



It's Hard to Succeed If the Contract Documents Are Silent on the Condition

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Who bears the risk of differing site conditions on a construction project? It is a question that has been litigated since time immemorial.

Many court cases that discuss DSC disputes center on what formed the basis for the alleged DSC. Most of the time there is some affirmative representation in the contract that led the contractor to expect certain types of conditions, but when the contractor began work, it found conditions that were materially different. The “fight” is typically whether the contractor’s expectations were justified based on a reasonable look at the contract documents or if a more robust prebid investigation

by the contractor would have revealed the conditions the contractor actually found.

There are some DSC cases that discuss what happens when the contract documents are silent on a particular condition. These cases create a challenge for contractors, as they need to justify how they arrived at their prebid expectations and why the owners should be responsible for the conditions they actually found. This issue’s case, *Slone Associates Inc. v. U.S.*, not only provides an excellent example of how situations like this get addressed but also how difficult it is for contractors to win.

THE CASE

Slone had a multiple award construction contract with the United States Navy for work in South Carolina and Georgia. In 2010, the Navy issued a \$5.43 million task order to Slone that involved repairs on a concrete dock at Naval Weapons Station, Joint Base Charleston in South Carolina. The repair work primarily involved demolishing portions of the existing concrete deck (supported on concrete piles) and installing additional concrete piles and new concrete decking. Because Slone did not have expertise with heavy marine construction work, the work was performed by Precon Marine Inc., a sub-subcontractor to Slone.

There were numerous delays and DSC claims, many of which were recognized by the Navy through contract modifications. However, one area of contention that was not resolved involved the presence of subsurface timber piles that were the remnants of an old wooden pier. During

a post-construction inspection, the Navy discovered that two of the new concrete piles that Precon installed were cracked. Slone and Precon eventually asserted that the cracks in the new piles were caused by them having “contact” with the timber piles during installation. The direct cost of removing the timber piles and replacing the cracked concrete piles was approximately \$450,000, and 169 days of delay was attributed to this remedial effort.

Slone argued that the timber piles and their impact on the concrete piles constituted a type 1 and 2 DSC. This assertion was included as part of an overall claim to the Navy. When the Navy’s contracting officer failed to render a final decision on the claim, Slone filed a complaint with the U.S. Court of Federal Claims. The court ultimately found that Slone had not proved that there was either a type 1 or 2 DSC and denied the claim.

THE RULING

The court cited longstanding precedent, stating that to prevail on a type 1 DSC, a contractor must first establish that “a reasonable contractor reading the contract documents as a whole would interpret them as making a representation as to the site conditions” and also that a contractor “is not eligible for an equitable adjustment for a type 1 (DSC) unless the contract indicated what that condition would

be.” Additionally, the DSC remedy is not available if the contract documents “say ‘nothing one way or the other about the unforeseen conditions.’” Citing other precedent, the court stated that if the contract is truly silent about the conditions, there is nothing that can be used as a baseline to compare against the actual conditions and show how they are materially different.

Based on this analysis, the court looked to the facts of this case and concluded that Slone had failed to show that the contract affirmatively indicated that a contractor would not encounter timber pile stubs or other remnants of an older structure. In fact, Slone could not cite to any contract provision or drawing that made any representations about subsurface conditions.

Slone relied upon the testimony of Precon's project manager in which he stated that he would have expected to see the timber piles that Precon encountered reflected in the contract drawings when Slone bid on the work. Because there were no obstructions noted in the drawings, that led him to assume that the work area was a "virgin" area and that there would be no obstructions. While the court found his testimony credible, it found that this position "collides with the law, under which establishing a type 1 (DSC) requires affirmative indications, as opposed to implications drawn from contractual silence."

Slone also cited several federal court cases in which type 1 DSCs were recognized based on implied, rather than affirmative, representations about site conditions. In these cases, the presence of subsurface conditions were identified in the contract documents, but there was nothing said about the subsurface conditions that were the basis for the

DSC claims. The court found these cases distinguishable, as the contract documents on Slone's project did not mention these conditions in any way.

The court then turned to the question of whether the timber piles could be considered type 2 DSCs: Were they of an unusual nature and did they differ materially from those normally encountered in the kind of work contemplated by the contract? The court cited longstanding precedent to explain that type 2 DSCs are more difficult to prove and have a heavier burden of proof than type 1 DSCs and that Slone failed to meet that burden. The court noted that the timber piles were predominantly found in one small section of the project site and that only 16% of the piles driven by Precon hit timber obstructions. These obstructions were removed without any material delay in the contractor's performance.

Finally, the court stated that even if it had determined that the timber piles were DSCs, Slone failed to prove that they caused the cracks in the two concrete piles. The only evidence of causation was from Precon's project manager, and he *speculated* that the problems in those two concrete piles were because of the timber. Furthermore, the project manager could not explain why Precon was able to drive all the other concrete piles without cracking them despite the presence of timber piles.

THE ANALYSIS

Of the takeaways from this case, perhaps the most important is the court's discussion of Slone having failed to prove that the cracks in the new concrete piles were caused by the alleged DSC (i.e., the timber piles). Far too often a contractor will focus its attention on proving the first part of its burden — the existence of the DSC condition itself — to the exclusion of proving the second part of its burden, causation (i.e., the relationship of the DSC to the alleged impact), whether the impact is project delay, loss of productivity, or, as the case here, discrete damage to an element of the work. This case is an important reminder that contractors face a two-prong burden of proof and must satisfy both prongs: the DSC itself and the effect of that condition.

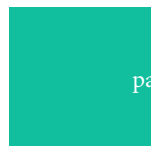
Another interesting takeaway was the court's discussion of type 2 DSCs. The court concluded that Slone could not have anticipated the presence of the timber through a pre-bid inspection because the material was underwater, and the Navy did not permit bidders to take boats beneath the dock to inspect for obstructions.

The court also concluded that it would not be typical to encounter another structure (the subsurface wooden pier) beneath the surface of an existing structure (the dock). However, in the end, the high burden of proof for a type 2 DSC is what doomed Slone, which should be a reminder to readers: It is typically very hard to prevail on a type 2 DSC claim. **CE**



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