CONTRACTORS SHOULD BE ABLE TO RELY UPON SOIL BORINGS NOTWITHSTANDING CONTRACT DISCLAIMERS

by Thomas R. Olson

The legal question is if it is both appropriate and customary practice for contractors to rely upon soil borings, should such disclaimers be legally enforceable?

It is customary practice for contractors, like engineers, to rely upon soil borings.

The most important information for a utility project is the soil borings. That is because all decisions for the utility work are dependent on the subgrade conditions. In order to properly design the utility work, engineers rely on the borings to determine the pipe size, type, and length, whether to case it, where to place it, how to perform the work, and how much it should cost. In order to properly bid the utility work, contractors rely on the same borings just as engineers do to determine how to perform the work and how much it should cost.

- "The resulting design implies, and the subsurface data describes, the conditions on which the bidding and construction will be based." [1]
- "The usual and customary practice in the industry is bidder reliance upon owner or design professional subsurface investigations." [2]

In summary, it is both appropriate and customary practice for contractors to rely upon soil borings to bid the utility work just as engineers do to design the work.

Notwithstanding that contractor reliance upon borings is customary, engineers include contract disclaimers that attempt to limit or bar such reliance so owners don't have to pay for differing site conditions.

Notwithstanding that it is standard practice for contractors, like engineers, to rely upon soil borings, engineers regularly include contract 'disclaimers' which purport to limit or bar contractors' 'right to rely upon soil borings.' Engineers include such disclaimers in an attempt to help project owners avoid paying for the extra costs incurred when a contractor encounters subgrade conditions different than indicated in the borings. The legal question is if it is both *appropriate* and *customary practice* for contractors to rely upon soil borings, should such disclaimers be legally enforceable?

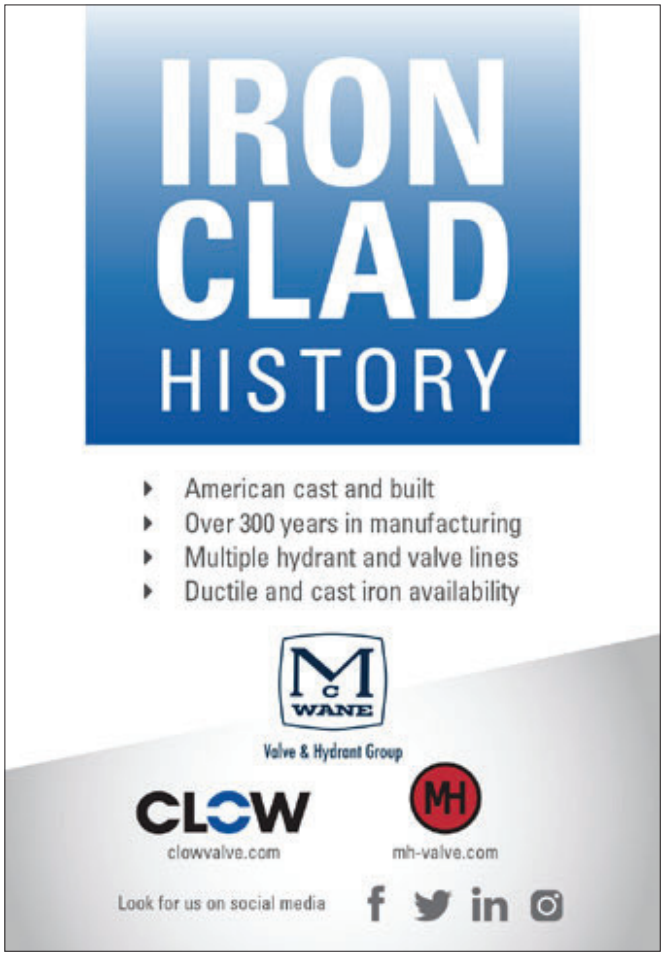
Contractors should be able to rely upon soil borings notwithstanding disclaimers: such disclaimers should not be legally enforceable.

Many courts around the country who have addressed this issue have held that such disclaimers are *not enforceable.* As a consequence, if a contractor encounters subgrade conditions *different than the borings indicate,* a contractor should still be able to successfully assert and be paid when it encounters 'differing site conditions' notwithstanding contract disclaimers to the contrary.

Courts and construction boards have refused to enforce *broad disclaimers.*

When contract representations are in the form of soil logs or borings, the Government is assumed to have provided the information to assist prospective bidders in preparing their bids. Broad exculpatory provisions . . . will not defeat an otherwise valid differing site conditions claim. [3]

Courts and construction boards have also refused to enforce more *specific disclaimers.* This has included disclaimers such as:



- "Soils Data is for Information Only"
- "The Owner Does Not Warrant or Guarantee the Accuracy of the Soils Data"
- "Site Conditions May Vary" and
- "The Contractor is Responsible for Conclusions to be Drawn from the Soils Data"

Important policy reasons support non-enforcement of disclaimers.

Courts and construction boards, as well as the U. S. Department of Transportation, have enunciated *important policy reasons* why disclaimers should not be enforced.

- Boring logs are "considered the most reliable reflection of subsurface conditions." [4]
- Site data disclaimers should not be enforced because to do so "would render meaningless the language of sections like [the differing site conditions clause] and negate their salutary purpose." [5]
- "The inclusion of geotechnical information in the contract provides both the Agency and the contractor a consistent geotechnical baseline for what constitutes a differing site condition." [6]

To be clear, project owners *save money* from contractors' reliance on soil borings.

> Reliance is affirmatively desired by the Government…The Government benefits from more accurate bidding, without inflation for risks which may not eventuate. It pays for difficult subsurface work only when it is encountered and was not indicated in the logs. All this is long-standing, deliberately designed procurement policy, expressed in the standard mandatory changed conditions clause and enforced by courts and the administrative authorities on many occasions. [7]

Contractors' duty to "examine the site" and "become familiarized with local conditions affecting the work" should not defeat its right to rely upon the soil borings.

I have experienced engineers argue that the contractor should not be able to rely upon the soil borings because of the standard contract 'site investigation' clause. Engineers have argued that the contractor should have discovered any and all subgrade conditions during this investigation. The contractual requirement for a contractor to perform a site investigation should not, in fact, shift subsurface risks to the contractor. [8]

As a starting point, the phase "site investigation" is properly interpreted to only mean "sight" investigation: it "does not require prospective bidders to make independent subsurface explorations." [9]

> We are not aware of any case where the Changed Conditions clause has been interpreted as charging a contractor with knowledge of the conditions at the site that could not be discovered by a visual examination of the site. [10]

The policy reason behind this is simple: a contractor should not be required "prior to submitting a bid and entering into the contract, to conduct its own investigation in order to ascertain the truth or falsity of the defendant's positive assertions regarding subsurface conditions encountered in drilling." [11] As a consequence:

> We agree where the Government makes a positive assertion as to subsurface conditions, it is not relieved of liability by general contractual provisions requiring the bidder to investigate the site. [12]

In summary, contractors should be able to rely upon soil borings *notwithstanding disclaimers or related contract language.* A contractor should be paid when it encounters subgrade conditions which differ from what the borings indicated. ■

Footnotes

1. U.S. Department of Transportation, "Geotechnical Engineering Notebook Geotechnical Guideline No. 15, Geotechnical Differing Site Conditions" (1996) at 10.

2. Affholder, Inc. v. North American Drillers, Inc., 2006 WL 3192537 at 10.

3. One Way Construction, Inc., 1994 WL 612249 (1994).

4. United Contractors v. U.S., 368 F.2d 585, 597 (Ct. Cl. 1966).

5. Asphalt Roads & Materials Co., Inc. v. Virginia Department of Transportation, 257 Va. 452, 512 S.E.2d 804, 807 (1999).

6. U.S. Department of Transportation, "Geotechnical Engineering Notebook Geotechnical Guideline No. 15, Geotechnical Differing Site Conditions" (1996) at 4.

7. PT & L Const. v. Department of Transportation, 108 N.J. 539, 531 A.2d 1330 (1987).

8. I. A. Constr. Corp. v. Department of Transportation, 139 Pa. Commw. 509, 591 A.2d 1146, 148 (1991).

9. Currie, "Changed Conditions," Construction Briefings No. 84-12 at 9 (1984).

10. Appeal of Lee R. Smith, 1999 WL 498 (1966).

11. Morrison-Knudsen Co., Inc. v. U.S., 345 F.2d 535, 539 (Ct. Cl. 1965).

12. Appeal of Herman H. Neumann, 1969 WL 959 (1969).

Tom Olson *is the founding partner of Olson Construction Law, P.C., in West St. Paul, Minn. The firm works exclusively for contractors on project change issues. While trained as an attorney, Tom's commitment is to educate and assist contractors, working behind the scenes, to cooperatively resolve their change issues on the project site, not in the court room. Tom is an active member of the underground industry on both a state and national level. He serves on NUCA's national Board of Directors and is currently Chairman of NUCA's Legal Committee. You can contact Tom through email (trolson@oc-law.com) or phone (651-298-9884). His website is* ***www.olsonconstructionlaw.com.***