John P. Ahlers is a founding partner of Ahlers & Cressman PLLC, the firm's practice focus is on the resolution of construction disputes. Paige Spratt is an Associate with the law firm of Ahlers & Cressman PLLC and has a degree in Construction Management.

Taming the "Under-Ground" Beast: Deciphering Differing Site Conditions in Construction

Unanticipated subsurface discoveries made during a construction project often result in contentious and heated disputes between construction contractors and owners. Many times, what lies beneath the soil—an underground tank, large boulders, a high water table, is much different than what was foreseen by either the contractor or the owner and neither wants to be liable for the unanticipated subsurface conditions. In construction, these different conditions are termed *differing site conditions* (in heavy construction) or concealed conditions (in building construction). Differing site conditions are treated differently than other types of changes that may be encountered during the course of a building construction project.

A differing site condition is a physical condition other than weather, climate, or other act of God,[1] discovered on or affecting a construction site and differing in some material respect from what reasonably was anticipated.[2] The condition *must be physical*; changes in political conditions,[3] economic conditions,[4] or labor issues are not differing site conditions.[5]

(1) Contracts which do not contain a differing site condition (Common Law)

Under common law, the risk of any cost or difficulty associated with unexpected subsurface site conditions is generally borne by the construction contractor.

> Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered. Thus one who undertakes to erect a structure upon a particular site, assumes ordinarily the risk of subsidence of the soil.[6]

Courts have recognized some exceptions to the common law rule where the contractor is able to prove fraud or negligent misrepresentation of conditions,[7] breach of implied warranty of the sufficiency and adequacy of the plans and specifications,[8] construction change,[9] failure to disclose superior knowledge,[10] impossibility and commercial impracticability,[11] and cardinal change.[12] In those instances, where the contract contains no differing site conditions clause or the contract contains a differing site conditions clause and a broad disclaimer or exculpatory provision, the contractor, to recover, must prove an exception to the common law rule to obtain an increase in the contract price.

Prudent contractors include contingencies in their bids to protect themselves from encountering unforeseen subsurface conditions during performance if the contract does not contain a differing site condition. Where such contingencies do not eventuate, the owner incurs an unnecessary expense by paying more than actually necessary for the contract work. On the other hand, if the contingency was insufficient to cover the contractor's costs, the construction of the project might be disrupted and delayed while the contractor sought instructions, filed claims, or halted for lack of funds. Thus, the majority of public works contracts contain differing site conditions clauses.

(2) Contracts that contain a differing site conditions clause

Many construction contracts include risk-shifting site condition provisions (differing site conditions clause) which set forth the rights and obligations of the parties when conditions encountered during the performance of the work are different from those that were expected. Three common contract provisions which come up when unforeseen site conditions are discovered are: (1) the "differing site conditions" clause, which creates a right to claim for the unforeseen subsurface condition; (2) the "site investigation" clause which limits the right to claim; and (3) the "disclaimer clause" which purports to preclude or narrow any such claims.

(a) Differing Site Conditions Clause

The differing site conditions clause expressly recognizes the possibility of a claim for the costs which arise from such conditions, addresses the question of who bears the extra costs incurred, and typically also sets forth procedures for resolution of any disputes. Generally, differing site condition provisions also requires that the contractor provide notice before the conditions are disturbed to prevent prejudice by allowing the owner to investigate the site and determine the least costly approach to mitigate damages.

Most commonly used contracts contain differing site conditions clauses.[13] An example of a public works differing site conditions clause is WSDOT Standard Specifications § 1-04.7 (2010):

> During the progress of the work, if preexisting subsurface or latent physical conditions are encountered at the site, differing materially from those indicated in the contract, or if preexisting unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the contract, are encountered at the site, the party discovering such conditions shall promptly notify the other party in writing of the specific differing site conditions before they are disturbed and before the affected work is performed…"

The differing site conditions clause promises a contractor an equitable adjustment in contract price when unforeseen subsurface conditions are encountered. This adjustment is not automatic; the contractor must still prove that conditions encountered vary materially from the conditions indicated (referred to as Type I condition) or from the conditions ordinarily encountered (referred to as Type II condition). The contractor does not have to show culpability as it would in a breach of contract action.[14] Courts have generally found that differing site conditions clauses cover only conditions existing at the time the contract was entered into and not conditions occurring after award of the contract.[15]

Whether or not a contractor can recover for a Type I differing site condition depends upon whether the contractor has encountered a subsurface or latent physical condition differing materially from the conditions which are indicated in the contract documents or which may be implied from other language in the contract documents.

In Washington's most recent differing site conditions case, *Basin Paving Co. v. Mike M. Johnson*,[16] the Court of Appeals denied the contractor's recovery where the changed condition complained of was foreseeable. In *Basin Paving*, the contractor, Mike M. Johnson ("MMJ"), was hired by the City of Lind ("City") to build a waste water system.[17] The bulk of the project involved trench excavation.[18] The drawings had been produced in accordance with boring tests performed by the City's engineer.[19] The borings were done at 50-foot intervals along the trench line.[20]

During performance, MMJ encountered more rock (cobbles) in the excavation than anticipated based on the boring tests.[21] Yet, the court found that MMJ was not entitled to recovery under the contract changed conditions clause because the City made no contractual representations as to what MMJ would find under the surface, the contract placed the burden on MMJ to determine the presence of rock, the contract limited MMJ's reliance on the boring tests, and MMJ admitted in a deposition that the MMJ estimates anticipated ("foresaw") MMJ could encounter rock.[22] In sum, even though there was a changed conditions clause, the court stated that "the presence of rock *in any amount* is not a changed condition entitling MMJ to additional compensation" because the presence of rock was foreseeable under the contract.[23] Though the contractor anticipated (foresaw) that occasional cobbles would be encountered during the excavation, the quantity of stone was not foreseeable. Nevertheless, the court denied the contractor recovery under the contract's differing site conditions provision.

To recover for a Type II condition, a contractor must generally demonstrate that the condition was "*unknown* and of an *unusual nature*, differing materially from those ordinarily encountered and recognized as inhering in [such] work" which was not disclosed to the contractor.[24] Type II differing site conditions are more difficult to prove than Type I conditions.[25]

(b) Site Investigation Clauses

A site investigation clause provides that the contractor has investigated the site and has familiarized itself with the site conditions. A contractor will not be able to make a claim for what it should have discovered as a reasonable contractor viewing the site. A contractor's failure to investigate does not preclude a claim under the differing site conditions clause. Rather, a contractor who fails to inspect or performs an inadequate inspection bears the risk of any condition that could have been discovered by a reasonable site investigation.[26] The City's site investigation clause in *Basin Paving* required "[p]rospective bidders [] to examine the pipeline routes carefully and to *their own satisfaction* determine the likelihood of encountering rock formations."[27]

(c) Disclaimer/Exculpatory Clauses

Both public and private owners, at times, include disclaimers in the contract as to subsurface conditions supplied in the bidding documents to limit a contractor's ability to recover for differing site conditions. These disclaimers might be specific statements that "no claims for differing site conditions will be recognized regarding the absence or presence of subsurface rock, unstable rock conditions, etc.," or general statements that "the contractors should not rely upon any contract indications or owner-furnished information, but should make their own soils analysis." The City's disclaimer in *Basin Paving* was a general statement that "[t]he information on the Plans is … the best factual information available *without assumption of responsibility as to its accuracy or for any conclusions that the contractor might draw therefrom*."[28] The Court of Appeals found this provision was enough for the court to limit MMJ's reliance on the boring tests supplied by the City's engineer.[29]

(d) Notice

All of the various differing site conditions clauses require the contractor to give notice of the differing site condition.[30] The purpose of the prompt notice requirement is to give the owner the opportunity to investigate, verify the existence of the differing site condition, and to possibly alter the work so as to avoid excessive cost increases.[31] Under another oft-cited case involving the Mike M. Johnson, Inc. firm,[32] a contractor must strictly comply with the contracts notice and claim submission requirements or it risks forfeiting any claim it might have had for encountering a differing site condition.[33]

(3) Conclusion

Today, King County is home to many "mega" construction projects, including the SR 99 Alaskan Way Viaduct Replacement, the SR 520 Bridge Replacement, and Sound Transit's light rail expansion which will entail extensive excavation and under-ground work. With many areas of King County not having been disturbed since the Great Seattle Fire of 1889, contractors will likely encounter some very interesting and unusual differing site conditions, as well as legal disputes.

[1]*Turnkey Enters., Inc. v. United States*, 597 F.2d 750, 754, 220 Ct. Cl. 179, 186 (1979).

[2]*Foster Constr. & Williams Bros. Co., a Joint Venture v. United States*, 335 F.2d 873, 193 Ct. Cl. 587, 613-14 (1970).

[3]*Hallman Bros. v. United States*, 68 F.Supp. 204, 107 Ct. Cl. 555, 556 (1947).

[4]*Western Contracting Corp. v. State Bd. of Equalization*, 39 Cal.App.3d 341, 114 Cal. Rptr. 227 (1974).

[5]*Cross Constr. Co.*, Eng. BCA No. 3676, 79-1 BCA § 13, 707 (1979).

[6]*Dravo Corp. v. Metro Seattle*, 79 Wn.2d 214, 218, 484 P.2d 399 (1971).

[7]*Douglas Northwest, Inc. v. Bill O'Brien & Sons Construction, Inc.*, 64 Wn. App. 661, 828 P.2d 565 (1992).

[8]*Weston v. New Bethel Baptist Church*, 23 Wn. App. 747, 753, 598 P.2d 411 (1978); *Prier v. Refrigeration Eng'r Co.*, 74 Wn.2d 25, 29, 442 P.2d 621 (1968).

[9]*Emerson-Sack-Warner Corp.*, ASBCA 6004, 61-2 BCA § 3248, 16,827 (1961).

[10]*Hardeman-Monier Hutcherson v. United States*, 458 F.2d 1364 (Ct.Cl. 1972); *Helene Curtis Indus., Inc. v. United States*, 312 F.2d 774 (Ct.Cl. 1963).

[11]*Valley Constr. Co. v. Lakehills Sewer Dist.*, 67 Wn.2d 910, 410 P.2d 796 (1965); *see also Liner v. Armstrong Homes of Bremerton, Inc.*, 19 Wn. App. 921, 579 P.2d 367 (1978) (commercial impracticability due to extreme and unreasonable difficulty, expense, injury or loss).

[12]*V.C. Edwards v. Port of Tacoma*, 83 Wn.2d 7, 514 P.2d 1331 (1973); *Bignold v. King Cty*, 65 Wn.2d 817, 399 P.2d 611 (1965).

[13] AIA 201 (2007) Article 4.3.4 (concealed or unknown conditions); FAR 52.236-2 (Apr. 1984) (differing site conditions); ConsensusDOCS (CDS No. 200) (concealed or unknown conditions); Engineers Joint Construction Documents Committee (EJCDC 4.02); WSDOT (2010) Standard Specifications § 1-04.7 (change conditions).

[14]*Arundel Corp. v. United States*, 515 F.2d 1116, 96 Ct.Cl. 77 (1975).

[15]*Id.*

[16]107 Wn. App. 61, 63, 27 P.3d 609 (2001).

[17]*Id*. at 63.

[18]*Id.*

[19]*Id.*

[20]*Id*.

[21]*Id*. at 64.

[22] *Id*. at 65-68.

[23] *Id*. at 66.

[24] F.A.R. 52-236-2.

[25] *See Charles T. Parker Constr. Co. v. United States*, 193 Ct. Cl. 320, 433 F.2d 771, 778 (1970).

[26] *Vann v. United States*, 420 F.2d 968 (Ct.Cl. 1970).

[27] *Basin Paving*, 107 Wn. App. at 66. (Emphasis in Original).

[28] *Id*. at 67. (Emphasis in Original).

[29] *Id.*

[30] AIA 201 (2007) Art. 4.3.4, ConsensusDOCS 3.16.2; FAR 52.236-2 (Apr. 1984); WSDOT Standard Specifications § 1-04.7 (2010) EJDC Standard Conditions 4.03 A. The current AIA clause requires that notice be given within 21 days. AIA 201 (1997) Art. 4.3.4.

[31] *Schnip Building Co. v. United States*, 645 F.2d 950 (Ct. Cl. 1981).

[32] *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 78 P.3d 161 (2003).

[33] In *Mike M. Johnson* the Washington Supreme Court held that an element of prejudice to enforce a contractual notice provision is not required. If the purpose behind the requirement of the notice provision is to give the owner an opportunity to investigate and verify the existence of the differing site condition and participate in the mitigation measures to avoid excessive cost, "prejudice" should, in some manner, be taken into account when determining whether the lack of written notice should effect the forfeiture of a contractor's claim.

The issue of written notice in construction contracts will be addressed in an upcoming Washington State Bar Association article. *See also* Ahlers, *Notice in Washington Construction Contracts: Is Prejudice the Issue?*, 54 Washington State Bar News 4, p. 41 (1998).

In *C.W. Bignold v. King County*, 65 Wn. 2d 817, 822-23, 399 P.2d 611 (1965), the contractor did not give written notice of the differing site conditions as required by the contract. This failure, however, did not prevent the contractor's recovery for the cost of the extra work required by the conditions which had not been anticipated by the contracting parties. King County (the owner) representatives had become immediately aware of the differing site conditions, and had ordered the contractor to perform the extra work involved. *Mike M. Johnson* did not overrule *C.W. Bignold*. *C.W. Bignold* should still be good law for differing site conditions cases where written notice does not strictly conform to the contract requirements.