Uneven Lanes

Contractor's failure to warn by requesting additional safety signs results in liability

In a recent Missouri case, a motorcyclist sued the Missouri Highway and Transportation Commission (MHTC) and a highway contractor for a crash that occurred in a construction zone. The motorcyclist was driving at 70 miles per hour (mph) while passing a tractor-trailer when he lost control and crashed due to uneven pavement between two lanes. The motorcyclist suffered significant injuries, and sued for failure to warn of the uneven lanes.

In *Harlan v. APAC-Missouri, Inc.* (Dec. 13, 2011), the Missouri Court of Appeals ruled the issue of whether the highway contractor, APAC-Missouri, Inc. (APAC), knew or had reason to know that a 1¾-inch lane height difference it created was dangerous, and whether signs warning of that condition should have been used, was properly decided by the jury.

MHTC contracted with APAC to resurface the highway. On July 26, 2006, a motorcyclist, David Harlan, was driving eastbound on Interstate 70 highway through a construction zone created by APAC. As he drove through the inactive construction zone at the posted speed of 70 mph, Harlan moved into the passing lane to pass a tractor-trailer traveling at 55 mph. After passing the truck, Harlan lost control of his motorcycle attempting to return to the driving lane, due to uneven pavement between the two lanes. Harlan crashed and sustained significant injuries. As a result, Harlan sued MHTC and APAC.

At trial, the failure to warn claim was the only one against APAC. The jury assessed Harlan's total amount damages to be $1 million. Following the trial, the jury returned a verdict finding MHTC to be 70 percent at fault, APAC to be 25 percent at fault, and Harlan to be 5 percent at fault. Therefore, the trial court entered judgment against MHTC for $700,000 and against APAC for $250,000. APAC appealed.

APAC argued the evidence established it followed the traffic control pattern established by MHTC, and it did not know the uneven pavement was a dangerous condition that was likely to cause injury. Under Missouri law,

the state highways are under the jurisdiction and control of MHTC. In this case, MHTC did all the design work and contracted with APAC to execute its plan. However, the jury found that APAC knew, or had reason to know, the 1¾-inch uneven lane height was dangerous and that signs warning of that condition should have been used.

APAC's general superintendent, Jason Stasny, testified that uneven lane situations can be dangerous. He testified that APAC knew there were going to be uneven lanes, that this condition could exist for extended periods of time, and that he was familiar with federal standards suggesting contractors should try to alleviate uneven lane conditions within one operating day, or as soon as possible, because it can be dangerous to motorists. Stasny acknowledged that MHTC's 1999 standard specifications, which were part of APAC's contract, provide:

"[t]he contractor may, at no cost to the Commission, add to the traffic control plan any standard signs or traffic control devices that contractor considers necessary to adequately protect the public and the work."

Stasny also acknowledged the Manual on Uniform Traffic Control Devices provides that uneven lane signs should be used during operations anytime a difference in elevation between adjacent lanes is created.

Another witness, an estimator for APAC and former inspector for MHTC, testified the uneven lanes created during the cold milling process can create a danger for motorists, that APAC could have requested additional signs, and that he had made such requests in the past. The plaintiff's engineering expert testified that studies going back to 1984 indicate uneven lanes can be unsafe and, at speeds of 45 mph or higher, even height differentials of one inch or less can be dangerous to motorcyclists. He testified that APAC's failure to act fell below the standard of care for contractors.

APAC argued the evidence did not establish it had authority to unilaterally place warning signs, or that MHTC would have authorized signs if APAC had requested them. However, the testimony showed MHTC would have taken seriously any request for additional safety signs. The court found the evidence was sufficient to support the jury's finding, and therefore, affirmed the judgment against APAC for $250,000.

This case highlights the importance of carefully reviewing and understanding a contract's language. The work of road and highway contractors affects the traveling public on a continual basis. Traffic control is especially important as it directly impacts life-health-safety issues where the potential liability can be enormous. Here, despite APAC's general compliance with its contract obligations, it was found liable for significant damages due to its failure to request additional safety signs. This liability might have been avoided by a careful review of the contract and specifications, especially regarding traffic control issues. ❖

Road builders must review contract language carefully – to both protect motorists and themsalves.

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By Brian Morrow

FHWA's Low Bid Rejection Overturned

There are various grounds to protest the improper award of a bid by a public agency. After advertising a project, typically in an invitation for bids (IFB), the public owner must open the bids and award the contract to the "lowest responsive, responsible bidder." To be awarded the contract, the low bidder must have been determined to be responsive to the IFB and be a responsible bidder. Responsive refers to the bidder's conformance with the material elements of the solicitation, and is determined at the time of bid opening. The requirement for a responsible bidder addresses the trustworthiness, quality, fitness and capacity of the bidder to perform the work, and is often determined after bid opening.

Agency did not assess contractor's bid, but rather simply tried to find a way to reject low bid.

In a recent case, Virgin Islands Paving, Inc. v. U.S. (Jan. 31, 2012), the Federal Highway Administration (FHWA) decision to reject the low bid of an engineering contractor for a road project in the Virgin Islands was overturned by the U.S. Court of Federal Claims as arbitrary, capricious and an abuse of discretion.

The FHWA, working with the Virgin Island Department of Public Works (VIDPW), prepared an estimate to widen and reconstruct a road. The engineer's estimate was for $8,550,000, plus administrative costs, for a total of $9,994,500. The July 25, 2011 IFB indicated the project would likely cost between $5 and $10 million. Two bidders submitted bids – Virgin Islands Paving, Inc. (VIP) and Island Roads Corporation (IRC). VIP submitted a bid for $6,762,720 (20.9-percent lower than the engineer's estimate), and certified that it was a Small Business Concern. IRC submitted a bid for $7,917,130 (7.4-percent lower than the engineer's estimate and 14.6-percent more than VIP).

Although VIP was the low bidder, the FHWA and VIDPW had two concerns about VIP's bid. First, the FHWA received "some past performance reports that were not very good" regarding VIP's previous work for VIDPW. Second, they were concerned that VIP's low bid reflected a poor understanding of the project. As a result, the FHWA reviewed both bids, with the primary focus on line items where the bid price varied significantly from the engineer's estimate unit prices.

On September 19, 2011, VIDPW officials advised the FHWA they were still concerned that VIP "had not been performing on other VIDPW projects," and that they were "getting political pressure" not to concur in the award. Nevertheless, the VIDPW concurred in the award to VIP. However, one hour after concurring in the award, the VIDPW requested a call with FHWA, during which they continued to express concerns about VIP.

After several days of meetings between FHWA and VIDPW, including VIP's written confirmation of its low bid, the FHWA issued a memo advising the contracting officer (CO) that, based on the government's concerns, the CO was not able to determine fair and reasonable pricing to the contractor (VIP) and the government. Therefore, the CO justified its conclusion that accepting VIP's bid would be unfair to VIP. As a result, on September 22, the FHWA awarded the contract to the second low bidder, IRC.

On September 27, VIP filed a bid protest, which the FHWA denied. On October 17, VIP filed a complaint with the U.S. Court of Federal Claims, seeking a ruling that the FHWA was required to accept VIP's bid because it was the lowest price and was also responsive. The court reviewed the facts and held that FHWA's rejection of VIP's bid was improper.

The evidence showed that, as of September 19, the FHWA determined: there was no misunderstanding by VIP or IRC regarding the line items that were analyzed; an analysis of IRC's and VIP's bids found nothing that would raise a concern; while VIP's past performance raised some concerns, these concerns were not outweighed by VIP's good past performance ratings; and there was no indication that VIP's bid contained any mistakes.

The court found the apparent reason for FHWA's scrutiny of VIP's bid was because the Virgin Islands governor wanted assurance that VIP would complete the work. As a result, FHWA's counsel suggested the bid could be awarded to the second low bidder if VIP's bid was determined to contain a mistake (despite VIP's representation its bid was correct). However, the FHWA failed to identify any particular mistake in VIP's bid, and failed to provide any analysis suggesting that VIP's bid – which was 20.9-percent below the engineer's estimate and 14.6-percent below IRC's bid – was mistaken. FHWA concluded that VIP's bid contained a mistake based on poor past performance. However, the evidence suggested the CO's decision to award the contract to IRC was a fait accompli. The FHWA was not trying to assess whether VIP made a mistake, but instead was trying to find a way to reject VIP's low bid.

The court also found that, if the FHWA was worried about VIP's ability to perform, the appropriate response was for the FHWA to make an adverse responsibility referral to the Small Business Administration. The court held that FHWA's decision not to proceed in this manner, if its general concern was about VIP's ability to perform, was also arbitrary, capricious and contrary to law. ❖

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InCourt

By Brian Morrow

Road Contractor's Excavator

Crushed after Blasting.

"Abnormally dangerous activities" are subject to special legal principles. According to the doctrine of abnormally dangerous activities, some activities, under certain conditions, may be so hazardous they result in strict liability. Though one who carries on an abnormally dangerous activity does so with the utmost care, they are liable for any injury or damage resulting from the activity to anyone whose person or property they should recognize as likely to be harmed by a mishap. Generally, an activity is deemed abnormally dangerous if it involves a risk of serious harm to others that cannot be eliminated by the exercise of the utmost care, and includes activities such as blasting, the testing of rockets, and the keeping of wild or vicious animals.

"Assumption of the risk" is a different legal doctrine that applies to bar or limit a plaintiff's recovery. Though most cases in which the doctrine of assumption of risk exists involve recreational sports, the doctrine has been applied to dangerous activities in other situations involving an inherent risk of injury to voluntary participants. In Montana, these two doctrines intersected in a recent blasting case.

In Patterson Enterprises, Inc. v. Johnson (Feb. 24, 2012), the Montana Supreme Court held that a road contractor and its employees assumed the risk for an excavator that was crushed as part of a blasting operation by its blasting subcontractor. In fall 2006, Patterson was hired to construct a road approximately 20 miles west of Missoula. Since the road was to be constructed in mountainous terrain, a significant amount of blasting was required. Patterson hired Archie Johnson Contracting (AJC) to perform all blasting on the project.

On January 2, 2007, Patterson and AJC entered into an agreement for the blasting, requiring AJC to drill and blast various rock outcroppings. Patterson's superintendent's job was to work with AJC's crews to remove blasted material. AJC was in charge of blasting while Patterson was in charge of excavating.

During the project, Patterson used its equipment to clear or build a flat pad for AJC's drilling equipment. AJC would place its drilling equipment on the pad, drill holes in the rock, and fill the holes with explosives. Before detonating the explosives, AJC would clear the area. The explosions fractured the rock and allowed Patterson to excavate the blasted material. AJC and Patterson repeated this process as they constructed the road.

On February 26, 2007, AJC detonated explosives along 500 yards of rock. This blast created a rock

overhang that caused concern. On February 28, 2007, AJC and the project owners met on site to discuss how to deal with the overhang. One idea was for AJC's crews to come in from above using ropes and drills so they could safely get to the overhang and bring it down. However, since this would take several days, the owners opposed this idea.

On March 1, 2007, when Patterson's superintendent arrived for work, he moved his excavator near the overhang and began excavating the blasted rock. AJC's crew arrived sometime later and checked on the progress. AJC's driller did not advise or warn the overhang was still dangerous because, according to the driller, Patterson's superintendent knew it was dangerous. When AJC's driller stopped by the area more than an hour later, he noticed the superintendent was working directly below the overhang so he signaled for him to exit the excavator. Almost immediately after exiting, an entire section of rock above the excavator collapsed and crushed it. The superintendent was not injured. AJC denied liability for the accident.

On September 11, 2007, Patterson filed suit. AJC denied all charges and counterclaimed for breach of contract and money owed. The case proceeded to a jury trial. The jury returned a verdict that AJC's blasting caused Patterson's damages regarding the crushed excavator, but Patterson and its employees assumed the risk of harm. The jury allocated fault 51 percent to AJC and 49 percent to Patterson, and awarded damages to Patterson of $50,000. The jury also ruled in favor of AJC's breach of contract claim and awarded damages to AJC of $19,255.16. Patterson appealed the jury's verdict regarding assumption of the risk.

The Montana Supreme Court examined the doctrine of assumption of the risk. The court determined that given Patterson's superintendent's knowledge of the danger of operating his excavator beneath the rock overhang, he possessed subjective knowledge of the danger the overhang posed. AJC's personnel expressed concern to the superintendent about the rock overhang that eventually fell on the excavator and told him "it was a very hazardous" condition. Patterson's superintendent testified that he "also, felt it was very hazardous." In fact, he testified that placing the excavator "right underneath" the overhang would have been "very dangerous." As a result, the court upheld the jury's verdict.

This case illustrates the intersection of the doctrines of abnormally dangerous activities and assumption of the risk. Blasting is an abnormally dangerous activity resulting in strict liability. However, in *Patterson*, the superintendent's subjective knowledge of the danger of operating his excavator beneath the rock overhang was enough to apply assumption of the risk. As a result, the blasting subcontractor, AJC, avoided what otherwise could have been a crushing defeat.

Assumption of the risk is a legal doctrine that can be used in a variety of contexts, including blasting and other activities involving an inherent risk of injury to voluntary participants. Its proper application, which varies depending upon the jurisdiction, can result in offsetting, and even negating, plaintiff's claims. ❖

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InCourt

by Brian Morrow

Low Bid?

A case of responsiveness and balance in a contract

A recent case regarding the Army Corp of Engineers' improper rejection of a low bid — Matter of W. B. Construction and Sons, Inc. (Jan. 4, 2012) — highlights important rules regarding bid responsiveness and unbalanced bids.

Government contracts — federal, state and local — may only be awarded to contractors who submit bids that are "responsive" to the material requirements of the invitation for bids (IFB). The responsiveness of a bid focuses on the mandatory requirements of the IFB and any governing statutes. Minor deviations may be waived, but material deviations may not. A deviation is "material" if it gives the bidder a competitive advantage and prevents other bidders from competing on the same footing. A materially non-responsive bid gives the bidder "two bites at the apple" because the contract can be invalidated at any time at the election of the bidder or the government.

Unbalanced bids typically result from the bidder's discovery of apparent discrepancies between estimated unit prices

An "unbalanced bid" is a unit price bid that contains abnormally low unit prices for some items, and abnormally high unit prices for other items. The government may reject an unbalanced bid as non-responsive because of the potential risk the unbalanced bid would not result in the lowest total cost. Unbalanced bids typically result from the bidder's discovery of apparent discrepancies between estimated unit price quantities in the IFB and the bidder's own estimated quantities; the bidder's desire to "front-end load" the payment schedule; or the bidder's mistaken bid. An unbalanced bid is not necessarily illegal, but must be analyzed to confirm it is the low bid and will not materially unbalance the payment schedule.

In a recent decision by the Comptroller General, Matter of W. B. Construction and Sons, Inc., the

government's rejection of a low bid as non-responsive, including rejection for failing to submit a price for a minor bid item and for being unbalanced, was determined to be improper.

On August 2, 2011, the U.S. Army Corps of Engineers (COE) issued an invitation for bids for the award of a fixed price, indefinite-delivery/indefinite-quantity (ID/IQ) construction contract for road and drainage work at Fort Polk, Louisiana. The term of the proposed contract was for one base year, with four additional 1-year option periods. The IFB required bidders to complete a bid schedule listing 378 separate line-items. Each line-item included a description, an estimated quantity, and a unit of purchase, in addition to blank spaces for the bidders to insert their unit prices and extended prices. The IFB required bidders to submit pricing for all the items. The 378 line-items included work such as removal of curbs and gutters, removal of trees and stumps, construction of drainage inlet structures and pavement replacement.

Lowest bid

On September 2nd, two bids were received, including a low bid from W. B. Construction and Sons, Inc. of $8,984,611.70, and a second low bid from Tanner Heavy Equipment Company LLC of $9,291,020.50. The COE produced an independent government estimate (IGE) of $10,304,987.10. Thus, W.B.'s bid was more than $300,000 lower than Tanner's bid, and more than $1.3 million lower than the IGE.

On September 26th, the COE rejected W.B.'s bid as non-responsive and awarded the contract to Tanner. The COE rejected W.B.'s bid for two reasons: (1) WB's bid failed to include a unit or extended price for one line-item; and (2) WB's bid contained unbalanced pricing, as several line-item prices were significantly higher or lower than the prices in the IGE.

On September 27th, W.B. filed a bid protest. W.B. claimed the omission of the one line-item price in its bid was a waivable minor deviation that did not make its bid non-responsive. In addition, W.B. claimed the COE failed to conduct a required risk analysis before rejecting its bid as unbalanced.

In its bid, W.B. failed to submit a price for Line Item 36 regarding removal of 21 to 50 trees from 24" to 36" diameter. However, W.B.'s bid contained prices for at least 11 other "tree removal" bid items. In addition, Line Item 36 was divisible from the contract because the COE was not obligated to perform any ID/IQ work. Further, the government's estimated price for Line Item 36 was less than 0.07 percent of the total IGE. As a result, W.B.'s failure to include a price for Line Item 36 was determined to be a waivable, minor deviation since this line-item was divisible from the contract and the price was de minimis as to the total contract cost.

The COE also rejected W.B.'s bid as unbalanced because 92 items in W.B.'s bid were 30 to 50 percent over the IGE, and 54 items were more than 50 percent under the IGE. The COE's initial determination that W.B.'s bid was unbalanced was found to be reasonable. However, the COE is also required to consider risks associated with unbalanced pricing, and only reject a bid where it performs an analysis that shows the unbalanced bid poses an unacceptable risk. Here, the COE did not perform any analysis. As a result, the COE's rejection of W.B.'s bid as unbalanced was found to be improper.

In summary, W.B.'s low bid was missing a price for one line-item and determined to be unbalanced. The COE rejected W.B.'s bid on these grounds. However, that is not the end of the inquiry. Prior to rejecting a low bid as non-responsive, the government must make more than this minimal showing. The government must also show negative consequences, including that the missing price is more than a minor deviation and the unbalanced bid poses an unacceptable risk. Here, the Army Corps failed to make this second showing of negative consequences. Therefore, its rejection of W.B.'s low bid was itself determined to be unbalanced.

For contractors, this case highlights the importance of making sure that bids are responsive to all bidding requirements, or with the right showing, a public entity may reject your bid (even if it is the lowest). For public entities, this case highlights the importance of how unbalanced bids need to be rejected. Specifically, there must be a showing the bid is unbalanced and that negative consequences result. ❖

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InCourt

by Brian Morrow

All Fall Down

Pit fall by indepdendent contractor may be liability for general contractor

In a recent California case involving the intersection of construction law, personal injury law and OSHA regulations — Tverberg v. Fillner Construction, Inc. (Jan. 26, 2012) — the court ruled a general contractor could delegate its obligation to comply with government safety regulations to a subcontractor's independent contractor. However, the court also found the general contractor could potentially be held liable for its negligent exercise of affirmative retained control over safety conditions relating to the independent contractor's work.

The facts of Tverberg are as follows. In 2006, Fillner was the general contractor on a project to expand a commercial fuel facility in Dixon, California. The project required construction of a metal canopy over some fuel pumping units. Fillner contracted with subcontractor Lane Supply, which delegated the work to subcontractor Perry Construction Company (Perry). Perry hired Tverberg — an independent contractor — as foreperson of Perry's two-person crew to construct the canopy. Tverberg had more than 20 years' experience in structural steel construction and held a state contractor's license under the name of J.T. Construction, a sole proprietorship consisting exclusively of Tverberg. Fillner also hired subcontractor Alexander Concrete Company to erect eight "bollards" — concrete posts intended to prevent vehicles from colliding with the fuel dispensers.

On May 1, 2006, Tverberg's first day on the job, Alexander Concrete had already dug eight holes for the bollard footings. Each hole was four feet wide and four feet deep. The holes, which were marked with stakes and safety ribbon, were next to the area where Tverberg was to erect the metal canopy. The bollards had no connection to the building of the metal canopy. In fact, Tverberg had never seen bollard holes at a canopy installation site. Tverberg asked Steve Richardson, Fillner's lead man, to cover the holes with large metal plates that were on site. However, Richardson said he did not have the necessary equipment to install the plates that day. Richardson did have his crew use a tractor to flatten dirt that was piled around the holes. Tverberg removed three or four stakes that marked the edges of some of the bollard holes. The next day, with the bollard holes still uncovered, Tverberg began work on the metal canopy. He again asked Richardson to cover the holes, but Richardson did not cover them. A short while later, as Tverberg walked from his truck toward the canopy, he mis-stepped and fell into a bollard hole and was injured.

In July 2006, Tverberg filed a personal injury action against Fillner and Perry. Tverberg alleged causes of action for negligence and premises liability, and sought recovery for alleged physical and mental injuries and lost income.

The court evaluated two potential bases for liability of the general contractor, Fillner. First, the court examined the potential liability of Fillner under a theory of breach of a non-delegable duty. Tverberg argued Fillner was responsible for complying with Cal-OSHA safety requirements that all pits be barricaded or securely covered. However, in California, when a hirer delegates contracted work to an independent contractor, it also impliedly delegates its duty to provide a safe workplace to that contractor. In these circumstances, the hirer has no duty and the independent contractor may not recover from the hirer for his or her injuries. Here, Fillner delegated its obligation to comply with Cal–OSHA workplace regulations to Tverberg, and therefore, could not be held liable for Tverberg's injuries.

Second, if a hirer entrusts work to an independent contractor, but retains control over safety conditions and then negligently exercises that control in a manner that affirmatively contributes to an employee's injuries, the hirer is liable for those injuries based on its negligent exercise of that retained control. Because the hirer actively retains control, it has not properly delegated that authority to the independent contractor. However, a hirer is not liable to an independent contractor or their employee merely because it retains control over safety conditions. Liability depends on whether the hirer exercised that retained control in a manner that affirmatively contributed to the injuries.

Here, the court found that by ordering the holes to be created and requiring Tverberg to conduct unrelated work near them, Fillner's conduct may have constituted a negligent exercise of its retained control that could have affirmatively contributed to Tverberg's injuries. In addition, Fillner determined there was no need to cover or barricade the bollard holes. Fillner's employee in charge of the jobsite testified he concluded the stakes and safety ribbon provided sufficient worker protection. As a result, the court found that Fillner might have affirmatively assumed the responsibility for the safety of the workers near the bollard holes, and discharged that responsibility in a negligent manner, resulting in Tverberg's injuries. Finally, Fillner failed to cover the holes after Tverberg twice asked Fillner to do so. When Tverberg made his first request to cover the holes, Fillner's representative stated the equipment required to cover the holes was not available. The court determined that a jury could conclude that Fillner agreed to cover the holes and then failed to meet this responsibility. Since the court concluded Fillner might be liable to Tverberg on a theory of affirmative retained control, the case was allowed to proceed toward trial against Fillner.

General contractors need to act with deliberate caution to avoid a "mis-step" and assuming liability that might otherwise not be their responsibility.

Although rules vary by jurisdiction, for general contractors and independent contractors, this case shows the importance of who retains and exercises affirmative control over compliance with job site safety requirements. In Tverberg, despite the fact the general contractor properly delegated its obligation to comply with Cal–OSHA regulations to an independent contractor; it was still potentially liable for the independent contractor's injuries based on its affirmative retained control over safety conditions. Given the complexity of the modern construction site — including the myriad of OSHA safety regulations and the multitude of subcontractors, suppliers and independent contractors involved in the construction process — general contractors need to act with deliberate caution to avoid a "mis-step" and assuming liability that might otherwise not be their responsibility. ❖

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InCourt

by Brian Morrow

TAKE EXTRA CARE WITH THE FINE PRINT

Liquidating agreements are enforceable *when properly drafted*

In a recent Colorado case that involved an airport runway reconstruction project and a drilling and blasting subcontractor's claim for additional costs due to differing site conditions — *R. E. Monks Construction Co., LLC v. Telluride Regional Airport Authority* (May 2, 2012) — the court provided a roadmap for making "pass-through claims" against government entities.

It is worthwhile to understand "pass-through claims" because they are important in government contracting. A pass-through claim is a claim by a party who has suffered damages (typically a subcontractor), against a responsible party with whom it has no contract (typically a governmental entity, i.e., the owner/government), presented by an intervening party (typically the prime contractor) who has a contractual relationship with both. In this example, the claim from the subcontractor "passes-through" the prime contractor to the owner/government.

Generally, absent "privity of contract," a subcontractor may not make a claim against or sue the government directly. "Privity of contract" simply means that parties are in a direct contractual relationship. Absent legal authority to the contrary, pass-through claims are not allowed due to subcontractors' lack of privity of contract with the government. However, a body of law has developed in the federal contracting arena, and many states, allowing pass-through claims against the government if certain requirements are met.

In the federal contracting arena, the *Severin* doctrine, which developed from the case *Severin v. United States*, 99 Ct. Cl. 435 (1943), provides for pass-through claims against the federal government. In the *Severin* case, the court held a subcontractor could not recover against the government in a representative lawsuit if the prime contractor was not also liable to the subcontractor on the same claim. This means the prime contractor must be obligated to pay the subcontractor regardless of whether the subcontractor claim is ultimately paid by the government.

Over the past several decades, federal court decisions have modified the *Severin* doctrine to limit the harsh effects from its strict application. For example, the *Severin* doctrine does not bar a legal action against the government if the prime contractor and subcontractor enter into a "liquidating agreement." A "liquidating agreement" is an agreement between the prime contractor and subcontractor which typically provides the subcontractor will release all claims it may have against the prime contractor in exchange for the prime contractor's promise to pursue the subcontractor's claims against the government. *When properly drafted*, liquidating agreements are enforceable. Liquidating agreements do not violate the *Severin* doctrine unless they completely and expressly release the prime contractor from liability to its subcontractor. In other words, a properly drafted liquidation agreement is a critical to ensuring that a pass-through claim will be upheld.

In the recent *Colorado case, R. E. Monks Construction Co., LLC v. Telluride Regional Airport Authority,* a general contractor, R.

E. Monks Construction Company (Monks) executed a contract with the Telluride Regional Airport Authority (TRAA) for the project known as Runway 9-27 Reconstruction Phase II, Telluride Regional Airport, in April 2009. The project involved extensive drilling and blasting operations associated with the construction of an airport runway. Monks subcontracted the drilling and blasting operations to Fisher Sand and Gravel Co., doing business as Arizona Drilling & Blasting (AD&B).

Prior to the contract, TRAA hired Terracon to perform exploratory drillings. Monks alleged the borings were located in the area where drilling and blasting would occur, were done to determine whether groundwater could be expected, and reflected that groundwater should not be expected. As a result, Monks submitted a bid to TRAA of anticipated costs to perform "dry hole" blasting, and stated that if "wet hole" conditions were encountered on the project, extra costs would result.

In early April 2009, AD&B commenced drilling and blasting. Almost immediately, Monks and AD&B alleged they encountered significant levels of groundwater in areas that TRAA represented would be dry. TRAA was notified of the wet hole condition and was informed that extra costs would result due to a differing site condition. TRAA refused to pay for any extra costs.

In June 2011, Monks, on behalf of AD&B, filed suit against TRAA, seeking in excess of $874,676 in damages. Prior to filing suit, Monks and AD&B entered into a liquidation agreement, wherein Monks and AD&B agreed to resolve the resolve the wet hole blasting claim between Monks and AD&B. In the liquidation agreement, Monks granted AD&B the authority to pursue the wet hole blasting claim in the name of Monks. In addition, the liquidation agreement reserved all rights against TRAA.

TRAA requested the court dismiss the case, arguing the liquidation agreement was not enforceable because of the prohibition against assignments in the TRAA/Monks contract, and because any claim that Monks had against TRAA was extinguished as a result of AD&B releasing Monks from any liability to it. The court denied TRAA's request to dismiss the case. The court disagreed that the liquidation agreement violated the TRAA/Monks contract prohibition against assignments. The court reasoned that if the liquidation agreement was an assignment of rights, any monies recovered would have to be paid directly by TRAA to AD&B. This was not the case.

TRAA also argued that under the *Severin* doctrine, Monks' claim against TRAA was nullified as a result of AD&B releasing Monks from any liability. The court disagreed, finding the liquidation agreement between Monks and AD&B did not contain an "iron-bound" release. As a result, the court allowed Monk's pass-through claim against TRAA to go forward.

The *R. E. Monks Construction Co.* case highlights the importance and complexity of understanding and properly drafting pass-through claims and liquidation agreements. The rules regarding pass-through claims, including time and procedural requirements, often vary between federal, state and local government jurisdictions. The failure to follow these requirements can be fatal to a pass-through claim (prior to the claim ever being considered on the merits). In order to properly preserve and assert their rights should a "pass-through claim" arise, prime contractors, subcontractors, material suppliers, sureties and their counsel should understand the differences and distinctions regarding "pass-through claims" in whatever jurisdictions they transact business. ❖

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InCourt

by Brian Morrow

Digging A Big Hole

A false or misleading statement may happen honestly

In a recent case regarding the supply of inadequate concrete to Boston's "Big Dig," a federal court of appeals affirmed the criminal convictions of two principals of a concrete contractor for knowingly making false claims to the government.

False claims against the government are a serious offense and can carry civil (monetary) and criminal penalties. Contractors who do business with the government need to take care to avoid submitting false information. The federal government and most states have passed False Claims Acts that prohibit fraud in contracting and carry stiff penalties. In order to be criminally liable, an individual must know their claims were false at the time they were made. It has been held that a claim or statement may be false even though it contains no untrue information or entries if, within the totality of the circumstances, the claim is not valid.

In United States v. Prosperi (July 13, 2012), the U.S. Court of Appeals for the First Circuit affirmed the criminal convictions of two principals of Aggregate Industries NE, Inc. (Aggregate) for knowingly providing non–conforming concrete to the Big Dig.

The Big Dig, a central artery/tunnel project in downtown Boston, lasted from 1991 to 2007. It is one of the largest and most expensive public works projects in the history of the United States. At the time of its completion, it cost an estimated $14.6 billion.

The Big Dig was managed by a joint venture between Bechtel Infrastructure and Parsons Brinkerhoff Quade & Douglas (B/PB). These companies acted as design consultants and managed the construction, which was performed by multiple major general contractors and various subcontractors. Overall, approximately 150 construction contracts were awarded in connection with the Big Dig.

The Big Dig required approximately 4.2 million cubic yards of concrete. Aggregate supplied 60 percent of the concrete for project. The Big Dig's concrete suppliers were required to: (1) adhere to a certain mix design, or recipe, for the concrete, based on the intended use; (2) have plants with an automatic batching system that ensured the proper mixture of each load, or batch, of concrete; (3) have in place recorders that captured information regarding the mix design, as well as the date and time of batching for each load of concrete, and provide a printout, called a "batch ticket," containing all the required information; (4) not add any additional water after the concrete mixture

It has been held that a claim or statement may be false even though it contains no untrue information or entries if, within the totality of the circumstances, the claim is not valid.

was loaded onto trucks for delivery; and (5) in most circumstances, place the concrete at the construction site within 90 minutes of the time it was mixed and loaded onto the delivery trucks.

The batch tickets served as a quality control mechanism. Aggregate's drivers would give the batch tickets to B/PB inspectors as they delivered their loads. The inspectors checked the batch tickets for certain criteria, including the time the concrete was loaded, the mix design, the volume loaded and the amount placed.

In the mid-1990's, Aggregate began to supply non-conforming concrete to the Big Dig. Aggregate instituted a practice of topping-off loads of leftover concrete, sometimes with concrete of a different mix design that met contract specifications. Aggregate would provide the entire load as if it were fresh concrete. These loads were designated "10/9" loads, which was the radio call signal that drivers used to alert the dispatcher they had leftover concrete.

The decision to use 10/9 concrete on the Big Dig was made by Aggregate's Ready Mix Division management, including Robert Prosperi, general manager, and Gregory Stevenson, operations manager. Once this process was instituted, 10/9 concrete was sent to the Big Dig on a daily basis. Dispatchers kept logs of the 10/9 concrete and these logs were provided to Prosperi, Stevenson and others on a daily basis.

Aggregate instituted a system to trick the inspectors by printing dummy batch tickets, by manually inputting the concrete quantity, mix design and time of loading using the batch computer's demonstration mode. When inspectors came to Aggregate's plant to check that procedures were being followed, the batch men would call the dispatchers and use the term "city plant" to signal that inspectors were present and 10/9 loads should not be sent out. In addition, when Aggregate ran out of fly ash, an important ingredient in some mix designs, Aggregate continued to supply concrete without fly ash by falsifying batch tickets to make it appear the loads contained fly ash. It is unclear how many loads without required fly ash were provided to the Big Dig.

Using the 10/9 logs, government investigators estimated that Aggregate provided 5,337 loads of 10/9 concrete to the Big Dig. In addition, the government included an estimated 1,200 loads of 10/9 concrete supplied to other public construction projects within Massachusetts. These loads totaled approximately 64,163 cubic yards of non-conforming concrete. The government paid an average of $80.90 per cubic yard of concrete. As a result, the government asserted a loss amount of $5.2 million. Overall, these non-conforming 10/9 loads amounted to approximately 1 percent of all the concrete provided by Aggregate to the Big Dig, and 0.6 percent of all concrete used in the project.

After a several week jury trial, Prosperi and Stevenson were convicted of multiple criminal offenses, including mail fraud, highway project fraud and conspiracy to defraud the government. They were sentenced by the trial court. On appeal, their sentences were affirmed.

Although it is obvious that one should not make false or misleading statements in any contract — especially with the government — for those who fail to heed this maxim the Prosperi case serves as a cautionary tale that criminal penalties can be the end result. ❖

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InCourt

by Brian Morrow

Read Before You Dig

Working with utilities means being very careful - on site and on paper.

Utility conflicts and relocation issues are common to most road construction projects. In urban areas, work can present increased risks with respect to utilities, including their location, avoidance, relocation and repair. Prior to construction, owners often undertake a preliminary design review process that includes local utilities. The utilities are provided preliminary plans to determine potential utility conflicts. The goal is to relocate conflicting utilities prior to the start of construction. If conflicts result during construction, the costs associated with these conflicts can be significant, including delay claims and increased costs to re-route utilities and/or conflicting subsurface features, such as drainage lines.

In Florida Power & Light Company v. Russell Engineering, Inc., 2012 WL 3326341 (decided August 15, 2012), a Florida court of appeals held that statutes governing an award of damages against a utility company regarding utility conflicts with road construction did not provide the contractor's exclusive remedy. Instead, the contractor was allowed to also pursue the utility on a negligence theory. As a result, the court affirmed a judgment in the contractor's favor, including an award for increased direct costs and delay damages.

This case arises from a road project in the Miami area. The county contracted with Miller Legg (Miller) to act as the county's engineering and inspection consultant. Miller prepared the project plans. Russell Engineering (Russell) was the low bidder.

In July 2000, Russell and the county entered into a contract for the project. The plans required Russell to install a 24-inch reinforced concrete drainage pipe, at one point over an existing Florida Power & Light (FPL) utility duct bank that was buried at an intersection and encased in concrete.

On April 30, 1999, the county sent FPL a letter pursuant to Sections 337.403 and 337.404 of Florida statutes, requesting FPL to remove or relocate any conflicting utilities. The letter included preliminary plans. FPL never removed or relocated its duct bank.

Internally, FPL identified a potential problem regarding the drainage pipe and duct bank. An internal memo dated July 15, 1999 stated that a "soft dig" should be performed to verify the depth of the duct bank to ensure the drainage pipe could be constructed over the duct bank, as this would "save [FPL] a lot of headaches down the road."

FPL did not verify the depth of the duct bank. Instead, FPL relied upon its own defective "plan and profile" drawing that showed an incorrect elevation for the duct bank. FPL submitted this incorrect drawing to Miller, who used the drawing to create the final plans. Based on this incorrect "plan and profile" drawing, Miller determined there was enough clearance for the drainage pipe.

On the same day as the FPL internal memo, July 15, 1999, FPL sent a letter to the county regarding potential problems with the plans and FPL's utilities. This letter did not disclose any concerns with the drainage pipe and duct bank.

In April 2001, Russell began construction. Approximately mid-way through the project, Russell encountered the FPL duct bank, which was buried at an elevation higher than shown in the plans. As a result, Russell could not install the drainage pipe. Russell immediately notified Miller, who in turn, notified FPL of the problem.

Russell could not continue work due to the duct bank. FPL did not remove or relocate the duct bank. As a result, Miller re-designed the drainage pipe to go below the duct bank. The extra work associated with the re-design required Russell to spend approximately six weeks on the drainage pipe installation.

The work required for the re-designed drainage pipe caused Russell to incur significant increased costs. For example, Russell had to excavate deeper (to 13 feet instead of six feet), use sheet pile driven to at least 20 feet to keep the existing road from collapsing into the excavation, and employ more expensive water pumping. This extra work was not part of Russell's contract.

The county notified FPL of its intent to seek reimbursement for all increased costs. Russell submitted a claim and settled with the county for $175,000.00 for its increased direct costs. In addition, the settlement included an assignment to Russell of the county's rights against FPL, including for any delay damages.

Russell filed suit on its own behalf and as the County's assignee. At trial, Russell prevailed against FPL under a negligence theory. Russell was awarded $175,000 in direct damages and $59,700 as delay damages.

FPL appealed, arguing that Sections 337.403 and 337.404 of the Florida statutes provide the exclusive remedy of requiring interfering utilities to be relocated or removed prior to awarding damages. FPL argued that because the county failed to pursue the statutory remedy, it should have prevailed. The appeals court disagreed, finding the statutes did not eliminate the common law right to recover damages for FPL's negligence. In addition, the court analyzed the language of the statutes, including the language of Section 337.404 that provides "Whenever it shall become necessary for the authority to remove or relocate any utility . . ." Since the drainage line was re-routed under the duct bank, it was not "necessary . . . to remove or relocate" the duct bank. As a result, the court found the statutes inapplicable and ruled in favor of Russell.

This case is an example of the minefield of potential claims regarding utility (and subsurface) conditions on construction projects. Here, the contractor's damages award against the utility was upheld on appeal. However, if the Florida statutes, or the contract, were worded differently, the contractor might have obtained a different result and been precluded from any recovery. As always, it is important to understand the terms and conditions of any contract and its risk allocation mechanisms, especially with respect to potential site utility conflicts and differing site conditions. ❖

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InCourt

by Brian Morrow

Winds of Change

A hurricane trumps a "no liability" clause in a delay damages case.

Construction projects are time sensitive by nature. Owners, developers, contractors, subcontractors and material suppliers commit to a project timeline so they can realize their anticipated profits within a defined schedule. When a project is delayed, one of the risks is escalating material costs.

With delays, foreseeable and unforeseeable conditions can lead to price increases, especially for products based on commodities such as oil. As a result, material price escalation clauses have become more prominent over the past decade. However, many contracts lack a materials escalation clause. Even without such a clause, if an owner delays a contractor's work, the first place to turn is the contract to determine whether the contractor can recover delay damages.

In a recent Arizona case — *Technology Construction, Inc. (TCI) v. City of Kingman*, 229 Ariz. 564 (decided June 12, 2012) — the Arizona court of appeals awarded delay damages to TCI relating to the increased price of asphalt due to Hurricane Katrina, despite the lack of a materials escalation clause and a "no liability" clause in the city's favor.

In July 2005, TCI contracted with city of Kingman for the construction of a railroad underpass for $5,226,722. Work on the project was scheduled for two phases. Phase 1 included a shoofly and relocation of a sewer line and water line, was scheduled to begin June 1, 2005, and was to be completed by June

30, 2005. Phase 2 included road work, was scheduled to begin July 18, 2005, and was to be completed by March 15, 2006. However, TCI's work did not commence until October 2005 because the city did not present a contract for TCI to sign until July 7, 2005. Also, the city did not give TCI notices to proceed until October 14, 2005 (Phase 2) and November 3, 2005 (Phase 1). TCI did not cause the delays.

In late August 2005, Hurricane Katrina occurred during delays to the project start. As a result, the price of oil increased dramatically. This led to an increase in the cost of asphalt. At the conclusion of the project, TCI had installed 10,359 tons of asphalt. TCI's initial bid price was $54.10 per ton, while the actual price was $85.40 per ton. TCI claimed damages of $324,933, or the total increase in cost from bid/contract execution to actual cost of installation.

In May 2006, TCI submitted a notice of claim requesting additional payment due to "the increased cost of asphalt materials arising out of . . . delays beyond the control of(TCI) and cost impact on oil-based products by Hurricane Katrina." The notice of claim stated TCI would submit a change order for the increased cost of materials from October 2005 onward. Subsequently, TCI requested payment but Kingman did not pay.

TCI filed suit for breach of contract and violation of the Arizona prompt payment act. The trial court found the delays were caused by the city, including those due to unexpected relocation of utilities, re-engineering for the sanitary sewer and delays by the city in getting the contract executed and financing in place. The former city engineer testified there were a number of unforeseen conditions that had to be addressed throughout the project. These conditions were not the fault of TCI and TCI handled them in a responsible manner.

The trial court found the delays were not attributed to TCI. The court entered judgment in TCI's favor in the amount of $324,933 plus pre-judgment interest in the amount of $117,785, post-judgment interest of 10 percent per annum, and attorneys' fees and costs. Kingman appealed.

The appeals court reviewed the contract and found conflicting clauses. There was a "no liability" clause. The city argued this clause limited its liability to the contract amount. The court noted, however, the contract included other documents, including the 2004 Uniform Standard Specifications for Public Works Construction. The specifications contained clauses that allow for delay damages and changes in the event of owner-caused delays or changes. The appeals court found the "no liability" clause did not override the other contract provisions.

The city argued that TCI's fixed price contract also prohibited an award of damages. However, the appeals court found the contract allowed for changes and the parties had executed at least three change orders. The court also found that TCI's damages for increased material costs were foreseeable, and hence recoverable, stating that

> "[p]rices of commodities such as construction materials change over time and in accordance with market forces under many influences, including weather. The fact that Hurricane Katrina drove up the price of asphalt materials subsequent to the signing of the contract does not mean that delay damages were unforeseeable."

As a result, the appeals court affirmed the trial court's judgment for TCI.

This case demonstrates an important contract principle. When possible, courts read conflicting contract provisions to give meaning to the entire contract and each individual clause. Here, the court found contract clauses providing for delay damages and changed conditions overrode the city's "no liability" clause. As the trial court noted, the city could have drafted a *force majeure* clause and insulated itself from damages based upon an act of God, but did not do so. However, with slightly different facts the court could have ruled the other way. In general, contracting parties need to be aware of risk-shifting mechanisms within a contract, including delay and escalation clauses relating to the increased price of materials. In the absence of such contract provisions, the question of who bears the risk of loss can be uncertain. ❖

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InCourt

by Brian Morrow

Court focuses on lack of a written Change Order in nixing subcontractor's claim

Construction projects rarely proceed exactly as planned. Changes are somewhat the norm in construction.

As a result, most construction contracts contain provisions relating to changes and extra work. These contract provisions — often referred to as "changes clauses" — require that certain conditions must be satisfied to obtain payment for change orders or extra work.

Changes clauses typically provide that changes and extra work must be authorized in writing. The purposes of this requirement are to minimize disputes over changes based on oral directions, document any changes that are actually ordered and ensure that costs incurred in performing changed work are properly documented.

In Process Engineers & Construction, Inc., v. DiGregorio, Inc., R.I. Super., 2012 WL 2946771 (decided July 13, 2012), a Rhode Island court determined that a subcontractor was not entitled to payment for extra work without a written change order. This case arose out of a project by Brown University to replace an underground piping system that delivers high-temperature, high-pressure water from a heating plant to buildings on campus. Brown selected a pre-insulated piping system manufactured by Perma Pipe, Inc.

On or about November 28, 2005, Brown hired Bond Brothers as the general contractor. On or about April 24, 2006, Bond subcontracted to DiGregorio to excavate and remove the existing piping system, prepare the trenches for the new pipe, place the new pipe in the trenches, and backfill the trenches when the new pipe was installed, tested, and approved. On or about April 24, 2006, DiGregorio also entered into a subcontract with Process Engineers & Constructors, Inc. ("Process") as its installation subcontractor to install, weld, flush, and inspect the new pipe. DiGregorio and Process agreed that Process would assume and manage the pre-existing purchase order with Perma Pipe to assure timely payment and delivery.

The project was to be completed in two phases. Phase one required part of the system to be installed and connected to the existing piping so the heating plant would be ready for use for the 2006 - 2007 heating season. Phase two included replacing the rest of the piping to be completed in spring 2007.

During the project, sand infiltration was discovered in Brown University's heating plant, which could have caused serious damage to its boilers. As a result, Brown shut down its heating plant and obtained a temporary heating system for the 2006 - 2007 heating period. Because of uncertainty regarding potential damage to the heating plant from the sand infiltration and which party or parties were responsible, Bond established a damage contingency fund and diverted payments to the fund that were otherwise owed to various subcontractors.

On or about October 30, 2006, it was discovered that insulation surrounding a 14-inch pipe had been flooded. As a result, the insulation deteriorated and required that some of the pipe be removed and replaced at a significant cost to DiGregorio and Process. The parties disagreed regarding who was to blame for the wet pipe. DiGregorio alleged that Process caused the insulation to become wet while pressure testing the pipe. Process denied responsibility and claimed that DiGregorio failed to keep the trenches dry, as required under the contract, which caused the pipe insulation to become wet. Nonetheless, Process replaced the damaged pipe and finished its work on the project.

In 2008, Process filed suit against DiGregorio for breach of contract. Process claimed that DiGregorio owed it $428,580.38 for change orders and extra work. The court held a two-day bench trial without a jury.

The court examined the DiGregorio/Process contract and found it incorporated the standard form AIA A-201 changes clause, which provides that "a Change Order is a written instrument prepared by the Architect and signed by the Owner, Contractor and Architect stating their agreement . . ." In addition, the contract provided that "the Subcontractor agrees that all work shall be done subject to the final approval of the Architect," and that "receipt of a final payment by DiGregorio from Bond Bros. for the Subcontractor's line item(s) is an express and strict condition precedent to DiGregorio's obligation to make final payment to the Subcontractor."

The court found that Process failed to present any evidence that the change orders for which it sought payment were in writing and signed by the parties. In addition, Process failed to present any evidence regarding the architect's approval of its extra work. Moreover, Process failed to present any evidence that DiGregorio ever received payment from Bond for its extra work. As a result, Process' claim for breach of contract failed because Process could not establish that it adhered to the contract requirements for written change orders and other prerequisites to payment.

This case shows the importance of knowing and adhering to contract requirements, especially regarding changes and extra work. Contracts often contain detailed requirements for the approval of changes, extra work and payment. It is important that contracting parties know and understand their contract provisions, as the contract provides a roadmap to which the court will refer if, and when, a dispute later develops. Although there are legal defenses to contract requirements regarding written change orders, they are not always applicable.

It is important that contracting parties know and understand their contract provisions, as the contract provides a roadmap to which the court will refer if, and when, a dispute later develops.

Here, Process appeared to lack an understanding of its contract requirements regarding written change orders. This lack of understanding and failure to adhere to the contract requirements was fatal to its claim. If Process had known and complied with the terms of its contract, it could have taken steps to have properly documented its extra work, presented the required evidence at trial and prevailed on its claim. ❖

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InCourt
by Brian Morrow

"Differing site conditions"

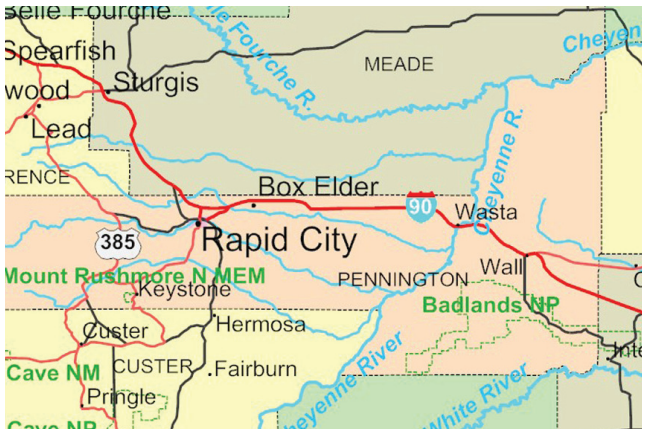
... not always an obvious call

The uncertainty that contractors face regarding unknown subsurface conditions can be their greatest risk. This type of risk is inherent on most road and heavy construction projects, commonly because testing of subsurface conditions is expensive and limited. This results in conclusions being drawn from limited data. In addition, this risk is often further exagerrated because geotechnical engineering is uncertain, often described as part science and part art.

In light of this risk, most major standard form construction contracts contain a differing site conditions clause. These clauses typically allocate to the owner the risk of unknown site conditions that the contractor could not have reasonably anticipated based on the contract documents and/or site investigation.

Differing site conditions clauses typically offer two separate bases for relief: Type I clauses are based on site conditions that differ materially from the conditions indicated in the contract documents, while Type II clauses are based on site conditions that differ materially from those ordinarily encountered and recognized as inherent in the work.

In the recent case, *Appeal of NDG Constructors* (August 21, 2012), the Armed Services Board of Contract Appeals (ASBCA or Board) denied the claim of NDG for a Type I differing site condition. NDG contracted



Boring a waterline tunnel under I-90 near Rapid City, S.D., a contractor claims to run into "differing site conditons". Not so, says a court ruling.

with the Army Corps of Engineers for $959,300 to tunnel a waterline underneath I-90 near Rapid City, South Dakota, to serve Ellsworth Air Force Base. NDG's work included constructing a 16-inch waterline under I-90 by tunneling and jacking approximately 560 linear feet of 54 inch steel casing. NDG subcontracted the tunneling portion to BT Construction, Inc., (BTC), a pipeline excavation contactor, for $706,000.

The contract documents incorporated two geotechnical reports from American Engineering Testing, Inc., including a total of 7 borings, soil samples obtained in accord with ASTM procedures, and lab tests of the soil

samples. During the work, NDG and BTC encountered difficult soil conditions that slowed their planned rate of progress, including shale rock, fat clays, and wet soils.

NDG submitted a claim of $146,278.94 and 9 calendar days based on alleged Type I differing site conditions. The contracting officer denied NDG's claim, and NDG appealed to ASBCA.

In reviewing its review ASBCA noted that Federal Acquisition Regulation 52.236-2(a)(1) provides that Type I differing site conditions consist of "subsurface or latent physical conditions at the site which differ materially from those indicated in the contract." In order to prove entitlement to a Type I differing site condition, NDG had to establish that:

... the conditions indicated in the contract differ materially from those actually encountered during performance; the conditions actually encountered were reasonably unforeseeable based on all information available to the contractor at the time of bidding; 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.

In light of the foregoing, the Board analyzed the three different aspects of NDG's claim.

First, NDG claimed that the soil profile was a differing site condition because the soil transitioned from clay to shale quicker than expected. NDG's expert testified that he anticipated shale would be encountered approximately 202 feet from Boring B-3, though it was encountered approximately 100 feet from Boring B-3.

NDG's expert reached this conclusion by drawing a straight line between Boring B-2 (where shale was indicated) and Boring B-3 (where fine alluvium soil was indicated).

The Board found this analysis faulty, in part because the soils reports and boring logs did not indicate where the transition to shale would occur. In addition, in preparing its estimate, BTC recognized the transition to shale would take place "at some point" as opposed to any specific point. As a result, the Board denied this aspect of NDG's claim.

Second, NDG argued that "[a] reasonable contractor would have anticipated encountering mostly lean clay, with some 'fat to lean clay' or 'lean to fat clay.' Instead, NDG and BTC actually encountered mostly fat clay." However, the Board found the boring logs indicated that Boring B-3 encountered a "mixture of lean to fat clay," while Boring B-2 encountered "fat to lean clay."

Since the material that was encountered — "mostly fat clay" — did not materially differ from the possible range indicated in the boring logs ("fat to lean clay" and "lean to fat clay,"), the Board concluded that NDG failed to prove a Type I condition in this respect.

Third, NDG contended the moisture content of the soils was much higher than indicated or anticipated, and thus, was a differing site condition. NDG stated that it encountered soils described as "very wet" or "extremely wet," while the soils reports described the soils as "moist to very moist," and as "soft wet soils, along with groundwater . . . that should be anticipated."

The Board did not see a difference between the wet conditions claimed by NDG and the soils described in the reports. In addition, the Board found NDG's expert's sampling of soils unconventional and contaminated by Bentonite slurry. Because the soil moisture encountered by NDG was what the soils reports indicated "should be anticipated," and the soil samples relied upon by NDG were not reliable, the Board found that NDG failed to prove a Type I differing site condition in this instance.

This case illustrates the difficulties that can be encountered in trying to prove a Type I differing site condition claim. In order to prevail on such a claim, the contractor needs to scrutinize the contract documents and show how and why the actual conditions encountered were different from those indicated. This includes an analysis of contract language and technical documents incorporated into the contract such as soils reports. ❖

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