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CHANGED CONDITIONS AND MISREPRESENTATION OF SUBSURFACE MATERIALS AS RELATED TO GOVERNMENT CONSTRUCTION CONTRACTS

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I. The Purpose of the Changed Conditions Clause

PROVISIONS for encountering changed conditions in subsurface work as found in Clause 4 of the present form of Government construction contract[1] probably mark the principal advance that has been made in our time in the law of public contracts and in owner-contractor relationships. In early Government construction contracts involving excavation the Government consistently made the effort to obtain a firm price for coping with the uncertainties of subsurface materials. Because contractors had no alternative but to resolve in their own favor any doubt as to difficulties that might possibly be experienced in the handling of subsurface materials, these early contracts frequently resulted in the payment by the Government of a disproportionate amount for the performance of such work. To avoid the necessity of having to pay for contingencies which frequently never arose, the Government inserted the changed conditions clause in its contract and by such action promised its contractors that if the subsurface conditions actually encountered should differ materially from those indicated on the contract drawings or in the specifications, or were unknown and unusual in work of the character contracted for, the contract price would be adjusted accordingly.

While the United States Court of Claims has frequently had occasion to discuss the clause as an inducement to bidders to exclude such contingencies from their bids,[2] and while this was certainly the intended purpose

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1. Clause 4 of Standard Form 23A of United States Government Construction Contract provides:

"4. Changed Conditions

"The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (1) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, 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. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment hereunder shall not be allowed unless he has given notice as above required; provided that the Contracting Officer may, if he determines the facts so justify, consider and adjust any such claim asserted before the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 hereof."

2. Joseph Meltzer, Inc. of New Jersey v. United States, 111 Ct. Cl. 389, 77 F. Supp. 1018

of the provision, it would be unwise to overlook the fact that the Government has contended that the language of the clause authorizes either an increase or a decrease in the contract price, and would thus permit the contracting officer to reduce the contract price if the conditions encountered were materially more favorable than those indicated by the plans and specifications. From a practical standpoint, however, it should be observed that it is decidedly the exception rather than the rule for the Government to seek a reduction of the contract price because of a changed condition.

II. Caveatory and Exculpatory Specifications Provisions Held Not to Restrict Changed Conditions Clause

Although the purpose and intent of the changed conditions clause is clear from the language employed, Government specifications, by curious paradox, quite often include general disclaimers of liability and other caveatory language which could readily be construed to restrict or even entirely nullify the changed conditions clause. However, these clauses have been consistently disregarded and set aside by the United States Court of Claims and by the various departmental and agency review boards possessing jurisdiction to consider claims for changed conditions.

For example, a clause frequently found in the specifications states that the quantities of work estimated by the Government are intended to serve only as a basis for canvassing bids, and that contractors must complete the contract work, be it more or less than the quantities estimated, for the unit prices agreed upon in the contract. The Court of Claims has refused to hold that this provision in the specifications restricts the changed conditions clause, saying that such a determination would mean that all considerations of equity and justice would be disregarded and a construction contract would be turned into a gambling transaction.[3]

Other specification provisions that have been declared not to restrict the changed conditions clause have required contractors to excavate all materials regardless of type;[4] or have provided that contractors must make their own estimates of the difficulties attending the execution of the proposed work;[5] or have called upon contractors to investigate subsurface conditions, warning at the same time that additional payment would not be made regardless of materials actually encountered;[6] or have

(1948); Chernus v. United States, 110 Ct. Cl. 264, 267, 75 F. Supp. 1018 (1948); Hirsch v. United States, 94 Ct. Cl. 602, 638 (1941).

3. Peter Kiewit Sons' Co. v. United States, 109 Ct. Cl. 517, 522-23, 74 F. Supp. 165, 168 (1947).

4. Loftis v. United States, 110 Ct. Cl. 551, 571, 627-29, 76 F. Supp. 816, 825-26 (1948).

5. Hirsch v. United States, 94 Ct. Cl. 602, 637 (1941).

6. Derby Construction Co. and Perkins Construction Co., Corps of Engineers, C & A No. 543 (1954).

provided that the data given on drawings was for information purposes only.[7]

One remarkable case before the Court of Claims involved a drawing supplied by the Government to bidders which described the type of material to be excavated. The specifications, however, stated that the drawing in question was not to be considered to be a contract drawing and was "furnished to bidders only for such use as they may choose to make of it." The bidder used the drawing in the preparation of his bid. The court held that even the above statement was insufficient to excuse the Government from liability, saying that "the drawing ought not to have been made at all if the one who made it had no knowledge of the facts" and that the Government should gain no advantage from the use of the drawing.[8]

The reason generally given by the Court of Claims for setting such provisions aside is that specifications are intended to supplement and give effect to the formal contract, and should not attempt to render void express provisions written into the contract.[9]

III. The Two Types of Situations Covered by the Changed Conditions Clause

Two general types of changed conditions are covered by the present day changed conditions clause.

First, relief is obtainable if the subsurface or latent physical condition encountered during the performance of the work differs materially from what is indicated in the specifications or on the drawings. This type of relief depends entirely upon a comparison between what is indicated by the contract documents and what was actually found after excavation got underway. Thus, if the borings had indicated that clay was to be excavated whereas rock was encountered, this would be a changed condition entitling the contractor to an equitable adjustment of his contract price.

If the contract had not indicated what the subsurface condition would be, it would follow that no relief could be obtained under this part of the changed conditions clause.[10] However, such a situation seldom occurs, for the Government, having gone to the expense of obtaining knowledge of the subsurface materials as a prerequisite to designing the structure contracted for, is almost certain to indicate upon the drawings what materials are expected to be encountered. The principal tests under the first type of situation, once the difference between the conditions indi-

7. Great Lakes Dredge & Dock Co., Corps of Engineers, C & A No. 501 (1954).

8. Ruff v. United States, 96 Ct. Cl. 148, 160, 162-63 (1942).

9. Loftis v. United States, 110 Ct. Cl. 551, 628, 76 F. Supp. 816, 826 (1948).

10. Derby Construction Co. and Perkins Construction Co., Corps of Engineers, C & A No. 543 (1954).

cated in the contract documents and those found during the performance of the work is established, are whether such difference was unknown, and whether it was material.

The second type of changed condition for which relief is provided arises from encountering unknown physical conditions of an unusual nature which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

Recovery, in this instance, does not depend upon a comparison of what the contract drawings show with conditions actually found to exist. It is necessary only that the conditions encountered be unknown; and that they be unusual; and that they differ materially from those that are ordinarily found in the type of work involved.

IV. Factual Situations in Which a Changed Condition Has Been Held to Exist

An important variation in estimated quantities given by the Government to prospective bidders has been held to constitute a changed condition.[11] While an underrun of ten per cent has been considered insufficient,[12] errors of more than ten per cent ranging upward to fifty per cent have been held to entitle a contractor to an adjustment of his contract price because of changed conditions.[13]

Other causes for recognizing a changed condition have been the encountering of rock, or cemented gravel, or ancient roots, or like substances where they were not expected.[14] Similarly where the success of a contractor's operations depended upon the existence of sound rock, the presence of decomposed rock has been recognized as a changed condition.[15] Also, the presence of unexpected water, whether it be artesian[16] or ground water which necessitated rehandling and drying of soils before they could be used on the job[17] has been held to qualify as a changed condition.

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11. Chernus v. United States, 110 Ct. Cl. 264, 75 F. Supp. 1018 (1948).

12. Allan W. Wolfe, Inc., Corps of Engineers, C & A No. 464 (1953).

13. Jacques Power Saw Co., Corps of Engineers, C & A No. 21 (1948), for more than ten per cent; Babbit & Son, Corps of Engineers, C & A No. 139, involving three-eighths of original quantity; Talley, Corps of Engineers, C & A No. 477, for fifty per cent; cf. General Contracting & Construction Co. v. United States, 84 Ct. Cl. 570 (1937) as to changes.

14. Great Lakes Dredge & Dock Co., Corps of Engineers, C & A No. 501 (1954); Swords-McDougal, Corps of Engineers, C & A No. 489 (1954); General Construction Co., Corps of Engineers, C & A No. 487 (1953).

15. Lee Hoffman, Corps of Engineers, C & A No. 487 (1954).

16. Trapp-Carroll, 1CCF 328, 331.

17. Piombo Construction Co., Corps of Engineers, C & A No. 461.

V. Factual Situations in Which a Changed Condition Has Been Held Not to Exist

Turning now to some of the situations which failed to qualify as a changed condition, it may be observed generally that conditions commonly attributed to the forces of nature fall within the category of acts of God, and do not constitute a changed condition. For example, neither unusual rainfall[18] nor flooding of the work area[19] is a changed condition. The scouring effect of a flood, or even of a hurricane, upon material that was supposed to be excavated has been rejected as a basis for changed conditions.[20] Similarly, an unanticipated projection of the work into winter is not a changed condition.[21]

Conditions reasonably to be inferred from visible evidence may not qualify as an unknown changed condition. For example, rock outcroppings have been held to negate contract borings which showed rock some distance below the surface of the ground, it being reasoned that a bidder examining the site should have concluded from such outcrops that the rock was situated at ground surface, and should not have relied upon the borings.[22]

Also non-physical conditions such as inability to obtain steel due to priorities[23] or increased cost resulting from higher wages authorized by the Wage Adjustment Board[24] have been held not to qualify as changed conditions.

An interesting case before the Armed Services Board of Contract Appeals involved a hydraulic dredge which sucked up a five inch anti-aircraft shell while dredging in a lagoon. The resulting explosion seriously damaged the dredge. Relief under the changed conditions clause was denied, the reason assigned being that the clause had not contemplated an explosion.[25] This conclusion is a labored one, for the presence of the shell was obviously unknown, and an explosion of this character was patently of an unusual nature not ordinarily inhering in work of the character contracted for.

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18. Winkelman Co., Corps of Engineers, C & A No. 141.

19. Lee & Dean Construction Co., Corps of Engineers, C & A No. 633 (1954); McVaugh Haynes Co., Corps of Engineers, C & A No. 293 (1952); Carman Kirchner Construction Co., Corps of Engineers, C & A No. 180; Dean Hodgden, Corps of Engineers, C & A No. 63.

20. Arundel Corp. v. United States, 103 Ct. Cl. 688, 711 (1945), cert. denied, 326 U.S. 752, rehearing denied, 326 U.S. 808 (1945); Barnard-Curtiss Co., Corps of Engineers, C & A No. 136.

21. Condon-Cunningham Co. and Paul B. Reis, ASBCA No. 1355 (1946).

22. Meyerstein, Inc., Corps of Engineers, C & A No. 47, BCA No. 1843.

23. Ingalls Shipbuilding Company, Corps of Engineers, C & A No. 569 (1954).

24. Gerwick-Morrisson-Twaits, ASBCA Nos. 130, 132, 133.

25. Case American Construction Co., 4CCF ¶ 60944.

VI. Requirements With Respect to the Giving of Notice of Changed Conditions

The giving of timely written notice of a changed condition *when the condition is encountered and before it is disturbed* is an absolute prerequisite to recovery under the changed conditions clause contained in construction contracts presently being entered into. However, during the next few years it is possible that the decisions of the Court of Claims and of the various administrative boards relating to the giving of notice, as well as to the written character of such notice, may appear to be somewhat inconsistent. If this occurs it will be due to the fact that these bodies will have before them two different contract provisions with respect to the giving of notice.

An early version of the changed conditions clause which controls many claims still in the process of adjudication, provides that if the "contractor encounter, or the Government discover, during the progress of the work" changed conditions "the attention of the Contracting Officer shall be called immediately to such conditions before they are disturbed." As this clause makes no provision for written notice, oral notice of a changed condition has been held by the Court of Claims to be sufficient.[26] Similarly, the language, "or the Government discover," as contained in the early form of contract has been recognized by the Court of Claims as placing a reciprocal obligation upon the Government representatives to call to the attention of the contracting officer any changed condition which they might first discover. Clause 4 of the contract imposes no greater burden in this respect upon the contractor than it did upon the Government's inspector at the site of the work.[27]

In March, 1953, the changed conditions clause was revised to eliminate the provision which anticipated that Government representatives might first discover the changed condition. The clause was also reworded to require written notice from the contractor of the existence of the changed conditions.[28] Thus, the entire burden of giving notice to the contracting officer now reposes upon the contractor, and it is necessary that such notice be in writing.

It is not always easy to determine at what time a changed condition has been encountered. In cases involving an underrun of estimated quantities, the question is largely one of degree—namely, at what point is the departure from the Government's estimate so great that it may be said that a changed condition exists? Prudence would therefore seem to dic-

26. General Casualty Co. of America v. United States, 130 Ct. Cl. 520, 127 F. Supp. 805, cert. denied, 349 U.S. 938 (1955).

27. Hirsch v. United States, 94 Ct. Cl. 602, 638-39 (1941).

28. General Regulation No. 13 of General Services Administration regarding Standard Form 23A. The revised clause is quoted in note 1 supra.

tate that written notice be given as soon as any physical condition which gives indication of becoming a material departure from what is shown by the contract documents is encountered.

VII. A Claim for Changed Conditions Must Be Presented Administratively Before Suit Can Be Instituted

While a formal claim for increased cost due to changed conditions need not be asserted at the time notice of a possible changed condition is given, it is necessary that a claim be presented administratively prior to settlement of the contract. If not presented for administrative consideration the claim will be regarded as forfeited for failure on the part of the contractor to exhaust his administrative remedy. This conclusion derives from the right granted to the contracting officer under Clause 4 of the contract to determine whether a changed condition exists. Clause 4 further provides that if the parties fail to agree ". . . the dispute shall be determined as provided in Clause 6 hereof." Clause 6 of the contract is the disputes clause which provides for finality of the contracting officer's decision on a disputed question of fact unless the contractor shall within thirty days from such decision take a written appeal to the head of the department. The United States Supreme Court has determined that when a contractor chooses to ignore the contract provisions for administrative appeal, he destroys his right to sue in the Court of Claims.[29] If, however, notice of a changed condition is given and the Government makes no determination as to whether a changed condition exists, the contractor is free to sue in the Court of Claims.[30]

VIII. Problems of Proof Presented in a Contested Changed Conditions Claim

The proof presented in a contested changed conditions claim consists principally of logs of borings, physical samples and cores of materials encountered, photographs and expert testimony.

A working knowledge of the methods commonly used for the drilling and sampling of subsurface soils and rock is very desirable because these methods bear heavily upon the classifications of, as well as the deductions to be made from, the sampled materials.

If the dispute is concerned with the character or quality of rock encountered during the performance of the work a qualified geologist may be asked to compare the logs of borings on the contract drawings, or physical cores of the rock taken by the Government in advance of the bidding, with the visible rock cuts at the site, and testify whether the

29. United States v. Joseph A. Holpuch Co., 328 U.S. 234, 240 (1946).

30. Shepherd v. United States, 125 Ct. Cl. 724, 731-34, 113 F. Supp. 648, 651-53 (1953).

borings and cores upon which the contractor was asked to bid did in fact fairly disclose the geologic conditions to be encountered. A geologist may also prepare geologic sections in which the areas lying between the precise locations of the borings shown on the contract drawings are hypothetically constructed to portray what a contractor reasonably should have expected in such areas from the information revealed by the adjacent borings made by the Government in advance of bidding. Such hypotheses materially aid the hearing officer in determining whether the conditions actually encountered were different from those indicated by the contract documents or were unusual or were such as not to inhere generally in work of the character contracted for.

On the other hand, if the materials involved in the claim are soils rather than rock, the occasion may arise to seek the assistance of highly specialized engineers who are versed in the relatively new science of soils mechanics. Using a combination of methods including elaborate mathematical formulae, these experts are able to predict with a high degree of accuracy the behavior of soils under any condition.

Photographs remain the most commonly used device for demonstrating the existence of changed conditions. For obvious reasons they should be taken at frequent intervals, and should be identified carefully as to time and location.

IX. Measure of Relief Obtainable Under Changed Conditions Clause

The elements of cost recoverable after a changed condition has been established may include all additional labor, material and equipment expense directly attributable to the increased burden of work performed. There should also be added an allowance for overhead and profit based upon such additional cost. The adjustment should likewise include an appropriate extension of time if the condition encountered operated to delay the project. The United States Supreme Court has determined, however, that damages for delay resulting from a changed condition are not recoverable.[31]

X. Misrepresentations of Subsurface Conditions

Claims for misrepresentation of subsurface conditions are becoming fewer as increased emphasis is placed upon the changed conditions clause. However, the two theories of recovery are not inconsistent and are frequently pleaded together and proved as alternate claims arising out of the same contractual situation.[32] The Court of Claims has determined

31. Rice v. United States, 95 Ct. Cl. 84 (1941), cert. granted, 316 U.S. 653, reversed, 317 U.S. 61, 66-68 (1942).

32. Nello L. Teer Co., Corps of Engineers, C & A No. 667 (1955).

that administrative presentation of a claim for changed conditions does not preclude the later institution of litigation based upon misrepresentation of subsurface conditions.[33]

Where misrepresentation occurs in a contract relating to subsurface work it is usually of the variety which involves failure on the part of the Government to reveal pertinent information within its possession.[34] Whether the withholding was the result of a sinister purpose has been declared by the United States Supreme Court to be of no importance.[35] The Government is under obligation to supply prospective bidders with all of the physical subsurface information that it may have collected.[36]

Disclaimers of responsibility for inaccuracy of information supplied bidders, and warnings that bidders are required to make their own investigations, have been held to afford the Government no protection against misrepresentation.[37] The same rule has been applied by the courts of New York.[38]

Like any other case involving misrepresentation, the burden of proof is upon the person asserting it,[39] and such proof must establish that the contractor relied upon the information supplied by the owner. As illustrative, the Court of Claims has held that a contractor could not be misled by the withholding of information on water conditions if he actually knew that in the performance of the work large quantities of water would be encountered.[40]

Because the administrative boards to which disputes concerning subsurface difficulties are usually referred derive their jurisdiction solely from the authority vested in them by the contract to determine disputed questions of fact, it is doubtful that they possess the right to adjudicate a question involving misrepresentation. However, the United States Court of Claims may do so, and the means of discovery before that tribunal afford a contractor's attorney an ample opportunity to determine whether the facts justify the assertion of a misrepresentation claim.

33. Potashnick v. United States, 123 Ct. Cl. 197, 219, 105 F. Supp. 837, 839 (1952).

34. Potashnick v. United States, 123 Ct. Cl. 197, 218, 105 F. Supp. 837, 839 (1952).

35. Christie v. United States, 237 U.S. 234, 242 (1915).

36. Potashnick v. United States, 123 Ct. Cl. 197, 216-18, 105 F. Supp. 837, 838-39 (1952); United States v. Atlantic Dredging Co., 253 U.S. 1 (1920).

37. Spearin v. United States, 248 U.S. 132, 136-37 (1918); United States v. Atlantic Dredging Co., 253 U.S. 1, 11 (1920); Dunbar & Sullivan Dredging Co. v. United States, 65 Ct. Cl. 567, 576-77 (1928).

38. Brassil v. Maryland Casualty Co., 210 N.Y. 235, 104 N.E. 622 (1914); McGovern v. City of New York, 202 App. Div. 317, 195 N.Y. Supp. 925 (1st Dep't 1922), aff'd, 235 N.Y. 275, 139 N.E. 266 (1923).

39. Midland Land & Improvement Co. v. United States, 58 Ct. Cl. 671, 683 (1924), aff'd, 270 U.S. 251 (1926).

40. Ragonese v. United States, 128 Ct. Cl. 156, 120 F. Supp. 768 (1954).