There are, however, some exceptions to this statement. If the quantities vary because the contractor encounters an "entirely different job" [63] or there is an unforeseen need for an unusual construction

methodology [64] then the Differing Site Conditions clause may be employed in lieu of the quantity variation clause. If a board or court determines that the owner's estimate was negligently performed [65], or if owner issued change orders substantially increase the estimated quantities [66] again, the Differing Site Conditions clause may override the quantity variation clause when it comes to pricing such variations. Material variations on owner provided quantity estimates may become a Type 1 differing side condition only if they resulted from a differing site condition. [67]

- **In the Absence of a Quantity Variation Clause:** Since the quantity variation clause is intended to work in conjunction with the Differing Site Conditions clause, the Navigant Construction Forum™ believes that if a contractor encounters a material change in estimated quantities and the contract does not include a quantity variation clause, the any such claim for additional costs may be pursued under the Differing Site Conditions clause. In such event, if the owner provided the estimated quantities in the bidding documents, then the claim would be a Type 1 differing site condition. If the owner did not provide any estimated quantities and the contractor was required to analyze the bidding documents to ascertain the estimated quantities, then such a claim would be a Type 2 differing site condition.

Roadmap for a Successful Differing Site Condition Claim – Six Indispensable Elements

The U.S. Court of Claims has established what it calls the "six indispensable elements" for differing site condition claims which creates a road map for contractors pursuing such a claim and is now followed by other boards and courts [68]. These elements follow:

- The contract document affirmatively indicated the subsurface or latent site conditions upon which the contractor's claim is based.
- The contractor must have acted as a reasonable and prudent contractor in interpreting the contract documents.
- The contractor must have reasonably relied upon the indications of subsurface or latent site conditions in the contract documents when preparing their bid.
- The subsurface or latent conditions actually encountered differed materially from the subsurface or latent conditions indicated in the contract documents.
- The actual conditions encountered were reasonably unforeseeable.
- The contractor's claimed excess costs were solely attributable to the materially different subsurface or latent conditions encountered.

Five Additional Contractual Requirements

In addition to the "indispensable elements" outlined by the Court of Claims above, there also are five additional contractual requirements which the contractor must follow in order to successfully pursue a differing site condition claim. Like the above requirements, deviation from any of these contractual contracts may result in the contractor losing their claim. These contractual requirements are the following:

- **Site Investigation** —Most contracts contain a Site Investigation clause stating that the owner expects bidders to visit the site to observe the various conditions which may impact the performance of the work [69]. The Site Visit clause is typically paired with a Site Investigation and Conditions Affecting the Work clause which contains an acknowledgement by the bidders that they did, indeed, visit the site and satisfy themselves as to all site conditions which may affect the work [70]. Contractors who do not visit the site prior to bidding place themselves in serious jeopardy should they be awarded the contract. Additionally, they may learn, to their dismay, that they cannot rely upon the Differing Site Conditions clause to compensate them for situations they would have seen had they visited the site, and therefore unaware of when preparing their bid simply because they did not perform a site visit [71]. That is, the contractor's failure to perform a site visit may negate the contractor's ability to recover under the Differing Site Conditions clause. In looking at this sort of situation the U.S. Court of Claims concluded that 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. [72]" "Information available" includes any and all information the contractor would have gained by making a site visit.
- **Notice to the Owner**—Most Differing Site Conditions clauses require that, "The contractor shall promptly…notify the [owner] in writing of …[73]" Written notice to the owner of a differing site condition is required to give the owner the opportunity to examine the situation to determine whether it is, or is not, a differing site condition. The written notice also provides the owner the opportunity to determine the most cost effective manner in which to deal with the condition encountered. The lack of written notice of a differing

condition deprives the owner of the opportunity to determine the nature and extent of the problem. Thus, from a claims perspective, the owner's position is materially harmed or substantially prejudiced. Recognizing this, boards and courts frequently deny differing site condition claims if it can be shown that the contractor provided no notice to the owner [74]. Thus, the failure to provide prompt written notice may result in the contractor not prevailing with their differing site condition claim [75]. However, if the contractor can demonstrate that the owner had actual knowledge of the conditions encountered in the field, the contractor may be allowed to pursue the claim. Nevertheless, the failure to provide written notice makes it substantially more difficult for the contractor to prove that they are entitled to recover damages under the Differing Site Conditions clause.

- **Stop Work in the Affected Area**—The Federal Differing Site Conditions clause is a self-actuating stop work order [76]. A contractor performing work under a Federal contract, "…shall promptly, and before such conditions are disturbed…" provide notice to the owner. The intent of this requirement is to preserve the condition so that the owner can confirm the condition encountered. Contactors who fail to preserve the alleged differing conditions, allowing the owner to investigate and determine what was actually encountered, are almost guaranteed to lose their claim. They will be unable to prove what condition they actually encountered because they removed "the evidence".
- **Allow the Owner Time to Investigate**—Under the U.S. Federal Differing Site Conditions clause, the owner, upon receipt of written notice, "…shall promptly investigate the conditions… [77]" This requires the contractor to allow the owner sufficient time to investigate the condition. Contractors who file notice of differing conditions but continue work are at serious risk of losing their claim. On the other hand, should the owner take an inordinately long period of time to investigate, they may become liable for an owner caused delay for the delayed investigation plus the damages arising from the differing site condition.
- **Mitigate Damages**—"It is a general principle of the law of contracts that the amount of damages awarded to a non-defaulting party will be measured as though that party had made reasonable efforts to avoid the losses resulting from the default. [78]" Simply put, a contractor who has encountered a differing site condition is not free to spend whatever amount of money they want to spend and expect to recover what was expended. Contractors must act reasonably in overcoming differing conditions in order to reduce the owner's costs. Failure to mitigate damages will not result in the contractor losing their entitlement to the claim but may reduce the amount recovered.

Contractor's Duty to Proceed With Work

Most construction contracts include a clause requiring the contractor to continue working on those portions of the project not impacted by the differing site condition pending the owner's determination of whether the condition encountered was a differing site condition. That is, the contractor cannot suspend all work to await the owner's decision.

U.S. federal contracts (as many others) have a specific clause to this effect:

> "The contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the contracting officer." [79]

The owner, subsequent to their investigation, may direct the contractor to proceed with the work even before reaching a determination on the differing site condition claim. A contractor who fails to diligently pursue the work may face termination for default. [80]

Reverse Differing Site Condition Claims

Although rare, it is possible for an owner to assert a differing site condition against a contractor, presumably for encounters with conditions substantially better than anticipated in the contract documents. This is clearly outlined in the U.S. Federal Differing Site Conditions clause wherein it states:

> "The contracting officer shall promptly investigate the conditions, and if he finds that such conditions do materially so differ and <u>cause an increase or decrease in the contractor's cost of, or the time required for, performance of any part of the work under this contract</u>, whether or not changed as a result of such conditions, <u>an equitable adjustment shall be made and the contract modified in writing accordingly.</u> [81]" (Underscoring provided.)

Litigation concerning reverse differing site condition claims is extremely rare. One of the few reported cases is *AFGO Engineering Corporation* [82] which arose on a project where the contractor had to remove 62 percent less rock than anticipated in the bidding documents. In another case involving a government reverse differing site condition claim against a contractor

the U.S. Court of Federal Claims determined that the government grossly overstated estimated quantities and denied the government's claim as a result. [83]

One of the authors has experience with two reverse differing site condition claims. In both cases, while the owners were able to demonstrate "conditions better than anticipated" it was more cost effective to prosecute the claim in the form of a deductive change order. The authors believe that the lack of reportable cases exists because few owners pay attention to this type of claim and those few that are aware of this claim and encounter such a condition are more likely to pursue the issue as a deductive change rather than a formal claim.

Traditional Understanding of the Differing Site Conditions Clause

After nearly 90 years most people in the construction industry think they understand the Differing Site Conditions clause and how it operates. Most believe that the clause transfers all risk of unforeseeable, latent site conditions to the owner. Most believe that they have an absolute right to rely on information provided with the bidding documents. Most believe that owners are obligated to provide all information at the time of bidding. And, most believe that when a subsurface conditions report is silent concerning water, rock, or other physical conditions, then this indicates that condition is not anticipated. While the authors frequently encounter these expectations, board and court decisions are not necessarily in agreement.

Changing Risk Allocation Concerning Differing Site Conditions

The remainder of this research perspective will examine the outcome of a number of board and court cases centering on differing site condition claims. The authors believe these decisions indicate that boards and courts have a much more nuanced understanding of the Differing Site Conditions clause than most construction industry professionals. The authors have also concluded that there is a trend toward changing the understanding of the risk allocation under this clause.

Contractor Has a Duty to Review Information Made "Available for Inspection

The *Appeal of Bean Stuyvesant LLC* [84] involved a contract where the contractor was required to dredge soil from a confined disposal area, transport the soil via a pipeline and place the material on a beach in order to restore a sea turtle habitat in North Carolina. The contractor encountered conditions they believed were materially different than anticipated and filed a differing site condition claim. The claim was denied by the contracting officer and appealed to the Armed Services Board of Contract Appeals. The bidding documents contained the following notice:

> "Drilling logs of other borings in the vicinity…of the project not provided in Appendix A are available upon request. All requests shall be directed to Ed Dunlop of the Wilmington District Office at (910) 251-4492. The government will not be responsible for any interpretation of or conclusion drawn from the data or information by the contractor. Bidders are expected to examine the site of the work and after examination decide for themselves the character of material."

The board decision stated that the other two bidders requested and received the information from the "other borings" referenced in the contract and did attend the site visit. Bean Stuyvesant did neither. The board ruled against Bean Stuyvesant stating that:

> "Appellant also has not shown that the conditions were reasonably unforeseeable based upon all the information available at the time of bidding. A contractor has the duty to review information that is made available for inspection [85]. …Appellant has not shown that the government disclaimed the accuracy of any of the relevant drilling data. We believe that the data included within the contract and the data made available upon request were part of the universe of relevant information made available to the bidders, which appellant should have considered in order to prepare its bid. Having failed to do so, appellant cannot prove that it reasonably relied upon all contract and contract-related data, as required by the Differing Site Conditions clause. [86]"

In a similar case, *Hunt & Willett, Inc. v. United States* [87] the court indicated that, "… the contractor cannot 'rest content with the materials furnished to him or her; he or she must also refer to other materials which are available and about which he or she is told by the contract documents.'"

- **Lesson Learned (Contractors):** When a bidding document identifies other subsurface conditions reports and/or soil borings are "available upon request", request and review all such information and incorporate the knowledge gained into your bid.
- **Lesson Learned (Owners):** Make certain that the design professionals and geotechnical consultants identify, search out and capture all subsurface conditions reports and boring logs previously done on or near the site and incorporate an appropriate notice of the availability of such additional information in the bidding documents.

Owner Has No Duty to Disclose Information Reasonably Available Through Independent Investigation

North Pacific Erectors, Inc. v. State of Alaska, Department of Administration [88] involved a contract for renovation and asbestos removal of a state office building. The contractor, "…requested additional payment for the asbestos removal, claiming there was a differing site condition that made the project much more labor-intensive than it had expected." The claim was denied at both the project and the agency level. The contractor appealed to the Superior Court who upheld the agency's determination. The contractor appealed to the State Supreme Court asserting that its claim was a valid differing site condition claim and that the state breached its duty to disclose information about the project.

The court decision recorded that North Pacific and their asbestos removal subcontractor neither participated in the pre-bid conference nor made a site visit. Having said this, the court noted:

> "Contractors would not have been able to see the pan deck surface at a site visit, however, because fireproofing was still covering the pan deck at the site."

Earlier, in one of the administrative hearings, the state's hearing officer concluded that the state had an obligation to disclose the condition North Pacific complained about and failed to do so. The officer commented that the Department's Deputy Commissioner:

> "…determined that the department did not have a duty to disclose the site condition, reasoning that it was possible for North Pacific to have obtained the information through site visits or an independent investigation."

The court further noted that the obligation to disclose site information had earlier been ruled upon in the following manner.

> "There are four requirements for establishing when the government has failed in its duty to disclose superior knowledge. First, the contractor undertakes to perform without vital knowledge of a fact that affects performance costs or direction. Second, the government was aware that the contractor had no knowledge of and had no reason to obtain such information. Third, the contract specification supplied either misled the contractor or did not put it on notice to inquire. Fourth, the government failed to provide the relevant information. [89]"

Turning to the North Pacific case the court ruled in the following manner:

> "Although the department had more control over the information here … the department did not have absolute control over the relevant information. Rather, North Pacific could have reasonably acquired the information without resort to the department. North Pacific could have requested photos or an inspection of an exposed pan deck, spoken to other contracting companies that had previously performed asbestos abatement for the department in Juneau, or researched conditions of similar buildings in the area… We conclude that North Pacific could have conducted research on its own and was not dependent on the department as the only reasonable avenue for acquiring information on the surface of the pan deck. Accordingly, we hold that the state had no duty to disclose information regarding the pan deck surface."

- **Lesson Learned (Contractors):** When reviewing bidding documents, do not assume that the owner is required to provide all possible information available. Be prepared to perform and document some independent investigation of conditions potentially impacting the project. If other information is discovered, make certain that the bid cost reflects this independently discovered information.

Where the Contract is Silent a Differing Site Condition Claim Cannot Arise

P. J. Maffei Building Wrecking Corporation v. The United States [90] was an appeal from the General Services Board of Contract Appeals decision that Maffei was not entitled to an equitable adjustment for a shortfall of salvageable steel in a demolition contract with the government. The bid documents did not contain as built drawing of the structure to be demolished but required the bidders to deduct the anticipated salvage value of the steel from their bid cost. The documents also noted that a local city agency had, "… drawings of the existing conditions…" but noted that, "These drawings are for information only and will not be part of the contract documents. The quantity, quality, completeness, accuracy and availability of these drawings are not guaranteed."

In *Maffei*, the court ruled that:

> "…the contract documents did not 'indicate' the amount of steel recoverable from the Pavilion, within the meaning of the Differing Site Conditions clause…success on a Type I Differing Site Conditions claim turns on the contractor's ability to demonstrate that the conditions 'indicated' in the contract documents differ materially from those it encounters during performance [91]. As a threshold matter, then, this kind of Differing Site

Conditions claim is dependent on what is 'indicated' in the contract. [92]

A contractor cannot be eligible for an equitable adjustment for change conditions unless the contract indicated what those conditions would supposedly be. " [93]

Ragonese v. United States [94], an older case, is cited by some as standing for, "… a contract silent on subsurface conditions cannot support a changed conditions claim [95]." Stated more succinctly, one court ruled that the Differing Site Conditions clause, "… cannot be invoked if the plans and specifications do not 'show' or 'indicate' anything about the alleged unforeseen condition, i.e., if they say 'nothing one way or the other about subsurface [conditions]'…[96]" Put even more bluntly, another court stated "…where the contract is silent, a claim cannot arise."[97]

- **Lesson Learned (Contractors):** If the bidding documents are silent on an issue (for example, groundwater) this is no guarantee that the condition does not exist. Investigation from other sources may be well warranted.

Owners Do Not Assume All Risk of Unforeseen Conditions

Olympus Corp. v. United States [98] involved a paving contract which was delayed, at least in part, due to an oil spill that contaminated the soil. The court stated that the Differing Site Conditions clause:

> "… does not shift the risk of all unanticipated adverse site conditions from the contractor to the government. Rather, the government bears only those risks that encourage more accurate bidding."

On this basis, the court concluded the Differing Site Conditions clause only applies to those conditions that exist on the date the parties sign the contract, and not to site conditions created after contract award.

- **Lesson Learned (Contractors):** If site conditions change subsequent to contract award, do not rely upon the Differing Site Conditions clause for an equitable adjustment to the cost or time of the contract. Look to other equitable adjustment clause such as the delay or the changes clauses instead.

Contractors Cannot Rely On Contract Indications Where Simple Inquiries Might Reveal Contrary Conditions

Even in situations where the owner includes all subsurface information in the bidding documents and makes no attempt to disclaim responsibility for the information provided, contactors cannot rest easy. In *Foster Construction C.A. and Williams Brothers Company, A Joint Venture v. The United States* [99] the U.S. Court of Claims ruled that:

> "The contractor is unable to rely on contract indications of the subsurface only where relatively simple inquiries might have revealed contrary conditions." (Underscoring provided.)

For example, in a highway project where the subsurface investigation report contains 30 borings to a depth of 15 meters (and the deepest cut on the drawings is approximately eight meters) all of which show no groundwater, bidders may not be able to rely on the lack of indication of groundwater. If the contractor could have, for example, reviewed and determined from the local Soil Conservation Service office that groundwater records show that at certain times of the year groundwater levels rose to within three meters of the surface, then bidders cannot rely upon the bidding information when preparing their bids. Similarly, if a pre-bid site walk would have revealed the condition, even though it was not shown in the geotechnical report, then the contactor cannot rely exclusively on the bidding information.

- **Lesson Learned (Contractors):** Bidders must perform a reasonable amount of independent investigation concerning subsurface conditions especially where the bidding information is silent on matters that, logically, should be present on or near the site.

When Bidding Information Makes "No Specific Representation" Contractors Cannot Claim "Materially Different Conditions"

Metcalf Construction Co., Inc. v. United States [100] involved a Navy contract to construct military housing on a base on Oahu, Hawaii. During the course of construction Metcalf encountered expansive soils and filed a differing site condition claim. The claim was denied. Metcalf took this claim, along with several others, to the U.S. Court of Federal Claims. Metcalf claimed that the Navy failed to perform a timely investigation subsequent to the notice of differing site conditions and unreasonably rejected the geotechnical reports submitted by Metcalf in support of their claim. The Contracting Officer's denial of the claim stated the following:

> "As far as the information provided in our soils report is concern[ed], the fact that it differs significantly from the soils report generated by the contractor in itself does not warrant as equitable adjustment … If the contractor decided to base the cost of the work relying upon the government provided data, that's the risk they took and any consequences resulting therefrom is their responsibility."

The court noted that the government issued geotechnical report addressed only, "… site

preparation, foundation support, footing, slab and reinforcement requirements…" The court took notice of the fact that the request for proposal instructed the contractor to employ their own geotechnical consultant subsequent to contract award to perform an independent investigation for the design of the project. The court concluded in this regard that:

> "In other words, Metcalf could rely on (the government issued report) for bidding purposes, but the Navy advised all potential contractors they could not rely on (the government issued report) in performing the…project."

Citing Comtrol v. United States [101] the court concluded that:

> "Because the contract made no specific representation as to the type of soil to be encountered, it cannot be said that [the contractor] encountered conditions materially differing from those specifically indicated in the specifications."

While *Metcalf I* was vacated and remanded by the U.S. Court of Appeals for the Federal Circuit in *Metcalf II* [102] the Appellate Court did state the following in regards to the argument raised in *Metcalf I*:

> "The government made clear that its pre-request soil report was not to be the last word on soil conditions for purposes of the project. A revised request for proposals stated that the requirements in the 'soil reconnaissance report' were 'for preliminary information only.' The resulting contract required that the contractor conduct its own independent soil investigation… Even before potential bidders had submitted proposals in response to the request, the government had clarified…that the contract would be amended if the contractor's post award independent investigation turned up soil conditions significantly different than those described in the government's report."

Similarly, the Civilian Board of Contract Appeals in *Flour Intercontinental, Inc. v. Department of State* [103] took a similar approach. The board noted that Section C.2.8 of the contract stated that:

> "The contractor's geotechnical engineer shall review all available geotechnical information provided in the contract package and become familiar with the soil and site conditions at the project site by visiting the site. During the site visit and subsequent phases of the project, the contractor shall examine and/or verify the information provided and obtain any additional information to complete the design and construction of the project. The contactor remains solely responsible and liable for design sufficiency and should not depend on reports provided by the [government] as part of the contract documents."

The board also noted that Section E.6.2 stated that:

> "**Information Obtained by Offeror**— Before submitting a proposal, each offeror shall, at its own expense, make or obtain any additional examinations, investigations, explorations, tests and studies, and obtain any additional information which the offeror requires."

Based on this contractual language the board concluded the following:

> "…the solicitation required each offeror to use a geotechnical engineer to assist in the preparation of its proposal, Fluor elected not to do so, instead relying upon the geotechnical information provided by the government in its EFS and SUP. Fluor did not retain geotechnical engineer until after contract award."

Finally, the board noted that this was a design/build contract and concluded that "This contract placed all of the responsibility for design and construction (and, as a consequence all of the risk) on Fluor."

- **Lesson Learned (Contractors):** When the contract information makes no specific representations as to conditions to be encountered, contractors may not be successful in claiming that the condition encountered "differed materially" from the conditions anticipated.
- **Lesson Learned (Contractors):** When bidders are faced with a requirement to perform their own independent, post award geotechnical investigation, they may not be able to rely exclusively on the owner furnished subsurface information.

Subsurface Soils of One Type Will Probably Not Transition Into Another Type Along a Straight Line Projection

The *Appeal of NDG Constructors* [104] involved a contract for installation of a water line into an Air Force base in South Dakota. A portion of the work involved tunneling under an interstate highway. The government issued two subsurface investigation reports each indicating that the contractor in the tunneled section would encounter clay material which would then transition to shale. The subsurface reports both contained the following statements:

> "…the subsurface conditions at other times and locations at the site may differ from those

found at our test boring locations … the soils between the boring locations may differ significantly from those found at the boring locations."

During the tunneling operation NDG encountered much more shale than clay and filed a differing site condition claim to recover the additional time and cost incurred. The contracting officer denied the claim and NDG appealed to the Armed Services Board of Contract Appeals.

During the board hearings, NDG's geotechnical expert testified that lacking any other information than the two soil borings near the tunneled portion of the work, the only option a bidder has for estimating and planning purposes is to draw straight lines for soil and rock conditions from boring to boring. The board rejected this position with the following statement:

> "It is highly improbable that subsurface soils of one type would transition into another type along a straight line projection. We do not accept NDG expert's opinion in this regard because it is intrinsically unpersuasive."

Citing *P. J. Maffei Building Wrecking Corp. v. United States* [105] and *S.T.G. Construction Co. v. United States* [106] and relying on the disclaimer language contained in the subsurface investigation reports, the board concluded:

> "A contractor cannot be eligible for an equitable adjustment for a Type I changed conditions unless the contract indicated what those conditions would supposedly be. … Here, the contract documents did not indicate where precisely the contractor would encounter Carlile Shale. In bidding the project, BTC did not expect to transition from 'Fine Alluvium' to 'Carlile Shale' or, to use its terminologies, from 'clay fill material' to 'shale rock material' at any specific point but only 'at some point'. And, as BTC predicted, the soil profile indeed changed from clay fill material to shale rock material 'at some point'.
>
> We conclude that NDG has failed to prove that the soil profile encountered was a Type I differing site condition because the AET's geotechnical reports and the boring logs did not indicate where the transition from 'Fine Alluvium' to 'Carlile Shale' would occur, and because in estimating the work, BTC recognized that the transition from 'clay fill material' to 'shale rock material' would take place 'at some point' rather than at any specific point."

- **Lesson Learned (Contractor):** When faced with a situation such as the one NDG faced bidders may be well advised to retain the services of a local geotechnical consultant to review the owner furnished information and provide advice on how to interpret the data and prepare this portion of the bid. If this is done, it will need to be documented in the event of a later differing site condition claim.
- **Lesson Learned (Owner):** To potentially avoid claims such as this, owners may want to consider use of a geotechnical design summary report or a geotechnical baseline report where the geotechnical consultant "interprets" soil, rock and water conditions between borings. [107]

Subsurface Data Provided in the Contract May Be a "Guide Only"

Stuyvesant Dredging Company v. United States [108] involved an Army Corps of Engineers contract for maintenance dredging of the Corpus Christi Entrance Channel in Texas. The Corps included information in the bidding documents concerning the character of the materials to be dredged and the in-situ densities. The Corps made available the records of previous dredging (self-performed by the Corps in past years) at their district office.

Stuyvesant had bid on two previous Corps dredging jobs and had, in each case, reviewed the information in the district office related to those two jobs. Stuyvesant elected not to visit the site for the Corpus Christi job nor take material samples or echo soundings. Instead, Stuyvesant relied on the fact that the technical provisions of this contract were, "… very similar, almost identical…" to the technical provisions of the previous two projects. They concluded that it was, "…not warranted to go to the expense of or necessary to do any particular further investigation…"

Stuyvesant filed notice of differing site condition and a claim during the performance of the work due to the increased density of the materials encountered which impacted their productivity and increased their cost. The Corps denied the claims and Stuyvesant appealed this adverse decision to the U.S. Court of Claims who upheld the Corps denial. Stuyvesant then appealed to the U.S. Court of Appeals for the Federal Circuit.

The appellate court examined the case and the lower court's ruling and concluded that the Claims Court correctly stated:

> "…the six average density readings were identified to be guides only … did not reach the level of estimates and [were] clearly not facts upon which plaintiff could rely."

The appellate court also noted that, "Government estimates are not warranties."

- **Lesson Learned (Contractors):** Contractors must review owner provided information carefully when preparing bids. If the information is included as a

"guide" then the contractor may be at risk for relying totally on this information.

Contractors Cannot Prove a Differing Site Condition Based Upon Information They Never Reviewed

The *Stuyvesant* Court also dealt with the issue of Stuyvesant having not reviewed the Corps information from previous projects, available in their district office. The appellate court upheld the claims court ruling that:

> "[P]laintiff cannot prove a differing site condition based upon the information in the files of the Corps because it never reviewed that information until the contract was nearly completed, but more importantly the Corps' records accurately reflected the character of the materials encountered by other dredges."

Citing *Vann v. United States* [109] the appellate court noted that "where a contractor 'has the opportunity to learn the facts [but fails to do so] he is unable to prove…that he was misled by the contract."

- **Lesson Learned (Contractors):** When other "available information" is noted in the bidding documents bidders must take the time and make the effort to review this information. Such a review may prove helpful in bidding and planning the project. Further, such a review will help preserve the contractor's right to file a differing site condition on the basis of a material difference between available information and actual conditions encountered.

Each Government Contract Stands On Its Own

Finally, the *Stuyvesant* Court addressed the argument that on their two previous bids Stuyvesant did review the material in the Corps' District office, visited the site and conducted various tests. Stuyvesant argued that on those two projects the material encountered was the same as the material indicated. Stuyvesant then went on to note that the technical specifications for the Corpus Christi Channel project were virtually identical to the previous two projects, thus justifying their assumption that the conditions to be encountered in the Corpus Christi project, "…were the same as those to be found in the other two channels."

The appellate court summarily dismissed this argument with the following statement:

> "Each government contract stands by itself … Unless the government advises contractors that conditions in different contracts are the same, a contractor acts at its peril if it assumes that what it learned on different contracts applies equally to a new contract."

- **Lesson Learned (Contractors):** Bidders cannot assume that conditions from previous contracts are the same as the conditions in the new contract currently out for bid. [110]

Among all of these adverse rulings which appear to be narrowing the coverage of the Differing Site Conditions clause the Navigant Construction Forum™ came across two court rulings which appear to be more favorable to contractors.

Notice of Differing Site Conditions Need Not Follow Any Specific Format

In a bit of good news for contractors, *Metcalf I* did reiterate an older court decision [111] concerning the "form of notice" regarding a differing site condition and stated:

> "…notice need not follow any specific format, but must merely make the contracting office aware of the differing site condition. … Notice under the differing site provision of the contract requires no precise formula. The obligation to give notice is discharged when a contractor makes the government representatives aware that he is encountering either subsurface or latent physical conditions at the site differing from those indicated in the contract."

- **Lesson Learned (Contractors):** Review the contract's Differing Site Conditions clause closely. Contractors are only required to provide prompt written notice of differing site condition to the owner. While not stated it is probably wise to state what the materially different condition is and its location.

It Is Not Necessary That "Indications" in the Contract Be Explicit or Specific

In an older case which is still frequently cited by more recent cases, *Foster Construction & Williams Brothers Company v. United States* [112], the court indicated a standard for determining whether there are implied conditions in the bidding documents:

> "[I]t 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'."

- **Lesson Learned (Contractors):** Bidders should summarize the subsurface and latent conditions they anticipate, based on review of all documents provided and referred to, as part of the bidding process. Once the conditions

anticipated are summarized, bidders should record how they relied on these conditions and how their reliance was translated into the bid.

Practical Recommendations for Owners and Contractors Dealing With the Risks of Differing Site Conditions

In an article entitled "Differing Site Conditions – Who Bears the Risk?" [113] the author crafted a list of suggestions for how to deal with differing site condition risks.

For Owners

To avoid liability for unknown or unforeseen site conditions, it may be wise to:

- Disclose all known conditions prior to the submission of bids.
- If you include a differing site conditions clause in the contract, impose strict notice requirements and consider limiting the reimbursable costs to only direct job site costs incurred by the contractor.
- Exculpatory clauses may not avoid liability when the contract documents make positive representations about the site or subsurface conditions. Avoid such representations within the contract documents or otherwise.
- If there is a desire to disclaim geotechnical information provided to bidders, be sure the contract clearly states that the geotechnical reports are not part of the contract documents.
- Prior to letting a project, be certain that you understand how the contract allocates the risk of unknown or differing site conditions.

For Contractors

Prior to bidding on a project, it may be wise to:

- Carefully review the contract and understand how it assigns the risk of differing site conditions.
- Search the contract for onerous exculpatory clauses or contract language disclaiming the accuracy of site information reflected in the bid documents.
- Perform a reasonable site inspection and make a written and photographic record of your site investigation. Notice the physical characteristics of the surrounding property.
- If a differing site condition is encountered, follow carefully the contract notice requirements and wait for instructions from the owner before disturbing the site conditions.
- Keep careful and separate cost records of your additional costs flowing from differing site conditions.
- Understand that the law varies greatly, from state to state, with respect to the allocation of site conditions risk. Before bidding work in an unfamiliar jurisdiction, check with your construction lawyer.

Conclusion

Despite nearly 90 years of continuous use and the general belief that everyone in the construction industry fully understands the Differing Site Conditions clause and its scope of coverage, Board and Court decisions seem to be narrowing the coverage of the clause, making it more difficult for contractors to recover damages pursuant to the clause. Barring a watershed case concerning differing site condition claims, the authors believe this erosive trend is likely to continue. As noted in an earlier report, *Trends in Construction Claims and Litigation* [114], one of the unintended consequences of the "vanishing trial" is that construction law is stagnating. Rather than keeping up with industry developments, construction law has stopped its evolution. Additionally, the scarcity of actual trials increases the odds that decisions such as those cited in this research perspective will have more sway over future differing site condition disputes.

As contractors seem to be much more at risk as a results of these decisions and others like them, then contactors must be more alert to situations such as those outlined above. Being able to document that the contractor reviewed all available site information, participated in the prebid conference and performed a prebid site visit is, likewise, critical. Contractors must be able to document their interpretations of available site information and why they reached such interpretations. Contractors must also be able to document how they relied upon these interpretations when preparing their bids. Attention to notice and documentation requirements is critical. Strict adherence to all contract requirements concerning differing site condition claims is an absolute must. Finally, whenever a contractor files a notice of differing site condition, separate accounting of all costs related to the differing condition and schedule tracking of the time impact of the differing site condition are critical to the success of any differing site condition claim.

END NOTES

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2. Max E. Greenberg, "It Ain't Necessarily So!", 40 Muni. Eng. J. Paper 263 (2d Quarterly Issue 1954).
3. Robert F. Cushman and David R. Tortorello, Differing Site Condition Claims, Wiley Law Publications, John Wiley & Sons, Inc., New York, 1992.
4. Neal J. Sweeney, Thomas J. Kelleher, Jr., Philip E. Beck and Randall F. Hafer, Smith Currie & Hancock's Common Sense Construction Law, John Wiley & Sons, Inc., New York, 1997.
5. Owen S. Walker, *Differing Site Condition Claims: What is Below the Surface of Exculpatory Clauses*

or Other Disclaimers?, The Procurement Lawyer, Summer 2013, American Bar Association, Chicago, IL.

6. *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. Sup. 165, 168 (1947).
7. "Contingency" – An amount added to an estimate to allow for items, conditions, or events for which the state, occurrence, or effect is uncertain and that experience shows will likely result, in aggregate, in additional costs. Typically estimated using statistical analysis or judgment based on past asset or project experience. (AACE International Recommended Practice 10S-90, Cost Engineering Terminology, Rev. January 14, 2014.)
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12. David Michael Pronchick, The Differing Site Conditions Clause: Time for A Change, Master of Laws Thesis submitted to The National Law Center, George Washington University, September 30, 1990.
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15. Federal Acquisition Regulation, §52.236-2, *Differing Site Conditions* (APR 1984) (48 FR 42478, Sept. 19, 1983, as amended at 60 FR 34761, July 3, 1995). American Institute of Architects Document A201 – 2007, General Conditions of the Contract for Construction, §3.7.4, *Concealed or Unknown Conditions*. ConsensusDocs 200, Standard Agreement and General Conditions Between Owner and Constructor, §3.16.2, *Concealed or Unknown Site Conditions*, 2011, Revised July, 2012.
16. Construction Management Association of America, Inc., §4.19.4.1.2, *Physical Conditions and Facilities Affecting the Work: Existing Facilities*, 2004.
17. Design Build of America Document No. 535, Standard Form of General Conditions of Contract Between Owner and Design-Builder, §4.2.1, *Differing Site Conditions*, 1993.
18. Engineers Joint Contract Documents Committee C-700, Standard General Conditions of the Construction Contract, §4.03, *Differing Subsurface or Physical Conditions*, 2007.
19. Office of Engineering, GT Guideline No. 15, April 30, 1996.
20. Federal Acquisition Regulation, §52.236-2, *Differing Site Conditions* (APR 1984). (48 FR 42478, Sept. 19, 1983, as amended at 60 FR 34761, July 3, 1995).
21. American Institute of Architects Document A201 – 2007, General Conditions of the Contract for Construction, §3.7.4, *Concealed or Unknown Conditions*.
22. ConsensusDocs 200, Standard Agreement and General Conditions Between Owner and Constructor, §3.16.2, *Concealed or Unknown Site Conditions*, 2011, Revised July, 2012.
23. Construction Management Association of America, Inc., 2004, §4.19.3, *Physical Conditions and Facilities Affecting the Work: Existing Facilities*.
24. Design Build of America Document No. 535, Standard Form of General Conditions of Contract Between Owner and Design-Builder, §4.2.1, *Differing Site Conditions*, 1993.
25. Engineers Joint Contract Documents Committee C-700, Standard General Conditions of the Construction Contract, §4.03, *Differing Subsurface or Physical Conditions*, 2007.
26. Design Build Contract Between Los Angeles County Metropolitan Transportation Authority and Kiewit Pacific Company – I-405 Sepulveda Pass Widening Project, April 23, 2009, Section 6.7, *Differing Site Conditions*.
27. The "Greenbook" – Standard Specifications for Public Works, 2012 Edition, §3-4(c), *Changed Conditions*, BNi Building News, Vista, CA.
28. American Institute of Architects Document A201 – 2007, General Conditions of the Contract for Construction, §10.3.1, *Hazardous Materials*.
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39. *Metropolitan Sewerage Commission v. R. W. Construction, Inc.*, 241 N.W.2d 371 (Wis. 1976).
40. *Reliance Enterprise*, ASBCA Nos. 27638, 27639, 85-2 B.C.A. ¶18,045.
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53. *George E. Jensen Contractors, Inc.*, GSBCA Nos. 3242, 3249, 71-1 B.C.A. ¶8,735.
54. *Robert E. McKee General Contractor, Inc.*, ASBCA 521, 60-1 B.C.A. ¶2526.
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64. *Dunbar & Sullivan Dredging Co.*, ENG BCA No. 8265, 73-2 B.C.A. ¶12,285.
65. *John Murphy Construction Co.*, AGBCA No. 418, 79-1 B.C.A. ¶13,836.
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67. *United Contractors v. United States*, 177 Ct. Cl. 151, 368 F.2d 585 (1966).
68. *Weeks Dredging & Contracting, Inc. v. United States*, 13 Ct. Cl. 193, 218 (1987), aff'd 861 F.2d 728 (Fed. Cir. 1988); *Simpson Constr. Co.*, VABCA No. 3176, 91-1 B.C.A. (CCH) ¶23,630 (1990); *Shumate Constructors, Inc.*, VABCA No. 2772, 90-3 B.C.A. (CCH) ¶22,946 (1990); *Weston-Bean Joint Venture v. United States*, 115 Fed. Cl, 215, 2014 U.S. Claims LEXIS 417, March 14, 2014.
69. See, for example, FAR §52.237-1, *Site Visit*, which is contained in all Federal construction contracts.
70. See, for example, FAR §52.236-3, *Site Investigation and Conditions Affecting the Work*, which is also contained in all Federal construction contracts.

71. See *Top Painting Co., Inc.*, ASBCA No. 57333, 12-1 BCA 35,020; *D&M Grading, Inc. v. Dept. of Agriculture*, CBCA No. 2625, 12-1 BCA 35,021; *Orlosky, Inc. v. United States*, 64 Fed. Cl. 63, (2005).
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76. FAR 52.236-2, *Differing Site Conditions*.
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78. *Holland v. Green Mountain Swim Club, Inc.*, 470 P.2d 61 (Col. 1970).
79. FAR §52.233-1, *Disputes*.
80. FAR §52.249-10, *Default (Fixed Price Construction)*.
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91. Citing *Arundel Corporation v. United States*, 207 Ct. Cl. 84, 515 F.2d 1116, 1128 (Ct. Cl. 1975).
92. Citing *Foster Construction C.A. and Williams Brothers Company v. United States*, 193 Ct. Cl. 587, 435 F.2d 873, 881 (Ct. Cl. 1970).
93. Citing *S.T.G. Construction co., Inc. v. United States*, 157 Ct. Cl. 409, 414 (1962).
94. 128 Ct. Cl. 156, 159, 120 F. sup. 768, 769 (1954).
95. *Foster Construction C.A. and Williams Brothers Company, A Joint Venture v. The United States*, 193 Ct. Cl. 587, 435 F.2d 873, 1970 U.S. Ct. Cl. LEXIS 74.
96. 368 F.2d 585, 595 (Ct. Cl. 1966).
97. *Neal & Co. v. United States*, 36 Fed. Cl. 600, 617 (1996), aff'd, 121 F.3d 983 (Fed. Cir. 1997).
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107. See *Delivering Dispute Free Projects: Part III – Alternative Dispute Resolution*, Navigant Construction Forum™, June, 2014.
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110. However, contractors are expected to use past experience when bidding new contracts.
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