Not Finding Anything Different and Not Reviewing All Documents Defeats DSC Claim

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Abstract: Differing site condition (DSC) claims are common in construction and can be very disruptive and expensive. The 1999 case of Fru-Con Constr. Corp. v. United States (Fru-Con Constr. Corp. v. United States) affords the opportunity to explore some of the issues that can mean the difference between prevailing and not prevailing on a DSC claim.

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Project

On September 2, 1993, the Corps of Engineers awarded a fixed-price contract to Fru-Con Construction Corporation for the rehabilitation of three lock and dam sites along the Illinois River. The work included the removal and replacement of mitre gates and the installation of eight new floating mooring bitts ("FMBs"). FMBs are barrel-shaped metal structures that rest within guides embedded in the concrete lock walls. The FMBs float in the lock chamber and assist in stabilizing passing tows when the level of water within the lock chamber rises and falls. Specifically, the contract provided for the removal of concrete from the lock chamber walls to permit the installation of four FMBs at the Brandon Road lock and dam site, three at the Marseilles lock and dam site, and one at the Dresden Island lock and dam site. The contract mandated that the mitre gate and FMB installations be completed within a 60 day lock closure period commencing on July 11, 1995, and ending on September 9, 1995. The Corps planned to close the locks to navigation during this period to permit Fru-Con to dewater the locks and work within the lock chambers. As a result of the lock closure, an 82 mi portion of the Illinois River was removed from active service. Recognizing the need to reopen the locks to navigation during this period to permit Fru-Con to dewater the locks and work within the lock chambers, the Corps mandated that the lock closure period be shortened to 60 days.

Contract

The relevant clauses in the contract are given in the following.

Site Visitation Clause

The contract required the contractor to visit the site. The clause, titled SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK, provided:

(a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the availability of labor, water, electric power, and roads; (3) uncertainties of weather, river stages, tides, or similar physical conditions at the site; (4) the conformance and conditions of the ground; and (5) the character of equipment and facilities needed preliminary to and during work performance. The contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

The Corps gave the contractors a general description of the work and permitted physical inspection of the lock sites. The Fru-Con visit lasted for approximately 45 min to 1 h at each site. During the inspection, Fru-Con “was looking for...any conflicts, overhead power lines for crane usage, conditions of the lock walls, impediments to operating equipment around the locks, and general access to the work that was to be accomplished.” Photographs of the lock and the surrounding area were taken that revealed construction joints, or lift joints, in the concrete monoliths, which Fru-Con did not believe would have a significant impact upon the concrete removal by the proposed drilling.
method or the later utilized blasting method. Fru-Con observed nothing unusual and anticipated high quality concrete.

**DSC Clause**

(a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, 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.

(b) The Contracting Officer shall investigate the site conditions promptly after receiving notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor’s cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.

(c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the written notice required; provided, that the time prescribed in (a) above for giving written notice may be extended by the Contracting Officer.

**Disclaimer Clause**

(b) The Government assumes no responsibility for any conclusions or interpretations made by the Contractor based on the information made available by the Government. Nor does the Government assume responsibility for any understanding reached or representation made concerning conditions which can affect the work by any of its officers or agents before the execution of this contract, unless that understanding or representation is expressly stated in this contract.

**Methods of Concrete Removal and Submittal Language**

The contract permitted a choice in methods for the selective removal of concrete from the lock wall face. One method was mechanical, i.e., the use of drilling followed by hydraulic splitters to break apart the concrete. Alternatively, the contract allowed for concrete removal by blasting.

Section C-02075, ¶ 3.2: Removal of the existing concrete may be done by blasting, as indicated on the drawings. All removals may be accomplished by other methods as approved by the Contracting Officer in the procedures submitted under paragraph C-02075 entitled, ‘SUBMITTALS.’

Paragraph 6 of section C-02075 specified the limits of concrete removal. These were also considered as “pay limits.” The contract prohibited the removal of more than 3 ft of concrete per blast and delineated areas in which no blasting was to occur. Because the contract obligated Fru-Con to repair any such damage at its expense, Fru-Con was to “take all necessary precautions to ensure against damage to existing work to remain in place.”

Fru-Con prepared its initial estimate based upon the use of drilling and splitting, although it took the position that blasting always was considered a viable option. Deeming, however, that blasting was both less expensive and a faster means of removal, Fru-Con later chose to blast the concrete. Installation of the new FMBs required that Fru-Con remove concrete from the lock chamber wall, thereby creating recesses between 39 and 52 ft in height.

**Other Referenced Documents**

The contract documents, Section H, Special Contract Requirements, P 5, included the information regarding conditions at the site. These documents were available for review, but were not included as bid or contract documents. They included the original construction drawings, shop drawings, specifications, and inspection reports for each of the three locks.

Additionally, the contract listed concrete-specific documents that were available for review. These were:

(8) Concrete Data:

(a) Brandon Road Lock: The horizontal and vertical faces of the lockwall were resurfaced in 1984. The replacement concrete is about 18 inches thick on most of the vertical surfaces. The new concrete is thicker nearer the floating mooring bitts and ladders. The concrete contain 1 1/2 inch maximum size crushed limestone coarse aggregate. Compressive strength of quality control cylinders was about 4,800 pounds per square inch at 28 days.

The concrete used in the original construction contain 3-inch maximum size natural gravel coarse aggregate and a natural sand fine aggregate. The coarse aggregate is mostly carbonate rock types with occasional igneous rock and chart particles. Compressive strengths of concrete in constantly submerged areas such as the sills may be higher than 7,000 pounds per square inch.

(b) Dresden Island Lock: The concrete contains 3 inch maximum size natural gravel coarse aggregate and natural sand fine aggregate. The coarse aggregate is mostly carbonate rock types with occasional igneous rock and chart particles. The concrete is well consolidated and contains some entrapped air, but is nonair entrained. The light brown paste is hard and dense. Cores taken from the lockwalls in 1977 had compressive strengths from 4,200 to 6,200 pounds per square inch. Compressive strengths of concrete in constantly submerged areas such as sills may be significantly higher.

(c) Marseilles Lock: The concrete contains 3 inch maximum size natural gravel coarse aggregate and natural sand fine aggregate. The coarse aggregate is mostly dolomite and dolomite limestones with minor amounts of other rock types. The concrete is well consolidated and contains occasional entrapped air voids but is nonair entrained. Cores taken from the lockwalls in 1974 had compressive strengths from 5,070 to 7,760 pounds per square inch. Compressive strengths of concrete in constantly submerged areas such as sills may be significantly higher.

**Blasting Operations**

During spring 1995 Fru-Con solicited bids for the blasting work. On or about March 28, 1995, Fru-Con awarded Ludwig Explo- sives, Inc. (Ludwig), a fixed-price subcontract in the amount of $243,950.00 for predrilling, blasting, and associated work at the
three locks. Ludwig had experience in quarry blasting.

Mr. Ludwig was on site for the blasting that took place on the first FMB, as well as the loading of charges for the initial blast on the second FMB. Thereafter, Mr. Ludwig left the work site for another project. He left Frank V. Camodeca in charge as Chief Blaster. Mr. Ludwig had hired Mr. Camodeca several months prior to the Illinois Waterway project. He was a recent college graduate with a degree in political science. He “never saw any blasting plan; rather,” [Mr. Ludwig] “explained what we were to do and how we were to do it.” As Chief Blaster, Mr. Camodeca made the final decisions on the project site after Mr. Ludwig left, as well as acting as liaison between Mr. Ludwig and Fru-Con.

Ludwig began drilling in April 1995 and completed the drilling for all eight FMBs prior to the July 11, 1995 lock closure. On July 11, 1995, Fru-Con began removing the gates and dewatering of the locks. Fru-Con subcontracted with Concrete Coring Company of St. Louis to perform the sawcutting on top of and within the lock chambers. Concrete Coring was also responsible for sawcutting the edges (boundaries) of concrete to be removed. Prior to July 11, 1995, Concrete Coring had completed the sawcutting on the exterior of the lock chambers, and then began the sawcutting work for FMBs on July 11, 1995 and ended on July 23, 1995.

Ludwig began blasting at FMB No. 1 at the Marseilles lock on July 17, 1995. Mr. Ludwig was present for this first blast; he then left the site, Mr. Camodeca was in charge of blasting at Marseilles and Brandon Road and Mr. Edward Gallagher, another Ludwig employee, was in charge of blasting at Dresden Island.

Overbreak occurred at all eight FMBs. The excess concrete removal amounted to 4,249 cu ft (183 CY). Although Fru-Con was in control that the overbreak conditions improved during the successive blasts, Fru-Con later acknowledged that the overbreak was not consistent. Depending on its severity, the overbreak required significant repair work, which included splicing rebar, making additional concrete forms, and modifying the existing scaffolding by attaching platforms that would enable workers to reach overbreak areas.

Schedule and Progress

Fru-Con was behind its proposed schedule from the day it was unable to remove the mitre gates as planned. Fru-Con initially was optimistic, believing that they could overcome the conditions that they were encountering at the sites. As the project progressed, however, a significant amount of extra work was required to repair the overbreakage, including refitting the prefabricated forms and gang planks that Fru-Con had prepared in anticipation of this project, creating templates to enable proper placement of rebar and the FMB forms, and extending the rebar dowels.

In spite of its efforts, Fru-Con was unable to complete the required contract work by the September 9, 1995 deadline. The Marseilles lock returned to operation on September 12, 1995; the Dresden Island lock and Brandon Road lock became operational on September 15, 1995, and September 18, 1995, respectively. The Corps assessed 10 days worth of liquidated damages for this delay totaling $206,950.00.

Claims

Fru-Con submitted multiple claims on this project. Only the differing site condition (DSC) claim is discussed in this paper.

Claim Letters

On October 2, 1995, Fru-Con submitted the first of two claim letters to the Corps. The first claim sought $4,265,718.00 as compensation for costs incurred due to the attempt to overcome labor delays caused by a Teamsters strike at Brandon Road, as well as “unusually severe weather delays experienced at all three lock sites.”

On July 3, 1996, Fru-Con submitted a second claim to the Corps, in which it asserted that many of the problems on the project resulted from “the Corps[‘] incomplete and incorrect Contract Documents and poor administration.” This claim sought compensation totaling $5,734,417.51 for the overbreak damage at the lock sites and difficulties in removing the mitre gates. Fru-Con alleged that neither Ludwig nor Fru-Con had “specific information as to the nature of the concrete to be demolished and removed” but rather the government had superior knowledge. [Fru-Con] relied upon the Corps in its submittal approval process to assure that the plan for demolition and removal was reviewed in light of the nature of the concrete. Fru-Con relied upon the DSC clause in the contract as a partial basis for their claim.

Type I and Type II DSC Claims

DSC claims are described as being either Type I or Type II. Both are defined as per the contract.

Type I

A Type I claim is one where the conditions encountered differ from those conditions indicated in the contract. The operative word is indicated. This means that the conditions need not be affirmatively expressed. Also, the contract must say something about the conditions. If the contract is silent, it cannot be a Type I claim.

Type II

If the contract is silent about the conditions, it must be a Type II claim, which is a claim about conditions that are “unknown physical conditions at the site, 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.”

DSC Analysis

The goal of this analysis is to understand the judicial reasoning behind the court’s decision.

Not All DSC Claims Are Geotechnical

The operative words of the DSC clause are . . . “latent physical conditions at the site” . . . Nothing in the DSC clause limits a DSC claim to geotechnical issues. The clause is more inclusive, but does not include all things. For instance, it does not cover a claim for a tax hike that increased contractor cost (Western Contracting v. California State Board of Equalization). This is not a latent physical condition at the site. So a DSC clause covers any hidden condition at the site provided it is a physical condition.
Shop Drawing Process

Fru-Con argued that somehow the government warranted that the Ludwig blasting plan would work because it approved the plan and the government had superior knowledge. The judicial viewpoint on approvals is that an approval only applies to (design) intent. Just because Fru-Con/Ludwig had the shop drawings approved did not mean that the government warranted that the blasting methods proposed by Ludwig would work. This view is consistent with other decisions, but received little discussion in the present case. Further, if inspectors observe the installation of items that deviate from the specifications, this alone does not constitute a waiver of the requirement for the contractor to follow the specifications (Appeal of Community Science 1977).

Type I DSC Claim

Fru-Con asserted a Type I DSC claim. To focus on the key issues, an analytical framework is followed (Thomas et al. 2007). Called an inquiry analysis, the questions asked by the court are repeated herein. For a Type I DSC, the following four inquiries (questions) are addressed: Is the contract silent? What does the contract indicate? Did conditions differ materially (significantly) from those indicated? Was contractor reliance on the information provided justified?

Is the Contract Silent?

Ordinarily one would only rely on the contract documents to determine if the contract is silent. The referenced reports and documents that are not part of the contract documents would not be used. This may mean that the contract is silent and only a Type II DSC can be asserted.

But, the U.S. Court of Federal Claims took a broader view. The court applied the following: “The term ‘contract documents’ is to be interpreted with considerable breadth to include not only the bidding documents (invitation for bids, drawings, specifications, and other documents physically furnished to bidders) but also documents and materials mentioned in the bidding documents as well” (Dawco Constr. Inc. v. United States), so the contract was not silent and meaning Fru-Con could only pursue a Type I claim.

This view poses a potentially serious dilemma for all parties. That is, what is the role of the soil report, which is not normally part of the contract documents? Can it be used to establish indications? This issue is not yet settled.

What Does the Contract Indicate?

At the outset it is worth noting that Fru-Con/Ludwig did not say what they felt the contract indicated, or what differed, or the basis for their DSC claim. This could potentially be sufficient to defeat their claim. This was a very technical and complex case. Many of the important technical details are not cited. However, it is clear from the contract documents and materials for review that much technical information was provided. This information suggested that Fru-Con’s argument was that the concrete to be blasted was homogeneous. But, there was rebar, air voids, possible delamination (the horizontal and vertical faces of the lockwall were resurfaced in 1984), and varying concrete core strengths. All could potentially make blasting more difficult.

The operative wording in the Fru-Con contract (DSC clause) is indicated. It is not necessary that the conditions be affirmatively expressed (Foster v. United States). All there needs to be is an indication or suggestion. This is an important criterion. The court reasoned that the contract and other documents indicated that the concrete to be blasted was not homogeneous and the lack of homogeneity possibly led to overbreak.

Did Conditions Differ Materially (Significantly) from Those Indicated?

Both sides offered experts in blasting, but the appellate court could not determine which expert was closest to presenting a valid explanation for the overbreak. Without an allegation, it is not possible to establish the cause of the overbreak, what in the contract was misleading, and how was the contractor damaged. From the judicial opinion, it is not possible to answer this inquiry as to what conditions differed. Without the element of cause and effect, the claim would appear to be defeated. This was a potential blunder for counsel on both sides. Without specifying the cause and what was misleading, the element of government liability cannot be established.

The message for contractors would seem to be that there is a need to be precise and specific as to what is misleading and how this misleading indication led to the contractor being harmed. Thus, Fru-Con’s claim would probably be defeated on this inquiry alone.

The court concluded that there was nothing materially different between what the contract indicated and what the contractor encountered.

Was Contractor Reliance on the Information Provided Justified?

There are a number of things that would potentially reduce the contractor’s reliance on any misleading information. Among the items discussed in the case are the site visits, disclaimers, and review of other documents.

Site Visit

A contractor is not required to conduct his/her own exploratory study unless expressly instructed to do so via the site visitation clause (Town of Longboat Key v. Widell 1978; United Contractors v. United States 1966).

Key contract language from the Fru-Con contract reads:

The contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

On the surface, there would appear to be no requirement for Fru-Con or Ludwig to conduct his/her own independent investigation of conditions at the site. But caution is advised because in
some instances, vague language, such as found in the Fru-Con contract, has sometimes been determined to be a directive to do an investigation. When in doubt, always ask. Get the owner to issue an addendum. This will protect the contractor. It is settled that in most instances, failure to conduct a site visit or perform an investigation when instructed to do so will preclude a claim. Owners should keep logs of all site visitors and take photographs of visible prebid conditions. Site visits cannot be made with your eyes closed.

Disclaimer
The Fru-Con contract contained disclaimer language that covered all manner of ills that could befall the contractor in his/her interpretation of information. Although there was limited discussion in the case about disclaimers, the court clearly dismissed the disclaimer as a broad exculpatory clause and saying that the Corps “may not avoid liability through the use of general exculpatory clauses.” It is widely recognized and accepted that courts do not like broad, general exculpatory clauses. Generally, a disclaimer will only be enforced if it is specific and narrow in scope.

The message to owners is do not rely on disclaimers to avoid liability for a claim, unless the disclaimer is specifically worded. In this case, the court found the disclaimer clause to be inoperative.

Review of Other Available Documents
From the Fru-Con case, it is settled that contractors must rely on all the information provided both in the bid and contract documents and cited as available for review. If contractors fail to do so, they will have a very difficult time in prevailing on a claim. Owners should keep logs of everyone who reviews documents.

In the Fru-Con case, Ludwig failed to review during the prebid period the documents provided, and they were criticized by the court for not doing so. The court said, “Plaintiff (Fru-Con) failed to consult the concrete data information incorporated directly within the contract, as well as other referenced material. The essential element of reliance therefore is wholly lacking from plaintiff’s claim, because plaintiff cannot be misled by documents on which it never relied.” This issue alone was probably sufficient to defeat Fru-Con’s claim.

Outcome
Fru-Con failed to prevail on its DSC claim largely because there was nothing different from what the contract indicated, and Ludwig did not review other relevant documents.

Lessons Learned
There are numerous lessons to be learned from the Fru-Con case.

When a submittal is approved, it does not constitute a guarantee that the method will work. It only means that the method chosen complies with the contract intent. Contractors must comply with all contract language regarding submittal submissions.

Not all DSC claims are geotechnical. The language of the contract is “subsurface or latent physical conditions at the site” (Type I) and “unknown physical conditions at the site” (Type II).

The key operative word in the contract is indicated. The condition need not be affirmatively expressed. All that is needed is an indication or a suggestion.

The message for contractors seems to be that there is a need to be precise and specific as to what is misleading and how this misleading indication led to the contractor being harmed. Failure to be precise may defeat the claim.

Contractors are not expected to do independent investigations unless specifically instructed by the contract to do so. Many site visitation clauses are vaguely worded and may be interpreted by a court as requiring a site investigation. Therefore, it is always wise for the contractor to ask and insist that an addendum be issued.

Disclaimers and exculpatory language are not favored by courts and are narrowly construed by courts. However, if a disclaimer is specific and precisely worded, it may not be ignored.

Contractors must review all documents and references cited in the bid documents. Failure to do so will likely defeat a claim.

List of Cases

Town of Longboat Key v. Carl E. Widell and Son 362 So.2d 719 (1978).

References