



DIFFERING SITE CONDITIONS

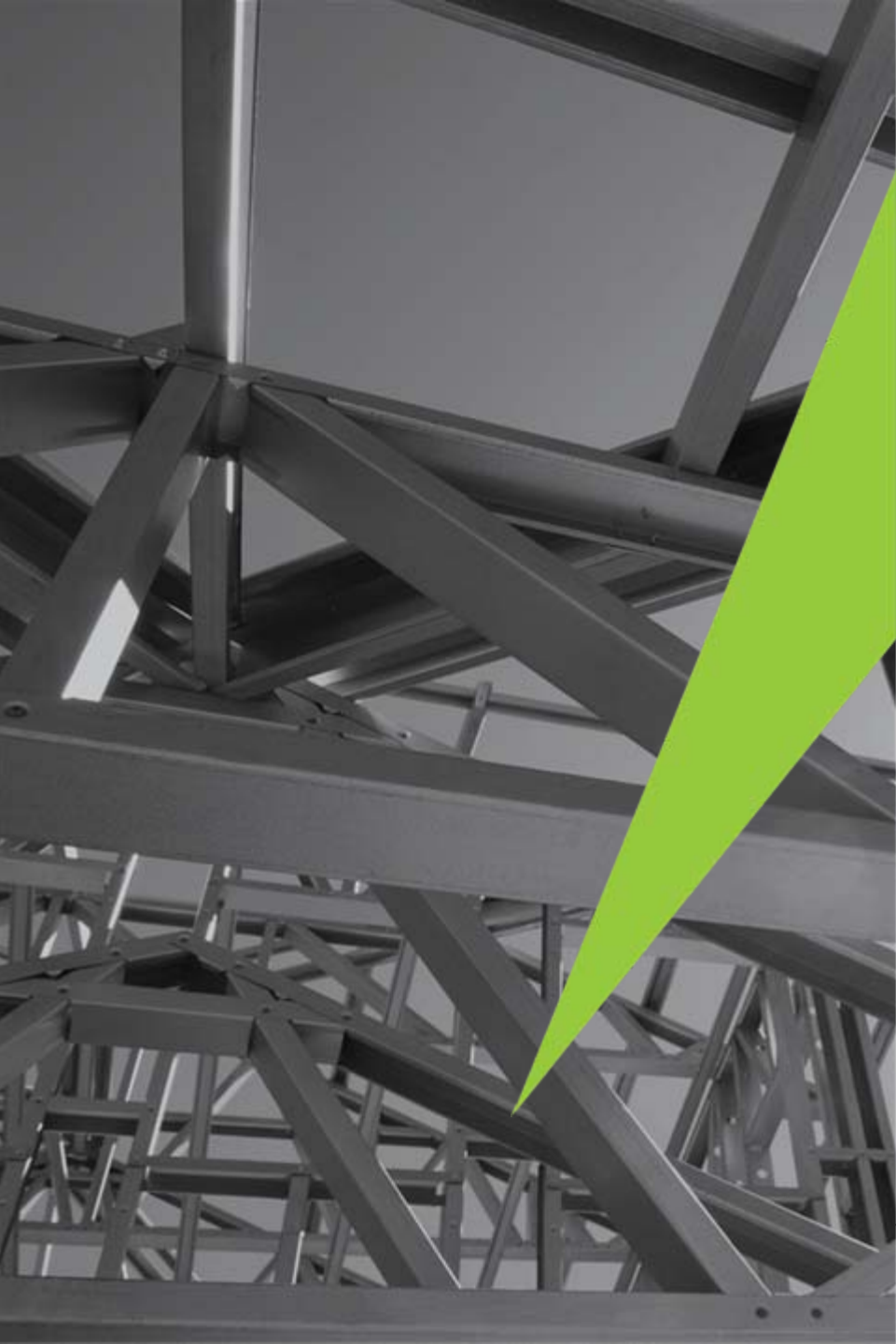
Whose Risk Is It?

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INTRODUCTION



Introduction



- DSC clause one of oldest in government contracts
 - Dates back to 1926
- Clause transfers all risk of latent, hidden or unknown site conditions to owner
 - Incentivizes contractors to decrease bid contingency
- Clause promises if “materially different conditions” encountered, contract will be adjusted
- Boards of Contract Appeals & Courts have slowly been eroding coverage of DSC clause
 - Increasing contractor risk

Definition of Differing Site Condition



➤ Definition

- Physical condition
- Encountered at site
- **Not** visible, **not** known to exist during bidding
- & **materially different** from conditions believed to exist at time of bidding

➤ Also referred to as Changed Site Conditions or Unforeseeable Physical Conditions

➤ Problem:

- Condition **not** known, **not** planned for & **not** budgeted
- Most conditions underground & since underground work typically early work, often causes project delay

Concept of Contractual Relief



- Involves risk assignment to specific party
 - Identifies what risks assigned
 - To which party
 - Conditions under which impacted party entitled to relief
 - What steps impacted party must take to obtain relief
- If risk event arises & impacted party complies with contract
 - Entitled to contractual relief (equitable adjustment)
 - cost &/or time

Purpose of DSC Clause

Why Need One?



➤ DSC clause needed

- *“...to shift the risk of unknown physical conditions to the owner...by allowing a contractor to seek an equitable adjustment in the contract price when the contractor encounters unanticipated conditions...”*

➤ Why do owners assume such risk?

- Theory – if owner includes DSC clause
- Contractors will reduce contingency in bid
- Resulting in lower bid cost
- Owner pays extra only for actual conditions encountered, materially different from conditions indicated

History of DSC Clauses



- Common law traditionally placed risk of unknown, unanticipated conditions on contractors
- In **1926** Federal Board of Contracts & Adjustments required DSC clause in all Federal contracts
 - “*...to eliminate the contingency factor for subsurface conditions...*”
- Originally included Type 1 DSCs only
 - “*...conditions differing materially from indicated conditions...*”
- **Idea** - to eliminate “*...element of gambling...*” from Federal construction contracts

History of DSC Clauses



➤ In **1935** Type 2 DSCs included in clause for

“...situations where contract silent regarding subsurface conditions but contractor encounters unforeseen, unusual conditions differing materially from conditions ordinarily encountered...”

➤ In **1963** name of clause changed from Changed Conditions to Differing Site Conditions

Modern DSC Clauses



- Most modern contracts contain DSC clause including both Type 1 and Type 2 conditions
 - Some contracts now include a Type 3 condition
- Type 1 DSC's
 - “...unanticipated physical conditions materially different from those indicated in bid documents...”
 - ❖ Federal Acquisition Regulations (FAR)
 - ❖ American Institute of Architects (AIA)
 - ❖ ConsensusDocs (AGCA & 33 construction organizations)
 - ❖ Construction Management Association of America (CMAA)
 - ❖ Design Build Institute of America (DBIA)
 - ❖ Engineers Joint Contract Documents Committee (EJCDC)

Modern DSC Clauses



➤ Type 2 DSC's

- “*...unknown physical conditions at the site of an unusual & unpredictable nature...*”
 - ❖ FAR, AIA, ConsensusDocs, CMAA, DBIA & EJCDC

➤ Type 3 DSC's

- New type in last 15 – 20 years
- Includes encounters with unanticipated toxic & hazardous wastes
 - ❖ Some local & highway department contracts
 - ❖ AIA, ConsensusDocs, DBIA, EJCDC

Conditions Typically Covered by DSC Clauses



- Most DSC clauses cover unforeseen, hidden or latent physical conditions at site materially different from available information at time of bid
- 3 key elements necessary for DSC claim
 - Unforeseeability –
 - ❖ Condition could not have been anticipated based on all information available at time of bid & site visit
 - Physical Condition –
 - ❖ Must be physical condition (natural or manmade) not economic, political, governmental or business condition
 - At the Site –
 - ❖ Project location or sites designated by owner in contract

Conditions Typically Covered by DSC Clauses

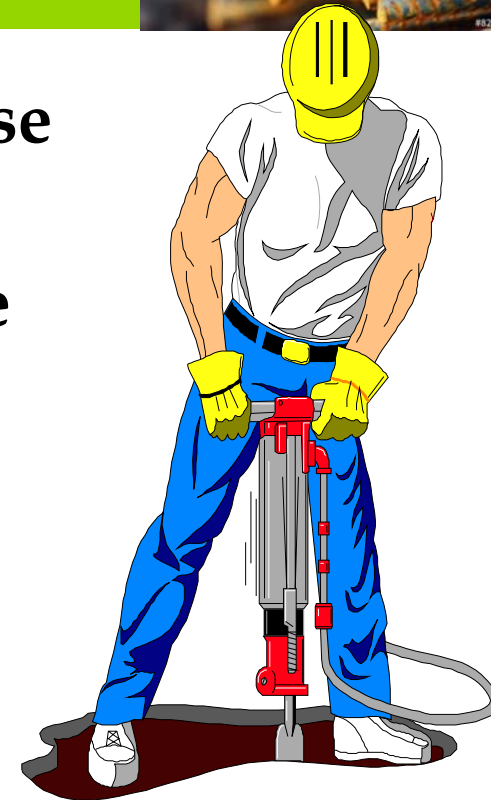


- Soil bearing capacity, unstable soils
- Rocks, boulders, debris & other subsurface obstructions
- Groundwater, subsurface water
- Failure of designated borrow pits to produce
- Undisclosed utilities & structures
- Archeological & paleontological sites
- Endangered species
- Hazardous & toxic wastes
- Incorrect disposal sites
- Inaccurate borings
- Inaccurate moisture retention qualities
- Hard, cemented soils
- Unsuitable fill
- Unanticipated water conditions, perched or artesian water
- Undisclosed concrete piles
- Inaccurate quantities of materials or substances to be removed
- Undisclosed ductwork
- Multiple roofs to be removed
- Thickness of concrete floor or wall
- Excessive, large subsurface boulders
- Inaccurate rock elevations
- Unanticipated weathering of rock
- Undisclosed conduits in floors or walls
- Etc.

What Are Indications?



- **“Indications”** for purposes of DSC clause may be either **“express”** or **“implied”**
- Examples of **express indications** include
 - Rock at specific elevations
 - Perched water vs. hydrostatic water
 - Specific soil types (i.e., clay, silts, sands, etc.)
 - Utility locations shown on drawings
- One Court noted
 - *“There must be reasonably plain or positive indications in the bid information or contract documents that such subsurface conditions would be otherwise than actually found...”*



What Are Indications?



- **Express indications** need **not** be
 - “...*explicit or specific, but only enough to impress or lull a reasonable bidder not to expect the adverse conditions actually encountered...*”
- **Implied indications** are uncertain, ambiguous
- Contractor must be able to demonstrate that indications “...*reasonably inferable...*” from documents
- Courts & Boards look to
 - Design requirements that cannot be met
 - Construction methods that cannot be employed
 - Lack of detail in description of condition

“Material Difference”



- **“Material difference”** – a term of legal art
- **“Material”** defined as “... *important...having influence or effect...*”
- **Material difference is situation specific analysis**
 - Depends on facts of each situation
 - Examined from perspective of whether condition had **“substantial impact”** on work, on cost &/or on time
- **Materiality turns on unique facts**
 - Difference in quality of substance encountered
 - Quantity changes resulting from encounter
 - Change in construction technique due to encounter

“Material Difference”



- Boards & Courts reluctant to define term
 - Prefer case by case analysis
 - Simply declare whether **is / is not** materially different
 - Generally give no reason for such decision

- What is clear –
 - Contractors pursuing Type 1 or Type 3 DSC will have easier time proving material difference by comparing actual to as bid conditions
 - Contractors pursuing Type 2 DSC will have more difficult challenge

Impact of Contract Disclaimers



- Despite employing DSC clause to lower bid costs, owners often try to insert disclaimer language
 - Site investigation clauses
 - Unit priced contracts declaring some aspects of work *“incidental”*
 - Contractual disclaimers



➤ Example

“The owner makes no representation & denies any responsibility for the accuracy of any subsurface data furnished & expects each bidder to satisfy itself as to the character, quantity & quality of subsurface materials to be encountered”

Impact of Contract Disclaimers



- Purpose of disclaimer language to **insulate** owner from DSC claims
- Boards & Courts often **refuse** to enforce such disclaimers
 - Take position owners **cannot** give with one hand (include a DSC clause & benefit from lower bids) & take away with other (disclaim information provided & deny contractor's right of recovery)
- Even clear disclaimer language **unlikely** to decrease contractor's right to rely on owner furnished data

Conditions Not Included Under DSC Clauses



- Conditions not covered by DSC clauses –
 - Weather conditions
 - Acts of God – fires, floods, typhoons, earthquakes, etc.
 - Economic, governmental or political conditions
 - Delays or problems caused by other contractors
 - Acts of government in sovereign capacity
 - Acts of war or third parties
 - Labor disputes or shortages
 - Civil unrest
 - Impact of local ordinances
- Not “*physical conditions*”



Conditions Sometimes Included Under DSC Clause



- Post award conditions generally not covered
 - But 3 exceptions to rule
- Government had duty to correct or prevent situation
 - Government had ability to prevent post-award condition from damaging project but failed to do so
- Variations in Estimated Quantities
 - Quantities vary because job entirely different than bid
 - Unforeseen need for unusual construction method
 - Owner estimate “*negligently performed*” or changes “*substantially increased*” estimated quantities

Conditions Sometimes Included Under DSC Clause



➤ Absence of Quantity Variation Clause

• Owner provided quantities?

- ❖ **Type 1 DSC** – measure difference between as bid & actual quantities to show “*material difference*”

• Contractor had to estimate quantities?

- ❖ **Type 2 DSC** – contractor must prove original estimated quantities reasonably accurate; must prove actual quantities installed; then measure difference between as bid & actual quantities to demonstrate “*material difference*”

Roadmap for Successful DSC Claim – Six Essentials



1. Contract documents affirmatively indicated expected subsurface conditions
2. Contractor acted reasonably & prudently in interpreting contract document information
3. Contractor reasonably relied on indications of subsurface conditions when preparing bid
4. Condition encountered materially different from conditions anticipated
5. Condition encountered unforeseeable
6. Claimed damages solely attributable to materially different condition encountered

Five Additional Contract Requirements



1. Site investigation
 - Failure to visit site may negate ability to recover
2. Notice to owner
 - Prompt written(?) notice required for DSC claim
3. Stop work in affected area
 - DSC clause “*self-actuating stop work order*” to preserve condition complained of (the evidence)
4. Allow owner time to investigate
 - Owner required to promptly investigate
5. Mitigate damages
 - Contractor required to resolve DSC cost effectively

Contractor's Duty to Proceed With Work



- Most contracts **require** contractor to continue work on portions of project **not** impacted by DSC, pending determination concerning claim
 - Contractor **cannot** suspend work awaiting owner decision
- Owner may direct contractor to return to work **prior to** determining whether or not a DSC
- Contractors failing to diligently pursue work **may** face Default Termination

Reverse DSC Claims



➤ Rare, but possible, for owner to file DSC claim for conditions “*materially better than anticipated*”

➤ DSC clauses which read –

“The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do materially differ and causes an increase or decrease in the contractor’s cost of, or the time required for, performance of any part of the work under this contract, ... an equitable adjustment shall be made and the contract modified in writing accordingly”

Reverse DSC Claims



- Owner should provide notice
- Owner **must** investigate actual conditions
- An owner claim therefore owner **must prove**
 - Conditions materially better than anticipated
 - Actual conditions caused cost savings
- Reverse DSC litigation very rare
- Most frequently handled as deductive change

Traditional Understanding of DSC Clause



- After more than 96 years, most think they understand DSC clause & how it operates
- Most contractors believe –
 - Clause transfers **all** risk of latent site conditions to owner
 - Contractors have **absolute right** to rely on information provided during bidding
 - Owners obligated to provide **all** information at time of bidding
 - When subsurface conditions report **silent** on condition this indicates condition **does not exist** at site



As Max E. Greenberg commented in 1954 –

“It ain’t necessarily so!”



Changing Risk Allocation Concerning DSC's



- **Examine some decisions limiting contractor's right of recovery under DSC clause**
- **Boards & Courts seem to have more nuanced understanding of DSC clause than most in industry**
- **Appears to be a trend toward changing risk allocation under DSC clause**

Duty to Review All Information “Available for Inspection”



Appeal of Bean Stuyvesant LLC

- Drilling logs & borings in bid but other information available at COE District office
- Bean Stuyvesant not review other information or make site visit
- Board ruled

“Appellant...has not shown that conditions reasonably unforeseeable based upon all information available at time of bidding. A contractor has a duty to review information made available for inspection...”

Duty to Review All Information “Available for Inspection”



- Similar ruling in Hunt & Willett, Inc. v. US
“...the contractor cannot rest content with the materials furnished to him; he must also refer to other materials which are available and about which he is told by the contract documents...”
- Lesson Learned (Contractors)
 - When bid documents identify “*other information available upon request*” review information & incorporate into bid
- Lesson Learned (Owners)
 - Require design professionals, geotechnical consultants locate all soil reports in area, incorporate notice of availability of additional information in ITB

No Duty to Disclose Information Available Through Independent Investigation



North Pacific Erectors v. Alaska Dept. of Administration

- Involved contract for renovation & asbestos removal from State office building
- North Pacific filed claim – DSC made work more labor intensive
 - Neither North Pacific nor subcontractor attended pre-bid conference or made site visit
- Court ruled 4 conditions needed to establish owner failed to disclose superior knowledge
 - Contractor takes job without vital knowledge that would affect performance of work

No Duty to Disclose Information Available Through Independent Investigation



- Owner aware contractor had **no** knowledge or reason to seek more information
- Contract misled contractor, **not** put them on notice to inquire
- Owner **failed** to provide relevant information
- Court ruled North Pacific **not** meet these tests
 - DSC claim denied
- **Lesson Learned (Contractor)**
 - Do **not** assume owner required to provide **all** information.
 - Perform & document some independent investigation. If other information discovered, **include** in bid cost.

When Contract Silent DSC Claim Cannot Arise



P.J. Maffei Building Wrecking Corp. v. US

➤ Court ruled against Maffei on DSC claim for shortfall of salvageable steel in demolition contract

➤ Court ruled

“...success on a Type I Differing Site Conditions claim turns on the contractor’s ability to demonstrate that the conditions ‘indicated’ in the contract documents differ materially from those it encounters during performance. A contractor cannot be eligible for an equitable adjustment for changed conditions unless the contract indicated what those conditions would supposedly be...”

When Contract Silent DSC Claim Cannot Arise



Ragonese v. US

“...a contract silent on subsurface conditions cannot support a changed condition claim...”

Foster Construction & Williams Brothers, IV v. US

➤ DSC clause *“...cannot be invoked if plans & specifications do not ‘show’ or ‘indicate’ anything about alleged unforeseen condition, i.e. if they say nothing one way or the other about subsurface conditions...”*

➤ Lesson Learned (Contractors)

- If bidding documents silent on condition, no guarantee condition does not exist

Owners Do Not Assume All Risk of Unforeseen Conditions



Olympus Corporation v. US

- Involved paving contract delayed due to oil spill that contaminated soil
- Court stated DSC clause
 - “...does not shift the risk of all unanticipated adverse site conditions from the contractor to the government. Rather, the government bears only those risks that encourage more accurate bidding...”*
- Court concluded DSC clause only applies to conditions existing on date of contract execution

Owners Do Not Assume All Risk of Unforeseen Conditions



➤ Lesson Learned (Contractors)

- If site conditions change after contract award, do not rely on DSC clause for equitable adjustment.
- Look to other equitable adjustment clauses such as Delay, Suspension or Changes clause.



Contractors Cannot Rely on Indications Where Simple Inquiries Might Reveal Contrary Conditions



Foster Construction & Williams Brothers, IV v. US

- Even in situations where owner provides all information on subsurface conditions & makes no attempt to disclaim responsibility, contractors cannot rest easy
- Court ruled
“The contractor is unable to rely on contract indications of the subsurface only where relatively simple inquiries might have revealed contrary conditions...”

Contractors **Cannot** Rely on Indications Where Simple Inquiries Might Reveal Contrary Conditions



➤ Example

- On highway project where soil borings show **no** groundwater in borings, contractors may **not** rely on silence if, for example, local Soil Conservation Service office has records indicating groundwater elevations in area

➤ Lesson Learned (Contractors)

- Bidders **must** perform reasonable amount of independent investigation concerning subsurface conditions, especially when bidding information **silent** on matters that, logically, should be present on or near site

When Bid Information Makes No Specific Representations Contractors Cannot Claim Materially Different Conditions



Metcalf Construction Company v. US

- Involved design/build contract for military housing in Hawaii
 - Metcalf encountered expansive soils & claimed DSC
- Court noted government soils report addressed only “*...site preparation, foundation support, footing, slab & reinforcement requirements...*”
 - Court also noted contract required contractor to employ own geotechnical consultant after award to perform independent investigation for design of project

When Bid Information Makes No Specific Representations Contractors Cannot Claim Materially Different Conditions



➤ Court concluded

“...Metcalf could rely on (government issued report) for bidding purposes, but the Navy advised all potential contractors they could not rely on (government issued report) in performing the...project...”

➤ Lesson Learned (Contractors)

- When bid information makes no specific representation, may not be successful in claiming *“material difference”*

➤ Lesson Learned (Owners)

- When require bidders to hire own geotechnical engineer, contractors probably not be able to rely on owner information exclusively

Subsurface Soils Probably Not Transition Into Another Type Along Straight Line Projection



Appeal of NDG Constructors

- Involved contract for installation of water line
- Portion of line had to be tunneled under interstate highway
- Contract contained disclaimer clause

“...the subsurface conditions at other times and locations at the site may differ from those found at our test boring locations ...the soils between the boring locations may differ significantly from those found at the boring locations...”

Subsurface Soils Probably Not Transition Into Another Type Along Straight Line Projection



- During hearings NDG's expert testified that lacking any other information than two borings, only option bidder had was to draw straight lines between borings
- Board rejected testimony
 - *"...it is highly improbable that soil conditions of one type would transition into another type along a straight line projection..."*
- Board relied on disclaimer
 - *"...soil conditions could change 'at some point' & they did..."*

Subsurface Soils Probably Not Transition Into Another Type Along a Straight Line Projection



➤ Lesson Learned (Contractors)

- When faced with disclaimers of geotechnical information bidders well advised to retain own geotechnical consultant to provide advice

➤ Lesson Learned (Owners)

- To avoid similar disputes owners may want to consider using Geotechnical Design Summary Report (GDSR) or Geotechnical Baseline Report (GBT) where geotechnical consultant “interprets” soil, rock & water conditions between borings
- Raises question: How else can contractor interpret such limited data when bidding?

Subsurface Data Provided in Contract May Be A “Guide Only”



Stuyvesant Dredging Company v. US

- Contract involved maintenance dredging
- COE included information on material to be dredged & in-situ densities in bid documents
 - Also made available records of previous dredging projects
- Stuyvesant had bid on 2 similar dredging projects
 - Did not visit site, take material samples or echo soundings
 - Relied on fact that technical information identical to previous 2 projects

Subsurface Data Provided in Contract May Be A “Guide Only”



➤ Court ruled

“...the six average density readings were identified to be guides only...did not reach the level of estimates and [were] clearly not facts upon which plaintiff could rely”

➤ Added

- *“Government estimates are not warranties”*

➤ Lesson Learned (Contractors)

- Review owner provided information carefully when preparing bid.
- If information labelled as “guide” contractor may be at risk for relying solely on such information

Contractors Cannot Prove DSC Based On Information Never Reviewed



Stuyvesant Dredging Company v. US

➤ Court also dealt with issue contractor not reviewing available information from previous projects

➤ Court held

“[P]laintiff cannot prove a differing site condition based upon the information in the files of the Corps because it never reviewed that information until the contract was nearly completed...”

Contractors Cannot Prove DSC Based On Information Never Reviewed



➤ Citing Vann v. US –

“Where contractor has opportunity to learn facts [but fails to do so] he is unable to prove ... he was misled by the contract”

➤ Lesson Learned (Contractors)

- When other *“available information”* noted in bid documents bidders must review information.
- Helps bid preparation & preserves contractor’s right to file DSC based on material difference between bid & actual conditions

Each Government Contract Stands on Its Own



Stuyvesant Dredging Company v. US

- Finally, Court dealt with argument that Stuyvesant had reviewed all information on 2 previous projects
 - Stuyvesant argued in 2 previous projects soil conditions encountered were same as actually encountered
 - Therefore assumed it would be same on project

Each Government Contract Stands on Its Own



➤ Court dismissed claim

“Each government contract stands by itself...Unless government advises contractors conditions in different contracts the same, contractor acts at its peril if it assumes that what it learned on different contracts applies equally to new contract...”

➤ Lesson Learned (Contractors)

- Do not assume conditions from previous contracts same as conditions on new contact

Good News: Notice of DSC Need Not Follow Any Specific Format



Ace Constructors, Inc. v. US

➤ In *Metcalf I* Court addressed issue of form of notice of DSC citing *Ace Constructors*

➤ Court noted

“...notice need not follow any specific format, but must merely make the Contracting Officer aware of the differing site condition...Notice under the differing site provision of the contract requires no precise formula...”

Good News: Notice of DSC Need Not Follow Any Specific Format



➤ Lesson Learned (Contractors)

- Review DSC clause in contract closely.
- **Must** provide prompt written notice to owner.
- While **not** stated in contract, probably wise to provide location & identify condition considered to be materially different



Good News: “Indications” in Contract Do Not Have to be Explicit or Specific



Foster Construction & Williams Brothers JV v. US

➤ An older case (1970) but still frequently cited even today –

“[I]t is not necessary that the ‘indications’ in the contract be explicit or specific; all that is required is that there be enough of an indication on the face of the contract documents for a bidder reasonably not to expect ‘subsurface or latent physical conditions at the site differing materially from those indicated in the contract’”

Good News: “**Indications**” in Contract do **NOT** have to Be Explicit or Specific



➤ Lesson Learned (Contractors)

- **Summarize & document** subsurface conditions anticipated based on review of **all** documents available.



- **Record** how relied on conditions when preparing bid & how reliance was translated into bid



Practical Recommendations – Owners



- Owners – To avoid liability for unknown, unforeseen site conditions
 - Disclose all known conditions during bid process
 - If include DSC clause in contract
 - ❖ Require all bidders to attend pre-bid site walk & document all site conditions observed
 - ❖ Impose strict written notice requirements
 - ❖ Consider limiting recoverable costs to direct job site costs & excusable, non-compensable delay
 - Understand exculpatory clauses may not avoid liability when contract documents make representations about site conditions

Practical Recommendations – Owners



- If owners want to **disclaim** geotechnical information provided make certain contract clearly states geotechnical & subsurface information **not** part of contract documents
- **Prior** to bidding & awarding contract owners need to be certain they understand how the contract allocates risk of DSCs



Practical Recommendations – Contractors



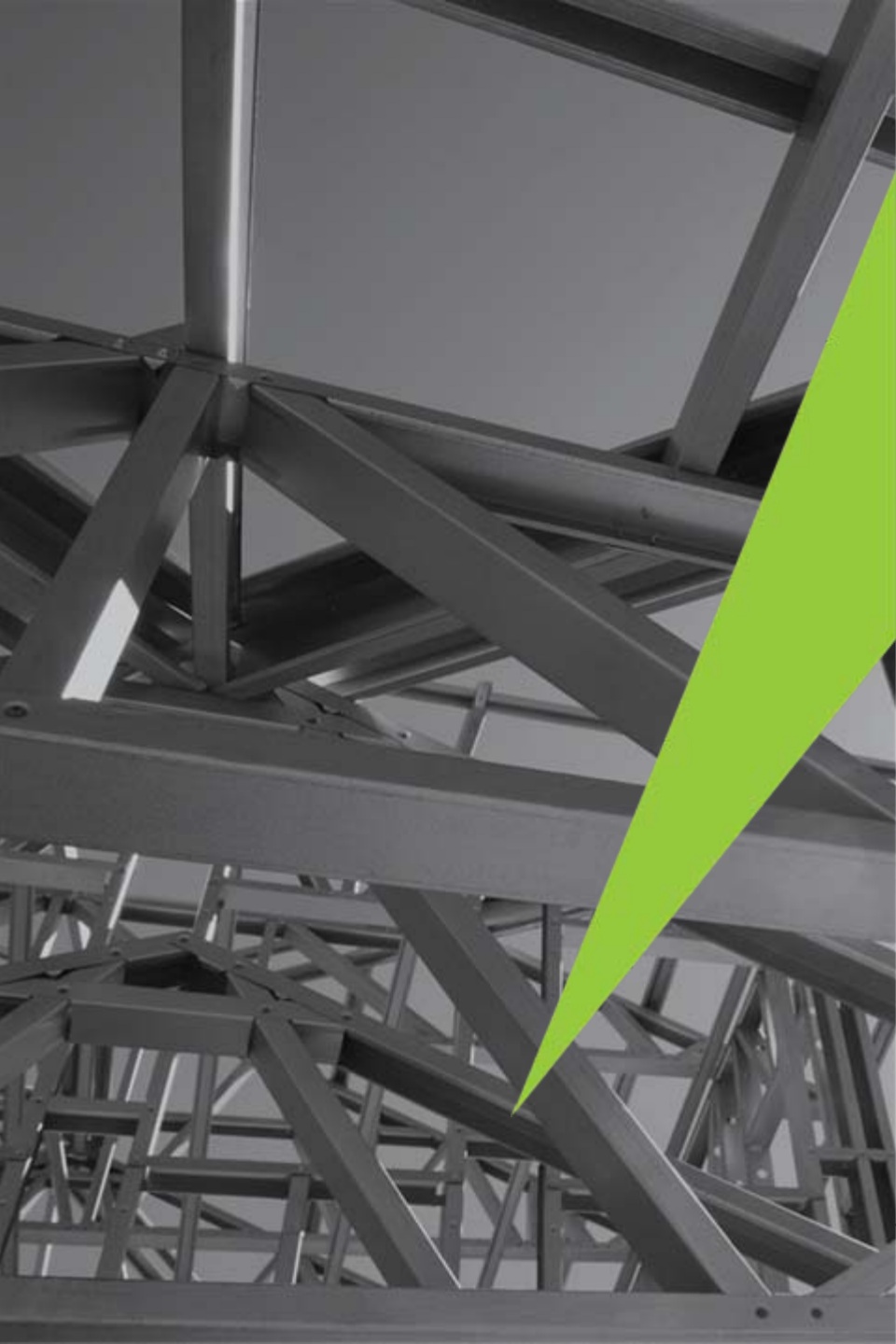
➤ Contractors – Prior to bidding

- Carefully review contract, determine how risk of DSC assigned
- Look for exculpatory clauses or contract language disclaiming accuracy of site information
- Perform reasonable site inspection
 - ❖ Make written notes & photographic record of site visit
 - ❖ Note & record physical characteristics of surrounding property

Practical Recommendations – Contractors



- If DSC encountered file prompt written notice as required by contract
 - ❖ Wait for instructions from owner before disturbing site conditions encountered
- Keep accurate, separate cost & schedule records of additional cost & time resulting from DSC
- Understand law concerning DSCs differs from State to State
 - ❖ Before bidding work in unfamiliar location, consult with construction attorney



CONCLUSION

Conclusion



- More than 95 years of continuous use has led most in construction industry to believe they understand clause
- Court & Board decisions are narrowing coverage of DSC clause
 - Making it more difficult for contractors to recover damages
- Scarcity of trials increases significance of some of these decisions

Conclusion



- Contractors more at risk as result of decisions
 - Must be much more alert to such situations
- Contractors **must** be able to
 - **Document** reviewed all information, made site visit & participated in pre-bid conference
 - **Document** interpretation of available site information
 - **Document** how interpretation relied upon in bid
- Contractors **must**
 - Provide **prompt written notice** when DSC encountered
 - Strictly adhere to **contact requirements** concerning DSCs
 - **Segregate** cost & time impacts of DSC encounter

Questions?



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