Changed Site Conditions Claims:

A Roadmap for Success[i]

By Jeffrey R. Blease, Ed Baxa, Jr., and C. Ryan Maloney Foley & Lardner LLP

Estimating subsurface conditions is a combination of art and science. While investigative techniques have improved greatly in the last decade, the exact conditions to be encountered below grade are still unknown. Inevitably, pile driving contractors will at some point encounter a situation where the conditions encountered are not what was assumed at bid time. Harder rock, different rock profiles, fractured rock and other unanticipated soil conditions can greatly affect production and the cost of the job. What should the contractor do when an unanticipated condition affects the job? As production costs rise, the contractor may be faced with an unprofitable job at a minimum and financial ruin in the worst case scenario. Differing site conditions claims (changed conditions) are therefore high stakes claims that must be properly developed to be successful. While the outcome of any specific changed conditions claims is highly dependent on the specific facts and circumstances and specific contract provisions at play,[ii] this article is designed to provide a brief roadmap to help contractors avoid some of the key pitfalls that can often arise in connection with changed conditions claims.

Changed Site Conditions Contract Clauses and Type I and Type II Claims

Almost all construction contracts now contain what are commonly known as changed or differing site conditions clauses.[iii] The purpose of these contractual clauses is to benefit the owner and the contractor by taking some of the risk of changed site conditions out of bidding for both parties. As one court described it[iv]:

> The purpose of the changed conditions clause is thus to take at least some of the gamble on subsurface conditions out of bidding. Bidders ... need not consider how large a contingency should be added to the bid to cover the risk. They will have no windfalls and no disasters. 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."

Modern changed site conditions clause generally divide changed conditions claims into two types. Type I claims involve "subsurface or latent physical conditions at the site differing materially from those indicated in the contract documents."[v] Courts have generally found that in order to prevail on a Type I claim, the contractor must be able to prove:[vi] (1) the conditions indicated in the contract documents differ materially from the actual conditions encountered; (2) the actual conditions must have been reasonably unforeseeable based on all the information available to the contractor at the time of bidding; (3) the contractor reasonably relied on its interpretation of the contract documents; and (4) the contractor was damaged as a result of the material variance between the expected and encountered conditions.[vii]

Type II claims are those based on "unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in the work of the character provided for in the contract."[viii] Type II claims are therefore not based on the contract documents, but arise when the conditions encountered different materially from those normally encountered.[ix] To recover on a Type II claim, a contractor must be able to prove: (1) it did not know about the actual physical condition; (2) it could not have reasonably anticipated the condition from inspection or general experience; and (3) the actual condition varied from that normally expected in similar construction work.[x]

Site Investigation Duties

Prevailing on either a Type I or Type II claim requires the contractor to be able to prove the changed site condition could not have been reasonably anticipated by the contractor, and most contracts also contain a site inspection clause. A contractor has a duty to perform a reasonable inspection of the site to determine the existing conditions, and a contractor that fails to make a reasonable site investigation will not be allowed to claim for conditions that would have been observed by a reasonable inspection.[xi]

Generally, unless the contract contains specific site investigation requirements, the contractor's duty is based on the standard of a reasonable and prudent contractor in the same field of work, and the contractor is not held to the standard of an expert or obliged to conduct its own invasive exploration of subsurface or other concealed conditions.[xii] This general duty usually does not require the contractor to independently verify the validity and accuracy of the information provided by the owner.[xiii]

However, if the contract identifies specific issues that a reasonably prudent contractor should investigate through further inspection, the contractor may not be able to assert a changed conditions claim if the contractor fails to avail itself of the opportunity. For example, in *T.L. James & Co., v. Traylor Bros. Inc.*, a pile driving contractor that was delayed in its work for the Port of New Orleans due to subsurface obstructions had its changed conditions claim denied where the contract advised of "unknown infrastructures" and referred the contractor to a maps and archives room of the Port for detailed maps to review, but the subcontractor failed to investigate the site or review such information.[xiv] Claims have also been denied where the contractor did not adequately account for potential subsurface anomalies or make reasonable bid assumptions in light of the owner information provided.[xv]

Prudent contractors should whenever possible make a thorough visual inspection of the site and conduct a careful review of the plans and specifications prior to bidding. Not only will this help to ensure the accuracy of the bid, but it will also help bolster the strength of a later changed site conditions claim.

Notice Requirements

Changed conditions clauses also generally require the contractor to give the owner prompt notice of the changed condition before the changed condition is disturbed. The purpose of the typical notice provision is to provide the owner with the ability to verify the condition before it is disturbed, to perform its own independent investigation, to track the extent and cost of dealing with the changed condition and to negotiate any time extension or change order cost.[xvi] Although strict compliance with notice requirements may sometimes be excused, particularly where the contractor can establish the owner was not prejudiced,[xvii] the failure to provide timely notice has resulted in claims for changed site conditions being denied, an extraordinarily harsh result.[xviii] Therefore, contractors should pay close attention and use their best efforts to comply with contractual notice requirements and otherwise keep the owner informed of unexpected site conditions as they arise to attempt to avoid this potential pit fall.[xix] The best practice is to involve counsel when a claim is first suspected to review and analyze the contract to make certain the notice provided is timely and effective.[xx]

Claim Documentation

One of the requirements of all changed conditions claims is for contractor to prove the damages it suffered that were caused by the changed site condition. Claims have been denied where the contractor is unable to prove through reasonable documentation and evidence the actual damages it suffered due to the changed condition.

For example, in *Connolly-Pacific Co. v. U.S.*, the Court found that it was "clear from the record that plaintiffs were delayed in the construction ... by reason of the directives issues by the Navy in connection with the driving of piles," due to subsurface obstructions.[xxi] However, the Court nevertheless approved the trial commissioner's ruling that the plaintiff could not claim delay damages because an "examination of plaintiffs' job record[s] ... do not indicate that plaintiffs were damaged in any way, or suffered increased costs because of the delays in driving piles."[xxii]

As this case demonstrates, even where there is delay due to a changed condition, the claim may be denied or limited where the contractor's documentation of damages is insufficient to prove the actual damages caused by the changed condition. For this reason, contractors should endeavor as soon as possible after determining that there might be a claim to document as accurately and thoroughly as possible the delay and additional costs incurred due to the changed condition. The best practice is to properly document the information provided by the owner at bid time and the assumptions that were used to develop production estimates at bid time. When faced with a changed condition during the job, the best practice is to set up and track the extra work under separate cost codes and provide all required notices.

Conclusion

While the success of a changed site conditions claim often greatly depends on the specific facts and circumstances, by taking the time to do a careful bid review and site inspection up front, being knowledgeable regarding the basic changed conditions concepts in order to be able to timely recognize and evaluate a potential changed conditions claim, providing timely notice to the owner in compliance with the contract, and carefully and thoroughly documenting additional costs due to the changed condition, the contractor will be best positioned to successfully navigate the often challenging circumstances that can brought about due to a changed condition. ▽

---

i. This article is a follow up to the Changed Conditions Claims on a Driven Pile Project: A Roadmap for Success presentation by the authors at the Pile Drivers Contractors Association's 15th Annual International Conference and Expo in Savannah, Georgia on April 28, 2011.
ii. Because of this, specific concerns on any particular matter should be addressed with an attorney.
iii. For example, the AIA Document A201-1997, § 4.3.4 contains a changed site conditions clause, and most federal construction contracts contain a version found at 48 C.F.R. § 52.236-2.
iv. Foster Constr. C.A. & Williams Bros. Co. v. U.S., 435 F.2d 873, 887 (Ct.Cl. 1970).
v. 48 C.F.R. § 52.236-2(a)(1). In other words, Type I claims arise when the actual conditions encountered differ materially from those indicated in the contract documents. H.B. Mac, Inc., v. U.S., 153 F.3d 1338, 1343 (Fed. Cir. 1998).
vi. The burden is on a contractor to establish a changed site condition of either type by a preponderance of the evidence. See Stuyvesant Dredging Co. v. U.S., 834 F.2d 1576, 1581 (Fed. Cir. 1987)
vii. See e.g., Stuyvesant Dredging Co., 834 F.2d 1576, 1581; H.B. Mac, Inc., 153 F.3d at 1345.
viii. 48 C.R.R. § 52.236-2(a)(2).
ix. H.B. Mac, Inc., 153 F.3d at 1343.
x. Martin Paving Co. v. Widnall, 173 F.3d 433 (Fed. Cir. 1998).
xi. See e.g., Connor Bros. Constr. Co., Inc. v. U.S., 65 Fed. Cl. 657, 673 (2005); Randa/Madison Joint Venture III v. Dahlberg, 239 F.3d 1264, 1270-71 (Fed. Cir. 2001); Hardwick Bros. Co., II v. United States, 36 Fed. Cl. 347, 406 (1996).
xii. Philip L. Bruner and Patrick J. O'Connor, Jr., Bruner and O'Connor on Construction Law, § 14.55 (2010 ed.).
xiii. See e.g., Kit-San-Azusa, J.V. v. U.S., 32 Fed. Cl. 647, 651 (1995) (holding that contractor who experienced great difficulty in driving sheet pile due to the presence of subsurface boulders could rely on boring logs provided by owner which did not reference boulders, particularly where borings were numerous and well spaced).
xiv. 294 F.3d 743, 747 (5th Cir. 2002).
xv. H.B. Mac, Inc., 153 F.3d at 1347 (denying contractor's changed conditions claim for where court found it was not reasonably for contractor to have relied on soil borings 300 yards from site where problematic work was to be conducted).
xvi. Schnip Bldg. Co. v. U.S., 645 F.2d 950, 959-60 (Ct. Cl. 1981).
xvii. See e.g., Brinderson Corp. v. Hampton Road Sanitation Dist., 825 F.2d 41, 45 (4th Cir. 1987) (notice provision not enforced and changed conditions claim allowed where owner representatives on site had opportunity to investigate even though formal written notice was late).
xviii. See e.g., Schnip Bldg. Co., 645 F.2d at 959-60 (claim denied where lack of timely notice was found to have prejudiced the government by precluding timely investigation of the site conditions and possible redesign of the work).
xix. In the federal contracting environment, notice to the government is also important as a defensive measure to preserve changed site conditions as a defense to government claims, such as claims for liquidated damages for delay. See M. Maropakis Carpentry, Inc. v. United States, 609 F.3d 1323, 1327 (Fed. Cir. 2010) (holding that that in order for a contractor to assert a defense to a federal government claim that would require an adjustment of the contract, the contractor must have previously submitted that defense as a formal claim to the federal contracting officer).
xx. In the federal contracting environment, notice to the government is also important as a defensive measure to preserve changed site conditions as a defense to government claims, such as claims for liquidated damages for delay. See M. Maropakis Carpentry, Inc. v. United States, 609 F.3d 1323, 1327 (Fed. Cir. 2010) (holding that that in order for a contractor to assert a defense to a federal government claim that would require an adjustment of the contract, the contractor must have previously submitted that defense as a formal claim to the federal contracting officer).
xxi. 358 F.2d 995, 997 (Ct. Cl. 1966).
xxii. Id.