

## CONTRACTING TOPICS

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## DIFFERING SITE CONDITIONS

**E**xcauation can lead to unpleasant surprises and when it does you should know whether you are entitled to extra compensation, otherwise known as an "equitable adjustment". The critical question is whether your contract has a differing site conditions clause, and, if so, what kind.

**U**nder earlier versions of the New Jersey Department of Transportation (NJDOT) Standard Specifications for Road and Bridge Construction, the risk of unforeseen subsurface conditions was placed squarely on the contractor. As a consequence under those specifications, which contained both a requirement that the contractor undertake its own subsurface investigation and a waiver of claims for changed conditions, the contractor would not be able to recover except when the public owner could be shown to have withheld information from the contractor. See *PT&L Constr. Co., Inc. v. NJDOT*, 108 N.J. 539 (1987); *Sasso Contracting Co., Inc. v. New Jersey*, 173 N.J. Super. 486 (App. Div. 1980). As the Appellate Division noted when citing *Sasso*, "risk-shifting contract provisions can preclude a contractors' claim for extra costs incurred in its work efforts." *Alliance Electric, Inc. v. Atlantic City Bd. of Ed.*, 2004 WL 583211, 11 (App. Div. 2004).

**H**owever, in another case, where the Mercer County specifications under consideration omitted the explicit waiver of claims by the contractor and merely required



the contractor to be familiar with all "information that is reasonably ascertainable", the court refused to find that the contractor had assumed the risk of a scour hole not shown in the contract documents. *SMC Corp., Inc. v. New Jersey Water Supply Authority*, 334 N.J. Super. 429 (App. Div. 2000).

**F**ollowing *PT&L* and *Sasso*, the NJDOT amended the specifications to remove the above-quoted explicit waiver of claims against the state (similar to the Mercer County specifications which were the focus of *SMC Corp., supra*). In its place, the NJDOT added a Differing Site Conditions (DSC) clause in the form of Article 108.09 - Unusual Site Conditions. No New Jersey case has addressed the effect of Article 108.09, but similar DSC clauses have long been present in federal and other

state contracts.

**D**SC clauses come in two varieties, Type I, which is a condition which differs materially from those indicated in the contract, and Type II, which is a condition which is an unknown physical condition of an unusual nature which differs materially from those ordinarily encountered and generally recognized as inhering in work of the character provided in the contract. For example, AIA General Conditions of the Contract for Construction (A201-1997) contains both Type I and Type II DSC clauses and reads in relevant part:

#### 4.3.4 Claims for Concealed or Unknown Conditions.

If conditions are encountered at the site which are (1) subsurface or otherwise concealed physical conditions which differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature, which differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents, then notice by the observing party shall be given to the other party promptly before conditions are disturbed and in no event later than 21 days after first observance of the conditions.

**A**rticle 108.09 of the NJDOT specifications is a Type II DSC clause which is harder for the contractor to prove than a Type I claim. To prove a Type II claim, the contractor has the burden to show:

## DIFFERING SITE CONDITIONS (CON'T)

1. The subsurface condition was unknown; and
2. The subsurface condition was unusual and could not be reasonably anticipated based on a review of the contract documents and site inspection; and
3. The encountered condition was materially different from those ordinarily encountered and generally expected in the type of work to be performed.

*Youngdale & Sons Construction*, 27 Fed.Cl. 516 (1993). In addition, in a Type II condition, the owner has not represented the subsurface conditions and there is a commensurately greater burden on the contractor to investigate. *Fru-Con Corp. v. United States*, 44 Fed.Cl. 298, 311 (1999).

The NJDOT specifications, however, contain only a Type II differing site conditions clause, as follows:

### **108.09 Unusual Site Conditions.**

The Contractor shall promptly, and before such conditions are disturbed, notify the Resident

Engineer in writing, on forms provided by the Department, of previously unknown physical conditions at the site of an unusual nature or differing materially from those ordinarily encountered and generally recognized as inherent in Work of the character provided for in the Contract. The Engineer will promptly investigate the conditions, and if the Engineer determines that such conditions are unusual, that they could not have been discovered by the Contractor through employing the high

standard of care required under Subsection 102.06, and that they cause an increase or decrease in the cost of, or the time required for, performance of any part of the Work under the Contract, an adjustment, as appropriate, will be made in the Contract Time pursuant to Subsection 108.11 and in compensation to the Contractor pursuant to Subsections 104.02, 104.03, 104.05, 104.06, 104.08, 109.03, and 109.04.

Claims arising from unusual site

conditions are barred unless the Contractor has given the required notice prior to disturbing such conditions.

Therefore, specifications that incorporate the NJDOT's Standard Specifications for Road and Bridge Construction increase the



burden on the contractor to conduct its own reasonable investigation prior to submitting a bid, which investigation may include consultation of available

reference materials and a separate site investigation. Courts have held, for example, that the contractor should anticipate encountering underground conditions observable on the surface. Therefore, if boulders are evident on the ground, the contractor will be deemed to have anticipated them during excavation.

*In a Type II condition, the owner has not represented the subsurface conditions and there is a commensurately greater burden on the contractor to investigate.*

## JOHNSON & CONWAY, LLP

Johnson & Conway, LLP is a law firm serving public and private clients in the construction industry throughout New Jersey. Its three partners, **Geoff Johnson**, **John Napolitano** and **William "Mickey" Conway** have a total of 48 years of legal experience working with small and large construction firms as well as construction professionals. In addition, John Napolitano has a background in engineering and is a licensed engineer.

We handle a wide range of matters including contract review and negotiation, corporate counsel and succession planning, employment disputes, and litigation, both complex and small before the courts and regulatory bodies.

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