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Bidder Be Thoughtful: The Impacts of Disclaimers in Pre-Bid Reports

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When bidding a project, subsurface or latent site conditions that are not immediately apparent can massively impact the costs of performance to general contractors. Were contractors required to bid on projects without any information on pre-existing conditions, they would need either to be assured that any additional costs would be reimbursed by the owner, or to include significant contingencies for subsurface conditions in their bids. For owners, these options result in either increased risk or increased cost—neither of which is particularly palatable. Owners therefore implement several contractual tools to minimize these risks and costs.

One of these tools is providing bidders with a report on latent conditions, often called a "geotechnical data report" or "GDR", but otherwise shifting as much of the subsurface-related risk as possible to the contractor. In theory, these reports permit contractors to appropriately adjust their contingencies for latent conditions, thus saving owners money. However, several independent and thorny issues arise where site reports provided by the owner are either inconsistent with or silent on the actual conditions of a project site. Hence owners often include disclaimers with these reports, such as noting that the report is for "informational purposes only" or that the report is "not part of the contract documents".

Disclaimers such as these leave bidders in an awkward position. On one hand, the owner has provided a report for the presumptive purpose of permitting bidders to adjust their contingencies for latent conditions accordingly. On the other, bidders have been warned against considering the data in that report when formulating their bids. In the face of this contradiction, courts have taken a range of approaches to such disclaimers—some enforce the disclaimer as written, while others decline to enforce disclaimers (or at least certain types of disclaimers) on public policy grounds. When contractors encounter an owner-provided site report accompanied by a disclaimer, it is therefore crucial that they understand both the jurisdiction that they are working in and the type of disclaimer at issue. In particular, contractors should be aware of three specific types of disclaimers: (1) general disclaimers of all data in the report provided, (2) requirements that the contractor perform pre-bid site investigations and reach its own conclusions with respect to a report, and (3) disclaimers that include only a particular factual portion of a report.

General Disclaimers

Most courts have taken the position that broad, general disclaimers of pre-bid reports provided by the owner are not enforceable. The Montana Supreme Court provided a thorough discussion of the policy considerations driving this position in *Haggart Construction Co. v. Montana State Highway Commission*, noting that an owner "places itself in a contradictory position when on one hand it warrants the condition [of the site], but the next moment disclaims any liability arising from reliance on such representations." 427 P.2d 686 (Mont. 1967).

The Federal Circuit's decision in *Metcalf Construction Co. v. United States* provides a practical application of that principle. 742 F.3d 984, 996 (Fed. Cir. 2014). There, the court held that a disclaimer stating that a soil

report was "for preliminary information only" did not absolve the owner when the information in that report turned out to be incorrect. Id. In reaching that decision, the court relied on "the longstanding background presumption against finding broad disclaimers of liability for changed conditions." Id. (citations omitted); see also *United Contractors v. U.S.*, 368 F.2d 585, 598 (Fed. Cl. 1966) (holding that a statement that the owner "does not guarantee that materials other than those disclosed by [its geotechnical report] will not be encountered, or that proportions of the various materials will not vary from those indicated by the logs of the explorations" did not absolve the government from the contract's differing site conditions clause). It should be noted, however, that while *Metcalf* likely represents the majority position, other courts have enforced similar disclaimers as written without regard to public policy concerns. See, e.g., *J.E. Brenneman Co. v. Pa. Dep't of Transp.*, 424 A.2d 592, 596 (Pa. Commw. Ct. 1981) ("In light of the exclusion of the test hole data from the agreement . . . the contract contains no indication of the subterranean materials which were to be expected.").

Often for courts, the question comes down to whether a report provided by an owner was reasonably verifiable by the contractor and whether the contractor's reliance on that report was reasonable notwithstanding the disclaimer. In *Raymond International, Inc. v. Baltimore County*, for instance, an owner provided a geotechnical report with the disclaimer that the representations in the report were "furnished to the Contractor for general informational purposes only and do not purport to represent existing field conditions" and urged bidders to conduct their own inspections. 412 A.2d 1296, 1300 (Md. App. 1980). However, the report provided by the owner took "almost four years and innumerable test divings to compile." Id. at 1302. Given that, the Maryland Court of Special Appeals held that the contractor was entitled to rely on that report despite the caution that the report was for "informational purposes only," as it would be unreasonable to expect the contractor to independently perform an equivalent investigation.

Requirements that Contractors Perform Pre-Bid Site Inspection

Courts are less unified when dealing with provisions that require contractors to conduct pre-bid inspections of a project site. Though contracts typically contain provisions that a contractor has "investigated and satisfied itself as to the general and local conditions which can affect the work or its costs," these provisions are often complied with only in the broadest sense. Issues of site access, bidding timelines, and cost usually limit the scale of the investigation that prospective bidders can conduct. As the Ohio Court of Common pleas described the contractor's problem over half a century ago:

What were the bidders to do? Was each bidder to run these tremendously expensive core boring tests not knowing whether or not he would get the contract? Under defendant's contention there would be practically no bidders. A bidder would be faced with this dilemma. Shall I bid on what is presented to be and run the risk of loss if the information is not correct or shall I run core boring tests at great expense, amounting to thousands of dollars, which expense I must bear on my own if I do not secure the contract? *Condon-Cunningham, Inc. v. Day*, 258 N.E.2d 264, 274–75 (Ohio C.P. 1969).

Several courts have therefore not required contractors to exhaust every possible investigative tool prior to bidding a project, provided that contractors take into account the "reasonably available information" that a site inspection would reveal. See, e.g., *Inland Dredging Co., L.L.C. v. Panama City Port Auth.*, No. 5:04 CV 280 RH/WCS, 2005 WL 2133702 at *3 (N.D. Fla. Aug. 29, 2005).

There exists some disagreement among courts, however, regarding the scope and effect of clauses such as these. The Appellate Division of the New York Supreme Court summarily dismissed an argument similar to that approved above:

Plaintiff argues that his [sic] time was too limited to make an in-depth inspection and that such an inspection would have been prohibitively expensive. Nevertheless, it is what plaintiff obligated itself to do by signing the contract. No authority is cited for plaintiff's argument that such a contract is against public policy, and we reject it. *Costanza Constr. Corp. v. City of Rochester*, 147 A.2d 929, 929 (N.Y. App. Div. 1989).

The Appellate Court of Connecticut reached the same conclusion when evaluating a contractor's claim that that subsurface highway conditions differed from those represented in the contract. *Empire Paving, Inc. v. City of Milford*, 747 A.2d 1063, 1068 (Conn. App. Ct. 2000). There, the contractor argued that it should not have been required to perform a subsurface investigation because "bidders cannot be expected to tie up municipal streets to do their own test borings." Id. The court was unmoved, though. It held that the investigation provisions of the contract could not be disregarded, even despite the significant expense, as "only in the most exceptional circumstances have courts concluded that a duty is discharged because additional financial burdens make performance less practical than initially contemplated." Id. The court thus felt itself bound by the language of the contract to reject the contractor's claim, despite the impracticality of conducting a thorough pre-bid site inspection.

In short, where a contract requires that the contractor investigate site conditions, courts have split on the question of what type of "investigation" a contractor is obliged to take prior to bidding a contractor. Some only require contractors to consider that information reasonably available to them; others require contractors to undertake an exhaustive (and likely unfeasible) pre-bid investigation of the site.

Disclaimers of Specific Issues

As noted above, general disclaimers of site reports provided by an owner are not always enforced. Hence owners will sometimes limit their disclaimers to particular parts of the report that they provide to prospective bidders. Courts have typically been more inclined to enforce these kinds of disclaimers than they are to enforce general disclaimers. The Texas Supreme Court, for example, has enforced a disclaimer that required the contractor to "confirm the location of all such [utility] crossings," despite the contract's specific requirement that the owner would "have exercised due diligence" in locating those crossings. *El Paso Field Servs., L.P. v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 807 (Tex. 2012). Similarly, the Federal Circuit enforced a contractual provision that directed bidders to information in the possession of a third-party regarding quantities of salvageable steel on the project site but explicitly disclaimed the "availability" of the steel shown in those documents. *P.J. Maffei Bldg. Wrecking Corp. v. U.S.*, 734 F.2d 913, 917 (Fed. Cir. 1984).

Conclusion

The ability of owners to disclaim the accuracy of reports they provide to prospective bidders depends on several factors, including the type of disclaimer at issue and the governing law of the contract. Contractors must therefore be careful to take both elements into account when bidding on a contract with such a disclaimer and must adequately account for the risks inherent in these provisions.