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It's what you don't know! What to know about FAR 52.236-2: Differing site conditions

By Ryan Gilchrist, Esq., Oles Morrison Rinker & Baker*

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Perhaps the greatest risk in a federal construction project is the risk of the unknown. This is especially true in the case of a fixed price project where the majority of the risk is on the contractor who has agreed to do the job for a fixed price, which generally includes all known and unknown risks of performance.

This narrative, however, has some relief in that the parties understand that there will, at times, be truly unforeseeable circumstances that even the most prudent contractor could not have reasonably prepared for.

> The DSC Clause seeks to reduce and/or eliminate bidding contingencies by shifting the risk of qualified unanticipated subsurface conditions to the government.

Accordingly, all fixed-price construction contracts with the federal government include Federal Acquisition Regulation ("FAR") 52.236-2, the Differing Site Conditions ("DSC") Clause (https://bit.ly/2I28IB3), which provides for an equitable adjustment of the cost and time required for construction when (1) subsurface or latent physical conditions at the site differ materially from those indicated in the contract, or (2) unknown physical conditions at the site of an unusual nature differ materially from those ordinarily encountered, and the contractor meets specified notice requirements.

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THE TWO TYPES OF DIFFERING SITE CONDITIONS

The DSC Clause contains two distinct types of DSCs. The first, known as a Type I DSC, covers unexpected natural or man-made conditions that materially differ from conditions indicated in the specific contract.

The second, known as a Type II DSC, covers unexpected natural or man-made conditions that materially differ from conditions normally expected in similar work. Unexpected natural conditions can include things such as unexpected subsoil composition, while man-made conditions can include things such as unknown utility lines.

One note to be aware of is that weather and acts of God that take place during performance of a contract do not constitute DSCs.

Type I DSCs require proving a four-part test:

- The conditions indicated in the contract materially differ from those actually encountered;
- The conditions encountered were reasonably unforeseeable based on available information at the time of bid;
- The contractor reasonably relied upon its interpretation of the contract and contract-related documents; and
- The contractor was damaged as a result of the material variation between expected and encountered conditions.

Type II DSCs can be proved with a three-part test:

- The contractor did not know about the physical condition;
- The contractor could not have anticipated the condition from inspection or general experience; and
- The condition varied from the norm in similar contracting work.

Typically, it is more difficult to prove a Type II DSC, as the contractor usually must rely on expert testimony to establish ordinary versus unforeseeable conditions.

NOTICE OF DIFFERING SITE CONDITIONS

In order to recover under the DSC Clause, a contractor must give the contracting officer prompt notice (which may be extended by the contracting officer) of the unknown conditions before the conditions are disturbed.

This notice requirement is the first issue impacting a contractor pursuing a DSC claim. While contractors should attempt to strictly comply with the notice requirements of the DSC Clause, this is not always realistic.

For example, it is possible that the DSC is not discovered until after it has been disturbed, the CO may not be timely in responding to notice if notice is promptly made, or government personnel on-site may dispute the DSC and direct the contractor to continue.

Because there are any number of reasons why strict compliance with the notice requirements may be difficult or impossible, lack of notice defenses by the government are typically rejected unless there is actual prejudice to the government.

While it is in a contractor's best interest to give notice immediately after discovering a DSC and to refrain from disturbing or further disturbing the condition, so long as the government is not prejudiced by lack of notice, a contractor likely can still make a claim.

Unexpected natural conditions can include things such as unexpected subsoil composition, while man-made conditions can include things such as unknown utility lines.

But it is always imperative that the contractor give notice as soon as it can and to do so in writing. And, in the notice to the government, the contractor should document the nature of the differences as much as possible, as well as any other facts or evidence which may be useful to demonstrate that the conditions as discovered are significantly different from those stated in the contract (to prevail on a Type I claim) or from the conditions generally known and accepted in the industry (to prevail on a Type II claim).

The notice should also state that the contractor will await further direction from the government before continuing any work because the contractor does not want to disturb the site condition until the government has had the chance to investigate the site and provide its position on the issue. These issues should always be documented so that a record can be prepared in the event the parties disagree on the issue.

Once the contractor gives timely notice of DSCs, the contracting officer will promptly investigate the site conditions. If the conditions do materially differ and cause an increase or decrease in the contractor's cost or time required for performance, the contracting officer is required to grant an equitable adjustment under the Clause.

OTHER CONSIDERATIONS FOR CONTRACTORS

Beyond the importance of providing timely notice, there are a number of other considerations that a contractor should bear in mind in order to maximize its chances of success on a differing site condition claim. First, both Type I and Type II DSCs must predate the contract, even though Type II DSCs are not tied to the specific terms of the contract.

Second, equitable adjustments for differing site conditions will not be granted if the request is made after final payment under the contract.

Third, while weather and acts of God are not grounds for a DSC claim, weather coupled with a previously unknown, existing condition can be grounds for a DSC claim. For example, heavy rains leading to flooding due to previously unknown problems with site drainage can constitute a DSC.

Fourth, the DSC Clause may cover off-site facilities so long as the contractor is required to use them, but may not cover off-site facilities that are available to the contractor, but not required.

Finally, because the DSC clause shifts the risk of unanticipated conditions to the government without consideration of the government's negligence or misconduct, the government often attempts to limit its liability under the Clause through exculpatory contract language, by including strict site inspection requirements, and by including warnings that government-furnished information, including subsurface studies, soil reports and historical data, may or may not disclose all hidden conditions to the bidder.

It is therefore important that contractors closely review all bid documents and the contract itself for any specific representations by the government or for any areas of omission where questions should be asked before bidding on the project.

The contractor's failure to undertake the proper diligence can bind the contractor to an unfavorable project and may weaken any differing site condition claim that the contractor can bring.

CONCLUSION

While the DSC Clause shifts the risk of unforeseen conditions to the government, contractors must be aware of their duties under the Clause to take advantage of the Clause. Contractors must pay particular attention to the terms of their contract with the government, including any potential exculpatory language for the government, as well as their notice duties under the Clause.

Prudent contractors will ensure their employees in the field are well aware of the Clause and its notice requirements so as to avoid a situation in which compliance with the notice provisions is made impossible due to the contractor proceeding with work after discovering a DSC.

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ABOUT THE AUTHOR

Ryan Gilchrist is an attorney in **Oles Morrison Rinker & Baker**'s Seattle office. His practice spans across the firm's construction, commercial litigation, business and real estate, and government contracts groups as he supports clients in the construction and real estate industries. He can be reached at gilchrist@oles.com. This article was first published Feb. 7, 2019, on the firm's Procurement Playbook blog. Republished with permission.