



Show Me The Money: Who Is Responsible for the Impacts of a Differing Site Condition on a Design-Bid-Build Project Versus Design-Build Project

May 12, 2022

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Program Agenda

- What is a Differing Site Condition?
 - Type I (Type A)
 - Type II (Type B)
- Who bears the risk of a DSC on a *design-bid-build* project?
- Who *should* bear the risk of a DSC on a *design-build* project?
 - Does the use of a design-build project delivery model effectively insulate an Owner from liability for Type I differing site conditions?
 - To what extent, if any, does the use of a design-build project delivery method insulate an Owner from liability (or mitigate an Owner's liability) for Type II differing site conditions?

General Considerations on Typical Design-Bid-Build Project

Definition: Subsurface or latent physical condition affecting a construction site, which differs in some material respect from what was set forth in the Owner's bid documents (Type I) or what was reasonably anticipated at the time of bid given the nature and location of the work (Type II).

Does a DSC clause reduce costs? Studies by the USA Corps of Engineers suggest that DSC clauses ultimately reduce cost to owners (eliminates contingencies on every project).

By an Owner contractually retaining the risk of differing site conditions, prices will be more competitive, and owners are required to pay for differing site conditions only when they occur.

If an Owner agrees to assume the risk, contractors will not be forced to carry large contingencies in their bids.

Common Law

“...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.”

- *Ruff v. United States*, 96 Ct. Cl. 148, 164 (1942).

Type I (Type A) DSC

Subsurface or latent physical condition at the site which differs materially from those conditions indicated in the contract.

- 48 C.F.R. § 52.236-2(a)(1)

Type I DSC Recovery

In order to recover for a Type I differing site condition, the contractor must prove by a preponderance of the evidence that:

1. the conditions indicated in the contract differ materially from those actually encountered during performance;
2. the conditions actually encountered were reasonably unforeseeable based on all information available to the contractor at the time of bidding;
3. the contractor reasonably relied upon its interpretation of the contract and contract-related documents; and
4. the contractor was damaged as a result of the material variation between expected and encountered conditions.

Type II (Type B) DSC

Unknown physical condition at the site, of an unusual nature, which differs materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

- 48 C.F.R. § 52.236-2(a)(2)

Unusual condition that differs materially from those ordinarily encountered or is generally recognized as inherent in the work that could not have been reasonably anticipated from the pre-bid examination or from the preparation of the bid.

- NJDOT Std Spec, Sec. 104.03.03.3.a

Proving a Type II DSC

To prove Type II differing site conditions, a contractor must show by a preponderance of the evidence: 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 for in the contract.

A Type II differing site condition depends on the existence of three elements:

1. the condition must be unknown to the contractor;
2. the condition must be of an unusual nature; and
3. materially different from comparable work.

Type II Proof Considerations

- Courts have generally recognized that proving a Type II DSC is more difficult than proving a Type I DSC.
- The contractor's "general experience" as a contractor in the area where the project is located is an important factor. The owner can use the contractor's bid proposal against it to defend a DSC Type II claim, if the contractor touted its experience or expertise of constructing in the geographical region of the project at issue.

DSC Identification

1. The party identifying condition must promptly notify other party in writing prior to disturbance and before affected work is performed
2. Engineer to investigate, and notify if adjustment to contract is warranted
3. No adjustment if Contractor has not notified
4. Adjustment only on changed work

Different Project Delivery Methods

- Design-Bid-Build
 - Owner has responsibility for geotechnical investigation, design, specification
 - Include a DSC clause
 - Risk of DSC on Owner
- Design-Build
 - Bid submittal, and in some cases construction begins, before design is 100% complete
 - Shift some geotech investigation responsibility to DB
 - DSC risk not as clear

Is Owner on Design-Build Insulated From Liability for Type I (Type A) DSC?

- If the Design-Builder, and not the Owner, is responsible for creating the geotechnical record on which to base its design and construction methods, then the Owner has not effectively made any representations regarding the anticipated site conditions.
- Without making any representations regarding the anticipated conditions, then theoretically there would be no Owner liability for Type I DSC.

Design-Build Contract Clauses (NYSDOT)

- “Design-Build Team acknowledges that project documents furnished by the Department are preliminary and provided solely to assist the Design-Build Team in the development of the project design. Unless otherwise noted herein, the Department does not warrant or guarantee the sufficiency or accuracy of any information furnished by the Department.”
- “Department represents that, to the best of its knowledge, the information represented by the borings and tests taken by the Department are accurate at the location of the tests. Any extrapolation of such information to other locations by the Design-Builder shall be at Design-Builder’s risk.”

- Standard NYSDOT D-B Contract Clauses

How effective are such qualifications on Federal projects?

“If the government intends to represent that a certain type of subsurface ground exists, it should so state rather than drafting a document with ambiguous inferences to all type of ground.”.

Shank-Artukovich v. United States, 13 Cl.Ct. 346 (1987)

Design-Build – Owner Provided Design Data

- New York DOT – Geotechnical Design Manual – refers to the need of the Department to provide certain baseline reports such as a Geotechnical Baseline Report (GBR).
- What weight should a contractor give to those documents?
- Is there any other historical data available?
- How effective is it for Owners to qualify the effect of the information provided?

DSC Claim on a Design-Build Contract

DSC clause “exists precisely in order to take at least some of the gamble on subsurface conditions out of bidding.”

A post-award duty to investigate site conditions did not shift risk to Design-Builder for the discovery of contaminated soils.

Public Owner could not avoid liability simply because the RFP indicated that the design data was “preliminary.”

- *Metcalf Construction Co. v. US*, 742 F.3d 984 (Fed. Cir. 2014)

Washington



Nova Group/Tutor-Saliba v. United States 2011 U.S. Claims LEXIS 2679

- Potential obstructions were disclosed in the contract documents. A condition cannot be unknown if it was described in the contract documents.
 - Contractor's expert acknowledged that the presence of cobbles and boulders would be obvious in the area
- Government defended the Type II claim by pointing to "readily available geologic information" about the region, from 1957, which described the presence of a similar strata of material that the contractor encountered during its pile driving operations, and which the contractor had claimed was a Type II DSC.
- Contractor alleged "defective specifications" claim, which the Court viewed as intertwined with the DSC claim, to the point where the Court considered them to be one in the same.
 - Contractor argued that the geotechnical report provided misleading information regarding the hammer size for the pile driving that would work.
 - But the Court found that the Geotech report merely provided "recommendations" for the development of the design, and did not require the use of specific equipment.

Alaskan Way Viaduct Replacement – SR 99 Tunnel – Washington State DOT

- Design-Build Project – Seattle Tunnel Partners (STP)
- Tunneling machine (57 ft diameter, 900 tons) failed and needed extensive repairs, causing 2 years of delay.
- STP argued that a differing site condition, which was the responsibility of WSDOT, caused the issues.
- 3/8-inch thick, 8-inch diameter hollow steel pipe previously used for groundwater testing and monitoring
- WSDOT argued that the damage to TBM was the result of inadequate design and faulty operation, and there was no DSC.
- Was there a DSC and what type? If there was a DSC, who was responsible for the impacts?

SR 99 Contract Design Documents

- Provided by Owner:
 - Environmental Baseline Report (EBR)
 - Geotechnical Environmental Data Report (GEDR)
 - Geotechnical Baseline Report (GBR)
 - Used to establish a common understanding between contractor and owner of the subsurface conditions and potential impact and effect of risk on the design and construction of the project design concept.
 - Primary purpose is to establish baselines regarding geotechnical subsurface conditions present within the project.
- Contract Definition of DSC:
 - actual subsurface or latent physical conditions at the Site that are substantially or materially different from the conditions identified in the GBR, the EBR, or the GEDR

Jury Verdict Form: Was the Steel Well Casing of TW-2 a Differing Site Condition?

• STP Argument

- Contract Documents required a TBM that could mine through only the conditions identified in the GBR (boulders, wood, concrete debris, etc.). *Steel* well casing of TW-2 was not identified and was substantially different, and therefore is a DSC.
- GBR, GEDR, and EBR are silent with respect to the steel well casing of TW-2.

• WSDOT Argument

- TW-2 was disclosed in the GEDR, but did not state what TW-2's casing was made of
- DSC cannot be based on silence in Contract Documents – GBR was silent as to TW-2 and its casing.
- GEDR did not state TW-2's material, but did disclose an 8-inch diameter pumping well. Pumping wells typically have steel casings, therefore the *steel* casing was foreseeable.

Jury Verdict: No Differing Site Condition

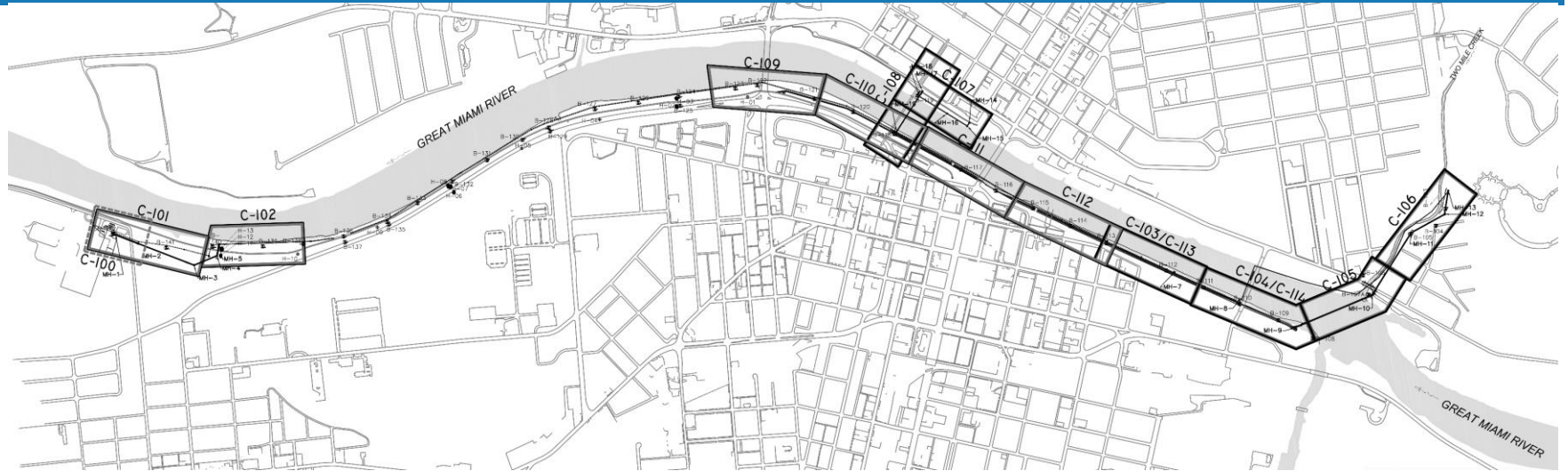
Result: No DSC. Design-Builder responsible for delays caused by the impact of the steel casing, thus no recovery by STP. Design-Builder liable to the State for \$57 million in liquidated damages.

Did the nature of the Project Delivery Method matter in the outcome?

Florida



Ohio and Pennsylvania



Questions?

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