DIFFERING SITE CONDITIONS:

Successful Strategies to Cooperatively Resolve Claims

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Differing Site Conditions ("DSC") are unfortunately here to stay. Project owners are often either not conducting a subgrade investigation or, if they are, not conducting an *adequate investigation*. And, even an adequate investigation can miss subgrade conditions outside of the borings. The net effect is that since there is nothing a utility contractor can do to stop encountering DSCs, contractors need to successfully identify and implement strategies to cooperatively and fairly resolve DSC claims on the jobsite. Set forth below are some battle-tested strategies. As such, all of these strategies can work for you.

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1. When bidding, evaluate 'right' to rely upon owner's subgrade investigation.

When project owners perform a subgrade investigation, they *intend* that bidders will *rely* upon the investigation in pricing the work and selecting the trenchless method. And yet, engineers regularly include contract language which purports to *limit or bar such reliance*. In response, I offer three pointers:

- First, recognize that as a matter of contract, such limiting or disclaimatory language is normally set forth in the Special or Supplemental Conditions (and sometimes in the Technical Conditions). Contractors must ensure they evaluate all of these conditions prior to bidding to assess whether such language is included.
- Second, even if the contract includes such language, contractors can still rely upon the project subgrade investigation as evidence of Type II DSC (i.e. conditions different than anticipated for the work in the geographic area), instead of a claim for a Type I DSC (i.e. conditions different than indicated in the contract documents).
- Third, as a matter of law, many jurisdictions have held that contract language which limits or bars contractors' reliance on the project subgrade investigation is *unlawful and unenforceable*.

2. When bidding as a subcontractor, state the 'anticipated' subgrade conditions.

To help ensure there is no dispute later whether the subgrade conditions you encountered were different than what you anticipated, state what you anticipated in your bid (e.g. full face of hard rock). This is particularly important when the owner has not performed a subgrade investigation. And, negotiate to *have your bid be incorporated into the subcontract*.

3. When bidding as a subcontractor, state 'right' to payment for 'stand-by' costs if DSC encountered

One of the common costs incurred for a DSC is 'stand-by:' waiting for a decision to be made on how to proceed. And, based on my experience, contractors fail to seek payment for stand-by costs. To help ensure a subcontractor is paid for such costs, subcontractors should state the 'right' for such payment in their bids,

and then seek to have the bid incorporated into the subcontract. Make sure when negotiating your subcontract that there are not clauses which would negate this, such as a "no damage for delay" clause.

Additionally, most public contracts include such a payment right in the General Conditions. Note that this payment right is sometimes hidden in the "Suspension of Work" clause, which is the normal case when DOT Standard Specifications are used. Further, to help get a DSC claim resolved sooner, when there is a contractual right to payment for 'delay,' a contractor should so advise as part of its initial DSC claim notice. If your iron must remain idle waiting for a decision, it is important that the engineer understand this at the outset.

4. The contractor should *always* provide written notice of a DSC.

Literally all public construction contracts require written notice if a contractor believes it has encountered a DSC. And, the reality is that much of the communications on site are verbal, not written. As a consequence, I have been involved on many projects *after the fact* where a contractor only provided verbal notice. While I have been successful getting around this notice failure on many occasions, it is risky business. This is true for two reasons.

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First, on public construction projects, the inspector is not authorized to waive *any* contract requirements. That means that even if the inspector stated that verbal notice is sufficient, a contractor is not excused from providing written notice. Make certain you are discussing any contract changes with the person authorized to make changes, typically the engineer.

Second, as a matter of law throughout the country, other than on *federal projects*, a contractor is generally deemed to have *waived* its DSC claim absent written notice. That is true regardless if the contractor provided the same notice *verbally* that it would have provided in *written* form.

5. Encourage the engineer to re-design the utility work to avoid the DSC.

Upon written claim notice, per standard DSC clause, a contractor is required to stop work, allow the engineer to investigate and, if the engineer determines there is or may be a DSC,

evaluate how to proceed. It is good to be *paid* for DSC extra costs. It is even better to *avoid* incurring the extra costs. A strategy not typically attempted is to work with the engineer to evaluate whether the affected work can be *re-designed* to avoid being performed in the DSC.

I recently helped a contractor accomplish this. The contractor assisted the owner and engineer to further investigate the subgrade (the contractor performed some excavations while the engineer took additional borings). The investigation revealed the existence of the anticipated subgrade conditions, albeit at different vertical and horizontal locations. The design was subsequently revised to reflect the more preferable location of the utility work. As a consequence, no extra costs were incurred (other than for the additional lineal footage of pipe that was required, for which the contractor was paid).

6. Contractor should perform its own subgrade investigation.

Too often, the project engineer will deny a DSC claim, notwithstanding that the engineer did not perform a subgrade investigation. This happened on a recent project. In response, we helped the contractor perform its own subgrade investigation. We retained a geotechnical engineer to substantiate the existence of a DSC, as well as the impact on the auger bore operations. We also retained the auger bore manufacturer, who confirmed that the contractor's extra costs were not caused by improper construction. The net result was the contractor was paid an acceptable amount, and did not have to pay any liquidated damages for the corresponding delay. All of this occurred on the jobsite.

As a standard business practice, if there is any question re: the existence of a DSC or its impact in time and/or dollars, the contractor should conduct its owner subgrade investigation.

7. Contractors should seek payment on a revised unit basis.

My experience is that when an engineer acknowledges that a contractor has or may have encountered a DSC, the contractor subsequently performs the work on a force account basis. This results in the contractor being *underpaid* (e.g. Blue Book equipment rates are too low). Fortunately, contractors have a means available to potentially overcome this problem: seek payment on a *revised unit price basis*. While the engineer may say "no" to such a request, the engineer certainly cannot say "yes" unless the contractor requests this. And, as you should explain to the engineer, it is in the owner's interest to agree to a revised unit price. By doing so, the owner will know *before the work is performed* what is will cost versus waiting until *after the work is performe*d to add up all the labor and equipment hours.

8. If there is a dispute on the existence of a DSC or its financial impact, a contractor should use the *engineer's estimate.*

When an engineer alleges that the contractor should have anticipated the subgrade conditions encountered and/or the financial impact, I recommend potential use of the *engineer's estimate*. I have helped contractors successfully utilize this strategy when the engineer's estimate for the DSC work is *lower than or similar to the contractor's corresponding bid amount*. This allows a contractor to powerfully state that since it did not have dollars in it bid for the DSC, then the engineer must not have either. Since neither the engineer nor the contractor had dollars in their bids for the DSC, it is fair to conclude that neither anticipated the subgrade conditions actually encountered. The same comparison can also then help establish the amount of compensable extra costs.

9. If you can use the Measured Mile Approach for calculation of your extra costs, do it.

To prove the financial impact of a DSC, contractors normally compare their planned costs (i.e. what they *bid*) with their actual costs. While this strategy is acceptable, there is a better strategy. If you have successfully performed work *outside* of the DSC (e.g. an earlier crossing), then a contractor can and should use production rates (and hence corresponding costs) from the *outside* area. This strategy is better for two reasons.

First, use of *actual* production rates from an area *outside* of the DSC should eliminate any question of what your production rate could have and would have been *but for the DSC*. By contrast, if you are relying upon your *bid*, the engineer can question if this is a valid baseline since it is *theoretical*, not *actual*. For the same reason, if you can't cooperatively resolve the issue on site, courts prefer use of the Measured Mile Approach when it is possible.

Second, use of actual rates should result in the contractor being paid for more extra costs. My experience is that

the contractor's bid rate is normally lower insofar as it typically accounts for the impacts of utility, weather and delays as well as re-work. By contrast, comparison of actual production rates achieved outside of the DSC with those obtained within the DSC should typically be higher (i.e. there will be a greater loss of production, and hence greater extra costs recoverable).

10. A contractor can successfully maintain a DSC claim when it encounters the anticipated 'type' of subgrade condition which 'reacts' in unanticipated manner.

It is considered a standard rule of law that a contractor cannot successfully maintain a DSC unless it encounters a subgrade condition which is different in 'type' than that shown in the owner subgrade investigation or otherwise anticipated for the work being performed in the geographic area. I am proud to share that I have successfully developed and applied another strategy. We helped a contractor get paid a significant amount of money and not pay a significant amount of liquidated damages when it encountered the anticipated 'type' of soils which 'reacted' in an unanticipated manner. We based this strategy on legal cases which we have collected over a period of decades. Notably, we helped the contractor achieve this result on the jobsite.

11. A contractor can prove the existence of a DSC on the basis of an *adverse impact to the contractor's operations.*

Sometimes, a contractor cannot prove actual *physical evidence of* a DSC. This may occur because a contractor cannot collect physical samples of the actual conditions encountered. This would also be the case if, as in the project discussed above, where the contractor encountered the anticipated 'type' of subgrade conditions which 'reacted' in an unanticipated manner. To substantiate the existence of a DSC on this project, we collected evidence of how the contractor's operations were adversely affected: equipment was damaged, larger equipment was required, production rates were abysmal, and the work could not be competed as designed. Like the strategy above, we successfully based this unique strategy on legal cases which we have collected for decades. Having successfully utilized this strategy for the first time, we know it can work elsewhere.

12. If the contract does not contain a DSC clause, a contractor can still potentially seek payment under the Extra Work clause.

Normally on public construction projects, the contract contains a DSC clause. That clause places the financial risk of DSC on the owner, not the contractor. On private projects, it is not that unusual for a DSC clause to be absent. By contrast, on limited occasions, I have been involved on public projects which did not include such a clause. That was the case on a recent public utility project. Given the absence of the DSC clause, we approached this as *extra work*. We listed the *new items* of extra work (i.e. not included in the contract) as well as the *increased quantities of contract work* (which is also properly characterized as *extra work*). This provided a contractual basis for payment. This is the referenced project on which the owner re-designed the project to avoid the DSC. I believe one important reason we were able to help facilitate this result was because the owner believed that the extra costs which would have bee incurred were compensable under the "Extra Work" clause.

In summary, remember the following:

- Owners regularly fail to adequately investigate the subgrade on trenchless projects.
- As a consequence, contractors will continue to encounter differing site conditions ("DSC").
- Contractors need effective strategies to be paid when they encounter DSC.
- There are a number of strategies which contractors can use to avoid incurring DSC-related extra costs as well as get fairly paid when a contractor does incur such costs.
- Based on the author's personal experience, these strategies have worked to cooperatively and fairly resolve DSC issues on the jobsite.
- As a consequence, each of these strategies can and should produce similar results.

ABOUT THE AUTHOR:

***Tom Olson** has helped utility contractors around the country for decades resolve issues on the jobsite, not in the courtroom. He recently helped edit and author a national trenchless manual.*