SUBSURFACE INFORMATION IN CONTRACT DOCUMENTS — THE RIGHTS AND LEGAL RESPONSIBILITIES OF OWNERS, ENGINEERS AND CONTRACTORS.

by
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The subject tonight, "Subsurface Information in Contract Documents", has been a fertile source of litigation as long as owners, engineers and contractors have had to struggle with the problems relating to excavation, drilling, boring and soil exploration generally. It has been a prime source of trouble and conflict because we are fundamentally dealing with the unknown. Borings are obviously inadequate as anything other than a possible clue to what lies below. A New York attorney specializing in the problems of the construction industry has suggested in a paper given at a recent meeting of the American Society of Civil Engineers that "adequate borings of such depth as to indicate the material below the bearing stratum through compressible layers and to indicate the contours of subsurface materials" together with orientation of foliations or seams in rock should be shown. But in my view, anything less than some kind of subterranean X-ray must leave the owner, engineer and contractor in the dark as to precisely what will be encountered and in what order of magnitude.

These are basic problems for the scientific community. What we have been asked to do tonight as lawyers is to give you some idea of the legal consequences arising from this state of affairs. What are the respective liabilities of owners, engineers and contractors, what is it that each party must do before the contract is entered into, who bears the risk of loss thereafter?

The original attitude of the State courts was quite hardnosed. In Massachusetts for example, until fairly recently the courts gave full weight to exculpatory language. The Supreme Judicial Court enforced quite literally contract requirements that the bidder satisfy himself as to conditions to be encountered — that he examine the site for himself — that the plots of borings were not warranted — that the contract price was to cover all contingencies, known and unknown. The court followed the rather simplistic notion that the parties had contracted with each other and that having agreed to such sweeping exclusions of liability the contractor was bound by them. Totally ignored was the usual unequal bargaining strength of the parties. The fact that the terms in question were not negotiated but were part of a big book which the contractor took as is if he was low bidder — that there simply was not time for a bidder to take borings in the interval between notice and receiving of bids — that a contractor who made careful

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investigation of each project before bidding, would go broke before he ever got the job.

In recent years the State courts began to relax the real hard-line approach and took to examining cases on their facts — sometimes finding reasons why that particular case differed from what had gone before. Thus in 1970 the Massachusetts Supreme Court decided *Alpert, Trustee vs. Commonwealth,* 357, 306, the so-called Golden and O'Brien case. There the trustee in bankruptcy of the contractor was allowed to recover damages where 165,000 yards of unsuitable material was found though the contract represented only 34,000 yards of such material. The rationale was that the D.P.W. had made a positive representation, viz., 34,000 yards and Golden had a right to rely on this representation "without further investigation and irrespective of the general language of several exculpatory clauses in the contract". Having said this, the court proceeds in the next sentence to make the contradictory assertion that "Golden did in fact attempt to make an independent investigation of the site, but because of the lack of time between the notice to bidders and the date bids had to be submitted, it was impossible for Golden to take adequate borings". Thus, the court says in one sentence:

a) Where the owner makes definite and positive representation the contractor can rely without further investigation.

b) It is impossible for the contractor to make adequate investigation in the time allotted.

These positions are somewhat inconsistent, but at least there is a recognition at last that unreal exculpatory clauses, i.e., that borings are not warranted, should not be enforced.

I will not take the time to develop further the case law in Massachusetts since I want to hurry on to AIA and federal contracts. I must, however, call your attention to a recent statute in Massachusetts which goes part way towards a real changed conditions provision. Section 39N of Chapter 30 requires that every contract essentially relating to construction by the state or any agency thereof shall contain a provision reading:

> "If, during the progress of the work, the contractor or the awarding authority discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those shown on the plans or indicated in the contract documents either the contractor or the contracting authority may request an equitable adjustment in the contract price of the contract applying to work affected by the differing site conditions. A request for such an adjustment shall be in writing and shall be delivered by the party making such claim to the other party as soon as possible after such conditions are discovered. Upon receipt of such a claim from a contractor, or upon its own initiative, the contracting authority shall make an investigation of such physical conditions, and, if they differ substantially or

materially from those shown on the plans or indicated in the contract documents or from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the plans and contract documents and are of such a nature as to cause an increase or decrease in the cost of performance of the work or a change in the construction methods required for the performance of the work which results in an increase or decrease in the cost of the work, the contracting authority shall make an equitable adjustment in the contract price and the contract shall be modified in writing accordingly."

The statute is limited because it requires a variance from what is shown in the contract documents. Therefore, if the contract documents are silent we are presumably thrown back on the common law. This question I will leave to my colleagues and subsequent discussion.

The changed conditions clause in AIA contracts governs the great bulk of private construction and Article 4, the changed conditions article, appears in most federal contracts. Article 4 is with one exception identical with Section 12.1.6 of the AIA contract and both provisions may properly be considered together. Section 12.1.6 of the present AIA contract provides as follows:

"Should concealed conditions encountered in the performance of the Work below the surface of the ground be at variance with the conditions indicated by the Contract Documents or should unknown physical conditions below the surface of the ground of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this Contract, be encountered, the Contract Sum shall be equitably adjusted by Change Order upon claim by either party made within twenty days after the first observance of the condition."

Prior to 1967 only item 1 dealing with concealed conditions at variance with conditions indicated by contract documents was covered. In 1967 there was added the provision covering unknown physical conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in the contract.

Two basic questions are raised in the interpretation of this section:

1. Was the condition either at variance with conditions indicated by the contract documents or of an unusual nature differing materially from those ordinarily encountered and generally recognized as inherent in the work?

2. If so, should the contractor have anticipated he was going to run into some such condition?

There are many cases dealing with these two points but in general it has been held that, if the conditions encountered were substantially different in such matters as quantity, nature of material, location, and if the contract

documents did not sufficiently warn the contractor in advance, and if the contractor should not for other reasons have anticipated the problem, he will be entitled to seek an equitable adjustment.[1] It is fairly easy to define a changed condition — an enormous quantity of rock, the presence of unstable or unsuitable material, etc.

The more difficult question is that of anticipation. Did the contractor know, or should he have known what he was going to run up against? And this brings us to the question of contract information which we are supposed to talk about tonight. Suppose the contract says you will encounter some rock but the contractor encounters three times as much as he figures. Suppose the contract documents say, to take a specific case, you will encounter a condition of high ground water and the contractor encounters a very large quantity of subsurface water. The court in that case said the borings were silent, the reference in the contract to high ground water was too vague, and were what the court called "low-key". In the absence of specific information in the borings, such vague references in the contract are inadequate.

In most cases that I have read, if what is encountered will entail a substantial loss to the contractor and if the contract references are broad and generalized, the contractor will be allowed to recover damages.

There are, of course, other matters the court will take into consideration. How much experience did the contractor have, should he have known about the problem from other jobs? Thus, where a contractor encountered a great quantity of permafrost in Alaska and the plaintiffs were local contractors, the court said the contractors knew that 80 percent of that area in Alaska was underlaid with permafrost. One thing the courts do not require is that the contractor do a research study in geology or soil mechanics in order to make a decision on his bid.

What about exculpatory language? It does not mean much in this context. "That the bidder has examined the site" — that he must satisfy himself as to conditions — that he has investigated and satisfied himself as to the nature and location of the work — that borings are not warranted. No such language is effective to deny recovery if the other ingredients are there. As the court said in one case:

> "Even unmistakable contract language in which the Government seeks to disclaim responsibility for drill hole data, does not lessen the right of reliance."
> *Foster Construction & Williams Brothers Company vs. U.S.,* 435 F. 2d, 873, 883 (Ct. Cl. 1970)

1. The contractor must, of course, satisfy the notice requirements, e.g., to make claim within 20 days after the first observance of the condition. Record keeping with respect to the damages attributable to the changed condition should be as accurate and detailed as possible.

In summary, if an unknown subsurface condition of an unusual nature is encountered, and if the contractor was not sufficiently alerted by the contract, by his own background, or by other circumstances which should have made him aware, he will be entitled to an equitable adjustment. The kind of contract warning which will be sufficient to bar an adjustment involves a specific and detailed description, not generalized or generic statements. The information must be of such a nature that a reasonable contractor would have been alerted to the possible danger. It is not enough to say that "rock" or "water" will be encountered. There must be something, either in the borings, plans or specifications which strongly suggests the presence of a large quantity of rock or an unusual water condition. If the contractor was not adequately warned and encountered such a changed condition, he will be entitled to an equitable adjustment, despite the presence of catchall exculpatory provisions. Provisions imposing impractical burdens on a contractor, or simply purporting to shift the burden from the owner's shoulders, will be of little avail. A full development of information on the part of the owner, and adequate delivery of that information to the contractor is essential. In the last analysis, the question is, on whom should the risk of loss fall? It seems clear that the courts will not let it fall on the contractor unless he has been fully and fairly warned of the dangers which lie ahead.