SECTION 5

CONTRACT MODIFICATIONS AND DELAY

A. THE CHANGES CLAUSE

1. Introduction

Virtually all construction contracts contain a "Changes" clause that allows the owner to modify the scope of the work, or the time of performance, without the contractor's consent, when the owner and the contractor cannot agree on the terms of the change. Under the common law, an attempt by one party to modify the contract without the consent of the other party was a breach of contract.[1] Thus, without a Changes clause, an owner could not modify the contract unless the contractor agreed to the change.

By empowering the owner to change the contract unilaterally, the clause gives an owner the flexibility it needs to administer the contract. Changes may be necessary for various reasons. A change order may be necessary to correct a design error, or deal with unanticipated site conditions that materially affect the cost of performance, or alter the time allowed for completion of the contract.

While the clause provides operating flexibility for the owner, it may also produce controversies that lead to disputes.[2] The clause is probably the most frequently litigated provision in construction contracts. The legal problems raised by the clause vary depending upon how the clause is worded and the nature of the change. The problems may vary from the enforceability of an oral directive to perform extra work, to the effect of an unprotested bilateral change as an accord and satisfaction, barring a later claim for additional compensation for changed work.

These and other related issues are discussed in this subsection. Part 2 begins this discussion with an overview of some standard clauses used by the Federal Government and some state transportation agencies. Part 3 reviews the law relating to unauthorized change orders. Part 4 discusses the requirement found in most "changes clauses" that changes must be ordered in writing to be enforceable and exceptions to this requirement based on waiver and estoppel. Part 4 also discusses constructive changes. Parts 5 and 6, respectively, focus on "cardinal changes" and notice requirements. The remaining parts of this subsection deal with bilateral changes, as an accord and satisfaction, barring claims for additional compensation beyond the amount agreed to in the change order, and exceptions to the rule of an accord and satisfaction based on economic duress, mistake, and the cardinal change doctrine. Variations in estimated quantities in unit price contracts complete this subsection.

2. Standard Clauses

The clause has been used in Federal Government construction contracting for over 100 years.[3] While its use spans over a century, the wording of the clause has not remained static. The clause has been revised, from time to time, to reflect both the experiences gained in the administration of contracts and the views expressed by federal courts in numerous decisions. Similar revisions have taken place in standard clauses used by state transportation agencies in their construction contracts.[4]

No attempt is made, however, to trace the various changes that have taken place, over the years, in federal and state clauses. Instead, it is the intent of this subsection to compare the current federal clause[5] with representative clauses used by various state transportation agencies,[6] including the AASHTO Guide Specification for Highway Construction.[7]

The standard changes clauses used by the Federal Government and state agencies have certain basic elements in common beyond empowering the owner to make unilateral changes to the contract. An analysis of the clauses shows that all of them identify the person who is authorized to issue change orders for the owner. Most clauses require change orders to be in writing to be binding on the owner, but some allow oral change orders and a few allow constructive change orders. All of the clauses specify, either generally or with particularity, the extent of changes that are permitted and impose limitations on the power to order changes by requiring that they must be within the general scope of

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[1] Tondevoid v. Blaine School Dist., 91 Wash. 2d 632, 590 P.2d 1268, 1270–71 (Wash. 1979). The common law rule requiring mutual assent to make contractual changes applies to government contracts with private parties. Hensler v. City of L.A., 124 Cal. App. 2d 71, 268 P.2d 12, 18 (Cal. App. 1954); Clark County Constr. Co. v. State Highway Comm'n, 248 Ky. 158, 58 S.W.2d 388, 2390-91 (1933).

[2] Typically, the dispute provisions of the contract require the contractor to keep working, with the resolution of the dispute deferred until later. WALLEY & VANCE, *Legal Problems Arising From Changes, Changed Conditions and Disputes Clauses in Highway Construction Contracts*, SELECTED STUDIES IN HIGHWAY LAW, vol. 3, pp. 1441–42. This allows the owner to keep the project on schedule, or at least moving forward, instead of coming to a standstill if the contractor stopped working. *Id*.

[3] General Dynamics v. United States, 585 F.2d 457 (Ct. Cl. 1978).

[4] WALLEY & VANCE, *supra* note 2.

[5] 48 C.F.R. ch. 1, pt. 52.243-4, Changes (1987).

[6] AASHTO Guide Specifications 104.03 (1998); Alaska Department of Transportation and Public Facilities Standard Specification 104.1.02 (1998); Arizona Standard Specification 104.02 (2000); California Department of Transportation Standard Specification 4-1.03 (1995); Florida Department of Transportation Standard Specification 4.3.2.1 (1996); Iowa Department of Transportation Standard Specification 1109.16C.1; Michigan Department of Transportation Standard Specification 103.02.B (1996); New Jersey Department of Transportation, Standard Specification 104.02 (1996); New York Department of Transportation Standard Specification 109-05 (1995); Texas Department of Transportation Standard Specification 4.2 (1995); Washington State Department of Transportation Standard Specification 1-04.4 (1996).

[7] AASHTO Guide Specification 104.03 (1998).

the original contract work. All allow changes to be made without the consent of the performance and payment bond surety or sureties. All clauses require the owner to compensate the contractor for its additional costs in performing changed work and to grant time extensions when appropriate. The federal clause allows impact costs for the effect of the change upon unchanged work. Most states allow compensation when the changed work affects other work, causing such work to become significantly different in character. Parenthetically, the DSC clauses used by the states and the federally-mandated clause,[8] for use in federally-aided Interstate highway construction contracts, do not allow a price adjustment for the effects of a DSC on unchanged work.[9] All clauses require the contractor to give notice of claims. Most provide for increases and decreases in quantities, where the contract quantities are based on unit prices. The key elements of the standard clauses are discussed in this subsection.

3. Authority To Order Changes

A change order must be issued by someone with actual authority to change the contract. In federal construction contracting, that person is the contracting officer. The Standard Changes Clause provides in part that, "the Contracting Officer may…make change in the work within the general scope of the contract…."[10] This is further emphasized by a federal regulation that "[o]nly Contracting Officers acting within the scope of their authority are empowered to execute modifications on behalf of the Government."[11]

In many state highway construction contracts, the person empowered to execute change orders on behalf of the agency is the "Engineer."[12] For example, the Texas Department of Transportation Standard Specification states in part that, "the Engineer reserves the right to make…such changes in quantities and such alterations in the work as are necessary to satisfactorily complete the project."[13] The Guide Specifications issued by AASHTO state in part that "[d]uring the course of the Contract, the Engineer can make written changes in quantities or make other alterations as necessary to complete the work."[14] Some other state specifications are couched in similar language.[15]

The identity of the person authorized to modify the contract is important because a government agency is not bound by the unauthorized acts of its agents. This rule is strictly enforced in public contracting.[16] It protects the government from the potential liability of employees who, without authorization, purport to alter the terms of the written contract.[17] Thus, government agencies are not bound by changes ordered by a project inspector,[18] or by a consulting engineer.[19]

The Doctrine of Apparent Authority—which allows private owners to be bound by the unauthorized acts of their representatives, who are clothed with apparent authority to act the way they did—cannot be invoked against government agencies.[20] The contractor's good faith belief concerning the authority of government agencies to make changes to the contract is irrelevant. Contractors who perform changed work that is unauthorized do so at their peril.[21]

4. Requirement That Change Orders Be in Writing

a. Waiver and Estoppel

Public construction contracts usually require that changes to the contract must be authorized in writing. A typical clause, used by state transportation agencies, authorizes the "Engineer" to make changes, "in writing" … "as are necessary to satisfactorily complete the project."[22] Some specifications may be even more explicit. For example, California's Standard Clause provides that,

> Those changes will be set forth in a contract change order which will specify, in addition to the work to be done in connection with the change made, adjustment of contract time, if any, and the basis of compensation for that work. A contract change order will not become effective until approved by the Engineer.[23]

Generally, provisions of this kind are judicially enforced unless the owner is found to have waived the requirement that changes must be ordered in writing.[24]

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[8] This topic is discussed in Subsection B, Differing Site Conditions.

[9] 48 C.F.R. ch. 1 pt. 52.243-4(a).

[10] 48 C.F.R. 52.243-4(a).

[11] 48 C.F.R. pt. 43, § 43.102(a).

[12] The "Engineer" is usually defined in the Contract.

[13] Texas DOT Standard Specification 4.2 (1995).

[14] AASHTO Guide Specification for Highway Construction 104.03 (1998).

[15] For some examples, see the specifications listed in note 6.

[16] ECC Int'l Corp. v. United States, 43 Fed. Cl. 359, 367–68 (1999); United States v. Christensen, 50 F. Supp. 30, 32–33 (E.D. Ill. 1943); Noel v. Cole, 98 Wash. 2d 375, 655 P.2d 245, 249–50 (Wash. 1982); 10 MCQUILLIAN, MUNICIPAL CORPORATIONS, § 29.04 (3d ed.).

[17] County of Brevard v. Miorelli Eng'g, Inc., 703 So. 2d 1049, 1051 (Fla. 1997).

[18] Elastromeric Roofing Assocs. v. United States, 26 Fed. Cl. 1106 (1992).

[19] Dillingham Constr. N.A., Inc. v. United States, 33 Fed. Cl. 495, 503 (1995), *aff'd*, 91 F.3d 167 (1996).

[20] Johnson Drake & Piper, Inc., ASBCA 9824 and 10199, 65-2 BCA 4868 180 (1965).

[21] ECC Inter Corp v. United States, *supra* note 16.

[22] Iowa DOT Standard Specification 1109.16 C1 (2001); Texas DOT Standard Specification 4.2 (1993).

[23] California DOT Standard Specification 4-1.03 (1995).

[24] *See generally* 64 AM. JUR. 2D *Public Works and Contracts*, § 189–198 (2d ed. 1972), Annotation, *Effect of Stipulation, in Public Building or Construction Contract, That Alterations or Extras Must Be Ordered In Writing*, 1 A.L.R. 3d 1273, 1281–1282 (1965). *See also*, Sentinel Indus. Cont. v. Kimmins Indus. Service Corp. 74 So. 2d 934, 964 (Miss. 1999).

In *Foster Wheeler Enviresponse v. Franklin County Convention Facilities Auth.,*[25] the Ohio Supreme Court said:

> It is universally recognized that where a building or construction contract, public or private, stipulates that additional, altered, or extra work must be ordered in writing, the stipulation is valid and binding upon the parties, and no recovery can be had for such work without a written directive therefor in compliance with the terms of the contract, unless waived by the owner or employer…(citations omitted).

This rule is based on the notion that a person who has authority to change the contract may waive its provisions.[26] Acts or conduct that may constitute waiver include: (1) the owner's knowledge of the change and its acquiescence in allowing the extra work to proceed,[27] and (2) a course of dealing between the owner and the contractor disregarding the requirement that changes be in writing.[28] This waiver principle is applicable to construction contracts.[29] The Parol Evidence Rule does not bar this kind of extrinsic evidence. The rule does not apply to evidence regarding a subsequent modification of a written contract, or to the waiver of contractual terms by language or conduct.[30]

A number of jurisdictions require clear and convincing evidence to prove that the owner waived the written change order provision.[31] In *Powers v. Miller*, the court gave several reasons why an oral modification to a written contract requiring that changes be in writing must be proven by clear and convincing evidence:

> [W]e believe that the higher standard of proof is appropriate in order to avoid the type of ambiguous situation that occurred in this case, in which one party thought the contract had been modified and the other did not think a modification had occurred. We further believe that requiring proof by clear and convincing evidence is an appropriate balancing of the principles of freedom of contract against the sanctity of written contracts. That standard reduces the risk that the parties' intent as set forth in the contract will not prevail.[32]

Estoppel is another theory that is used to avoid the preclusive effect of a written change order requirement. When the owner's words or conduct constitute a waiver of the written change order requirement, the owner may be estopped from asserting that requirement as a defense to a claim for extra work.[33] The court is likely to apply estoppel as another reason why the written change order requirement does not bar an oral change order, when the owner has acted unfairly.[34] Estoppel, like waiver, must be proved with clear and convincing evidence.[35]

Some courts, for policy reasons, have refused to enforce an oral modification to a public works construction contract when the contract provides that modifications must be made in writing. In *County of Brevard v. Miorelli Engineering*, the court held, as a matter of law, that waiver and estoppel cannot be applied to the government in any dispute arising out of a contractual relationship.[36] The court said:

> MEI asserts that the County waived the written change order requirement by directing work changes without following its own formalities. We decline to hold that the doctrines of waiver and estoppel can be used to defeat the express terms of the contract. Otherwise, the requirement of *Pan Am* that there first be an express written contract before there can be a waiver of sovereign immunity would be an empty one. An unscrupulous or careless government employee could alter or waive the terms of the written agreement, thereby leaving the sovereign with potentially unlimited liability.[37]

In a similar view, the court in *State Highway Commission v. Green-Boots Construction Co*.[38] said:

> The stipulation in construction contracts that compensation for extra work should be agreed upon prior to the performance of the work is not an unusual provision in this class of contracts. The reason therefore, no doubt, arises because of the frequent claims made by contractors for this so-called extra work. 'Municipal Corpora-

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[25] 78 Ohio St. 3d, 353, 678 N.E.2d 519, 525 (Ohio 1997).

[26] Clark County Constr. Co. v. State Highway Comm'n, 248 Ky. 158, 58 S.W.2d 388, 390–91 (Ky. 1933); Hempel v. Bragg, 856 S.W.2d 393, 297 (Ark. 1993); 13 AM. JUR. 2D; *Building and Construction Contracts*, § 24 *et seq*. (1964); Gilmartin Bros. v. Kern, 916 S.W.2d 324, 329 (Mo. App. 1995); Weaver v. Acampora, 229 A.D. 2d 727, 642 N.Y.S.2d 339, 341 (N.Y. A.D. 1996); Bonacorso Constr. Corp. v. Commonwealth, 41 Mass. App. Ct. 8, 668 N.E.2d 366, 368 (Mass. App. 1996); Austin v. Barber, 227 A.D. 2d 826, 642 N.Y.S.2d 972, 974 (N.Y. A.D. 1996); Todd Shipyards Corp. v. Cunard Line Ltd., 943 F.2d 1056, 1061 (9th Cir. 1991); D.K. Meyer Corp. v. Bevco, Inc., 206, Neb. 318, 292 N.W.2d 773, 775 (1980); Morango v. Phillips, 33 Wash. 2d 351, 205 P.2d 892, 894 (1949); Annotation, 2 A.L.R. 3d 620.

[27] State v. Eastwind, Inc., 851 P.2d 1348, 1351 (Alaska 1993).

[28] Gilmarten Bros. v. Kern, 916 S.W.2d 324, 329 (Mo. App. 1995); Menard & Co. Masonary Bldg. Contractors v. Marshall Bldg. Systems, Inc., 539 A.2d 523, 526–27 (R.I. 1988).

[29] *See* 13 AM. JUR. 2D *Building and Construction Contracts* § 24 (2d ed. 2000).

[30] 29 AM. JUR. 2D *Evidence* § 1133 (2d ed. 1994).

[31] City Nat'l Bank of Fort Smith v. First Nat'l Bank and Trust, 22 Ark. App. 5, 732 S.W.2d 489, 492 (1987); Kline v. Clinton, 103 Idaho 116, 645 P.2d 350, 355 (1982); Duncan v. Cannon, 204 Ill. App. 3d 160, 561 N.E.2d 1147, 1149, 149 Ill. Dec. 451 (1990); Glass v. Bryant, 302, Ky. 236, 194 S.W.2d 390, 393 (1946); Jenson v. Olson, 144 Mont. 224, 395 P.2d 465, 469 (1964); Nicolella v. Palmer, 248 A.2d 20, 23 (Pa. 1968).

[32] 127 N.M. 496, 984 P.2d 177, 180 (1999) (citation omitted).

[33] Harrington v. McCarthy, 91 Idaho 307, 420 P.2d 790, 793 (1966); Northern Improvement Co. v. S.D. State Hwy Comm'n, 267 N.W.2d 208, 213 (S.D. 1978).

[34] W.H. Armstrong & Co. v. United States, 98 Ct. Cl. 519, 528–29 (1941); Griffith v. United States, 77 Ct. Cl. 542, 556–57 (1933); Bignold v. King County, 65 Wash. 2d 817, 54 Wash. 2d 817, 399 P.2d 611, 616 (Wash. 1965).

[35] 28 AM. JUR. 2D *Estoppel and Waiver* § 148 (2d ed. 2000).

[36] 703 So. 2d 1049 (Fla. 1997).

[37] *Id*. at 1051.

[38] 199 Okla. 477, 187 P.2d 209 (Okla. 1947).

> tions have so frequently been defrauded by exorbitant claims for extra work under contracts for public improvements that it has become usual to insert in contracts a provision that the contractor shall not be entitled to compensation for extra work unless it has been ordered in a particular manner.' Mr. Justice Clarke, in the *Wells Brothers Case*, said: 'Men who take $1,000,000 contracts for government buildings are neither unsophisticated nor careless.' We think that statement applies to this present situation. Contractors engaged in the nature of the work here performed are neither 'unsophisticated nor careless.' It would have been a simple matter for the plaintiff to have agreed in writing with the commission for this extra work prior to the performance thereof. This provision of the contract is not an unreasonable provision, and we know of no reason why it should not be given effect.…[39]

The rule requiring written authorization for changes as a condition precedent to recovery by a contractor for the cost of performing the change is designed to protect owners. This was explained by the Ohio Supreme Court in *Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Auth.*:

> The primary purpose of requiring written authorization for alterations in a building or construction contract is to protect owners against unjust and exorbitant claims for compensation for extra work. It is generally regarded as one of the most effective methods of protection because such clauses limit the source and means of introducing additional work into the project at hand. It allows the owner to investigate the validity of a claim when evidence is still available and to consider early on alternative methods of construction that may prove to be more economically viable. It protects against runaway projects and is, in the final analysis, a necessary adjunct to fiscal planning.[40]

While denying recovery to the contractor, the court noted that, "under proper circumstances, the refusal of a public entity to give a contractor a written order for alterations, in accordance with a contract stipulation therefor, may constitute a breach of the contract or amount to a waiver of written orders." Moreover, "'proof of waiver, however must either be in writing, or by such clear and convincing evidence as to leave no reasonable doubt about it.'"[41]

b. Constructive Changes

A "constructive change" occurs when the clause provides that the contract may be modified by an oral order, or determination by the owner, which causes the contractor to perform work beyond contract requirements.[42] The standard clause used by the Federal Government incorporates the constructive change concept.[43] The clause provides in part that, "(b) any other written or oral order (which, as used in this paragraph (b), shall include direction, instruction, interpretation or determination) from the Contracting Officer that causes a change shall be treated as a change order under the clause…." This language, which was adopted in l968,[44] has been an express provision of the clause for more than 30 years, and has allowed contracting officers to deal administratively with disputes involving extra work under the changes clause where no formal change order had been issued.[45] This has allowed claims to be dealt with more expeditiously than resolving them through litigation.[46]

To establish a constructive change for extra work, "the contractor must show the performance of work in addition to or different from that required under the contract (the change component) either by express or implied direction of the Government or by Government fault (the order/fauth component)…."[47] The "change component" includes defective contract specifications and misinterpretation of the specifications by the Government, requiring the contractor to perform extra work.[48]

A state court has held that a constructive change occurred where the contract contained language identical to that used in part (B) of the federal clause.[49] But the constructive change theory has been rejected where the contract provides only for written change orders.[50] Massachusetts reached a similar result, holding that the constructive change theory is inconsistent with an express contract requirement that changes must be ordered in writing.[51] Under this view, the written change order requirement will be enforced unless the changes clause expressly allows constructive changes or the

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[39] *Id*. at 220 (citations omitted).

[40] 78 Ohio St. 3d 353, 678 N.E.2d 519, 527–28 (Ohio 1997) (citations omitted).

[41] *Id*., 678 N.E.2d at 528.

[42] District of Columbia v. Organization for Envtl. Growth, 700 A.2d 185, 203 (D.C. App. 1997); Miller Elevator Co. v. United States, 30 Fed. Cl. 662, 677 (1994); Global Constr. v. Mo. Highway and Trans. Comm'n, 963 S.W.2d 340, 343 (Mo. App. 1997); Youngdale & Sons Constr. Co. v. United States, 27 Fed. Cl. 516 (1993).

[43] 48 C.F.R. § 52.243-4.

[44] 32 Fed. Reg. 16269 (Nov. 29, 1967).

[45] Incorporation of the constructive change concept into the clause allows the Contracting Officer to deal with claims under the terms of the contract rather than for breach of contract.

[46] United States v. Utah Constr. & Mining Co., 384 U.S. 394, 405 (1966).

[47] Miller Elevator Co. v. United States, 30 Fed. Cl. 662, 679 (1994).

[48] *Id*. at 678.

[49] Roger J. Au & Sons, Inc. v. Northeast Ohio Regional Sewer Dist., 29 Ohio App. 3d 284, 504 N.E. 1209 (Ohio App. 1986). *See also* Julian Speer Co. v. Ohio State Univ., 83 Ohio Misc. 2d 88, 680 N.E.2d 254, 257 (Ohio Ct. Cl. 1997) (oral instruction to change specifications created a constructive change order), and R.J. Wildner Contracting Co. v. Ohio Turnpike Comm'n, 913 F. Supp. 1031 (N.D. Ohio 1996) (unjust enrichment claim based on superior knowledge).

[50] Sentinel Indus. Contracting Corp. v. Kimmins Indus. Service, 743 So. 2d 954 (Miss. 1999).

[51] Bonacorso Constr. Corp v. Commonweath, 41 Mass. App. Ct. 8, 668 N.E.2d 366, 368 (Mass. App. Ct. 1996).

owner, by its acts or declarations, has waived the requirement. The contractor has a greater burden of proof in establishing waiver or estoppel than in proving a constructive change.[52]

5. Changes Within the General Scope of the Contract—Cardinal Changes

The power to order changes, under a changes clause, is not unlimited. In general, a contractor is not contractually obligated, under the disputes clause, to perform a unilateral change order when the changed work results in a contract that is substantially different from the one the contractor agreed to perform when it signed the contract.[53]

Most clauses contain language limiting the power to order changes. Some clauses limit changes to those that are "within the general scope of the contract.[54] Some clauses allow changes that are "necessary to satisfactorily complete the contract,"[55] or "to satisfactorily complete the project."[56] The clause may permit the engineer to make changes "required for the proper completion or construction of the whole work contemplated."[57] Most clauses allow the owner to increase or decrease the quantity of an item in the contract or delete any item or portion of the work.[58] Some clauses specify the types of changes that the clause covers. For example, the Federal Changes clause covers changes within the general scope of the contract, including changes: "(1) in the specifications (including drawings and designs); (2) in the method or manner of performance of the work; (3) in the government-furnished facilities, equipment, materials, services or site; or (4) directing acceleration in the performance of the work."[59]

Drafting the clause too narrowly may limit the owner's authority to make changes. For example, in *General Contracting & Construction Co. v. United States*, the deletion of a building from a hospital construction contract was held to be beyond the scope of the contract, even though the value of the building that was deleted was about 10 percent of the contract price.[60] The standard changes clause that was used by the Federal Government prior to 1968 was limited to changes "in the drawings and specifications."[61] The 1968 revision to the clause[62] expanded the authority to modify the contract.[63] The criterion for determining whether the change is authorized is whether it is within the "general scope of the contract."[64] That determination is governed by the magnitude of the change and whether the change is of the type that would be within the contemplation of the parties when the contract was let.[65]

A contractor who believes that a change ordered by the Government is beyond the scope of the contract has a choice. It may perform the change and sue later for damages, or it may refuse to perform the change and sue for breach of contract.[66] The contractor cannot hedge by seeking a declaratory judgment as to whether the change is beyond the scope of the contract.[67] Faced with these choices, and the consequences if the change is later determined not to be cardinal, most contractors will elect to perform the change and sue later for damages.

The doctrine that contractors cannot be contractually compelled to perform changes beyond the scope of the contract developed as part of federal procurement law. The rule had two purposes. First, it was designed to

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[52] Summerset Community Hosp. v. Allen B. Michell & Assocs., 454 Pa. Super. Ct. 188, 685 A.2d 141, 146 (Pa. Supp. 1996) (written contract for architectural services to renovate hospital modified orally, even though contract required modifications to be in writing, where clear and convincing evidence showed the hospital's intent to waive the requirement that modifications be made in writing).

[53] *See* L. K. Comstock & Co. v. Becon Constr. Co., 932 F. Supp. 906 (E.D. Ky. 1993) (extensive discussion of the "Cardinal Change" doctrine).

[54] 48 C.F.R. ch. 1, 52.243-4(a); Alaska DOT Specification 104.02.

[55] AASHTO Guide Specification 104.03; Florida DOT Specification 4.3.1.

[56] Arizona DOT Specification 104.02. (D)(1); Michigan DOT Specification 103.02; New Jersey DOT Specification 104.02; New York DOT Specification 109-05(A).

[57] California DOT Specification 4-1.03.

[58] *Id*. Most clauses allow the owner to make "such changes in quantities and such alterations in the work as are necessary to satisfactorily complete the project." *See, e.g.,* Texas DOT Specification 4.2.

[59] 48 C.F.R. ch 1, 52.243-4 (a)(1), (2), (3), (4).

[60] 84 Ct. Cl. 570 (1937).

[61] Article 3 of the contract provided that, "The Contracting Officer may at any time, by written order…make changes in the drawings and (or) specifications of this contract and within the general scope thereof…" *Id*. at p. 579.

[62] *See* note 44.

[63] 48 C.F.R. 52.243-4.

[64] *Id*.

[65] Dittmore-Freimuth Corp. v. United States, 182 Ct. Cl. 507 (1968), 290 Fed 664; ThermoCor, Inc. v. United States, 35 Fed. Cl. 480, 492 (1996); Albert Elia Building Co. v. New York State Urban Dev. Corp., 338 N.Y.S.2d 462 (App. Div. 1976); Freund v. United States, 260 U.S. 60, 68–69 (1922). Work can be deleted as a partial termination under a termination for convenience clause. Whether work is deleted under the changes clause or as a partial termination under a termination for convenience clause does not matter if the amount of the equitable adjustment would be the same in either case. J.D. Hedin Constr. Co. v. United States, 171 Ct. Cl. 70, 347 F.2d 235 (Ct. Cl. 1965). If the deletion would result in a cardinal change, the owner should delete the work as a partial termination under the termination for convenience clause. Krygoski Constr. Co. v. United States, 94 F.3d 1537, 1543 (Fed. Cir. 1996).

[66] L.K. Comstock & Co. v. Becon Constr. Co., 932 F. Supp. 906, 945 (E.D. Ky. 1992); Hensel Phelps Constr. Co. v. King County, 59 Wash. App 170, 787 P.2d 58, 65 (1990); United States v. Spearin, 248 U.S. 132, 138, 39 S. Ct. 59, 63 L. Ed. 166 (1918).

[67] Valley View Enters., Inc. v. United States, 35 Fed. Cl. 378, 383–84 (1996).

protect contractors from being compelled to perform work substantially different from the work the contractor agreed to perform when it signed the contract.[68] Second, the rule prevented government agencies "from circumventing the competitive procurement process by adopting drastic modifications beyond the original scope of a contract."[69] The doctrine developed at the state level for similar reasons,[70] and has been referred to in various ways: "fundamental changes,"[71] radical changes,"[72] and "abandonment."[73] The Cardinal Change doctrine, however, has not been universally accepted.[74]

The Cardinal Change doctrine is fact dependent.[75] "No rule of thumb exists to measure what constitutes a cardinal change."[76] Each case must be analyzed on its facts, considering the magnitude or quantity of the change and its affect upon the project as a whole.[77] At the end of the day, the basic question is whether the contractor has been ordered to perform changes that are substantially different from what the contractor agreed to do when it accepted the contract.[78] For example, adding a tunnel by change order to connect a building that the contractor was constructing to an adjacent site owned by the developer was a cardinal change, because the change was not the same type of work the contractor agreed to perform when the contract was awarded.[79]

A change that causes a substantial increase in the cost of the work by making it more difficult to perform may constitute a cardinal change.[80] However, a substantial increase in the cost of the contract, standing alone, does not constitute a cardinal change where the change "entails the same nature of work as contemplated under the original contract (albeit of a different scope)."[81] Similar reasoning applies to the number of changes made by the owner. A changes clause does not limit the number of changes that the owner can order. Changes only become cardinal when they exceed the reasonable number of changes that should be expected for the type of work specified in the contract. This can be proven through expert testimony. For example, an expert can testify as to the usual and customary number of changes as a percentage of the contract price.[82]

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[68] General Dynamics Corp. v. United States, 585 F.2d 457 (Ct. Cl. 1978); ThermoCor Inc. v. United States, 35 Fed. Cl. 480 (1996); Wunderlich Contracting Co.v. United States, 173 Ct. Cl 80, 351 F.2d 956 (1965); L.K. Comstock & Co. v. Becon Constr. Co., 932 F. Supp. 906 (E.D. Ky. 1993).

[69] Cray Research, Inc. v. Department of Navy, 556 F. Supp. 201, 203 (D.D.C. 1982), *quoted with approval in* Miller Elevator Co. v. United States, 30 Fed. Cl. 662, 677 (1994).

[70] Albert Elia Building Co. v. N.Y. State Urban Dev. Corp., 388 N.Y.S.2d 462, 468 (App. Div. 1976); C. Norman Peterson Co. v. Container Corp. of America, 172 Cal. App 3d 628, 218 Cal. Rptr. 592 (Cal. App. 1985); Blum v. City of Hillsboro, 183 N.W.2d 47, 50 (Wis. 1971); State Highway Comm'n v. J.H. Beckman Constr. Co., 84 S.D. 337, 171 N.W.2d 504, 506 (S.D. 1969). *See* Annotation, *Statute Requiring Competitive Bidding for Public Contract as Affecting Validity of Agreement Subsequent to Award of Contract to Allow the Contractor Additional Compensation for Extras or Additional Labor and Material Not Included in the Written Contract*. 135 A.L.R. 1265. The Alaska DOT Standard Specification (104-1.02) provides that, "Changes that are determined to be outside the general scope of the original Contract will be authorized only by Supplemental Agreement."

[71] Hensel Phelps Constr. Co. v. King County, 57 Wash. App. 170, 787 P.2d 58 (1990).

[72] McHugh v. Tacoma, 76 Wash. 127, 135 Pac. 1011, 1015 (1913).

[73] C. Norman Peterson Co. v. Container Corp. of America, 172 Cal. App. 3d 628, 218 Cal. Rptr. 592, 598 (Cal. App. 1985) (changes so numerous that they constituted an abandonment of the contract).

[74] Claude DuBois Excavation v. Town of Kittery, 634 A.2d 1299, 1301–02 (Me. 1993); Jackson v. Sam Finley, Inc., 366 F.2d 148, 155 (5th Cir. 1966).

[75] Air-A-Plane Corp v. United States, 187 Ct. Cl. 269, 408 F.2d 1030, 1033 (Ct. Cl. 1969).

[76] Miller Elevator Co. v. United States, 30 Fed. Cl. 662, 677 (1994).

[77] L.K. Comstock & Co. v. Becon Constr. Co., 932 F. Supp. 906, 909 (E.D. Ky. 1992).

[78] Alliant Techsystems, Inc. v. United States, 178 F.3d 1260, 1276 (Fed. Cir. 1999).

[79] Albert Elia Building Co. v. N.Y. State Urban Dev. Corp., 54 A.D. 2d 337, 388 N.Y.S.2d 462, 467 (App. Div. 1976).

[80] Merrill Eng'g Co. v. United States, 47 F.2d 932, 933–34 (S.D. Miss. 1931) (change in design of a brick pavement on a bridge reduced bricklaying production from 1000 square yards per day to 200 square yards per day and increased the amount of asphalt needed by 66 percent); Luria Bros. & Co. v. United States., 177 Ct. C. 676, 369 F.2d 701, 707–08 (Ct. Cl. 1966) (change lowered depth of footings for columns from 9 feet to 19 feet).

[81] Miller Elevator Co. v. United States, 30 Fed. Cl. 662, 677 (1994) (an adjustment of $75,615.21 contract to $212,900.00 contract not a cardinal change); General Dynamics Corp. v. United States, 218 Ct. Cl. 40, 585 F.2d 457 (Ct. Cl. 1978) (An increase of $100 million in a $60 million contract not a cardinal change); Peter Kiewit Sons Co. v. Summit Constr. Co., 422 F.2d 242, 255 (8th Cir. 1969) (a treble rise in the cost of the contract was beyond the scope of the contract).

[82] In a case involving a building construction contract for the State of Washington, the architect testified that it was normal to expect changes of about 5 percent of the contract price for that type of construction. The contractor's claim for quantum meruit was based on what it considered to be an excessive number of changes. The trial court disregarded the number of changes and looked to the dollar value of the changes. The court found that the dollar value of the changes was not excessive and not a cardinal change and dismissed the quantum meruit claim. However, where there are numerous changes due to poor design, the changes may be cardinal. *See, e.g.*, Slattery Contracting Co. v. New York, 288 N.Y.S.2d 126, 129 (N.Y. Ct. Cl. 1968); Housing Auth. of Texarkana v. E.W. Johnson Constr. Co., 264 Ark 523, 573 S.W.2d 316 (Ark. 1978); General Contracting and Constr. Co. v. United States, 84 Ct. Cl. 570, 580 (1937).

A change outside the scope of the contract is not governed by the changes clause.[83] Whether the change is an "in-scope" change that the contractor is contractually obligated to perform or an "out-of-scope" breach depends upon whether the change is reasonable and necessary to complete the work specified in the original contract. While it may be difficult, at times, to define the boundaries of an allowable change—since each case depends upon its own set of facts—there are, however, some guidelines. Is the work, as changed, essentially the same work called for in the original contract? Are the total number of changes reasonable for the type of work specified in the contract? And finally, are the changes normally associated with the type of work called for in the contract?

If the change is reasonable, and necessary to complete the contract, and does not have an unreasonable impact on the contractor, the change should be within the general scope of the contract. If the change does not meet this test, it is a breach of contract, giving the contractor a choice: perform the change and sue later for damages, or stop work and sue for damages. Most cases involve the former situation rather than the latter because of the consequences that the contractor may face if the change is found by a court to be an allowable change under the change clause.[84]

6. Notice Requirements

"A typical clause requires the contractor to give the owner written notice when it believes that it is performing extra work. The clause specifies that notice must be given within a specified number of days from the event that gave rise to the claim."

The federal Changes clause[85] requires written notice of any oral order, as defined in the clause, which the contractor regards as a change order.

> If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for an adjustment based on defective specifications, no adjustment for any change under paragraph (b) of this clause shall be made for any costs incurred more than 20 days before the Contractor gives written notice as required. In the case of defective specifications for which the Government is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the Contractor in attempting to comply with the defective specifications.[86]
>
> The Contractor must assert its right to an adjustment under this clause within 30 days after (1) receipt of a written change order under paragraph (a) of this clause or (2) the furnishing of a written notice under paragraph (b) of this clause, by submitting to the Contracting Officer a written statement describing the general nature and amount of proposal, unless this period is extended by the Government. The statement of proposal for adjustment may be included in the notice under paragraph (b) above.[87]

Some Changes clauses require the contractor to give notice, before it begins work, that it regards it as a change.[88] Other clauses require notice, within a specified time, after the contractor believes that any work ordered by the owner is extra work and not original contract work. An example is a specification used by the New Jersey Department of Transportation, which requires that "the contractor shall promptly notify the Engineer in writing, on forms provided by the Department, within five days from the date that the Contractor identifies any actions or state conduct including, inactions, and written or oral communications, which the Contractor regards as a change to the Contract terms and conditions."[89]

Some contractors have stamps that they use to protest unilateral change orders. The stamp is worded to allow the contractor to reserve its increased costs for performing unchanged work, as well as any additional time needed for performing the changed work. Reservation of the right to assert a claim is usually based on the contention that the contractor is unable to determine, in advance of performing the work, the extra costs and time that may result from the change. When faced with a reservation or notice of a claim, an owner may wish to determine whether the change is really necessary in order to perform the original contract work. In some instances, the owner could withdraw the change order, avoid a dispute, and add the work to a future contract or perform the work with its own employees after the contract is completed.

The notice requirement serves several purposes. Notice enables the owner to investigate the claim while the facts are still fresh to determine its validity. Notice allows the owner to keep records of the costs of an operation that the contractor asserts is extra work. Notice allows the owner to take remedial action to mitigate damages, or take other steps that are in the owner's best interests. Notice also protects the owner from claims for changes that the owner never ordered.[90] The

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[83] Miller Elevator Co. v. United States, 30 Fed. Cl. 662, 677 (Ct. Cl. 1994).

[84] Under the "dispute" provisions of the contract, a contractor is contractually obligated to perform a unilateral change order that is within the scope of the contract. Refusal to perform such a change is a material breach of contract by the contractor, establishing grounds for a default termination. Discount Co. v. United States, 213 Ct. Cl. 567, 554 F.2d 435, 440 (Ct. Cl. 1977).

[85] *See, e.g.*, 48 C.F.R. § 52.243-4 (1987).

[86] *Id.*, at § 52.243-4(d).

[87] *Id*., at § 52.243-4(e).

[88] *See, e.g.*, Connecticut DOT Standard Specification § 1.04-04(3) (2000); Oregon DOT Standard Specification § 00140.40 (2002).

[89] New Jersey Standard Specifications 104.09 (1996).

[90] 3 JOHN C. VANCE, *Enforceability of the Requirement of Notice in Highway Construction Contracts*, SELECTED STUDIES

public policy considerations that underlie notice requirements in public works contracts were recently articulated by the New York Court of Appeals:[91]

> Strong public policy considerations favor scrutiny of claims of bad faith when offered by contractors to excuse noncompliance with notice and reporting requirements in public contracts. These provisions, common in public works projects, provide public agencies with timely notice of deviations from budgeted expenditures or of any supposed malfeasance, and allow them to take early steps to avoid extra or unnecessary expense, make any necessary adjustments, mitigate damages and avoid the waste of public funds. Such provisions are important both to the public fisc and to the integrity of the bidding process. Respondent's accumulation of $1,000,000 in undocumented damages—a full 20% over the combined contract price—is precisely the situation that the cited provisions are intended to prevent.[92]

Generally, notice requirements are strictly enforced.[93] However, as with most general rules, there are exceptions. Written notice may be waived if the owner had actual knowledge that extra work was being performed.[94] Also a consideration of the claim, on its merits, may waive lack of timely notice as a defense.[95] And some courts follow the rule that strict compliance with notice requirements will not bar a claim if the court finds that the owner is not prejudiced by lack of notice. Under federal case law, lack of notice will not bar the claim unless the government can show that it was prejudiced, or put at a disadvantage due to the contractor's failure to provide notice.[96] In other jurisdictions, lack of prejudice will not prevent notice requirements from being enforced.[97]

The question of notice often turns on whether the information provided is sufficient to inform the owner that the contractor has a problem for which it intends to hold the owner responsible.[98] The form of the notice is not important if the notice alerts the owner to the problem and gives the owner an opportunity to investigate and take steps to protect itself.[99] The case law dealing with notice requirements has established the following propositions: First, contract provisions that require written notice of intention to make a claim for extra work before starting work are enforceable, absent circumstances constituting waiver, and in a few jurisdictions, lack of prejudice to the owner. Second, in those jurisdictions where waiver has been applied to avoid the defense of lack of notice, certain facts have been identified as being significant. These facts include: extra work orally ordered by the owner,[100] or a course of conduct and dealing between the parties establishing a continuing disregard for the provision relating to notice,[101] or remaining silent, knowing that the contractor is performing extra work.[102]

In general, most courts are disinclined to allow an owner to avoid payment for extra work because the contractor failed to provide written notice when the owner had actual knowledge that extra work was being performed and did nothing to stop it. Some jurisdictions, however, require strict compliance with notice provisions when public contracts are involved.[103]

For example, in *Perini Corp. v. City of New York*, the City's construction contract was funded by the EPA and contained the Federal Changes clause required by EPA regulations.[104] The contractor's claim for extra work was denied by the City because of the contractor's failure to give written notice that it was performing what it considered to be extra work. The contract required such notice before the contractor could begin work.

IN HIGHWAY LAW 1542-N2, *et seq*.; Clark-Fitzpatrick, Inc./Franki Foundation Co. v. Gill, 652 A.2d 440, 447 (R.I. 1994); Plumley v. United States, 226 U.S. 545, 548, 33 S. Ct. 139, 57 L. Ed. 342 (1913).

[91] A.H.A. General Constr., Inc. v. N.Y. Housing Auth., 92 N.Y.2d 20, 699 N.E.2d 368, 677 N.Y.S.2d 9 (N.Y. 1998).

[92] *Id*. at 376.

[93] *Supra* note 91; Risser & McMurry Co. v. Sheridan Area Water Supply Joint Powers Bd., 929 P.2d 1228, 1232–33 (Wyo. 1996); Sime Constr. Co. v. Wash. Pub. Power Supply Systems., 28 Wash. App. 10, 621 P.2d 1299, 1302–03 (1980); Allen-Howe Specialties Corp. v. United States Constr., Inc., 611 P.2d 705, 707–08 (Utah 1980).

[94] Harrington v. McCarthy, 91 Idaho 307, 420 P.2d 790 (1966); Frederick Snare Corp. v. Maine-New Hampshire Interstate Bridge Auth., 41 F. Supp. 638, 645 (D. N.H. 1941) (failure to give written notice did not bar claim—owner was reasonably conversant with all the facts that written notice would have provided); Hoel-Steffen Constr. Co. v. United States, 456 F.2d 760, 766 (Ct. Cl. 1972) (actual notice of claim satisfies notice requirement).

[95] Dittmore-Freimuth Corp. v. United States, 390 F.2d 664, 667 (Ct. Cl. 1968) (owner should obtain agreement from the contractor that consideration of the claim in settlement negotiations will not waive the defense of lack of timely notice in litigation if the claim is not settled).

[96] Fru-Con Constr. Corp. v. United States, 43 Fed. Cl. 306, 328–29 (Fed. Cl. 1999); Eggers & Higgins & Edwin A. Keeble Assocs., Inc. v. United States, 185 Ct. Cl. 765, 403 F.2d 225, 233 (Ct. Cl. 1968) (prejudiced established—claim barred).

[97] *Supra* note 91, at 368, 374. 677 N.Y.S.2d. 9 (N.Y. 1998); Absher Constr. Co. v. Kent School Dist., 77 Wash. App. 137, 890 P.2d 1071, 1096 (Wash. App. 1995).

[98] State Highway Dep't v. Hall Paving Co., 127 Ga. App. 625, 194 S.E.2d 493, 496 (1972); Department of Transp. v. Fru-Con Constr. Corp., 206 Ga. App. 821, 426 S.E.2d 905, 908 (Ga. App. 1992) (knowledge that grading work was behind schedule did not waive the agency's right to notice that the contractor would seek a time extension).

[99] Gilmarten Bros. v. Kern, 916 S.W.2d 324, 329 (Mo. App. 1995).

[100] Reif v. Smith, 319 N.W.2d 815, 817 (S.D. 1982).

[101] *Supra* note 99*;* DeNiro v. Gasvoda, 1999 Mont. 129, 982 P.2d 1002, 1004 (1999).

[102] Zook Bros. Constr. Co. v. State, 171 Mont. 64, 556 P.2d 911, 915 (Mont. 1976).

[103] D. Federico Co. v. Commonwealth, 11 Mass. 248, 252, 415 N.E.2d 855, 857–58 (1981) *See, e.g.*, cases cited in note 97.

[104] 18 F. Supp. 2d 287 (S.D. N.Y. 1998), *aff'd without published opinion*, 182 F.3d 901 (2d Cir. 1999), *cert. denied*, 120 S. Ct. 615 (1999).

The question before the court was whether state law or federal law applied in determining what type of notice was sufficient. Under federal law construing notice provisions, lack of notice will bar the claim only if the Government can show prejudice. Under state law, strict compliance with notice requirements was a condition precedent to payment for extra work. The court held that New York law applied, and that the contractor's failure to provide notice as required by the contract barred its claim.[105]

A typical "changes" clause does not require the owner to obtain the consent of the payment and performance bond surety. Without language of this kind, the owner may discharge the surety's obligations under its bonds for changes made without the surety's approval.[106]

Most clauses do not require the owner to give the surety notice of the change. For example, the clause may provide that, "Such changes in quantities and alterations do not invalidate the contract nor release the contract surety…."[107] However, a clause may require the contractor to obtain surety consent for substantial changes.[108] The standard form performance bond used by some agencies incorporates by reference all of the provisions of the construction contract. The surety, by signing the bond, agrees to the waiver provisions in the Changes clause or the limitations on notice as provided in the construction contract.

7. Effect of Changes on Other Work

The Federal Changes clause allows the contractor to recover, as part of an equitable adjustment, the contractor's increased costs of performing unchanged work.[109] This was not necessarily so prior to 1968 because of the so-called *Rice* doctrine.[110] Under this doctrine, the contractor could recover for performing the change, but not for the effect that the change had on unchanged work. The increased cost of performing unchanged work caused by the change was held to be "consequential."[111] In 1968, the *Rice* doctrine was eliminated from federal construction law when the Changes clause was revised.[112] Today, at the federal level, changes that affect unchanged work are compensable. This has been true for over 30 years.

In general, the same is true at the state level. The clause used by the New York State Department of Transportation provides in part that, "if the alterations or changes in quantities significantly change the character under the contract whether such alterations or changes are in themselves significant changes to character of the work, or by affecting other work, cause such other work to become significantly different in character, an adjustment excluding anticipated profit, will be made to the contract."[113] The Florida[114] and Texas[115] specifications provide that, "if the alterations or changes in quantities significantly change the character of the work under the contract, whether or not changed by any such different quantities or alterations, an adjustment, excluding loss of anticipated profits, will be made to the contract." The standard specifications used by Arizona,[116] Michigan,[117] and Iowa[118] have similar language. They provide that, "If the alterations or changes in quantities significantly change the character of the work under the contract, whether such alterations or changes are in themselves significant changes to the character of the work, or by affecting other work, cause such other work to become significantly different in character, an adjustment excluding anticipated profit, will be made to the contract." The Changes clause mandated by 23 U.S.C. § 112 contains similar provisions.[119]

8. Variations in Estimated Quantities

Highway construction contracts based on fixed unit prices for estimated quantities typically contain a variation in estimated quantities (VEQ) clause. The VEQ clause used in federal contracts is based upon variations in estimated quantities that exceed 115 percent, or are less than 85 percent of the estimated plan quantities.[120] The VEQ clauses typically used in state transportation contracts provide for a price adjustment from the contract unit price when the actual quantity used exceeds or is less than 25 percent of the estimated

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[105] 18 F. Supp. 2d at 295.

[106] Gritz Harvestore, Inc. v. A.O. Smith Harvestore Products, Inc., 769 F.2d 1225, 1230 (7th Cir. 1985) (material alteration without consent of guarantor discharges guarantor); National Sur. Corp. v. United States, 118 F.3d 1542, 1546 (Fed. Cir. 1997).

[107] AASHTO Guide Specifications § 104.03, Texas DOT Specification 4.2. The Alaska DOT Changes Clause (104-1.02) allows changes to be made, "without notice to the sureties and within the general scope of the contract."

[108] Surety consent required for changes that increase the total cost of the project by more than 25 percent. WSDOT Standard Specification, 1-04.4.

[109] 48 C.F.R. ch. 1 § 52.243-2(b).

[110] United States v. Rice, 317 U.S. 61 (1942).

[111] *Id.*

[112] The elimination of the Rice doctrine was accomplished by adding the phrases "any part of the work" and "whether or not changed" to the clause. Appendix to 32 Fed. Reg. 16269 (Nov. 29, 1967).

[113] Standard Specification 109-16A(3)(ii).

[114] Standard Specification 4.3.2.1.

[115] Standard Specification 4.2.

[116] Standard Specification 104.02(D)(2).

[117] Standard Specification 103.02 B.

[118] Standard Specification 1109.16 C2.

[119] 23 C.F.R. § 635.109(a)(3)(ii), "Significant Changes in the Character of the Work" provides:

> If the alterations or changes in quantities significantly change the character of the work under the contract, whether such alterations or changes are in themselves significant changes to the character or work or affecting other work cause such work to become significant different in character an adjustment, excluding loss of anticipated profits, will be made to the contract.

[120] 48 C.F.R. § 52.211-18.

contract quantity.[121] The federally-mandated Changes clause also uses 25 percent.[122]

The VEQ clause has several purposes: First, it affords protection to the contractor by providing a remedy for excessive overruns or underruns from estimated contract quantities.[123] Second, it affords protection to the owner from claims when the quantities vary from estimated contract quantities within a specified percentage.[124] The clause may also entitle the owner to a downward adjustment in the unit contract price when the contractor's actual cost is reduced by an overrun in excess of the specified percentage.[125] An overrun of less than 125 percent or an underrun of less than 75 percent in the case of the state clauses is a risk that the contractor assumes. Agencies, however, are required to use reasonable care in preparing estimated quantities. Where information is available to quantify the estimate with more precision and the owner neglects to use that information, the 25 percent variance may not limit recovery.[126]

The adjustment in the unit contract price for overruns or underruns that exceed or differ from the estimated contract quantities is determined by the language of the VEQ clause and the contractor's costs for performing that item of work. In the case of overruns, the adjustment is based on the actual unit cost for performance of the item minus the unit contract price for 115 percent (Federal VEQ) or 125 percent (state VEQ) of the estimated plan quantity. Where the variation is less than 85 percent (Federal VEQ) or 75 percent (state VEQ) of the original bid quantity, the adjustment is based on any increase in costs due solely to the variation.[127]

The VEQ clause applies only to errors in estimated quantities. In this sense, it supplements the Changes clause by allowing the overrun or underrun to differ from the original quantity estimate up to or less than the specified percentage, without any adjustment in the contract price, when the overrun or underrun is due to an estimating error, and not a change ordered by the owner or some other cause.[128] When the variation in quantity is due to a change ordered by the owner, the Changes clause applies and any increase in the cost of performance resulting from the change is governed by that clause.[129]

9. Accord and Satisfaction

An accord and satisfaction is a means of discharging an existing right.[130] In a change order setting, an accord occurs when the owner and the contractor agree upon the terms of a contract modification and express those terms in a bilateral change order. The satisfaction occurs when the contractor performs the change and is paid for it by the owner.[131] A typical change order provision provides that a change order that is not protested by the contractor is full payment and final settlement of all claims for time, and for costs of any kind, including delays related to any work either covered or affected by the change, and constitutes a waiver of any future claims arising out of the change order.[132]

An accord and satisfaction will bar any claim arising within the scope of the accord.[133] There are, however, exceptions to this rule. One frequently litigated exception is whether the contractor and the owner reached an accord. In *Safeco Credit v. United States*, the court said: "As in many contract cases where accord and satisfaction is the government's asserted defense, 'this case requires the court to rule on whether there was a meeting of the plaintiff's and the Government's minds. Without agreement the parties did not reach an accord…'"[134] (citations omitted).

This determination is a question of law that requires the court to determine whether the parties intended the change order to be an accord.[135] In making this deter-

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[121] Arizona DOT Standard Specification (104.2(D)(4)). California DOT Standard Specifications 4-1.03B(1) (1995), (Increases); 4-1.03 B(2) (1995), (Decreases). Michigan DOT Standard Specification 103.02B2 (1996), Florida DOT Standard Specification 4.3.2.1 (B). Texas DOT Standard Specification 4.2 (b).

[122] 23 C.F.R. § 635.109(a)(3)(iv)(B). A "significant change" includes:

> When a major item of work, as defined elsewhere in the contract, is increased in excess of 125 percent or decreased below 75 percent of the original contract quantity. Any allowance for an increase in quantity shall apply only to that portion in excess of 125 percent of original contract item quantity, or in case of a decrease below 75 percent, to the actual amount of work performed.

This clause and the other clauses mandated by 23 C.F.R. 635, *et. seq*., do not apply to federally-aided state transportation projects if a state has a similar clause, or if state law prohibits their use. 23 U.S.C. § 112.

[123] "The object is to retain a fair price for the contract as a whole in the face of unexpectedly large variations from the estimated quantities on which bids are based." Bean Dredging Corp., 89-3 ENGBCA 22,034 (1989) ¶ 110, 816 at 110,824 (concurring opinion).

[124] Burnett Constr. Co. v. United States, 26 Ct. Cl. 296, 302 (1992); Farub Found. Corp. v. City of N.Y., 183 Misc. 636, 49 N.Y.S.2d 922, 923 (N.Y. Sup. Ct. 1944).

[125] Foley Co. v. United States, 11 F.3d 1032 (Fed. Cir. 1993).

[126] Travis T. Womack, Jr. v. United States, 182 Ct. Cl. 399, 389 F.2d 793 (Ct. Cl. 1968).

[127] Burnett Constr. Co. v. United States, 26 Ct. Cl. 296, 302 *et. seq*. (1992); Foley v. United States, *supra* note 125.

[128] Reliance Ins. Co. v. United States, 931 F.2d 863, 866 (Fed. Cir. 1991).

[129] ThermoCur v. United States, 35 Fed. Cl. 480, 486 (1996).

[130] 6 CORBIN, CORBIN ON CONTRACTS, § 1276 (rev. ed. 1993).

[131] Brock & Blevins Co. v. United States, 170 Ct. Cl. 52, 343 F.2d 951, 955 (Ct. Cl. 1965); C. & H. Commercial Contractors, Inc. v. United States, 35 Fed. Cl. 246, 252 (1996).

[132] *See* Safeco Credit v. United States, 44 Fed. Cl. 406, 419–20 (Fed. Cl. 1999), for examples of this type of clause.

[133] Transpower Contractors v. Grand River Dam Auth., 905 F.2d 1413, 1419 (10th Cir. 1990).

[134] Safeco Credit v. United States, *supra* note 132, at 419.

[135] McLain Plumbing & Elec. Serv., Inc. v. United States, 30 Fed. Cl. 70, 78 (Fed. Cl. 1993).

mination, the court will not consider parol evidence of prior negotiations to create a genuine issue of material fact when such evidence would vary or contradict the plain and unambiguous language of the change order.[136]

Another theory that a contractor may advance to avoid the preclusive effect of a bilateral change order is economic duress. To establish economic duress, the contractor must prove that the contractor's assent was induced by an improper threat that left the contractor with no reasonable alternative, other than to sign the change order without protest.[137] Economic pressure, and even the threat of considerable financial loss, do not constitute duress. The act must be coercive and violate notions of fair dealing.[138] For instance, when the owner induces the contractor to sign because of an improper threat, the change order is voidable.[139]

Because a change order induced by duress is voidable and not void, the contractor must act promptly to repudiate the change order or be deemed as having waived the right to do so.[140] A contractor may also be deemed as having ratified a change order executed under duress when the contractor accepts payment for the change, and then remains silent for a period of time after the contractor has had an opportunity to repudiate the change order.[141]

Another theory for avoiding the preclusive effect of an unprotested change order is the Cardinal Change doctrine. This exception is based on the premise that a contractor should not be bound by a change order as an accord and satisfaction when the contractor was unable to assess the cumulative effect of the change order on the overall performance of the contract,[142] or determine how the changes would ultimately impact the work.[143] The Cardinal Change doctrine will not apply, however, where the contractor clearly waives future claims. For example, in *In re Boston Shipyard Corp*.,[144] the contractor signed a change order settling all of its claims for delay and disruption. The contractor later attempted to avoid the change order by claiming that the changes were so extensive that they amounted to a cardinal change. The court found that the change order barred the contractor's claim for quantum meruit. The court observed that the change order clearly served as a release of claims, and once the contractor accepted payment, the parties had reached an accord and satisfaction on all possible claims, including those for delay and disruption. The court also noted that the contractor's assertion that it did not intend to waive its claim when it signed the change order was insufficient to raise a genuine issue of material fact so as to preclude summary judgment for the Government.

A claim cannot be reserved on the basis of the contractor's subjective intent.[145] To avoid the preclusive effect of a bilateral change order, the contractor must show that the mistake was mutual, not unilateral, and that the change order did not reflect what the contractor and the owner intended.[146] The Parol Evidence rule prevents the contractor from creating a contractual ambiguity based on its intentions.[147]

10. Observations

The Changes clause is a powerful and necessary tool in the administration of construction contracts. Yet, the clause should be used sparingly insofar as practicable. Changes to the contract increase the cost of the work and the potential for delay. In addition, they often lead to disputes and ultimately to litigation. Thus, the goal of every owner should be to reduce change orders. Owners may wish to consider better subsurface site investigations when the contract contains a DSC clause. Also, when the work is novel or extremely complex, the owner may wish to employ constructibility reviews to assure that the design is reasonably constructible within accepted industry standards.

A balance should be struck by weighing the cost of such investigations and reviews against the potential cost and delay that can result when design errors and inadequate investigations have to be corrected through the change order process.

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[136] Safeco Credit v. United States, *supra* note 132, at 420-21.

[137] Systems Technology Assocs. v. United States, 699 F.2d 1383, 1386–87 (Fed Cir. 1983); David Nassif Assocs. v. United States, 644 F.2d 4, 12 (Ct. Cl. 1981).

[138] David Nassif Assocs. v. United States, *supra* note 137.

[139] Willms Trucking Co. v. JW Constr. Co., 314 S.C. 170, 442 S.E.2d 197 (S.C. App. 1994) (citing the RESTATEMENT OF CONTRACTS, § 175(1)) (2d 1981) (contractor needed payment provided by change order to pay subcontractors and suppliers and avoid litigation).

[140] In re Boston Shipyard Corp., 886 F.2d 451, 455 (lst Cir. 1989).

[141] *Id*. at 455.

[142] Atlantic Dry Dock Corp. v. United States, 773 F. Supp. 335, 399 (M.D. Fla. 1991).

[143] Saddler v. United States, 152 Ct. Cl. 557, 287 F.2d 411, 413 (Ct. Cl. 1961).

[144] In re Boston Shipyard Corp., *supra* note 140.

[145] *Id.*

[146] H. L. C. & Assocs. Constr. Co. v. United States, 367 F.2d 586, 591 (Ct. Cl. 1966).

[147] Denver D. Darling v. Controlled Env'ts Constr., Inc., 89 Cal. App 4th 1221, 1235, 108 Cal. Rptr. 2d 213 (2001).

B. DIFFERING SITE CONDITIONS

1. Introduction

Under common law, a contractor who agreed to build some improvement assumed the risks ordinarily associated with performing that kind of work.[148] The fact that the work was actually more difficult and costly than the contractor anticipated did not entitle the contractor to additional compensation or excuse its performance. This principle of construction law was succinctly stated in *United States v. Spearin*:[149] "Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered."

This principle applies to unknown subsurface or latent physical conditions at the work site. These are risks that the contractor assumes, unless the contract shifts those risks to the project owner.[150] It was generally understood that contractors, faced with the risk of adverse, unknown site conditions, would include some amount in their bids as a contingency against encountering such conditions.[151] Some project owners, particularly large institutional owners such as the Federal Government, realized that if they assumed the risk of adverse site conditions, bids would be lower and the overall cost of their construction projects would be reduced. This realization was based on three assumptions: First, by shifting the risk of adverse conditions to the owners, the contractor would not have to include a contingency in its bid to guard against the risk of unforeseen site conditions. Second, on fixed-price contracts that are competitively bid, contractors must be competitive to obtain work. Third, it was cheaper to pay the occasional DSC claim than to pay the contingency as part of the price of each contract. Thus, the competitive process would force contractors to exclude those contingencies from their bids if they wished to be competitive and obtain contracts.

The desire of owners to reduce construction costs led to the development of the Federal "Changed Conditions" clause, and in 1968, its successor, the "Differing Site Conditions" (DSC) clause. This clause, which is now codified in the Federal Acquisition Regulations (FAR),[152] is required in direct, fixed-price construction contracts. Its purpose is to take some of the gamble out of bidding with regard to subsurface conditions. That purpose was stated by the Court of Claims in *Foster Construction C.A. and Williams Brothers v. United States*:

> The starting point of the policy expressed in the changed conditions clause is the great risk, for bidders on construction projects, of adverse subsurface conditions…Whenever dependable information on the subsurface is unavailable, bidders will make their own borings or, more likely, include in their bids a contingency element to cover the risk. Either alternative inflates the costs to the Government. The Government, therefore, often makes such borings and provides them for the use of the bidders, as part of a contract containing the standard changed conditions clause.[153]

Bidders are thereby given information on which they can rely in making their bids, and are at the same time promised an equitable adjustment under the changed conditions clause if subsurface conditions turn out to be materially different than those indicated in the logs. The purpose of the changed conditions clause is thus to take at least some of the gamble on subsurface conditions out of bidding. Bidders need not weigh the cost and ease of making their own borings against the risk of encountering an adverse subsurface, and they need not consider how large a contingency should be added to their bid to cover the risk.

Some state transportation agencies have developed their own DSC clauses. Those clauses differ from the standard clause used by the Federal Government in its construction contracts. Some states have adopted the Changed Conditions clause contained in the AASHTO Guide Specifications for Highway Construction.[154] This subsection discusses those differences and the legal problems ordinarily associated with this type of clause.

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[148] Ashton Co. v. State, 9 Ariz. App. 564, 454 P.2d 1004, 1008 (Ariz. App. 1969); 3 A. CORBIN, CORBIN ON CONTRACTS § 598; 6 A. CORBIN, CORBIN ON CONTRACTS § 1333 (1962).

[149] 248 U.S. 132, 136, 39 S. Ct. 59, 63 L. Ed. 166 (1918).

[150] "[N]o one can ever know with certainty what will be found during subsurface operations." Kaiser Indus. Corp. v. United States, 169 Ct. Cl. 310, 340 F.2d 322, 329 (Ct. Cl. 1965). "If he [the contractor] wishes to protect himself against the hazards of the soil…he must do so by his contract." White v. Mitchell, 123 Wash. 630, 213 Pac. 10, 12 (Wash. 1923). There can be no claim for "Changed Conditions" when the contract does not contain a "Changed Conditions" clause. Frenz Enters. v. Port of Everglades, 746 So. 2d 498, 503 (Fla. App. 1999) ("[T]he parties' contract contained no 'changed conditions' clause, thus no breach of contract actions would lie for changed conditions."); Dravo Corp. v. Metro Seattle, 79 Wash. 2d 214, 484 P.2d 399, 402 (1971).

[151] Foster Constr. and Williams Bros. Co. v. United States, 193 Ct. Cl, 587, 435 F.2d 873, 887 (Ct. Cl. 1970); Hardwick Bros. Co., II v. United States, 36 Fed. Cl. 347, 405 (1996); H.B. Mac, Inc. v. United States, 36 Fed. Cl. 793, 819 (1996); Department of General Services v. Harmans Assoc., 987 Md. App. 535, 633 A.2d 939, 947 (Md. App. 1993); Sornsin Constr. Co. v. State, 190 Mont. 248, 590 P.2d 125, 130 (1978), P.T.L. Constr. v. Department of Transp., 531 A.2d 1330 (N.J. 1987).

[152] 48 C.F.R. ch. 1 § 52.236-2. In 1968, the title of the clause was changed from "Changed Conditions" to "Differing Site Conditions." 32 Fed. Reg. 16269 (Nov. 29, 1967).

[153] Foster Constr., *supra* note 151, at 887. *See also* Annotation, *Construction and Effect of "Changed Conditions" Clause in Public Works or Construction Contract With State or its Subdivision*, 56 A.L.R. 4th 1042 (1987).

[154] 3 D. W. HARP, *Preventing and Defending Against Highway Construction Claims: The Use of Changes or Differing Site Conditions Clause, Etc.*, SELECTED STUDIES IN HIGHWAY LAW, National Cooperative Highway Research Program Legal Research Digest No. 28.

In the absence of a DSC clause, the contractor assumes the risk of subsurface conditions unless the contractor can shift that risk to the owner under one of several common law theories. One such theory is misrepresentation. This theory imposes liability on an owner for adverse site conditions when the contractor can prove that it was mislead by erroneous information in the contract documents that caused the contractor to submit a bid lower than it would have otherwise made. Liability is based on the theory that furnishing misleading plans and specifications constitutes a breach of an implied warranty of their correctness.

Alternatively, a contractor may claim that the owner failed to disclose information about site conditions that was vital in preparing the bid. Liability for nondisclosure may be imposed where the contractor could not reasonably obtain such information without resort to the owner.

This subsection also discusses impossibility of performance as an excuse for nonperformance where unforeseen, adverse site conditions make performance physically impossible or commercially impracticable. Subcontractor pass-through claims are also discussed briefly, since subsurface work is often sublet by the general contractor and a DSC clause may be incorporated in the subcontract, either expressly or by implication through a flow-down clause. The subsection concludes with some observations about change orders as admissions when an owner wishes to change the design and keep the project moving, rather than let it languish because of a dispute over whether a DSC has occurred.

2. Contract Clauses—Type I And Type II Conditions

The FAR require inclusion of the standard DSC clause in all fixed-price construction contracts.[155] Some states have similar laws.[156] Other state agencies include DSC clauses under their general authority to develop plans and specifications for their construction projects.[157]

The federal clause differs from most state clauses in how it treats the effect of a DSC on unchanged work. The 1968 revisions to the federal clause not only changed the name of the clause from "Changed Conditions" to "Differing Site Conditions," it also broadened the equitable adjustment provisions of the clause to cover the effect of changed conditions upon the cost of performing unchanged work. Prior to 1968, a contractor was only entitled to the additional cost it incurred in performing the changed work. If the changed condition affected other work by delaying or resequencing that work, the contractor was not entitled to additional compensation. The financial impact that the condition had on other work was considered "consequential" and as such was not compensable.[158] To obviate that result, the 1968 revision added this language: "…that such conditions do materially so differ and cause an increase or decrease in the contractor's cost of, or the time required for, performance of any part of any work under this contract, *whether or not changed as a result of such conditions*" (emphasis added). This language eliminated the *Rice* doctrine.[159]

The standard DSC clauses used by most states contain language disallowing impact costs on unchanged work.[160] The FHWA DSC clause mandated in 23 C.F.R. 109(A)(1) for federally-aided highway projects also disallows impact costs. Subsection (IV) of that clause provides that, "no contract adjustment will be allowed under this clause for any effects caused on unchanged work."

Both the federal and state clauses recognize two types of DSCs: (1) subsurface or latent physical conditions at the site that differ materially from those indicated in the contract (generally referred to as a Type I condition); and (2) physical conditions that are so unusual for the type of work performed that the conditions could not have been reasonably anticipated by an experienced and prudent contractor (generally referred to as a Type II condition). For example, the DSC clause contained in federal construction contracts provides in pertinent part as follows:

> 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.[161]

The AASHTO Guide Specification defines differing site conditions similary as:

Surface or latent physical conditions at the site that:

A. Differ materially from those indicated in the Contract.

B. Differ materially from conditions normally encountered or from those conditions generally recognized as inherent in the nature of the work required.

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[155] 48 C.F.R. ch. 1 § 52.236-2.

[156] *See* Sutton Corp. v. Metropolitan Dist. Comm'n, 423 Mass. 200, 667 N.E.2d 838, 842 (Mass. 1996); Metro Sewerage Comm'n of the County of Milwaukee v. R.W. Constr., Inc., 72 Wis. 2d 365, 241 N.W.2d 371, 376 (Wis. 1976); Department of Gen. Services v. Harman Assocs., 98 Md. App. 535, 633 A.2d 939, 948 (Md. App. 1993).

[157] For example, WASH. REV. CODE § 47.28.050 authorizes the WSDOT to include in its highway construction contracts those specifications which in its judgment it deems necessary.

[158] United States v. Rice, 317 U.S. 61, 63 S. Ct. 120 (1942).

[159] 32 Fed. Reg. 16269 (Nov. 29, 1967).

[160] Arizona Standard Specification 104.02(B)(4); California Standard Specification 5-1.116 (1995) ("no contract adjustment allowed…for any effects caused on unchanged works."); Iowa Standard Specification 1109.16 A.4.; New York Standard Specification 109-16A(1)(iv); Texas Standard Specification 9.7. Florida's DSC clause, however, allows for an increase or decrease in the cost required for the performance of any work under the contract. Florida Standard Specification 4-3.4.

[161] 48 C.F.R. pt. 1 § 52.243.2(A).

C. Present unknown or unusual physical conditions.[162]

a. Type I DSC

To prevail on a Type I DSC claim, a contractor must prove that the conditions indicated in the contract differed materially from those it encountered during contract performance.[163] The meaning of the term "indicated" is generally regarded as a question of law since it requires an interpretation of the contract.[164] The indications in the contract need not be explicit, but may be proved by inferences and implications in the contract documents that would lead a reasonable contractor to expect certain site conditions in performing the work.[165]

The basic question is whether the conditions actually encountered differ from what a reasonably prudent, knowledgeable, and experienced contractor would expect when bidding the contract.[166] For example, in *Foster Construction Co.*,[167] the contractor claimed that it had encountered a Type I DSC in constructing bridge pier footings at three of the six bridge pier locations. The court found that the contract led the contractor to believe, when it prepared its bid, that dry soil could be expected at all six pier conditions. The actual soil conditions at three of the piers were highly permeable, causing the cofferdams to fill with water and requiring the use of seals and tremie concrete[168] to pour the footings. The court held that a Type I changed condition had occurred at those three piers.

The fact situations that constitute Type I conditions vary. Rock obtained from a quarry designated in the contract as an approved source was a Type I condition when the rock could not be used. The court held that by designating the quarry in the contract as an approved source, the government indicated that the quarry would produce suitable material.[169] A Type I condition was established when the contractor encountered numerous boulders while driving sheet pile. The contract indicated that sheet pile could be driven without extraordinary efforts.[170] Wet soil conditions have produced their share of Type I claims. Type I conditions were established where the moisture content was far greater than indicated in the contract;[171] where the site contained dense, nondraining soil, rather than free-draining sands and gravel;[172] and where the site contained perched water instead of dry soil as indicated in the contract documents.[173] The possibility that actual conditions may vary from those indicated in the contract is almost unlimited. "[N]o one can ever know with certainty what will be found during subsurface operations."[174]

There are six elements which the contractor must prove, by a preponderance of the evidence, to establish a Type I DSC claim. These six elements are:

> (1) the contract documents must have affirmatively indicated or represented the subsurface or latent physical conditions which form the basis of plaintiff's claim; (2) the contractor must have acted as a reasonably prudent contractor in interpreting the contract documents; (3) the contractor must have reasonably relied on the indications of subsurface or latent physical conditions in the contract; (4) the subsurface or latent physical conditions actually encountered within the contract area must have differed materially from the conditions indicated in the same contract area; (5) the actual subsurface conditions or latent physical conditions encountered must have been reasonably unforeseeable; and (6) the contractor's claimed excess costs must be shown to be solely attributable to the materially different subsurface or latent physical conditions within the contract site. To prove these six elements, the contractor is only required to use a simple logical process in evaluating the information in the contract documents to determine the expected subsurface or latent physical conditions….[175] (citations omitted).

The term contract documents, as used in a typical Type I DSC clause, includes not only the documents furnished to bidders, but also materials referenced in those documents. There cannot be, however, a Type I condition when there is nothing in the documents indi-

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[162] AASHTO Guide Specifications for Highway Contruction § 101.03 (1998). Some of the states using the AASHTO Guide Specifications are Arizona, California, Florida, Iowa, Michigan, New York, and Texas. The WSDOT clause is patterned after the federal clause.

[163] H.B. Mac, Inc. v. United States, 36 Fed. Cl. 793, 819 (1996). "In the absence of controlling state authority, state courts naturally look for guidance in public contract law to the federal court of claims and federal boards of contract appeals." New Pueblo Constructors, Inc. v. State, 144 Ariz. 95, 696 P.2d 185, 191 (Ariz. 1985).

[164] P.J. Maffi Bldg. Wrecking Corp. v. United States, 732 F.2d 913, 916 (Fed. Cir. 1984).

[165] H.B. Mac, Inc. v. United States, *supra* note 163, at 819. If the contract is silent as to a condition, there cannot be a Type I condition. Olympus Corp. v. United States, 98 F.3d 1314, 1318 (Fed. Cir. 1996).

[166] H.B. Mac, Inc. v. United States, *supra* note 166, at 819.

[167] 435 F.2d 873, *supra* note 151.

[168] Tremie is a means of placing concrete under water by using a pipe or "elephant trunk."

[169] Kaiser Indus. Corp. v. United States, 169 Ct. Cl 310, 340 F.2d 322 (Ct. Cl. 1965).

[170] Kit-San-Azusa v. United States, 32 Fed. Cl. 647, 658 (1995); Thomas M. Durkin & Sons, Inc. v. Department of Transp., 742 A.2d 233, 238 (Pa. Commw. 1999) (encountering unanticipated rock in constructing highway ramps).

[171] Ray D. Bolander Co. v. United States, 186 Ct. Cl. 398, 408 (1968).

[172] H.B. Mac, Inc. v. United States, *supra* note 163; Ragonese v. United States, 128 Ct. Cl. 156, 120 F. Supp. 768 (Ct. Cl. 1954) (subterranean water where boring showed no water).

[173] Appeal of R.D. Brown Contractors, ABSCA No. 43973, 93-1 BCA ¶ 25, 368 (1992).

[174] Kaiser Indus. Corp. v. United States, 340 F.2d 322, 329 (Ct. Cl. 1965), *supra* note 169.

[175] H.B. Mac, Inc. v. United States, 36 Fed. Cl. 793, 820 (1996); (citing Youngdale & Sons Constr. Co. v. United States, 27 Fed. Cl. 516 (1993)).

cating what the contractor could expect to encounter in the way of site conditions.[176] For example, a Type I condition was denied where there was nothing in the contract about the density or type of soil that the contractor could expect to encounter in driving sheet pile.[177] A similar result was reached where there was no indication in the contract as to the size of boulders where large boulders were encountered.[178] Even where there are indications in the contract, the contractor must show that its reliance upon those indications was reasonable. If the inference that the contractor draws from the documents is not reasonable, there is no Type I condition. This principle was applied in *Stuyvesant Dredging Co. v. United States*, where the contractor claimed it encountered a Type I condition when it dredged materials that were denser than indicated in the technical provisions of the contract.[179] The court denied the claim because the contract stated that the density readings were the average value of all the readings. The contractor was not entitled to rely on the average density since it should have known that the average density represented densities both greater and less than the average. A contractor's claim for a Type I condition for encountering hardpan[180] was denied where the hardpan amounted to 11 percent of the material excavated, and the contract warned the contractor that some hardpan could be expected.[181] A similar result was reached where the contract contained indications that the subsurface soil would be wet.[182] This principle was applied by a Washington DOT disputes review board in denying a claim for a Type I condition. The contractor claimed that it encountered a DSC when it was unable to drive piling at a bridge pier using the same driving methods that were successfully used at other piers. The board denied the claim, finding that the contract warned the contractor that it might be necessary to use certain predriving techniques to loosen the soil and make driving easier.[183]

A Type I condition must be physical in nature. This is so because both the federal clause and the clauses used by some states refer to subsurface or latent physical conditions at the site.[184] The DSC must exist before the contract is awarded. This is so because the DSC clause requires that the conditions differ materially from those indicated in the contract. This was explained by the New Jersey Supreme Court in *P. T. & L Construction v. State, Department of Transportation*, when it said:

> Bidders are thereby given information on which they may rely in making their bids, and are at the same time promised an equitable adjustment under the changed conditions clause, if subsurface conditions turn out to be materially different than those indicated in the logs. The two elements work together; the presence of the changed conditions clause works to reassure bidders that they may confidently rely on the logs and need not include a contingency element in their bids. Reliance is affirmatively desired by the Government, for if bidders feel they cannot rely, they will revert to the practice of increasing their bids.[185]

A Type I DSC (as well as a Type II DSC, which is discussed next) must be material. Both the federal and state clauses refer to conditions at the site that differ *materially* from those indicated in the contract. To be material, the condition must affect the contractor's costs and/or the time for performance. And the extra costs and/or delays claimed by the contractor must be solely attributable to the DSC.[186] Whether the condition is material is a question of fact. "We think that whether the changed conditions are 'conditions…differing materially from those in the contract' under § 104.03 is a question of fact regardless of whether the claimed changes result in quantitative or qualitative changes to the work to performed."[187]

b. Type II DSC

The Federal DSC clause defines a Type II condition as: "(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 contractor provided for in the contract."[188]

Most DSC clauses used by state transportation agencies follow the AASHTO Guide Specifications in providing for a Type II condition.[189] The Guide Specification defines DSCs in part as those that:

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[176] Fru-Con Constr. Corp. v. United States., 43 Fed. Cl. 306, 318 (Fed. Cl. 1999) (defining contract documents); Olympus Corp. v. United States, 98 F.3d 1314 (1996) (no Type I condition when contract is silent about the condition).

[177] Appeal of PK Contractors, Inc., ENGBCA 92-1 BCA, ¶ 24, 583.

[178] T.F. Scholes, Inc. v. United States, 357 F.2d 963 (Ct. Cl. 1966).

[179] 834 F.2d 1576 (Fed. Cir. 1987).

[180] A very dense, cemented material, often clay, which is difficult to excavate.

[181] R.C. Huffman Constr. Co. v. United States, 100 Ct. Cl. 80 (1943).

[182] Leal v. United States, 149 Ct. Cl. 451, 276 F.2d 378 (Ct. Cl. 1960).

[183] I-90 Bridge Approach Spans, Third Lake Washington Floating Bridge Project.

[184] The same requirement applies to Type II conditions, as discussed in Part B *infra*.

[185] 108 N.J. 539, 531 A.2d 1330, 1334–35 (N.J. 1987) (quoting Foster Constr. Co. C.A. Williams Bros. Co. v. United States, 435 F.2d 873, 887, 193 Ct. Cl 587 (1970).

[186] Fruin-Colnon Corp. v. Niagara Frontier, 180 A.D. 2d 222, 585 N.Y.S.2d 248, 251 (N.Y. A.D. 1992) (citing federal cases).

[187] Asphalt Roads & Materials Co. v. Commw., DOT, 257 Va. 452, 512 S.E.2d 804, 807 (Va. 1999).

[188] 48 C.F.R. pt. 1 § 52.243.2(A).

[189] AASHTO Guide Specification for Highway Construction § 101.03 (1998).

B. Differs materially from conditions normally encountered or from those conditions generally recognized as inherent in the nature of the work required.

C. Present unknown or unusual physical conditions.

A Type II DSC exists when the conditions at the work site differ materially from those normally encountered in performing the work specified in the contract. To prevail on a claim for a Type II condition, the contractor must show: (1) that it did not know about the condition; (2) that it could not have reasonably anticipated the condition after a review of the contract documents, a site inspection, and the contractor's general experience in that area; and (3) that the condition was unusual because it varied from the norm in similar construction work.[190]

The condition does not have to be a "geological freak" to qualify as unusual.[191] Nevertheless, the contractor's burden in establishing a Type II site condition is heavy.[192] The key is whether the site condition is physical, preexisting, unknown, and unusual. If these elements are satisfied the condition may qualify as a Type II DSC.[193] But conditions that do not satisfy these criteria are not covered by the clause.[194] A Type II condition may be proven by expert testimony.[195] Proving a Type II condition is usually more difficult when the condition is natural. Generally, it is more difficult to prove that a natural condition was unexpected because of the variations and kinds of earth materials found in subsurface work.[196]

Generally, the DSC clause encompasses only those site conditions that existed prior to the time the contract was awarded.[197] Site conditions that are created after the contract has been awarded are not covered by the clause, although there are some exceptions to this rule.[198] In addition, changes to the work that are nonphysical in nature do not qualify as DSCs since the clause refers only to physical conditions at the site.[199]

States must use the DSC clause in 23 C.F.R. 635.109(a)(1) for federal-aid highway projects unless the agency has an acceptable[200] DSC clause of its own or use of the clause is prohibited by state law.[201] The federally-mandated clause reads as follows:

> (i) During the progress of the work, if subsurface or latent physical conditions are encountered at the site differing materially from those indicated in the contract or if unknown physical conditions of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in the work provided for in the contract, are encountered at the site, the party discovering such conditions shall promptly notify the other party in writing of the specific differing conditions

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[190] Fru-Con Constr. Corp. v. United States, 44 Fed. Cl. 298, 311 (Fed. Cl. 1999); Lathan Co. v. United States, 20 Cl. Ct. 122, 127 (1990). Information in boring logs available to the contractor that provided notice of the condition precluded recovery for a Type II claim. Youndale & Sons Constr. Co. v. United States, 27 Fed. Cl. 516, 537 (1993).

[191] Western Well Drilling Co. v. United States, 96 F. Supp. 377, 379 (N.D. Cal. 1951).

[192] Charles T. Parker Constr. Co. v. United States, 433 F.2d 771, 778 (Ct. Cl. 1970); Youndale & Sons, *supra* note 190, at 537–39 (discussing contractor's burden of proof).

[193] Type II conditions established when contractor encountered: James Julian, Inc. v. Comm'rs of Town of Elkton, 341 F.2d 205 (4th Cir. 1965) (buried wharf during construction of a sewer); Reliance Ins. Co. v. County of Monroe, 198 A.D. 2d 871, 604 N.Y.S.2d 439, 440 (N.Y. 1993) (hazardous waste); Appeal of Panhandle Constr. Co., DOTCAB 79-1 BCA ¶ 13576 (1979) (buried animal bones); Kit-San Azusa v. United States, 32 Fed. Cl. 647 (1995) (encountering boulders that impeded driving sheet pile).

[194] Type II conditions were not established in the following cases. Condition visible from site inspection: Walsh Bros. v. United States, 107, Ct. Cl. 627, 69 F. Supp. 125 (Ct. Cl. 1947) (foundations from old buildings visible); Appeal of Basic Construction Co., ASBCA 77-2 BCA 2738 (1977) (roadway cuts revealed rock outcroppings); Sergent Mech. Sys., Inc. v. United States, 34 Fed. Cl. 505, 527 (1995) (encountering heavy rains preventing compaction not a Type II condition at airforce base project). Not preexisting: Olympus Corp. v. United States, 98 F.3d 1314, 1317 (Fed. Cir. 1996) (damage to work caused by another contractor after contract award). Weather: Donald B. Murphy Contractors, Inc. v. State, 40 Wash. App. 98, 696 P.2d 1270 (Wash. App. 1985); Annotation, *Construction and Effect of a "Changed Conditions" Clause in Public Works or Construction and Effect of a "Changed Conditions" Clause in Public Works or Construction Contract with State or its Subdivision*, 56 A.L.R. 4th 1042, 1066 (1987) (heavy rain); contracts, 56 A.L.R. 4th 1042, 1066 (heavy rain); Turnkey Enterprises v. United States, 220 Ct. Cl. 199, 597 F.2d 750 (Ct. Cl. 1977) (drought). Difficulty in performing work due to alleged unusual site condition: Fru-Con Constr. Corp v. United States, 44 Fed. Cl. 298, 311–12 (Fed. Cl. 1999) (concrete removal).

[195] T. Brown Constr., Inc., DOTCAB, 95-2 BCA ¶ 27,870 (1995) (expert testified that it was unusual for clay to adhere to rock); Charles T. Parker Constr. Co. v. United States, 193 Ct. Cl. 320, 433 F.2d 771, 778 (Ct. Cl. 1970) (expert testified to the amount of garnet encountered in excavating rock and its affect on drilling the rock).

[196] Charles T. Parker, *supra* note 79; Hardwick Bros. Co. II. v. United States, 36 Fed. Cl. 347, 409–10 (Ct. Cl. 1996) (ground water conditions not a Type II condition).

[197] Arundel Corp. v. United States, 96 Ct. Cl. 773 (Ct. Cl. 1942); Olympus Corp. v. United States, 98 F.3d 1314, 1317 (Fed. Cir. 1996).

[198] John A. Johnson Contracting Corp. v. United States, 132 F. Supp. 698, 702 (Ct. Cl. 1955) (unusual soil conditions combined with rains and early thaw damaged haul roads); Phillips Constr. Co. v. United States, 184 Ct. Cl. 249, 394 F.2d 834 (1968) (flooding of site due to heavy rainfall exacerbated by defective drainage system); Donald B. Murphy Contractors, Inc. v. State, 40 Wash. App. 98, 696 P.2d 1270, 1273 (Wash. App. 1985) (changed conditions claim based on defective drainage system and heavy rains denied).

[199] Olympus Corp. v. United States, *supra* note 197, at 1318 (labor strike not a DSC); Bateson-Stolte, Inc. v. United States, 145 Ct. Cl. 387, 172 F. Supp. 454 (1959) (change in wage rates during contract performance not a changed condition).

[200] The substitute clause is subject to FHWA approval.

[201] 23 U.S.C. § 112.

before they are disturbed and before the affected work is performed.

(ii) Upon written notification, the engineer will investigate the conditions and if it is determined that the conditions materially differ and cause an increase or decrease in the cost or time required for the performance of any work under the contract, an adjustment, excluding anticipated profits, will be made and the contract modified in writing accordingly. The engineer will notify the contractor of the determination whether or not an adjustment of the contact is warranted.

(iii) No contract adjustment which results in a benefit to the contractor will be allowed unless the contractor has provided the required written notice.

(iv) No contract adjustment will be allowed under this clause for any effects caused on unchanged work. (This provision may be omitted by the SHA's at their option).

3. Site Investigation

Most construction contracts contain site inspection clauses. These clauses require bidders to bid on conditions, as they appear, based upon a reasonable investigation of the physical conditions at the site that could affect the work. The site investigation clause, when coupled with a DSC clause, encourages more accurate bidding as to the true cost of performing the work.[202]

The federal "Site Investigation" clause[203] is typical of the type of clause used in construction contracts. That clause provides as follows:

(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 conformation 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.

(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.

The knowledge that a reasonable site inspection would disclose is imputed to the contractor.[204] A contractor who fails to make a reasonable site inspection may not recover for a DSC if the condition would have been observed by a reasonably prudent contractor.[205]

As a general rule, a contractor is not obligated to verify representations in the contract about subsurface site conditions through independent tests when the contract contains a DSC clause and the accuracy of the information, such as test borings, is not specifically disclaimed. The presence of the DSC clause is intended to assure bidders that they may rely on the soils information and need not incur the expense of their own tests, or include a contingency element in their bids.[206]

DSC clauses cannot be overridden by general exculpatory clauses.[207] In *Asphalt Roads & Materials v. Commw. DOT*,[208] the State argued that the exculpatory provisions in the contract relating to site investigation and bid submittal[209] precluded the contractor's claim for

[202] Foster Constr. Co., 435 F.2d at 887.

[203] 48 C.F.R. pt. 1 § 52-236-3.

[204] Hardwick Bros. v. United States, 36 Fed. Cl. 347, 406 (Ct. Cl. 1996).

[205] Gene Hock Excavating, Inc. v. Town of Hamburg, 227 A.D. 2d 911, 643 N.Y.S.2d 268 (App. Div. 1996); Umpqua Riv. Nav. Co. v. Cresent City Harbor Dist., 618 F.2d 588 (9th Cir. 1980); "The conditions actually encountered must have been reasonably unforeseeable based on all the information available to the contractor at the time of bidding." Fur-Con Constr. Corp. v. United States, 44 Fed. Cl. 298, 309 (1999) (quoting A.S. McGaughan Co. v. United States, 24 Cl. Ct. 659 (1991) *aff'd*, 980 Fed. 2d 744 (Fed. Cir. 1992) and referring also to CIBINIC & NASH, ADMINISTRATION OF GOVERNMENT CONTRACTS 508 (3d ed. 1995)). Contractor charged with knowledge that reasonable site inspection would disclose. Beltrone Constr. v. State, 256 A.D. 2d 992, 682 N.Y.S.2d 299, 301 N.Y. A.D. 1998).

[206] H.B. Mac, Inc. v. United States, 36 Fed. Cl. 793, 819 (1996); Foster Constr. C.A. & Williams Bros. Co. v. United States, 93 Ct. Cl. 589, 435 F.2d 873, 887 (1970); Asphalt Roads & Materials Co. v. Commw. DOT, 257 Va. 452, 512 S.E.2d 804, 807–08 (Va. 1999).

[207] Sutton Corp. of Metro. Dist. Comm'n, 423 Mass. 200, 667 N.E.2d 838, 843 (Mass. 1996); Metro Sewerage Comm'n of the County of Milwaukee v. R.W. Constr., Inc., 72 Wis. 2d 365, 241 N.W.2d 371, 382 (Wis. 1976); United Contractors v. United States, 177 Ct. Cl. 151, 368 F.2d 585, 598 (Ct. Cl. 1966). These cases involve DSC clauses that were required by law to be included in construction contracts. Contracting agencies lack authority to negate DSC clauses through the use of exculpatory provisions. *See, e.g.,* Department of General Services v. Harmans' Assocs., 98 Md. App. 535, 633 A.2d 939, 945 (Md. App. 1993).

[208] 257 Va. 452, 512 S.E.2d 804 (Va. 1999).

[209] *Id*. at 808. "The submission of a bid will be considered conclusive evidence that the bidder has examined the site…and is satisfied as to the conditions to be encountered in performing the work…." VDOT Specification 102.04.

a DSC. The court, in rejecting this contention, said that giving effect to the exculpatory provisions, "…would render meaningless the language of sections like 104.03 [Differing Site Condition clause] and negate their salutary purposes."[210]

A contractor must conduct the site inspection in a reasonable and prudent manner. A contractor is not required or expected to discover conditions that would only be observed by a geologist or a geotechnical engineer. The standard is what a reasonably prudent and experienced contractor would learn from a reasonable pre-bid site investigation.[211]

Occasionally, contractors try to avoid the consequences of not conducting a site investigation by arguing that the time between the advertisement for bids and bid opening was too short to allow for a reasonable inspection. How this argument fares depends upon several considerations. First, was the time really too short to permit a reasonable inspection of the project site? Second, is the clause mandated by a statute or regulation? If the answer to these questions is "yes," the contractor's failure or inability to conduct a reasonable site inspection will not bar a claim for a DSC.[212] However, the claim may be barred where the information that would be gleaned from a site investigation could be obtained from other sources, available to the contractor when it prepared its bid.[213]

Where there is no DSC clause in the contract, failure to investigate the site may bar a claim for misrepresentation[214] of site conditions even though the time allowed for the investigation is insufficient. The risk of unanticipated soil conditions should be considered by the contractor in formulating its bid.[215]

[210] 515 S.E.2d at 808 (citations omitted).

[211] Foster Constr. Bros., 435 F.2d at 886, *supra* note 151; Western Contracting Corp., ENGBCA No. 4066, 82-1 BCA ¶ 15,486 (1982); Gulf Constr. Group, Inc., *supra* ENGBCA 93-3 BCA ¶ 26,040, CCH 25,229 (1993).

[212] Where the DSC clause is required by statute or regulation, an agency cannot frustrate those laws by imposing unreasonable requirements. Department of General Services v. Harmon, 633 A.2d 739 (Md. App. 1993). *See also* Grow Constr. Co. v. State, 56 A.D. 2d 95391 N.Y.S.2d 726, 728 (N.Y. A.D. 1977) (evidence indicated that it would have taken far more time to investigate the site than allowed).

[213] "'[T]he conditions actually encountered must have been reasonably unforeseeable based on all the information available to the contractor at the time of bidding.'" Fru-Con Constr. Corp. v. United States, 44 Fed. Cl. 298, 309 (Fed. Cl. 1999); Fortec Constructors, ENGBCA No. 4352, 80-2 BCA ¶ 14,623 (1980).

[214] Misrepresentation, as a theory of recovery of recovery for adverse site conditions encountered during contract performance, is discussed in Part Five of this subsection.

[215] J.E. Brenneman Co. v. Commw., Dep't of Transp., 56 Pa. Commw. 210, 424 A.2d 592, 595 (Pa. Commw. 1981); Central Penn Indus., Inc. v. Commw., Dep't of Transp., 358 A.2d 445, 448 (Pa. Commw. 1976) (insufficient time for site investigation will not support a claim for unanticipated conditions).

4. Notice Requirements

All DSC clauses require the contractor to provide prompt written notice to the owner when it encounters what it considers to be a DSC. Notice must be given before the condition is disturbed.[216] Prompt notice allows the owner to investigate the condition while the facts are fresh and determine whether a DSC occurred. If the owner determines that a DSC has occurred, it can consider design changes or other alternatives to reduce costs and keep the project on schedule. This is particularly important to public agencies that operate under tight budgetary restrictions.[217] Notice also allows the owner the opportunity to document costs caused by the condition as they are incurred by the contractor.[218]

Generally cases involving notice issues range from strict enforcement[219] to no enforcement, unless the owner can show that it was prejudiced by lack of notice.[220] Jurisdictions that require strict compliance with notice requirements regard them as substantive rights that the owner is entitled to enforce as a condition precedent to any recovery, by the contractor, for a DSC. Failure to satisfy notice requirements will bar a claim for DSC,[221] unless the owner has waived notice or the owner is estopped from asserting lack of notice as a defense. [222] Once notice is given, it is not necessary to continue to give notice when the condition recurs.[223]

[216] "Notify the Agency…when encountering different site conditions on the project. Unless directed otherwise, leave the site undisturbed and suspend work." AASHTO Guide Specification § 104.02 (1998). "The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer…." 48 C.F.R. pt. 1 § 52.236.2. *See* "Enforceability of the Requirements of Notice in Highway Construction Contracts," 3 JOHN C. VANCE, SELECTED STUDIES IN HIGHWAY LAW 154 N-1.

[217] Justin Sweet, *Owner Architect Contractor: Another Eternal Triangle*, 47 CAL. L. REV. 645 (1959).

[218] Sutton Corp. v. Metro Dist. Comm'n, 423 Mass. 200, 667 N.E.2d 838, 843 (Mass. 1996); Blankenship Constr. Co. v. N.C. State Highway Comm'n, 28 N.C. 593, 222 S.E.2d 452, 459–60 (N.C. 1976).

[219] A.H.A. General Constr., Inc. v. Housing Auth., 241 A.D. 2d 428, 661 N.Y.S.2d 213, 215 (A.D. 1997); Blankenship Constr. Co. v. State Highway Comm'n, *supra* note 218 (strict compliance with notice requirements required).

[220] Hoel-Steffen Constr. Co. v. United States, 197 Ct. Cl. 561, 456 F.2d 760, 767–8 (Ct. Cl. 1972); Fru-Con Constr. Corp. v. United States, 44 Fed. Cl. 298, 313 (Fed. Cl. 1999); T. Brown Contractors, Inc., DOTCAB 95-2 BCA ¶ 27870 (1995); New Pueblo Constructors, Inc. v. State, 144 Ariz. 95, 696 P.2d 185, 191 (Ariz. 1985). Contra: Absher Constr. Co. v. Kent Sch. Dist., 77 Wash. App. 137, 890 P.2d 1071, 1073 (Wash. App. 1995) (showing of prejudice not required to enforce notice provision).

[221] A.H.A. General Constr., Inc. v. N.Y. City Housing Auth., 92 N.Y.2d 20, 699 N.E.2d 368, 374, 677 N.Y.S.2d 9, 15 (N.Y. 1998).

[222] Reif v. Smith, 319 N.W.2d 815, 817 (S.D. 1982) (waiver); Thorn Constr. Co. v. Utah Dep't of Transp., 598 P.2d 365, 370 (Utah 1979) (estoppel; work ordered by project engineer); Northern Improvement Co. v. State Highway Comm'n, 267

Courts that do not require strict compliance with notice requirements view notice from the standpoint of why notice is required. Under this approach, written notice is excused if the owner knew about the condition early enough to take steps to protect its interests.[224] This "substantial compliance" approach to notice often leads to arguments over who told what to whom, requiring a trial or hearing to resolve those kinds of factual disputes. The contractor must prove that the alleged oral notice of a DSC was "sufficiently forceful to anyone to replace the contractual requirement of clear written notice." Failure to make that showing will bar a claim for DSCs.[225]

Under federal contract law, lack of notice by the contractor that it encountered a DSC will not bar the contractor's claim for the condition, unless the Government can show that it was prejudiced by lack of notice.[226]

5. Misrepresentation of Soil Conditions

Construction contracts may contain language that purports to relieve owners from any responsibility for the accuracy or completeness of soils information and other site data furnished to bidders. Owners who choose not to include DSC clauses in their contracts are reluctant to guarantee this type of information. This is not only understandable, it is prudent. Information of this kind is obtained for design purposes and is furnished to prospective bidders with the caveat that the information is not part of the contract, is not necessarily accurate, was obtained for design purposes, and should not be relied upon by the bidders in making their bids. Bidders are cautioned to make their own site investigation to verify the data and obtain additional information. Often the time allowed for the site investigation is short, and on occasion insufficient. It may be difficult for bidders to discover, in a limited time, information that the owner was unable to discover during its own site investigation—an investigation that may have taken months, even years.[227] The bidders are given the site data that the owner obtained for design purposes, but told not to rely on the data. Faced with this dilemma, bidders can choose not to bid, or to bid and include an amount in their bids to cover site investigations of their own (if they so choose) and a contingency for unforeseen site conditions. The DSC clause, as discussed earlier, is designed to obviate this dilemma.

As a general rule, a broad exculpatory clause will not override the DSC clause; otherwise the purpose of the DSC clause would be negated.[228] When a DSC clause is required to be in the contract by a statute or regulation, an agency cannot avoid the clause by omitting it from the contract. A DSC clause that is physically omitted will be read into the contract and enforced as if it were part of the contract.[229] Where the DSC clause in the contract is not mandated by statute or regulation, a disclaimer concerning site conditions must be specific, clear, and unambiguous, otherwise it will not be enforced.[230] But what are the rules when there is no DSC clause in the contract, and the agency is not legally obligated to include one as part of its procurement policy?

In the absence of a DSC clause in the contract, the contractor assumes the risk of unforeseen site conditions.[231] The contractor may attempt to shift this risk to the owner under several legal theories. The contractor may claim that the owner failed to disclose information about the site that would have been important to the contractor in preparing its bid. This theory is advanced when the contract documents are silent about the condition that was encountered.[232] A more common situation is where the contract contains information about the site but the information was inaccurate. When this occurs, the claim for adverse site conditions is based on misrepresentation.[233]

N.W.2d 208, 214 (S.D. 1978) (estoppel). There is authority, however, that lack of notice may be waived as a defense when the claim is considered on the merits. Blount Bros. Corp. v. United States, 191 Ct. Cl. 784, 424 F.2d 1074, 1076 (Ct. Cl. 1970); T. Brown Contractors, Inc., DOTCAB 95-2 BCA ¶ 27,870 (1995).

[223] Fru-Con Constr. Corp. v. United States, 43 Fed. Cl. 306, 328 (Fed. Cl. 1999).

[224] Neal & Co. v. City of Dillingham, 923 P.2d 89, 92 (Alaska 1993); New Pueblo Constructors, Inc. v. State, 144 Ariz. 93, 696 P.2d 185, 191 (Ariz. 1985); Zook Bros. Constr. Co. v. State, 177 Mont. 64 556 P.2d 911, 914–15 (Mont. 1976); Lindbrook Constr. Co. v. Mukilteo Sch. Dist., 76 Wash. 2d 539, 458 P.2d 1 (Wash. 1969).

[225] Neal & Co. v. City of Dillingham, *supra* note 227, at 92–93.

[226] Fru-Con Constr. Corp; 43 Fed. Cl., *supra* note 226, at 324–25. But where prejudice is shown the claim will be barred. Schnip Building Co. v. United States, 227 Ct. Cl. 148, 645 F.2d 950, 958–59 (Ct. Cl. 1981) (lack of notice prevented Government from determining whether problems with rock were due to a DSC or the contractor's blasting methods); Eggers & Higgins v. United States, 185 Ct. Cl. 765, 403 F.2d 225, 293 (Ct. Cl. 1968) (late notice prejudiced Government's ability to evaluate DSC claim).

[227] 3 WALLEY & VANCE, *Legal Problems Arising From Changes, Changed Conditions, and Disputes Clauses in Highway Construction Contracts*, SELECTED STUDIES IN HIGHWAY LAW 1441.

[228] Asphalt Roads & Materials v. Com. DOT, 757 Va. 452, 512 S.E.2d 804, 808 (Va. 1997).

[229] District of Columbia v. Organization for Envtl. Growth, Inc., 700 A.2d 185, 198–99 (D.C. App. 1999); Department of General Services v. Harman Assocs., 98 Md. App. 535, 633 A.2d 939, 947 (Md. App. 1993).

[230] United Contractors v. United States, 177 Ct. Cl. 151, 368 F.2d 585, 598 (Ct. Cl. 1966); Bignold v. King County, 65 Wash. 2d 817, 399 P.2d 611, 614 (1965).

[231] *See* note 150 *supra*.

[232] This theory is discussed next in the part dealing with nondisclosure.

[233] 3 VANCE & JONES, *Legal Effect of Representations as to Subsurface Conditions*, SELECTED STUDIES IN HIGHWAY LAW 1471–77.

Misrepresentation has its roots in actions for damages based on fraud and deceit.[234] The theory has evolved in construction law, so that today a contractor may recover for adverse conditions if it can prove that the owner misrepresented the conditions at the site. The general rule is that when statements of fact made by an owner in the contract documents cause a contractor to make a lower bid than it otherwise would have made, the owner is liable for the increased costs caused by those conditions.[235] This rule has been expressed in various ways:

> [W]here plans or specifications lead a public contractor reasonably to believe that conditions represented therein do exist and may be relied upon in bidding, he (contractor) is entitled to compensation for extra expense incurred as a result of the inaccuracy of those representations….[236]

> A contractor…who, acting reasonably, is misled by incorrect plans and specifications issued by public authorities as the basis for bids and who, as a result, submits a bid which is lower than he would have otherwise made may recover in a contract action for extra work or expenses necessitated by the conditions being other than as represented. This rule is mainly based on the theory that furnishing of misleading plans and specifications by the public body constitutes a breach of an implied warranty of their correctness…(citations omitted).[237]

The rule articulated in these cases is a fundamental principle of construction law,[238] and is based on reliance. This was observed by Professor Williston when he said,

> The real issue which should be discussed is this constantly obscured by the terminology of the subject. The real issue is no less than this: When a defendant has induced another to act by representations false in fact although not dishonestly made, and damage has directly resulted from the action taken, who should bear the loss?[239]

The answer is the owner when the following elements are proven:[240]

- Positive representations about physical conditions at the project site. The representations must be material, i.e., basic to the work called for in the contract.
- The contractor must rely on the representations in making its bid. Its reliance must be reasonable.
- The actual conditions that the contractor encounters must differ materially from those represented in the contract.
- The difference between the actual conditions encountered and those represented in the contract must result in damages suffered by the contractor.

An application of these elements is illustrated in the following case. In *Christie v. United States*, there was a representation as to the type of materials that the contractor would excavate in constructing a dam.[241] The representation was material because the excavation was necessary in building the dam. The contractor relied on the representation in figuring its bid. The reliance was justified because there was insufficient time to verify the information by personal investigation. The material encountered was substantially different from that described in the contract and more costly to excavate than the material the contractor expected to encounter. Since these elements were proved, the contractor was able to recover its additional costs.

Recovery, however, has been denied where the court found that there was no factual misrepresentation. For example in *L-J Inc. v. South Carolina State Highway Department*, the court said that each soil boring "was a true revelation of the content of the earth at the 33 sites. The Contractor's problem arises because the borings were misinterpreted. It was assumed that rock lay on a level plane and this assumption was simply erroneous."[242]

A similar result was reached in *Codell Construction v. Commonwealth of Kentucky*, which involved a contract for the construction of 8 miles of Interstate 71.[243] Among the documents provided by the state to prospective bidders was a profile showing the line where rock would be encountered. Printed on the plans and contained in other contract documents were specific disclaimers stating that the information about the rock was solely for the information of the state, and was not to be taken as an indication of classified excavation or the quality of rock that would be encountered. The contractor brought suit claiming an overrun of rock and alleging misrepresentation by the state as to subsurface conditions. In denying recovery, the court said:

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[234] L. PROSSER & KEETON, HANDBOOK ON THE LAW OF TORTS, ch. 18, at 525, *et seq*. (5th ed. 1984).

[235] United States v. Spearin, 248 U.S. 132, 135–36, 395 S. Ct. 59, 63 L. Ed. 166 (1918); E.H. Morrill Co. v. State, 65 Cal. 2d 787, 791, 423 P.2d 551, 56 Cal. Rptr. 479 (1967). Morris Inc. v. State ex rel DOT, 1999 S.D. 95, 598 N.W.2d 525, 523 (S.D. 1999); *Changed Conditions as Misrepresentation in Government Construction Contracts*, 35 GEO. WASH. L. REV. (1967).

[236] Nelson Constr. Co. of Ferndale, Inc. v. Port of Bremerton, 20 Wash. App. 321, 582 P.2d 511, 515 (Wash. App. 1978).

[237] Souza & McCue Constr. Co. v. Superior Court, 57 Cal. 2d 508, 370 P.2d 338, 339–40, 20 Cal Rptr. 634 (Cal. 1962); Fairbanks North Star Borough v. Kandik Constr. & Assoc., 795 P.2d 793, 797 (Alaska 1990); Vinnell Corp. v. State Highway Comm'n, 85 N.M. 311 512 P.2d 71, 77 (N.M. 1973); Jack B. Parson Constr. Co. v. State, 725 P.2d 614, 616 (Utah 1986); Ideker, Inc. v. Mo. State Highway Comm'n, 654 S.W.2d 617 (Mo. App. 1982); P.T. & L. Constr. Co. v. Department of Transp., 108 N.J. 539, 531 A.2d 1330, 1335 (N.J. 1987).

[238] Nelson Constr., *supra* note 236. Annotation, *Right of Public Contractor to Allowance of Extra Expenses Over What Would Have Been Necessary if Conditions Had Been as Represented by the Plans and Specifications,* 76 A.L.R. 268 (1932).

[239] WILLISTON ON CONTRACTS § 1510, at 462 (3d ed. 1970).

[240] *Supra* note 233.

[241] 237 U.S. 234, 35 S. Ct. 565, 59 Ed. 733 (Ct. Cl. 1915).

[242] 270 S.C. 413, 242 S.E.2d 656, 665 (S.C. 1978).

[243] 566 S.W.2d 161 (Ky. App. 1977).

> The record does not disclose any misrepresentations of facts or withholding of material information in connection with the drawings, plans, specifications or other data furnished by the Department. The Highway Department, for its own purposes, made tests of the soil conditions and published the results with an express and unqualified disclaimer as to any guarantee of their accuracy. Clearly, this put any bidder on notice as to its obligation to make its own private investigation to determine the classification and quantities of the materials to be excavated….
>
> The express and unqualified disclaimer…clearly put the bidders on notice of their obligation to make a private investigation. In a situation where the information and representations are intended to be suggestive of construction conditions, or the contract provides that they are to be taken as estimates only, then the governmental agency is not to be held accountable for variances which may be encountered on the job when there is no deliberate misrepresentation or fraud involved. (citations omitted).[244]

The element paramount to recovery is reliance. The contractor must show that it was mislead by the representations. If a reasonably prudent contractor would not have relied on the information in preparing its bid, there can be no recovery for misrepresentation. The question is this: Were the disclaimers about the accuracy of the data sufficiently specific to warn a reasonable contractor not to rely on them in formulating its bid?[245] This question is discussed further in Part Seven (Exculpatory Provisions) of this subsection.

6. Nondisclosure

Generally, the law holds an owner liable for failing to impart its knowledge about the difficulties a contractor may encounter in performing the work.[246] The rule requiring disclosure has been described in various ways. For example, in *Warner Construction Corp. v. City of Los Angeles*, the court said:

> A fradulent concealment often composes the basis of an action in tort, but tort actions for misrepresentation against public agencies are barred by Government Code section 818.8. Plaintiff retains, however, a cause of action in contract. "It is the general rule that by failing to impart its knowledge of difficulties to be encountered in a project, the owner will be liable for misrepresentation if the contractor is unable to perform according to the contract provisions. This rule is mainly based on the theory that the furnishing of misleading plans and specifications by the public body constitutes a breach of an implied warranty of their correctness. The fact that a breach is fradulent does not make the rule inapplicable."[247]

In *Hardeman-Monier-Hutcherson v. United States*, the court said: "[W]here the government possesses special knowledge, not shared by the contractor, which is vital to the performance of the contract, the government has a affirmative duty to disclose such knowledge. It cannot remain silent with impunity."[248]

Similarly, the Alaska Supreme Court, in referring to decisions by the United States Court of Claims concerning disclosure, said that:

> We read these cases as establishing the following test for imposing a duty to disclose upon the state: did the state occupy so uniquely-favored a position with regard to the information at issue that no ordinary bidder in the plaintiff's position could reasonably acquire that information without resort to the state? Where resort to the state is the only reasonable avenue for acquiring the information, the state must disclose it, and may not claim as a defense either the contractor's failure to make an independent request or exculpatory language in the contract documents….[249]

An owner, however, does not have a duty to disclose information that the contractor could reasonably obtain for itself. The contractor "cannot thereafter throw the burden of his negligence (in failing to obtain information) upon the shoulders of the state by asserting that the latter was guilty of fraudulent concealment in not furnishing him with information which he made no effort to secure for himself."[250] In one case, for example, the court held that the State had no duty to disclose information that it obtained from other bidders concerning the feasibility of hydraulic dredging at the project site. The court observed that the contractor could

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[244] *Id*., at 164.

[245] J.A. Constr. Corp v. Department of Transp., 591 A.2d 1146 (Pa. Commw. 1991); Wunderlich v. State, 65 Cal. 2d 777, 423 P.2d 545, 548–50, 56 Cal. Rptr. 473 (Cal. 1967) ("The crucial question is one of justified reliance."); Joseph F. Trionfo & Sons, Inc. v. Board of Educ., 41 Md. App. 103, 395 A.2d 1207, 1209 (Md. App. 1979).

[246] GAF Corp. v. United States, 932 F.2d 947, 949 (Fed. Cir. 1991); Hercules, Inc. v. United States, 24 F.3d 188, 196 (Fed. Cir. 1994); J. A. Jones Constr. Co. v. United States, 390 F.2d 886 (Ct. Cl. 1968); Warner Constr. Corp. v. City of L.A., 2 Cal. 3d 285, 466 P.2d 996, 1001, 85 Cal. Rptr. 444 (Cal. 1970); Nelson Constr. Co. of Ferndale, Inc. v. Port of Bremerton, 20 Wash. App. 32, 582 P.2d 511, 514–15 (Wash. App. 1978); Hardwick Bros. II v. United States, 36 Fed. Cl. 347, 386 (Ct. Cl. 1996); R.J. Wildner Contracting Co. v. Ohio Turnpike Comm'n, 913 F. Supp. 1031, 1042 (N.D. Ohio 1996); Annotation, *Public Contracts: Duty of Public Authority to Disclose to Contractor Information Allegedly in its Possession, Affecting Cost or Feasibility of Project*, 86 A.L.R. 3d 182 (1978). McDonnell Douglas Corp. v. United States, 182, 3d 1319, 1329 (Fed. Cir. 1999).

[247] 2 Cal. 3d 285, 466 P.2d 996, 1001 85 Cal. Rptr. 444 (Cal. 1970) (citation omitted).

[248] 198 Ct. Cl. 472, 458 F.2d 1364, 1371–2 (Ct. Cl. 1972) (citations omitted).

[249] Morrison-Knudson Co. v. State, 519 P.2d 834, 841, 86 A.L.R. 3d 164 (Alaska 1974).

[250] Wiechmann Eng'rs v. State, 31 Cal. App. 3d 741, 753, 107 Cal. Rptr. 529 (1973); *see also* Nelson Constr., *supra* note 236 (agency not required to provide soils report concerning glacially consolidated soils containing boulders where information about harbor bottom was reasonably available from other sources); Comprehensive Bldg. Contractors, Inc. v. Pollard Excavating, Inc., 251 A.D. 2d 951, 674 N.Y.S.2d 869 (N.Y. A.D. 1998) (depth of sewer available to excavation contractor from subdivision plat).

have performed its own tests at the site like other bidders.[251]

In addition to proving that the information that the agency failed to disclose was not reasonably available, the contractor must also prove that it was prejudiced by the nondisclosure. In other words, the contractor must show that its bid would have been different had it seen the information. Failure to make that showing will bar the claim.[252]

Whether there was a failure to disclose vital information, entitling the contractor to recover damages is a jury question.[253] The use of special interrogatories to the jury should be considered. This technique was used successfully by the State in a case where the contractor alleged, among other things, that the State failed to disclose test reports about a pit that the State furnished to the contractor.[254]

7. Exculpatory Provisions

Unless an agency is required by a statute[255] or a regulation[256] to include a DSC clause in its contracts, it may choose to let the risk of unforeseen site conditions remain with the contractor.[257] In making this choice an agency may decide that it would rather pay a contingency for unforeseen conditions than pay for such conditions through litigation. This policy determination is driven by considerations such as budget predictions, the number and size of its projects, and the availability of potential bidders who are willing to assume the risk of unforeseen conditions and factor that risk into their bids. At times, there may be situations where the agency does not know what will be encountered and prefers that the contractor assume those risks and price them competitively as part of its bid. "But once a policy determination is made, it should be enforced by the courts."[258]

When a DSC clause is included in the contract, an agency cannot undermine the clause by also including broad exculpatory provisions that purport to shift the risk of unanticipated conditions to the contractor. Generally, broad exculpatory provisions will simply not be enforced.[259] Most courts view broad exculpatory language, disclaiming liability for DSCs, as contradictory. General statements, which are inconsistent with the intention of the parties as expressed in the DSC clause, will not be enforced.[260] The key to making exculpatory clauses effective is specificity. Specific warnings telling the contractor not to rely on certain information about site conditions should be enforced.

In the absence of a DSC clause, an agency is not liable for unforeseen site conditions unless the contractor was misled by the information provided to prospective bidders,[261] or the agency failed to disclose information about the site that should have been disclosed.[262] To insulate itself from liability for unforeseen site conditions, the agency should: (1) disclose information in its possession about site conditions or tell the prospective bidders where the information can be obtained, and (2) include clear and specific exculpatory clauses in the contract disclaiming responsibility for unforeseen conditions. This latter point is supported by case law, particularly the leading case of *Wunderlich v. State*.[263]

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[251] Morrison-Knudson Co. v. State, 519 P.2d at 842 (Alaska 1974); *but see* Howard Contracting, Inc. v. G. A. MacDonald Constr. Co., 71 Cal. App. 4th 38, 56, 83 Cal. Rptr. 2d 590 (Cal. App. 1998) (city liable for failure to direct bidder to examine permits issued by regulatory agencies, even though bidder knew that agency would impose restrictions on the project).

[252] A.S. Wikstrom, Inc. v. State, 52 A.D. 2d 658, 381 N.Y.S.2d 1010, 1012 (App. Div. 1976) (contractor failed to prove that its bid would have been different had it seen the test borings); Wm. A. Smith Contracting Co. v. United States, 188 Ct. Cl. 1065, 412 F.2d 1325, 1338 (Ct. Cl. 1969) (contractor not misled by failure to disclose information); *see also* Hendry Corp. v. Metro Dade County, 648 So. 2d 140, 142 (Fla. App. 1994).

[253] Horton Indus., Inc. v. Village of MoweAqua, 142 Ill. App. 3d 730, 492 N.E.2d 220, 226, 97 Ill. Dec. 17 (Ill. App. 1986).

[254] Ledcor Indus., et al. v. State of Wash. Dep't of Transp., Thurston County Superior Court No. 92-200085-4.

[255] *See* Department of Gen. Services v. Harmans, 98 Md. App. 535, 633 A.2d 939, 947 (1993) (DSC clause required by statute); 23 U.S.C. § 112 (requiring use of a DSC clause in certain federally-funded state highway construction contracts).

[256] 48 C.F.R. ch. 1, pt. 52.236-2.

[257] Most state agency DSC clauses provide that, "No contract adjustments will be allowed under this clause for any effects caused by unchanged work." *See, e.g.*, Iowa Standard Specifications 1109.16A.4. When procurement laws require that a particular clause be included in a contract, the contract is read as though it contained that clause irrespective of whether the clause was actually written in the contract. G.L. Christian & Assocs. v. United States, 160 Ct. Cal. 1, 312 F.2d 418, 424 (Ct. Cl. 1963); S.J. Amoroso Constr. Co. v. United States, 26 Cl. Ct. 759, 764 (1992); Department of Gen. Services v. Harmans, 98 Md. App 535, 633 A.2d 939, 949 (1993).

[258] P.T.& L. Constr. v. Department of Transp., 108 N.J. 539, 531 A.2d 1330, 1331 (N.J. 1987); S&M Contractors, Inc. v. City of Columbus, 70 Ohio St. 2d 69, 434 N.E.2d 1349, 1351 (Ohio 1982) (argument that enforcing disclaimer is bad public policy rejected); HARP, *supra* note 154. Mr. Harp notes that a "no claims specification" had mixed reviews by the TRB Task Force on Innovative Contracting. The Task Force expressed concern that "no claims" specifications generate additional litigation and greater conflict between the contractor and the agency, and result in an adverse working relationship that could affect the quality and progress of the work. These observations could be urged as additional reasons, besides eliminating contingency bidding, for having a DSC clause in contracts.

[259] Sornsin Constr. Co. v. State, 180 Mont. 248, 590 P.2d 125, 129 (1978); Morris, Inc. v. State ex rel DOT, 1999 S. D. 95, 598 N.W.2d 520, 523 (S.D. 1999); Mass. Bay Trans. Auth. v. United States, 129 F.3d 1226, 1231 (Fed. Cir. 1997).

[260] Morrison-Knudson Co. v. United States, 184 Ct. Cl. 661, 686, 397 F.2d 826 (Ct. Cl. 1968); Haggart Constr. Co. v. Highway Comm'n, 149 Mont. 422, 427 P.2d 686, 689 (Mont. 1967).

[261] *Id*.

[262] 86 A.L.R. 3d 182 (1978).

[263] 65 Cal. 2d 777, 423 P.2d 545, 548 (Cal. 1967).

Wunderlich was a breach of warranty claim by a highway contractor when a state-furnished pit did not provide sufficient material for the project. The contract indicated that there would be certain base material "of satisfactory quality" available for the contractor's use from a private pit that the state had obtained. The specifications disclaimed responsibility for the quantity of suitable material that could be produced from the pit. The contractor claimed that the material was too sandy, requiring the contractor to bring in more equipment and finally to import material from other pits. The contractor claimed the State had misrepresented the actual conditions encountered in the pit and was liable for the extra costs incurred in processing material at the pit and in hauling material from more distant sources. The State claimed that what was represented in the contract was accurate based on the tests it had performed. The trial court's decision in favor of the contractor was reversed by the California Supreme Court which, said:

> The crucial question is thus one of justified reliance. If the agency makes a "positive and material representation as to a condition presumably within the knowledge of the government, and upon which…the plaintiffs had a right to rely" the agency is deemed to have warranted such facts despite a general provision requiring an onsite inspection by the contractor. (Citation omitted.) But if statements "honestly made" may be considered as "suggestive only," expenses caused by unforeseen conditions will be placed on the contractor, especially if the contract so stipulates…(citations omitted).

The court concluded that the boring data from the test holes were only indicative of the general area of the pit. There were no positive representations about the quantity of material that could be obtained from the pit. The court emphasized the importance of specific exculpatory language disclaiming any state responsibility for the quantity of acceptable material and requiring the contractor to determine whether there was enough material in the pit for the project.

Briefly stated, the court held that the contractor could not justifiably rely on the information about the sufficiency of suitable material in view of the specific nature of the statements about the quantity of material, the specificity of the exculpatory provisions, and the absence of any misrepresentations about factual matters. Thus, where the statements are not positive representations and the contractor is warned to determine conditions for itself, there is no warranty.

Other states have followed the *Wunderlich* rule, focusing on the lack of positive representations and the specificity of the disclaimer.[264] For example, in *Ell-Dorer Contracting Co. v. State*, the specifications required the contractor:

> [T]o ascertain for himself all the facts concerning conditions to be found at the location of the Project including all physical characteristics above, on, and below the subsurface of the ground, …and to make all necessary investigations….
>
> Borings, test excavations and other subsurface investigations, if any, made by the Engineer prior to construction of the project…are made for use as a guide for design. Said borings, test excavations and other subsurface investigations are not warranted to show the actual subsurface conditions. The contractor agrees that he will make no claims against the State if in carrying out the project he finds that the actual conditions encountered do not conform to those indicated by said borings, test excavations and other subsurface investigations.[265]

The court found that the disclaimers were so specific that the contractor could not justifiably rely on the soils data provided to the bidders. A similar result was reached in *Joseph F. Trionfo & Sons, Inc. v. Board of Education*, where the court enforced an exculpatory clause that provided that the soils information was: (1) not part of the contract, (2) not guaranteed, (3) obtained by the agency for design purposes only, (4) was not to be relied upon by the contractor, and (5) that the contractor should make its own site investigation. [266] The clause also provided that the owner was not responsible if the actual conditions differed from what the contractor expected or from what the soils data indicated.

Other examples are *Biolota Construction Corp. v. Village of Mamaroneck*, in which the specifications stated that the grade elevations shown on the plans were approximate, their accuracy not guaranteed, and that the contractor should make its own site investigation;[267] and *Air Cooling & Energy, Inc. v. Midwestern Construction Company*, in which no implied warranty was found where the boring logs were not part of the contract and the contractor was required to make its own site investigation and told not to rely on the boring logs.[268]

It is important that the specifications specifically disclaim responsibility for the accuracy of the soils data provided to bidders. If this is not done, the disclaimer may not be enforced even though the test borings are

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[264] Nelson Constr. Co. v. Port of Bremerton, 20 Wash. App, 321, 582 P.2d 511, 515 (Wash. App. 1978); Bilotta Constr. Corp. v. Village of Mamaroneck, 199 A.D. 2d 230, 604 N.Y.S.2d 966 (N.Y. App. Div. 1993); Air Cooling & Energy, Inc. v. Midwestern Constr. Co. of Missouri, Inc., 602 S.W.2d 926, 930 (Mo. App. 1980); L-J, Inc. v. S.C. Highway Dep't, 280 S.C. 413, 242 S.E.2d 656 (S.C. 1978); Joseph F. Trionfo & Sons v. Board of Ed., 395 A.2d 1207, 1213 (Md. App. 1979); S&M Contractors, Inc. v. City of Columbus, 434 N.E.2d 1349, 1353 (Ohio 1982); Gene Hock Excavating, Inc. v. Town of Hamburg, 227 A.D. 2d 911, 643 N.Y.S.2d 268 (N.Y. App. Div. 1996); Sasso Contracting Co. v. State, 173 N.J. Super. 486, 414 A.2d 603, 606, *cert. denied*, 85 N.J. 101, 425 A.2d 265 (N.J. 1980); J.A. Thompson & Sons, Inc. v. State, 51 Haw. 529, 465 P.2d 148, 155 (1970); Frontier Founds., Inc. v. Layton Constr., 818 P.2d 1040, 1042 (Utah App. 1991).

[265] 197 N.J. Super. 175, 484 A.2d 356, 359 (App. Div. N.J. 1984).

[266] 41 Md. App. 103, 395 A.2d 1207, 1209 (Md. App. 1979).

[267] 199 A.D. 2d 230, 604 N.Y.S.2d 966, 967–68 (N.Y. App. Div. 1993).

[268] 602 S.W.2d 926, 930 (Mo. App. 1980).

not part of the contract.[269] It is also important for the exculpatory clause to disclaim any intention on the part of the owner that bidders should use the soils information in preparing the bid. Absent a disclaimer specifically disclaiming any such intention, a court may find that "the government performs certain basic tests in order to provide each bidder with some information on which he may make his bid."[270]

There are, of course, decisions that decline to enforce exculpatory provisions. The specifications may be viewed as conflicting[271] or ambiguous[272] or unfair because insufficient time was allowed for a reasonable site investigation. With respect to the latter point, there is a split of authority as to the enforceability of exculpatory provisions when insufficient time is allowed for a contractor to conduct its own site investigation. One view is that an agency cannot enforce exculpatory clauses, particularly those requiring a contractor to make its own site investigation, when the time allowed is insufficient.[273] There is authority, however, that insufficient time does not preclude enforceability.[274] This latter view is premised on the notion that contractors are not compelled to bid. If they believe that the time allowed for an adequate site investigation is not sufficient, they can decline to bid, or they can factor the lack of an adequate site investigation into their bids.[275]

In preparing contracts that do not contain DSC clauses, care should be taken to avoid the pitfall of nondisclosure. Care should also be taken to avoid presenting information to bidders in a way that can be construed as positive assertions of fact. Data should be qualified by using words like "approximate" or "estimated" or "for design purposes only," or words of like import. Exculpatory provisions should say in clear and plain language that:

- The soils information is not part of the contract.
- The accuracy or completeness of the soils information is not guaranteed.
- The soils information was obtained only for design purposes.
- The soils information should not be relied upon by bidders in making their bids.
- Bidders should make their own investigations of site conditions. If a bidder believes that the time allowed for the investigation is insufficient, that should be taken into consideration in preparing the bid.
- The owner will not be responsible in any way for additional compensation based on any claim that soils information obtained solely for design purposes and furnished to bidders differed from what the contractor expected to encounter or differed in any way from what the soils information indicated to the contractor concerning subsurface conditions.

Disclaimers that are specific should be enforced.[276] Specific contract provisions trump general provisions.[277] Thus, where the specific disclaimer conflicts with other general contract provisions, the disclaimer should be enforced. Where the disclaimer is clear, unambiguous,

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[269] City of Columbia v. Paul N. Howard Co., 707 F.2d 338, 340 (8th Cir. 1983) (court construed contract to mean that contractor could rely upon the data shown in the borings, but not upon interpolations between borings).

[270] Robert E. McKee, Inc. v. City of Atlanta, 414 Supp. 957, 959 (N.D. Ga. 1976); Morris, Inc. v. State ex rel. DOT, 1999 S.D. 95, 598 N.W.2d 520, 523 (S.D. 1999); Haggart Constr. Co. v. State, 149 Mont. 422, 427 P.2d 686, 687 (Mont. 1967) (State admitted at trial that one purpose in furnishing soils data to bidders was to obtain lower bids).

[271] Young-Fehlahaber v. State, 265 A.D. 61, 37 N.Y.S.2d 928, 929 (N.Y. A.D. 1942) (conflict between representation in the plans and the disclaimer in the specifications, resolved in favor of the contractor under the rule that plans take precedence over specifications); Millgard Corp. v. McKee/Mays, 49 F.3d 1070, 1073 (5th Cir. 1995) (specific disclaimer with respect to underground water took precedence over the more general language in the DSC clause). "[G]eneral disclaimers will not absolve defendant for positive and material representations upon which the contractor had a right to rely." Morris, Inc. v. State el rel DOT, 598 N.W.2d 520., 523 (S.D. 1999) (quoting Western States Mech. Contractors, Inc. v. Sandin Corp, 110 N.M. 676, 798 P.2d 1062, 1065 (N.M. App. 1990)).

[272] Ambiguous specifications are construed against the drafter. Metric Constructors, Inc. v. National Aeronautics and Space Admin., 169 F.3d 747, 751 (Fed. Cir. 1999); Van-Go Transport Co. v. N.Y. City Bd. Of Educ., 53 F. Supp. 2d 278, 283 (E.D. N.Y. 1999); Haggart Constr. Co. v. State, 149 Mont. 422, 427 P.2d 686, 689 (1967) (soils data and general disclaimer conflicted, making the contract ambiguous; contract was construed against the State because the State had drafted it).

[273] Kiely Constr. Co. v. State, 154 Mont. 363, 463 P.2d 888, 890 (1970); Yonkers Contracting Co. v. N.Y. State Thruway Auth., 45 Misc. 2d 763, 257 N.Y.S.2d 781, 784 (N.Y. Ct. Cl. 1964); Peter Salvucci & Sons, Inc. v. State, 110 N.H. 136, 268 A.2d 899, 906 (1970); Alpert v. Commonwealth, 357 Mass. 306, 258 N.E.2d 755, 764 (1970) (adequate site investigation would require 2 ½ to 3 months, but only 21 days allowed).

[274] J.E. Brenneman Co. v. Commonwealth, Dep't of Transp., 56 Pa. Commw. 210, 424 A.2d 592, 595 (1981); Central Penn Indus. v. Commonwealth, 358 A.2d 445, 448 (Pa. Commw. 1976). "Insufficiency of the allowed for investigation by bidders, standing alone, will not support a claim for extra compensation for unanticipated site conditions."

[275] Codell Constr. Co. v. Commonwealth, 566 S.W.2d 161, 165 (Ky. App. 1977); Scherrer v. State Highway Comm'n, 148 Kan. 357, 80 P.2d 1105, 1110 (Kan. 1938); McArthur Bros. Co. v. United States, 258 U.S. 6, 42 S. Ct. 225, 66 L. Ed. 433 (1922).

[276] P.T.& L. Constr. v. State Dep't of Transp., 108 N.J. 539, 531 A.2d 1330, 1334 (N.J. 1987). The court acknowledged that the State, for policy reasons, may require the contractor to assume the risk of unforeseen site conditions.

[277] "It is a maxim of interpretation that when two provisions of a contract conflict, the specific trumps the general." Millgard Corp. v. McKee/Mays, 49 F.3d 1070, 1073 (5th Cir. 1995); (specific disclaimer concerning underground water given precedence over more general language in DSC clause). *See also* Vaughn v. Gulf Copper, 54 F. Supp. 2d 688, 690 (E.D. Tex. 1999); Transitional Learning v. United States, 220 F.3d 427, 432 (5th Cir. 2000); Chantilly Constr. Corp. v. Department of Highways, 6 Va. App. 282, 369 S.E.2d 438, 445 (Va. App. 1988).

and specific, a court may hold that the contractor's reliance on site data was not justified, and that its claim for misrepresentation of site conditions may be dismissed as a matter of law.[278]

8. Subcontractor Claims

Claims for DSCs often originate with subcontractors. This occurs because earth work, such as excavation, embankment construction, pile driving, and site preparation may be sublet by the general contractor. Typically, claims for DSCs are presented by the subcontractor to the general contractor who, in turn, passes them on to the owner for resolution. This process was described by the California Court of Appeals in *Howard Contracting v. G.A. MacDonald Construction Co.*

> As a matter of law, a general contractor can present a subcontractor's claim on a pass-through basis. When a public agency breaches a construction contract with a contractor, damage often ensues to a subcontractor. In such a situation, the subcontractor may not have legal standing to assert a claim directly against the public agency due to a lack of privity of contract, but may assert a claim against the general contractor. In such a case, a general contractor is permitted to present a pass-through claim on behalf of the subcontractor against the public agency…(citations omitted).[279]

To recover for a DSC (subcontractor versus general contractor), there must be a DSC clause in the subcontract,[280] either expressly or by implication.[281] The *Severin* doctrine, which prevents a general contractor from recovering for its subcontractor against the owner when the prime contractor is not liable to the subcontractor, is discussed in the next section.

9. Impossibility

A contractor is not excused from performing its contract when unforeseen circumstances make performance burdensome.[282] To excuse performance, the contractor must prove that performance was impossible. "Impossibility excuses a party's performance only when the destruction of the subject matter of the contract or the means of performance makes performance objectively impossible. Moreover, the impossibility must be produced by an unanticipated event that could not have been foreseen or guarded against in the contract."[283] (citations omitted).

Impossibility can be either actual or practical. Actual impossibility exists when it is physically impossible for anyone to perform the contract. If another contractor could perform the work, the contractor's own inability to perform is not excused.[284] Practical impossibility exists when the cost of performance is so great that it becomes economically senseless.[285] Impossibility may be raised as a defense by a contractor in an action brought by an owner for breach of contract for the contractor's nonperformance.[286]

To prove practical impossibility, the contractor must show that the cost of performance would be so extreme that it would render further performance economically senseless. Because courts are reluctant to excuse performance, this is usually difficult to prove.[287] Whether an unanticipated event rendered the contract impossible to perform is a factual question.[288]

10. Admissions

Occasionally, a dispute over whether a DSC occurred may threaten to delay the work. To expedite construction, the owner may wish to change the design or make some other modification to allow the work to proceed. If this happens, the change order should be carefully worded to prevent the change order from being used by the contractor as an admission by the owner that a DSC had occurred.[289]

If the contractor will not agree, in a bilateral change order, that the design change is not an admission of a DSC, and if the owner still wishes to make the change, the unilateral change order should be couched in language indicating that the owner denies that a differing

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[278] Frontier Founds., Inc. v. Layton Constr., 818 P.2d 1040, 1041–42 (Utah App. 1991) (where disclaimer is effective as a matter of law, owner is entitled to judgment); Joseph F. Trionfo, 395 A.2d 1207 (Md. App. 1979).

[279] 71 Cal. App. 4th 38, 60, 83 Cal Rptr. 2d 590 (1998); *see also* Buckley & Co. v. State, 140 N.J. Super., 289, 356 A.2d 56, 73–74 (N.J. Super. 1975) (cases cited from other jurisdictions holding that lack of privity between the subcontractor and the owner does not bar the subcontractor's pass-through claim when the prime contractor is liable to the subcontractor for damages for which the owner ultimately assumes responsibility).

[280] Dravo Corp. v. Metro Seattle, 79 Wash. 2d 214, 484 P.2d 399 (Wash. 1971).

[281] A flow-down clause in a subcontract incorporates by implication an express DSC clause in the prime contract.

[282] United States v. Spearin, 248 U.S. 132, 135–36 39 S. Ct. 59, 63 L. Ed. 166 (1918); Comprehensive Bldg. Contractors v. Pollard Excavating, Inc., 251 A.D. 2d 951, 674 N.Y.S.2d 869, 871 (N.Y. App. 1998).

[283] Comprehensive Bldg. v. Pollard Excavating, 674 N.Y.S.2d at 871.

[284] Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 P. 458, 459 (1916); Tripp v. Henderson, 158 Fla. 442, 28 So. 2d 857 (1947).

[285] Blount Bros. Corp. v. United States, 872 F.2d 1003, 1007 (Fed. Cir. 1989).

[286] Annotation, *Modern Status of the Rules Regarding Impossibility of Performance as a Defense in an Action for Breach of Contract*, 84 A.L.R. 2d 12 (1962).

[287] Large cost overruns do not necessarily excuse further performance. Campeau Tool & Die Co., ASBCA No. 18,436, 76-1 BCA ¶ 11,653 (1975) (cost overrun of $600,000 on a $1.2 million contract did not amount to commercial impossibility).

[288] Silverite Constr. Co. v. Town of North Hempstead, 259 A.D. 2d 745, 687 N.Y.S.2d 434 (N.Y. A.D. 1999) (Hazardous waste encountered at construction site); Interstate Markings, Inc. v. Mingus Constructors., Inc., 941 F.2d 1010, 1014 (9th Cir. 1991); (jury found that it was not possible to do the work).

[289] Foster Constr. and Williams Bros. C.A. v. United States, 193 Ct. Cl. 587, 435 F.2d 873 (Ct. Cl. 1970).

site occurred, that it reserves all defenses, waives nothing, and makes the change solely to move the project along rather than have the project delayed because of the dispute. The stronger and more self-serving the language, the less likely the change order will be offered in a lawsuit or arbitration as an admission.

C. DELAY

1. Introduction

Construction work is more susceptible to delay than many other forms of contracting. Variables such as adverse weather conditions, the division of work between the general contractor and its numerous subcontractors, changes to the work ordered by the owner, DSCs, strikes, and other events can delay the original contract completion date.

Most construction contracts contain clauses that deal with delay. The "suspension of work" clause[290] and time extension clauses allow the time for contract completion to be extended when the event that caused the delay is excusable.[291] The "changes" clause and the "differing site conditions" clause (discussed earlier) also provide for time extensions as part of an equitable adjustment.[292]

Determining whether a time extension should be granted can be important. If the delay is not excused, the contract completion date will not be extended and the contractor may be assessed liquidated damages. If, however, it is later determined that the delay was excusable, the owner may face a claim for constructive acceleration for costs incurred by the contractor in making up a delay that should have been excused.

This subsection discusses how delay is usually classified in analyzing delay claims made by a contractor. It also discusses the use of time related clauses, such as a "suspension of work" clause, and the use of "no-pay-for-delay" clauses to minimize exposure for delay damages.[293] Acceleration claims and owner's remedies for delay (liquidated damages and termination for default) complete this subsection.

2. Types of Delay

Some events that may cause delay are usually classified in the contract as excusable, subject to the caveat that the delay was beyond the control or responsibility of the contractor.[294] Acts of God, unavoidable strikes, acts of government, and other *Force Majeure* events are examples.[295] If a delay is not classified in the contract, the delay will be determined as excusable or inexcusable by the law of the jurisdiction that governs the contract.[296]

Contract clauses allocating risk of possible delay between the contractor and the owner provide benefits to owners similar to those provided by a "differing site conditions" clause. Contractors who are promised time extensions, and in some instances monetary relief for specific kinds of delay,[297] will be deterred (if contractors wish to be competitive in bidding work) from including contingencies in their bids for delays that may or may not occur during contract performance.[298] Whether a time extension is warranted is usually determined by analyzing the critical path method (CPM) schedule furnished by the contractor.[299] In general, only delays to work shown on the critical path affect the completion date of the contract,[300] although there is authority to the contrary.[301]

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[290] *See, e.g.,* 48 C.F.R. 52.242-14, Suspension of Work Clause.

[291] E. M. Freeman v. Department of Highways, 253 La. 105, 217 So. 2d 166 (La. 1968) (delay excusable, contractor entitled to a time extension). "The grant of an extension of time by the contracting officer carries with it an administrative determination (admission) that the delays resulted through no fault of the contractor." J.D. Hedin Constr. Co. v. United States, 347 F.2d 235, 245 (Ct. Cl. 1965).

[292] These clauses require the owner to grant time extensions, when appropriate, for added or changed work.

[293] How delay damages are computed is discussed in Section Six, which deals with construction claims.

[294] PYCA Indus., Inc. v. Harrison County Waste Water Management Dist., 177 F.3d 351, 361 (5th Cir. 1999).

[295] 3 D.W. HARP, *Liability for Delay in Completion of Highway Construction Contracts*, SELECTED STUDIES IN HIGHWAY LAW, at 1495, 1515-17; J. D. Hedin Constr. Co. v. United States, 408 F.2d 424, 428 (Ct. Cl. 1969).

[296] Highland Constr. Co. v. Stevenson, 636 P.2d 1034, 1037 (Utah 1981) (delay caused by utility relocation not excusable; contractor knew that utility relocation would be carried on simultaneously with its own work); Mount Vernon Contracting Corp. v. State, 56 A.D. 2d 952, 392 N.Y.S.2d 726, 727 (N.Y. A.D. 1977) (delay due to work stoppage caused by court order, where contractor, aware of pending litigation when bids were submitted, not changeable to State.); Arrowhead, Inc. v. Safeway Stores, Inc., 179 Mont. 510, 587 P.2d 411, 413–14 (1978) (severe weather that was normal for winter construction was not a basis for further extension of time beyond that already granted); Reichenbach v. Sage, 13 Wash. 364, 43 Pac. 354, 356 (1896) (delay caused by its subcontractor not excusable); Cooke Contracting Co. v. State, 55 Mich. App. 479, 223 N.W.2d 15, 17–18 (1974) (delay to contractor caused by other state contractors not excusable).

[297] Delay to unchanged work caused by a DSC is compensable under the federal DSC clause but not under most state clauses. See Subsection B.

[298] Foster Constr. C.A. and Williams Bros. Co. v. United States, 193 Ct. Cl. 587, 435 F.2d 873, 887 (Ct. Cl. 1970).

[299] The use of CPM schedules in analyzing claims is discussed in Section Six, *infra*.

[300] Morrison-Knudsen Corp. v. Fireman's Fund Ins. Co., 175 F.3d 1221, 1232 (10th Cir. 1999); Haney v. United States, 230 Ct. Cl. 148, 676 F.2d 584, 595 (Ct. Cl. 1982); Neal & Co., Inc. v. United States, 36 Fed. Cl. 600, 645 (1996).

[301] Howard Contracting, Inc. v. G. A. MacDonald Constr. Co., 71 Cal. App. 4th 38, 83 Cal. Rptr. 2d 590, 597 (Cal. App. 1999) (declining to apply federal rule that only delay to work on the critical path affects the project's completion date).

a. Excusable But Noncompensable Delay

Simply put, this type of delay allows a time extension but no monetary relief. To be excusable, the contractor must show that (1) the delay was not foreseeable when the contract was let, (2) the delay was not caused by any act or neglect by the contractor, and (3) the contractor could not have reasonably prevented the delay.[302] If the contractor can establish these criteria, the contractor is entitled to a time extension. The contractor, however, is not entitled to delay damages unless it can also show that the delay, while excusable, is also compensable.[303]

The most common example of excusable but noncompensable delay is unusually severe weather. Weather is considered as unusually severe when the weather was unforeseeable. If it was foreseeable when the contract was let, it is not unusual and therefore not excusable.[304] When severe weather is not unusual for the time and place where the work is performed, the contractor is required to anticipate severe weather and account for it in its bid.[305] Whether severe weather encountered during construction was normal and to be expected is usually determined by comparing what occurred with weather conditions in prior years.[306]

Proving unusually severe weather is just the first step in seeking a time extension. The contractor must also show that the weather affected the progress of the work and that the effect of the weather on the work could not have been avoided by taking reasonable care to protect the work.[307] In addition, the contractor is usually required to show that the weather affected work on the critical path, causing the contract completion date to be extended.[308]

As a general rule, delay caused by third-party actions that were not foreseeable and could not have been reasonably avoided is normally excusable but not compensable unless the owner has assumed responsibility for such actions in the contract. For example, an owner is not liable for delays to its contractor caused by its other contractors unless the contract imposes a duty upon the owner to coordinate and control the work of other contractors. [309] Thus, where, under the contract, the engineer completely coordinates construction and controls the work, a court may find that the agency has assumed a contractual duty to coordinate the project.[310] A similar result may be reached where the contract is ambiguous with respect to the owner's duty to coordinate the work of multi-prime contractors.[311] The rule that an owner is not vicariously liable for its various contractors applies to utility relocation work. Generally, an owner does not owe a duty to its prime contractor to ensure timely relocation of utilities while the prime is performing its contract.[312] The specifications, however, should clearly provide that any costs resulting from utility relocation, adjustment, or replacement, including delays resulting from such work, shall be at the contractor's expense, and the only remedy for such costs or delay shall be a time extension.[313] If the specification is not clear, it will not be enforced.[314] The rule that the owner is not vicariously liable for third-party actions that delay contract performance applies to labor strikes. Unavoidable strikes are excusable but not compensable.[315]

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[302] Carnegie Steel Co. v. United States, 240 U.S. 156, 165, 36 S. Ct. 342, 60 L. Ed. 576 (1916); Morrison-Knudsen Corp v. Fireman's Fund Insurance Co., 175 F.3d 1221-7 (10th Cir. 1999).

[303] Morrison-Knudsen Corp., *supra* note 300, at 1234 n.8 (to establish excusable delay, the contractor need only prove that the delay was not foreseeable, not within its control, or due to its fault; to show that the delay is also compensable, the contractor must prove that the delay was the government's fault).

[304] Annotation, *Construction Contract Provision Excusing Delay Caused By "Severe Weather,"* 85 A.L.R. 3d 1085.

[305] Arrowhead, Inc. v. Safeway Stores, Inc., 179 Mont. 510, 587 P.2d 411, 414 (1978); McDevitt & Street Co. v. Marriott Corp., 713 F. Supp. 906, 911–12 (E.D. Va. 1989).

[306] Experts usually use a 10-year base for comparison purposes, although the base may be longer or even shorter than 10 years. National Oceanic and Atmospheric Administration (NOAA) records may be used. Robert L. Rich, DOTCAB No. 1026, 82-2 BCA ¶ 15,900 (1982). Other records such as airport records may be used if they are not too far from the project site and reliable. University meteorology professors may make excellent expert witnesses on weather issues.

[307] Titan Pacific Constr. Corp., ASBCA No. 24,148, 87-1 BCA ¶ 19,626 (1987) (light rain had little effect on steel erection in constructing a bridge, but the same weather could have a serious, adverse effect on painting the bridge).

[308] CPM schedules discussed in Section Six, *infra*.

[309] Department of Transp. v. Fru-Con Constr. Corp., 206 Ga. App. 821, 426 S.E.2d 905, 906 (Ga. App. 1992) (DOT was not vicariously liable for delay caused by its various contractors); Cooke Contracting Co. v. State, 55 Mich. App. 479, 223 N.W.2d 15 (Mich. App. 1974) (contractor not entitled to recover damages for delays caused by other contractors).

[310] Department of Transp. v. APAC-Georgia, Inc., 217 Ga. App. 103, 456 S.E.2d 668 (1995). Regarding the duty to coordinate multi-prime construction contractors, *see* Goldberg, *The Owner's Duty to Coordinate Multi-Prime Construction Contractors, a Condition of Cooperations*, 28 Emory L.J. 377 (1979); United States v. Blair, 321 U.S. 730, 737, 64 S. Ct. 820, 88 L. Ed. 1039 (1944).

[311] E.C. Nolan, Inc. v. State, 58 Mich. App. 294, 227 N.W.2d 323, 327 (1975); *Liability for Delay in Completion of Contract*, 3 SUPPLEMENTARY MATERIAL, SELECTED STUDIES IN HIGHWAY LAW 1524-S4-S5.

[312] White Oak Corp. v. Department of Transp., 217 Conn. 281, 585 A.2d 1199, 1204 (1991); Cooke Contracting Co. v. State, 223 N.W.2d at 18.

[313] Highland Constr. Co. v. Stevenson, 636 P.2d 1034, 1037 (Utah 1981).

[314] Peter Kiewit & Sons Co. v. State Highway Comm'n, 184 Kan. 737, 339 P.2d 267, 273–74 (1959); HARP, *supra* note 295.

[315] Olympus Corp. v. United States, 98 F.3d 1314, 1318 (Fed. Cir. 1996). The contract may list "unavoidable strikes" as an excusable delay. PYCA Indus. v. Harrison County, 177 F.3d 351, 361 (5th Cir. 1999).

b. Excusable and Compensable Delay

Delay is often equated with money. The adage "Time is Money" may have its origin in construction work. When a project is delayed, although work is unchanged, it may be more costly to perform. For those costs to be compensable, the delay must be caused by the owner, and result from an event that is either covered by a contract clause or by the common law dealing with remedies for breach of contract.[316]

The "suspension of work" clause is one of the more significant clauses dealing with delay. The clause was adopted by the Federal Government in 1960,[317] and is currently codified in the FAR.[318] Under this clause, the contractor may be awarded compensation for "*government caused* delays of an unreasonable duration."[319] The clause disallows compensation, however, to the extent that, "other causes" attributable to the contractor "would have simultaneously suspended, delayed, or interrupted contract performance."[320] The delay, however, need not be a government-ordered work stoppage to be compensable. Any unreasonable delay attributable solely and directly to the government will be considered a constructive suspension of work under the clause.[321]

The FHWA requires a "suspension of work" clause in state highway construction contracts that receive federal-aid. The federally-mandated clause, like the clause used in direct federal contracts (FAR 52.242-14), allows the agency to suspend work without breaching the contract. The suspension does not entitle the contractor to compensation for the delay unless, "the work is suspended or delayed…for an unreasonable period of time (not originally anticipated, customary or inherent in the construction industry)…."[322] What constitutes an "unreasonable" delay is a question of fact based on the circumstances of each case.[323] Under the federal clause (FAR 52.242-14) the delay, to be compensable, must be attributable solely and directly to the government.[324] The federally-mandated clause appears to allow compensation for third-party delays, something which the federal clause does not allow. Part (iii) of the federally mandated clause provides for an adjustment (excluding profit) when the suspension was caused by "conditions beyond the control of and not the fault of the contractor, its suppliers, or subcontractors at any approved tier, and not caused by weather…."

Another notable feature is the language in Part (iv) of the federally-mandated clause. Delay damages that are excluded under another provision of the contract are not recoverable under this clause.[325] For example, delay to unchanged work caused by a DSC is not compensable under the federally-mandated DSC clause. Thus, recovery for such damages would also be excluded under the "suspension of work" clause.

To recover under the federal "suspension of work" clause, the contractor must show that (1) contract performance was delayed, (2) the delay was caused by the government, (3) the delay was for an unreasonable period of time (delay that is not unreasonable in duration is not compensable), and (4) the contractor incurred additional expense because of the delay.[326] The contractor is entitled to an equitable adjustment for both written and constructive (oral) suspended work orders under the federal clause. The concept of a "constructive suspension," however, has been rejected by one court as inconsistent with a contract requirement that an order delaying or suspending work must be in writing and signed by an authorized representative of the owner.[327]

The "changes" clause and the "differing site conditions" clause provide for time extensions in addition to compensation for changes to the work ordered by the owner, or caused by a DSC. Whether delays resulting from such changes are compensable depends upon how the contract is written. The federal clauses provide for an equitable adjustment in the contract price for an increase in the cost of performing unchanged work resulting from the change or the DSC. Most DSC clauses used by the states and the Federally-mandated DSC clause[328] bar delay damages. Those clauses provide that no contract adjustments will be allowed for any effects on unchanged work.

The possible claims that a contractor may have against an owner for delay damages vary. The claim may be based on a specific contract clause entitling the contractor to additional compensation because of owner delay. The "changes" clause is one example. The claim, in the absence of a specific, controlling contract clause,[329] may be based on breach of contract for the owner's failure to perform some express contract obligation, or for the owner's actions or inactions that hinder or delay performance. Claims based on the latter theory may result from a myriad of situations.

As a matter of law, there is an implied covenant in every contract that the parties will deal fairly and in

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[316] Jensen Constr. Co. v. Dallas County, 920 S.W.2d 761, 770 (Tex. App. 1996); Morrison-Knudsen Corp. v. Fireman's Fund Ins. Co., 175 F.3d 1221, 1232 (10th Cir. 1999).

[317] Hoel-Steffen Constr. Co. v. United States, 197 Ct. Cl. 561, 456 F.2d 760, 763 n.2 (Ct. Cl. 1972).

[318] 48 C.F.R. 52.242-14.

[319] Beauchamp Constr. Co. v. United States, 14 Ct. Cl. 430, 436–37 (1988) (emphasis original).

[320] *Id*. at 437.

[321] John A. Johnson & Sons v. United States, 180 Ct. Cl. 969, 984–85 (Ct. Cl. 1967); Mega Constr. Co. v. United States, 29 Fed. Cl. 396, 424 (1993).

[322] *Id.*

[323] Commercial Contractors, Inc. v. United States, 29 Fed. Cl. 654, 662 (1993).

[324] Beauchamp Constr. Co., *supra* note 319, at 437.

[325] See Subsection B of this Section.

[326] Melka Marine, Inc. v. United States, 38 Fed. Cl. 545, 546 (Fed. Cl. 1997).

[327] Bonacorso Constr. Corp. v. Commonwealth, 41 Mass. App. Ct. 8, 668 N.E.2d 366, 367 (1996).

[328] See Subsection B of this Section.

[329] See Subsection A of this Section.

good faith.[330] Equally basic is the principle that the owner will not hinder or delay the contractor in performing the contract.[331] This principal is almost universally accepted as a matter of general contract law.[332] An owner's failure to provide the contractor with the work site, or an owner's interference with the use of the work site, are examples of acts or omission that hinder or delay the contractor, resulting in delay that is excusable and compensable.[333]

c. Inexcusable Delay

Inexcusable delays are delays for which the contractor assumes sole responsibility. Generally, inexcusable delay occurs in one of two ways. The first category involves delays caused by the fault or negligence of the contractor. An example of this type of delay is the contractor's failure to provide sufficient resources to perform the work.[334] Another example is delay caused by the contractor's failure to plan and coordinate the work of its subcontractors.[335] The second category involves delays that result from events for which the contractor assumes responsibility. Adverse weather that is not unusually severe is an example of that kind of delay. The law requires the contractor to consider the effects of normal weather, although severe, when it calculates its bid.[336]

A contractor is not entitled to a time extension if the delay is inexcusable.[337] In addition, the contractor may be liable for damages for breach of contract if the delay caused the contract completion date to be postponed.[338] The contractor must also take reasonable steps to avoid or reduce the delay. A contractor who fails to take such steps may be liable for liquidated damages caused by the delay.

d. Concurrent Delay

Concurrent delay occurs when two or more independent events take place at the same time during contract performance, causing an activity or activities on the critical path to be delayed and resulting in a single, overall delay to project completion.[339] Where both the owner and the contractor contribute to the delay, neither can recover damages from the other, unless there is a clear apportionment of the delay attributable to each party.[340]

There is some authority that a court should approximate the delay in the nature of a jury verdict. The trial court, however, cannot guess at apportionment—delay must be apportioned in a way that is not too speculative and is supported by some evidence.[341] The modern trend is to segregate delays using a CPM analysis and allocate the delay to the party responsible for the delay.[342] But if the delays are so intertwined that they cannot be apportioned without resorting to speculation, then the general rule proscribing apportionment will apply. "The general rule is that 'where both parties contribute to the delay, neither can recover damages, unless there is in the proof a clear apportionment of the delay and expense attributable to each.'"[343]

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[330] State v. Transamerica Premier Ins. Co., 856 P.2d 766, 774 (Alaska 1993); Howard Contracting v. McDonald Constr., 71 Cal. App. 4th 38, 83 Cal. Rptr. 2d 590, 596 (Cal. App. 1998) (implied coverant to provide timely access and facilitate performance); United States v. Metric Constructors, Inc., 325 S.C. 129, 480 S.E.2d 447, 450 (S.C. 1997); J&B Steel Contractors, Inc. v. C. Iber & Sons, Inc., 162 Ill. 2d 265, 642 N.E.2d 1215, 1222 (Ill. 1994).

[331] Urban Masonary Corp. v. N&N Contractors, Inc., 676 A.2d 26, 36 (D.C. 1996); Neal & Co. v. United States, 36 Fed. Cl. 631 (Ct. Cl. 1996); SIPCO Services & Marine, Inc. v. United States, 41 Fed. Cl. 196, 216 (Fed. Cl. 1998); Lester N. Johnson Co. v. City of Spokane, 22 Wash. App. 265, 588 P.2d 1214, 1217 (1978).

[332] Maine apparently is an exception. *See* Claude Dubois Excavating, Inc. v. Town of Kittery, 634 A.2d 1299, 1302 (Me. 1993).

[333] Department of Transp. v. Arapaho Constr., 257 Ga. 299, 357 S.E.2d 593, 595 (1987); Southern Gulf Indus., Inc. v. Boca Ciega San. Dist., 238 So. 2d 458, *cert. denied*, 240 So. 2d 813 (Fla. 1970) (failure to provide right of way); Grant Constr. Co. v. Burns, 92 Idaho 408, 443 P.2d 1005, 1011 (1968).

[334] John F. Miller Co. v. George Fichera Constr. Corp., 7 Mass. App. Ct. 494, 7 Mass. App. Ct. 494, 388 N.E.2d 1201 (1979).

[335] Reichenbach v. Sage, 13 Wash. 364, 43 Pac. 354, 356 (Wash. 1896); Space Communications Etc., ASBCA No. 9805, 65-1 BCA ¶ 4726 (1965).

[336] *See* "Excusable But Noncompensable Delay," *supra* note 305.

[337] Morrison Knusen Corp. v. Fireman's Fund Ins. Co., 175 F.3d 1221, 1234 n.8 (10th Cir. 1999) (only delays that are not foreseeable, not within the contractor's control, or not due to its fault are excusable).

[338] 3 D.W. HARP, *Liability for Delay in Completion of Highway Construction Contracts*, SELECTED STUDIES IN HIGHWAY LAW 1495, 2495, 1508-9. *See generally* Annotation, *Contractual Provisions for Per Diem Payment for Delay in Performance as One for Liquidated Damages or Penalty*, 12 A.L.R. 4th 891 (1982).

[339] Mega Constr. Co. v. United States, 29 Fed. Cl. 396, 424 (Fed. Cl. 1993).

[340] William F. Klingensmith, Inc. v. United States, 731 F.2d 805, 809 (Fed. Cir. 1984); Buckley & Co. v. State, 40 N.J. Super., 289, 356 A.2d 56, 71 (N.J. 1975); L.A. Reynolds Co. v. State Highway Comm'n, 155 S.E.2d 473, 482 (N.C. 1967); Mega Constr. Co. v. United States, 29 Fed. Cl. 396, 424 (1993).

[341] Grow Constr. Co. v. State, 56 A.D. 2d 95, 391 N.Y.S.2d 726, 729, "Liability of building or construction contractor for liquidated damages for breach of time limit whose work is delayed by contractee or third persons" (App. Div. 1977); Annotation, 152 A.L.R. 1349, 1359–78 (1944).

[342] District of Columbia v. Kora & Williams Corp., 743 A. 2d 682, 691–92 (1999).

[343] Mega Constr. Co. v. United States, 29 Fed. Cl. 396, 424 (1993) (quoting William F. Klingensmith, Inc. v. United States, *supra* note 340); Blinderman Constr. Co. v. United States, 695 F.2d 552, 559 (Fed. Cir. 1982); Coath & Gass, Inc. v. United States), 101 Ct. Ct. 702, 714–15 (1944).

3. Early Completion

A contractor may claim damages for delay contending that the owner prevented it from completing the contract earlier than scheduled. As a general rule, an owner has no implied duty to aid the contractor in completing its contract prior to the completion date specified in the contract.[344] However, an owner does have a duty not to hinder or prevent the contractor from completing its contract earlier than scheduled.[345] In *Metropolitan Paving Co. v. United States*, the court said:

> While it is true that there is not an "obligation" or "duty" of defendant to aid a contractor to complete prior to completion date, from this it does not follow that defendant may hinder and prevent a contractor's early completion without incurring liability. It would seem to make little differences whether or not the parties contemplated an early completion…Where defendant is guilty of "deliberate harassment and dilatory tactics" and a contractor suffers damages as a result of such action, we think that defendant is liable.[346]

A "no-damage-for-delay" clause should bar an early completion delay claim unless the delay falls within one of the exceptions to enforceability of the clause discussed next in Part 4. For example, New York State has a provision that provides that:

> In the event the Contractor completes the work prior to the contract completion date set forth in the proposal, even if he informs the Department of his intention to complete early or submits a schedule depicting early completion, the Contractor hereby agrees to make no claim for extra costs due to delays, interferences or inefficiencies in the performance of the work….[347]

Most construction contracts require the contractor to submit a schedule showing how the project will be completed on time. Occasionally, contractors submit schedules showing a completion date earlier than required by the contract. There is a desire to accept a schedule showing early completion, since it is usually in the owner's interest to have the project completed early. This can also be a concern. By accepting a schedule showing early completion, the owner implies that the schedule is realistic. This can come back to haunt an owner when faced with an early completion delay claim. To avoid this dilemma, owners may consider including a "no-damage-for-delay" clause like the one quoted earlier. The owner may also reject schedules that are patently unreasonable.

4. No-Damage-for-Delay Clauses

In an effort to reduce claims, owners will often include "no-damage-for-delay" clauses in their construction contracts. These exculpatory clauses preclude damages for owner-caused delay, limiting the contractor's sole remedy to a time extension. Generally, such clauses are valid and enforceable.[348] A typical clause provides that a contractor's sole remedy for delay is a time extension, and that the contractor is not entitled to any compensation from the owner for any damages caused by the delay.[349] The "no-damage-for-delay" clause may be combined with a clause providing for time extensions.

> If delays are caused by acts of God, acts of Government, unavoidable strikes, extra work, or other causes or contingencies clearly beyond the control or responsibility of the Contractor, the Contractor may be entitled to additional time to perform and complete the Work…*The Contractor agrees that he shall not have or assert any [sic.] claim for, nor shall he be entitled to any additional compensation or damages on account of such delays*.[350]

The law on the validity of "no-pay-for-delay" clauses varies from state to state. All jurisdictions agree that, because such clauses are exculpatory in nature and have harsh results, they will be strictly construed.[351] Therefore, in drafting this type of clause it is important to make sure that the clause is clear and unambiguous.[352] It is also important to make sure that the clause complies with the law of the jurisdiction where the contract will be performed.

The rule that "no-damage-for-delay" clauses are enforceable is subject to the following exceptions: (1) where the delay was not contemplated by the parties to the contract; (2) where the delay was caused by fraud, gross negligence, or active interference; and (3) where the delay is so unreasonable that it is tantamount to an abandonment of the contract.[353]

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[344] United States v. Blair, 321 U.S. 730, 64 S. Ct. 820, 88 L. Ed 559 (1944).

[345] Housing Auth. of City of Texarkana v. E. W. Johnson Constr. Co., 1039, 264 Ark. 523, 573 S.W.2d 316, 323 (1978); Grow Constr. v. State, 56 A.D. 2d 95, 391 N.Y.S.2d 726, 729 (N.Y. A.D. 1969); State v. Cherry Hill Sand & Gravel Co., 51 Md. App. 29, 443 A.2d 628, 634 (1982).

[346] 163 Ct. Cl. 420, 325 F.2d 241 (1963).

[347] New York DOT Standard Specifications 102-17, art. 13 (1995).

[348] Annotation, *Validity and Construction of "No Damage Clause" with Respect to Delay in Building or Construction Contract*, 74 A.L.R. 3d 187 (1976); Beltrone Constr. Co. v. State; 256 A.D. 992, 682 N.Y.S.2d 299, 300 (1998).

[349] L & B Constr. Co. v. Ragan Enters., Inc., 267 Ga. 809, 482 S.E.2d 279, 282 (1997).

[350] PYCA Indus. v. Harrison County Waste Water Mgmt. Dist., 177 F.3d 351, 361 (5th Cir. 1999) (emphasis in original).

[351] Little Rock Wastewater Utility v. Larry Moyer Trucking, Inc., 321 Ark. 303, 902 S.W.2d 760, 765 (1995); WILLISTON ON CONTRACTS, § 602A (3d ed.). Contract provisions aimed at relieving a party from the consequences of its own faults are strictly construed. Such clauses, however, are valid as long as they comply with the rules governing the validity of contracts. 74 A.L.R. 3d 187, 200 at § 2(a) (1976). Such clauses are risk-shifting provisions in which the contractor assumes the risk of owner caused delay. Green Int'l, Inc. v. Solis, 951 S.W.2d 384, 386 (Tex. 1997).

[352] *See, e.g.*, Borden v Phillips, 752 So. 2d 69, 73 (2000).

[353] PYCA Indus. v. Harrison County, *Id*., at 364; Corinno Civetta Constr. Co. v. City of N.Y., 67 N.Y.2d 297, 493 N.E.2d 905, 907–08 502 N.Y.S.2d 681 (N.Y. 1986); United States v. Metric Constructors., Inc., *Id*. at 448; United States ex rel.

a. Delay Not Contemplated by the Parties

Under this exception, delay is not barred by the clause if the delay was not contemplated by the parties. This exception is based on the premise that if the delay was not contemplated, the contractor could not waive a delay that it had not considered in making its bid.[354] "It can hardly be presumed…that the contractor bargained away his right to bring a claim for damages resulting from delays which the parties did not contemplate at the time."[355]

Other decisions enforcing the clause have not required that the delay be contemplated.[356] Observing that unforeseen delay was the sort of delay that the clause was designed to cover, the court in *City of Houston v. R. W. Ball Const. Co.,* said:

> The clause does not limit its application to those delays and hindrances that were foreseen by the parties when they entered into the contract. Instead, it embraces all delays and hindrances which may occur during the course of the work, foreseen and unforeseen. Indeed, it is the unforeseen events which occasion the broad language of the clause since foreseeable ones could be readily provided for by specific language.[357] (citations omitted)

b. Delay Caused by Bad Faith, Gross Negligence, or Active Interference

Under this exception, damages for delays are not barred by the clause if the delay is caused by bad faith,[358] gross negligence,[359] or active interference with the contractor's efforts to perform the contract.[360] This exception is based on the principle that such conduct violates the obligation of good faith and fair dealing implicit in the contract,[361] and would allow the owner to avoid the consequences of its wrongful acts.[362]

c. Abandonment

Some courts recognize an exception to a "no-damage" clause where the delays are so unreasonable in length that they amount to an abandonment of the contract by the owner.[363] Other courts do not recognize this exception and enforce the clause,[364] although delays that are unreasonable in duration and prevent the contractor from performing the contract may justify treating the contract as ended.[365] In those jurisdictions where this exception is recognized, the question of whether the

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Evergreen Pipeline v. Merritt-Meridan Pipetime Constr. Corp., 890 F. Supp. 1213, 1221 (S.D. N.Y. 1995) (applying New York law).

[354] Corinno Civetta Constr. Co. v. City of N.Y., *Id*. at 911; United States ex rel. Evergreen Pipeline v. Merritt, 890 F. Supp. 1213 (S.D. N.Y. 1995) (applying New York state law); J & B Steel Contr. v. C. Iber & Sons, 246 Ill. App. 3d 523, 617 N.E.2d 405, 411; 187 Ill. Dec. 97 (Ill. App. 1993), *aff'd*, 162 Ill. 2d 265, 642 N.E.2d 1215, 205 Ill. Dec. 98 (1994); PYCA Indus. v. Harrison County, *Id*. at 362; Department of Transp. v. Arapaho Constr., Inc., 257 Ga. 269, 357 S.E.2d 593, 594 (1987).

[355] Corinno Civetta Constr. Co. v. City of N.Y., 67 N.Y.2d 297, 493 N.E.2d 905, 910 502 N.Y.S.2d 681 (1986).

[356] State Highway Admin. v. Greiner Eng'g Sciences, Inc., 83 Md. App. 621, 577 A.2d 363, 367–68 (Md. App. 1990); John E. Gregory and Son, Inc. v. A. Guenther & Sons Co., 148 Wis. 2d 298, 432 N.W.2d 584, 586–89 (1988); Edward E. Gillen Co. v. City of Lake Forest, 3 F.3d 192, 194 (7th Cir. 1993); Western Eng'rs v. State, 20 Utah 2d 294, 437 P.2d 216, 217–18 (1968). United States v. Metric Constructors, Inc., 325 S.C. 129, 480 S.E.2d 447, 450 (1997).

[357] 570 S.W.2d 75, 78 (Tex. Civ. App. 1978).

[358] Halloway Constr. Co. v. Department of Transp., 218 Ga. App. 243, 461 S.E.2d 257 (1995); Owen Constr. Co. v. Iowa State Dep't of Transp., 274 N.W.2d 304, 308 (1979); White Oak Corp. v. Department of Transp., 217 Conn. 281, 585 A.2d 1199, 203–04 (1991); State Highway Admin. v. Greiner Eng'g Sciences, Inc., 83 Md. App. 621, 577 A.2d 363 (1990); 74 A.L.R. 3d 187, 215–16 § 7(b). In Kalisch-Jarcho, Inc. v. City of N.Y., 58 N.Y.S.2d 397, 448 N.E.2d 413, 467 N.Y.S.2d 746 (N.Y. 1983), the court approved a jury instruction that required the contractor to prove that, "the city acted in bad faith and with deliberate intent delayed the [contractor] in the performance of its obligation." 448 N.E.2d at 418.

[359] State Highway Admin. v. Greiner Eng'g Sciences, Inc., 577 A.2d 363 (Md. App. 1990); White Oak Corp. v. Department of Transp., 585 A.2d 1199, 1203–04 (Conn. 1991); Gust K. Newberg, Inc. v. Illinois State Toll Highway Auth., 153 Ill. App. 3d 918, 506 N.E.2d 658, 665, 106 Ill. Dec. 858 (1987).

[360] Newberry Square Dev. Corp. v. Southern Landmark, Inc., 578 So. 2d 750, 752 (Fla. App. 1991); Owen Constr. Co. v. Iowa State Dep't of Transp., 274 N.W.2d 304, 307 (Iowa 1979); Christiansen Bros. v. State, 90 Wash. 2d 892, 586 P.2d 840, 844 (1978) (unconscionability defense); United States v. Metric Constructors, Inc., 480 S.E.2d 447, 449 (S.C. 1997) (adopting this exception).

[361] Lewis-Nicholson, Inc. v. United States, 213 Ct. Cl. 192, 550 F.2d 26, 32 (Ct. Cl. 1977).

[362] J & B Steel Contractors, Inc. v. C. Iber and Sons, Inc., 162 Ill. 2d 265, 642 N.E.2d 1215, 1222, 205 Ill. Dec. 98 (1994).

[363] Corinno Civetta Constr. Co. v. City of N.Y., 67 N.Y.2d 297, 493 N.E.2d 905, 912, 502 N.Y.S.2d 681 (1986) ("No-Damage" clause did not apply to delay that was so excessive and unreasonable as to be beyond the contemplation of the parties); United States v. Metric Constructors, Inc., 325 S.C. 1, 480 S.E.2d 447, 449–50 (1997); 74 A.L.R. 3d 187, 226–231, 7(i), (1976).

[364] State Highway Admin. v. Greiner Eng'g Sciences, Inc., 83 Md. App. 621, 577 A.2d 363, 370 (Md. App. 1990) (clause barred delay of over 4 years); Dickinson Co. v. Iowa State Dep't of Transp., 300 N.W.2d 112, 114–15 (Iowa 1981) (2-year delay).

[365] Gust K. Newberg, Inc. v. Illinois State Toll Auth., 153 Ill. App. 3d 918, 506 N.E.2d 658, 665, 106 Ill. Dec. 858 (1987) ("no-damage" clause enforced); Southern Gulf Utils., Inc. v. Boca Ciega San. Dist., 238 So. 2d 458 (Fla. 1970) ("no-damage" clause not enforced); Merritt-Chapman & Scott Corp. v. United States, 108 Ct. Cl. 639, 528 F.2d 1392, 1399 (Ct. Cl. 1976) ("no-damage" not enforced); Buckley & Co. v. State, 140 N. J. Super. 289, 356 A.2d 56, 61–62 (N.J. Super. 1975) ("no-damage" clause not enforced); *see also* United States v. Merritt Meridian Constr. Corp., 95 F.3d 153, 167 (2d Cir. 1996).

delay is of sufficient duration to constitute abandonment is factual.[366]

Contractors, in an effort to avoid the application of a "no-damage" clause, have argued that courts should declare such clauses void and contrary to public policy because they are unfair and inflate bids. Generally, this argument has not been successful. For example, in *Christiansen Bros., Inc. v. State,* the contractor was delayed by design errors and by other contractors performing change orders.[367] The trial court determined the amount of damages caused by the delay, but denied judgment to the contractor because of the "no-damages-for-delay" clause in the contract.[368] On appeal, the contractor argued that such clauses are contrary to public policy because they inflate bids and are unconscionable. The court held that the clause was valid, and that more forceful considerations of public policy outweighed the argument that the clause was unfair and inflated bids. In this regard, the court said:

> In a construction project of the magnitude of the WSU structure, some delays are inevitable. Costs attributable to such delays must be borne by either the owner or the contractor. By allowing the owner to preclude damages at the outset, the contractor may raise the price of his bid so as to take into account delay costs. By this method, the owner is able to know more accurately the total cost of a building at the outset and does not have to worry about "hidden costs" in the form of damages which do not arise until the project is substantially underway. The constituents of a municipality or of the state will also know the costs of a particular project prior to embarking on the construction. The contractor is protected because it knows in advance of bidding that it cannot recover for damages for delay and will bid accordingly.…[369]

Following the court's decision in *Christiansen Bros*., the Washington State Legislature enacted a statute prohibiting "no-pay-for-delay" clauses in both public and private contracts.[370] In 1990, Missouri enacted legislation prohibiting such clauses in public works contracts.[371] The prohibition does not apply to contracts between private parties.[372] The Missouri statute provides that:

> Any clause in a public works contract that purports to waive, release, or extinguish the rights of a contractor to recover costs or damages,…for delays in performing such contract, if such delay is caused in whole, or in part, by acts or omissions within the control of the contracting public entity or persons acting on behalf thereof, is against public policy and is void and unenforceable.[373]

Other states have enacted similar legislation as depicted in the following table.

[366] Hawley v. Orange County Flood Control Dist., 211 Cal. App. 2d 708, 716–17, 27 Cal. Rptr. 478 (Cal. App. 1983).

[367] 90 Wash. 2d. 872, 586 P.2d 840 (Wash. 1978).

[368] The court determined the amount of damages caused by the delay in case its decision on liability was reversed on appeal. *Id*. at 842.

[369] *Id*. at 844.

[370] WASH. REV. CODE 4.24.360 (1988).

[371] MO. REV. STAT. 34.058 (2001).

[372] Roy A. Elam Masonary, Inc. v. Fru-Con Constr. Corp., 922 S.W.2d 783, 790 (Mo. App. E.D. 1996).

[373] *Supra* note 371.

State	Applies To Public Contracts	Applies To Private Contracts	Reference
California	Yes	No	CAL. PUB. CONT. CODE § 7102 (1985)
Colorado	Yes	No	COLO. REV. STAT. § 24-91-103.5 (1991)
Louisiana	Yes	No	LA. REV. STAT. ANN. § 38.2216(H) (1990)
North Dakota	Yes	No	N.D. CENT. CODE § 9-08-02.1 (1999)
Ohio	Yes	Yes	OHIO CODE ANN. § 4113.62 (C)(1) (1998)
Oregon	Yes	No	OR. REV. STAT. § 279.063 (1985)
Virginia	Yes	No	VA. CODE ANN. § 2.2-4335 (A) (1991)

Despite numerous cases to the contrary, these statutes are based on the premise that "no-pay-for-delay" clauses violate public policy. Those who advocate this view argue that such clauses are unfair. Are such clauses unfair? The language used by the Supreme Court in *Wells Bros. Co. v. United States* is instructive.

> Men who take million-dollar contracts for government buildings are neither unsophisticated nor careless. Inexperience and inattention are more likely to be found in other parties to such contracts than the contractors, and the presumption is obvious and strong that the men signing such a contract as we have here protected themselves against such delays as are complained of by the higher price exacted for the work.[374]

5. Subcontractor Delay

A "no-pay-for-delay" clause may be expressly incorporated in a subcontract, or it may be incorporated by reference through the subcontractor's "flow-down" clause.[375] Whatever its form, the clause is subject to the same rules and exceptions that apply to such clauses in contracts between an owner and a general contractor.[376] However, the clause will be enforced between the general contractor and its subcontractor so long as the clause meets the ordinary rules governing contracts and does not fall within one of the exceptions that prevent enforceability. For example, in *L& B Construction Co. v. Ragan Enterprises*, a clause in the subcontract provided that, "[s]hould subcontractor be delayed in the work by contractor then contractor shall owe subcontractor therefor only an extension of time for completion equal to the delay…."[377] The use of the word "only" limited the subcontractor's remedy to an extension of time. Damages for the delay were not allowed.

Clauses precluding subcontractor claims become important to owners when the prime contractor attempts to pass the claim along to the owner for delays that the owner caused. If the clause bars the subcontractor's claim against the contractor for delay,[378] the claim cannot be passed through to the owner even though the owner caused the delay.[379] The clause may also extend to and protect the owner's architect/engineer as a third-party beneficiary of the owner's construction contract with the contractor.[380] The limitations on pass-through claims and the *Severin* doctrine are discussed in the next section.

6. Notice of Delay

Most construction contracts contain provisions requiring the contractor to notify the owner, in writing, when the contractor claims that it has been delayed and seeks a time extension, or additional compensation for the delay.[381] Notice serves several purposes. It allows the owner to verify the contractor's claim and document the contractor's costs. It also allows the

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[374] 254 U.S. 83, 84, 41 S. Ct. 34, 65 L. Ed. 148 (1920).

[375] Pete Scalamandre & Sons v. Village Dock, 187 A.D. 2d 496, 589 N.Y.S.2d 191 (1992).

[376] Port Chester Elec. Constr. Corp. v. HBE Corp., 894 F.2d 47, 49 (2nd Cir. 1990).

[377] 267 Ga. 809, 482 S.E.2d 279, 280 (1997).

[378] Green Int'l, Inc. v. Solis, 951 S.W.2d 384, 387 (Tex. 1997).

[379] Frank Briscoe Co. v. County of Clark, 772 F. Supp. 513, 516–17 (D. Nev. 1991).

[380] Bates & Rogers Constr. Corp. v. Greeley & Hanseon, 109 Ill. 2d 225, 486 N.E.2d 902, 906, 693 Ill. Dec. 369 (Ill. 1985).

[381] Under the Severin doctrine, the contractor must be liable to the subcontractor in order to pass the subcontractor's claim through to the owner. Severin v. United States, 99 Ct. Cl. 435 (1943).

owner to explore alternatives such as termination for convenience if the delay could be extensive.[382]

There is ample authority that failure to provide written notice, as required by the contract, will bar the claim.[383] There is, however, authority to the contrary. These cases hold that written notice is not required when the owner had actual notice of the delay,[384] or the government was not prejudiced or disadvantaged by lack of notice.[385] These views focus more on the purpose of the clause than on a literal and strict construction of its language.[386]

Whether oral notice was given, or whether the owner knew about the delay is often disputed. Requiring strict compliance with the notice requirements of the contract eliminates those types of disputes. This is of particular importance when the issue of whether oral notice was given, or the owner knew about the delay, is being litigated years after the project has been completed. These are questions of fact.[387] Written notice requirements, like other contract provisions, can be waived.[388] This may occur, for example, by granting time extensions that have not been requested by the contractor and by not assessing liquidated damages.[389]

7. Acceleration

Acceleration in construction parlance means to speed up work through the use of increased labor, additional equipment, or other contractor resources. Acceleration may be used to make up work that is behind schedule or to complete the project earlier than scheduled. There are two types of acceleration: actual and constructive. Both types are based on the changes clause.[390]

Actual acceleration occurs when the owner issues a formal change order directing the contractor to speed up the work.[391] Constructive acceleration, as the name implies, does not involve a formal change order. Generally, it occurs when a contractor encounters an excusable delay,[392] and the owner refuses to grant an extension of time for the delay and directs the contractor to meet the original contract completion date.[393]

The vast majority of cases recognizing constructive acceleration are federal decisions.[394] There are, however, some state court decisions where constructive acceleration has been recognized as a theory of entitlement in public works contracts[395] and private contracts.[396] In the absence of precedent, state courts may look to federal law for the elements necessary to establish constructive acceleration.[397]

To prove construction acceleration under federal law, five elements must be established.

> First, there must be an excusable delay. Second, the Government must have knowledge of the delay. Third, the Government must act in a manner which reasonably can be construed as an order to accelerate. Fourth, the contractor must give notice to the Government that the "order" amounts to a constructive change. Fifth, the contractor must actually accelerate and thereby incur added costs.[398]

An order to accelerate, to be effective, need not be couched in terms of a specific command to speed up the

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[382] It may be prudent for the owner to terminate the contract for convenience and pay an "equitable adjustment" under the termination for convenience clause rather than pay damages for a prolonged delay.

[383] *See supra* note 219 and accompanying text.

[384] *Id.*

[385] Hoel-Steffen Constr. Co. v. United States, 197 Ct. Cl. 561, 456 F.2d 760, 768 (Ct. Cl. 1972); APAC-Georgia, Inc. v. Department of Transp., 221 Ga. App. 604, 472 S.E.2d 97, 101 (1996) (any recovery limited to desgn errors); New Pueblo Constrs. v. State, 144 Ariz. 95, 696 P.2d 185, 193 (1985).

[386] Fru-Con Constr. Corp. v. United States, 43 Fed. Cl. 306, 324–25 (Fed. Cl. 1999).

[387] New Pueblo Constrs. v. State, *supra* note 385; State v. Eastwind, Inc., 851 P.2d 1348, 1351 (Alaska 1993).

[388] Reif v. Smith, 319 N.W.2d 815, 817 (S.D. 1982).

[389] APAC-Georgia, Inc. v. Department of Transp., *supra* note 389, at 99–100.

[390] In the absence of a changes clause authorizing the owner to order acceleration, the contractor is not contractually obligated to accelerate. If the contractor agrees to accelerate, the acceleration may be authorized by a supplemental agreement, which is in effect a new contract, not a change to the existing contract. See Subsection A, "Changes," *supra.*

[391] For example, the Federal Changes Clause in 48 C.F.R. pt. 1, 52.243-4 authorized the contracting officer to make changes, including: "(4) directing acceleration in the performance of the work."

[392] Norair Eng'g Corp. v. United States, 229 Ct. Cl. 160, 666 F.2d 546, 548 (Ct. Cl. 1981) (The delay may be compensable or noncompensable, but in either case the delay must be excusable).

[393] Fru-Constr. Corp. v. United States, 43 Fed. Cl. 306, 328 (Fed. Cl. 1999).

[394] *Id.;* Norair Eng'g Corp. v. United States, *supra* note 392; Tombigee Constructors v. United States, 190 Ct. Cl. 615, 420 F.2d 1037, 1046 (Ct. Cl. 1970); McNutt Constr. Co., 85-3 BCA ¶ 18,397, at 92,279 (1985); Envirotech Corp. v. Tenn. Valley Auth., 715 F. Supp. 190, 192 (W.D. Ky. 1988).

[395] Department of Transp. v. Anjo Constr. Co., 666 A.2d 753, 757 (Pa. Commw. 1995); Siefford v. Housing Auth. of City of Humbolt, 192 Neb. 643, 223 N.W.2d 816, 820 (1974) ("no-damage" clause barred recovery for acceleration damages); Global Constr., Inc. v. Mo. Highway and Transp. Comm'n, 963 S.W.2d 340, 343 (Mo. App. 1997).

[396] S. Leo Harmonay, Inc. v. Binks Mfg. Co., 597 F. Supp. 1014, 1026 (S.D. N.Y. 1984) (general contractor liable to subcontractor for acceleration damages—court applied New York law); Johnson Controls, Inc. v. National Valve & Mfg. Co., 569 F. Supp. 758, 761 (E.D. Okla. 1983) (constructive acceleration claim by subcontractor against general contractor denied because of subcontractor's failure to give notice that it considered a directive from the general contractor to stay on schedule an order to accelerate the work).

[397] For example, the court in Department of Transp. v. Anjo Constr. Co., 395, *supra,* followed Norair Eng'g Corp. v. United States, 229 Ct. Cl. 160, 666 F.2d 546 (Ct. Cl. 1981).

[398] Fru-Con Constr. Corp. v. United States, *supra* note 394, at 328.

work. In *Department of Transportation v. Anjo Construction Co.*, the court observed that

> An order to accelerate need not be expressed as a specific command by the government unit, but may be constructive. A constructive acceleration order may exist, when the government unit merely asks the contractor to accelerate or when the government expresses concern about lagging progress. Whether a constructive acceleration order was given to a contractor is a question of law. (citations omitted)[399]

To guard against constructive acceleration claims, an owner may wish to include a clause in its construction contracts prohibiting such claims unless the order to accelerate is in writing and signed by the engineer, or another person authorized to sign change orders. An example of this type of clause is the New York State Department of Transportation Standard Provision governing acceleration claims:

> The Contractor may not maintain a dispute for costs associated with acceleration of the work unless the Department has given prior express written direction by the Engineer to the Contractor to accelerate its effort. The Contractor shall always have the basic obligation to complete the work in the time frames set forth in the contract. For purposes of this Subsection, lack of express written direction on the part of the Department shall never be construed as assent.[400]

This type of clause, absent a waiver by the owner, should bar constructive acceleration claims in those jurisdictions where written change order requirements are strictly enforced. Also, clauses requiring the contractor to give notice of a constructive acceleration claim may bar the claim if notice is not given.[401] However, as with any contractual provision, notice requirements may be waived by the party attempting to enforce them.[402] Also, conduct by the owner that amounts to overreaching or bad faith may equitably estop the owner from asserting such clauses as a defense.[403]

A contractor may recover its acceleration costs even if it does not complete the project on time. All that is required is a reasonable and diligent effort to make up the delay.[404] There is also authority that a contractor may recover damages when the owner prevents the contractor from completing the contract earlier than scheduled.[405] Acceleration costs may include added labor costs, including premium pay for overtime and weekend work, lost labor productivity due to overmanning, impacts on subcontractors, stacking of trades, and additional equipment. These costs are usually proved by expert witnesses using CPM scheduling methods. Costs are discussed in more detail in Section Six.

8. Owner's Remedies for Delay

a. Liquidated Damages

A failure to complete a contract on time is a breach of contract unless the delay extending the contract completion date is excusable. The owner, as the injured party, is entitled to damages for the breach. Damages for late completion are usually addressed by including a liquidated damages clause in the contract. The clause authorizes the owner to assess a specified sum of money for each day that the contract completion date is delayed.[406]

Historically, the law did not favor liquidated damages. Clauses providing for liquidated damages were often suspect, with some courts viewing them as more penal in nature than compensatory.[407] When viewed in this matter, the clause was regarded as a penalty because it was being used *in terrorem* to compel performance rather than to quantify damages for delay in completing the contract, and it was invalidated.[408] The modern view favors liquidated damages.[409] As a general rule, courts will enforce a liquidated damages clause

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[399] Anjo Constr., *supra* note 397, at 757 (citing Norair Eng'g Corp. v. United States, 666 F.2d 546 (Ct. Cl. 1981)).

[400] New York DOT Standard Specification § 105-148 (1995).

[401] Johnson Controls, Inc. v. National Valve & Mfg. Co., *supra* note 396.

[402] APAC-Georgia, Inc. v. Department of Transp., *supra* note 389.

[403] Bignold v. King County, 54 Wash. 2d 817, 399 P.2d 611, 615–16 (1965); Kohn v. City of Boulder, 919 P.2d 822, 824–25 (Colo. App. 1995).

[404] Appeal of Monterey Mechnical Co., ASBCA No. 51450, 2001 – 1B.C.A. ¶ 31,380 (2001).

[405] Grow Constr. Co. v. State, 56 A.D. 2d 95, 391 N.Y.S.2d 726, 729 (1977).

[406] Usually the sum is set forth in the special provision of the contract. For example, the California DOT Standard Specification 8-1-07 provides that, "the Contractor will pay to the State of California, the sum set forth in the special provisions for each and every calendar day's delay in finishing the work in excess of the number of working days prescribed…." Instead of a specific sum, the clause may include a formula for calculating liquidated damages. For example, WSDOT Standard Specification 1-08.9 contains the following formula:

LIQUIDATED DAMAGES FORMULA

$$LD = \frac{0.15C}{T}$$

where: LD = liquidated damages per working day (rounded to the nearest dollar)
C = original contract amount
T = original time for physical completion

[407] *Contractual Provisions for Per Diem Payments for Delay in Performance as One for Liquidated Damages or Penalty*, 12 A.L.R. 4th 891 (1982); DARRELL W. HARP, 3 *Liability for Delay in Completion of Highway Construction Contract*, SELECTED STUDIES IN HIGHWAY LAW 1495, 1510–11.

[408] S. L. Rowland Constr. Co. v Beall Pipe & Tank Co., 14 Wash. App. 297, 540 P.2d 912, 921–22 (1975).

[409] RESTATEMENT OF CONTRACTS 2d, § 356 (1979); 12 A.L.R. 4th 891 (1982).

unless the party challenging the clause can prove that the clause is unenforceable.[410]

An attack on a liquidated damages clause may be made on several fronts. The most common line of attack is that the amount specified as liquidated damages is so disproportionate to the anticipated loss that it is, in fact, a penalty.[411] The second but less common line of attack is that actual damages can be accurately quantified. This argument is based on the premise that liquidated damages are permissible only when it would be impracticable or extremely difficult to determine actual damages accurately.[412] A third line of attack is that liquidated damages should not be enforced where no actual damages were sustained because of the delay.[413] Under the Restatement of Contracts rule, liquidated damages cannot be recovered if there is no loss.[414] This, however, is not the majority rule. The view taken by most courts is that liquidated damages will be enforced even though no actual damages were suffered.[415] This view is based upon the premise that the reasonableness of the amount specified as liquidated damages is determined as of the date the contract was made, not the date that the breach occurred. In *Gaines v. Jones*, the court said:

> It is not unfair to hold the contractor performing the work to such agreement if by reason of later developments damages prove to be less or non-existent. Each party by entering into such contractual provision took a calculated risk and is bound by reasonable contractual provisions pertaining to liquidated damages.[416]

If the liquidated amount is determined to be a penalty, the clause will be stricken and actual damages may be recovered. The court cannot reform the contract by substituting an amount of liquidated damages that the court believes to be reasonable, but it can determine the actual damages incurred as a result of the delay.[417] An owner's recovery for delay is limited to the liquidated amount even though its actual damages are greater.[418] However, a liquidated damages clause does not preclude recovery for actual damages that are not covered by the clause,[419] or where the right to recover actual damages is reserved in the contract. In *VanKirk v. Green Construction Co.*, the state was entitled to liquidated damages for the contractor's delay and to indemnification from the contractor for damages that the state paid to another contractor because of the delay.[420]

Occasionally, construction contracts will contain milestone completion dates.[421] Failure to meet these dates is a breach of contract. Liquidated damages are assessed unless it is clear that when the contract was made that no damages could possibly result from a breach. If so, the clause serves no compensable purpose; its only function is to compel performance by "an exaction of punishment for a breach which could produce no possible damage…."[422]

The fact that the clause induces performance does not invalidate liquidated damages, if it were reasonable to expect that delays in contract completion would result in damages to the owner. A liquidated damage clause is not invalid because it also has the effect of encouraging prompt performance.[423] In *Robinson v. United States*, the court said that a provision in a construction contract "giving liquidated damages for each day's delay is an appropriate means of inducing due performance, or of giving compensation, in case of failure to perform…."[424]

Where both the contractor and the owner contribute to the delay, and neither can establish the extent to which the other is responsible for the delay, neither can recover delay damages from the other.[425] This is simply the rule of apportionment that was discussed earlier. The authorities also differ regarding the enforcement of a liquidated damage provision for delay that accrues after the contractor abandons the contract. The majority rule is that only actual delay damages can be recovered after the contract has been abandoned.[426] This in-

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[410] APAC-Carolina v. Greensboro-High Point, Airport Auth., 110 N.C. App. 664 431 S.E.2d 508, 516 (N.C. App. 1993); Reliance Ins. Co. v. Utah Dep't of Transp., 858 P.2d 1363 (Utah 1993).

[411] RESTATEMENT OF CONTRACTS 2d, § 356 (1979). *See also* State Highway Dep't v. Milton Constr. Co., 586 So. 2d 872 (Ala. 1991) (disincentive payment of $5,000.00 for each day the contract overran in addition to liquidated damages held to be an unenforceable penalty).

[412] 12 A.L.R. 4th 891; New Pueblo Constructors v. State, 144 Ariz. 95, 696 P.2d 185 (Ariz. 1985).

[413] RESTATEMENT OF CONTRACTS 2d, § 339, 356 (1979).

[414] Lind Bldg. Corp. v. Pacific Bellevue Dev., 55 Wash. App. 70, 776 P.2d 977, 983 (Wash. App. 1989).

[415] 34 A.L.R. 1336 (1925) "Right to amount stipulated in contract for breach, where it appears there were no actual damages, or there was no proof of such damage," (1982); *see* Wallace Real Estate Inv., Inc. v. Groves, 881 P.2d 1010, 1017 (Wash. 1994).

[416] 486 F.2d 39, 45 (8th Cir. 1973) (quoting Southwest Eng'g Co. v. United States, 341 F.2d 998, 1002–03 (8th Cir. 1965)).

[417] Kingston Contractors, Inc. v. Washington Metro. Area Transit Auth., 930 F. Supp. 651, 656 (D.D.C. 1996).

[418] Brower Co. v. Garrison, 2 Wash. App. 424, 468 P.2d 469 (Wash. App. 1970).

[419] Meyer v. Hansen, 373 N.W.2d 392, 395–96 (N.D. 1985).

[420] 195 W. Va. 714, 466 S.E.2d 782, 787 (1995).

[421] Milestone dates refer to dates when certain portions of the project are required to be completed; for example, in opening the highway to traffic. Department of Transp. v. Anjo Constr. Co., 666 A.2d 753, 756 (Pa. Commw. 1995).

[422] Priebe & Sons, Inc. v. United States, 332 U.S. 407, 413, 68 S. Ct. 123, 92 L. Ed 32 (1947); DJ Mfg. Corp. v. United States, 86 F.3d 1130, 1136 (Fed. Cir. 1996).

[423] DJ Mfg. Corp., 86 F.3d at 1135.

[424] 261 U.S. 486, 488, 43 S. Ct. 420, 67 L. Ed. 760 (1923).

[425] Buckley v. State, 140 N. J. Super. 289, 356 A.2d 56, 69, 71 (1975); *but see* Nomeollini Constr. Co. v. State of Cal. ex rel. Dep't of Water Resources, 19 Cal. App. 3d 240, 245–46, 96 Cal. Rptr. 682 (1971) (court said that apportioning delay was an "uncomplicated fact finding process").

[426] Six Companies v. Joint Highway Dist., 311 U.S. 180, 185, 61 S. Ct. 186, 85 L. Ed 114 (1940).

cludes damages for the delay in completing the contract.[427] The majority rule is based on the notion that abandonment of the contract constitutes abandonment of the liquidated damages clause, limiting the owner to those damages that it can actually prove. The minority view holds that the abandonment should not deprive the owner of the benefit of the liquidated damage clause.[428]

Liquidated damages are not assessed after substantial completion of the project.[429] Once substantial completion is achieved, further overruns in contract time are assessed on the basis of direct engineering costs until actual physical completion has occurred.[430] Problems occur when the contractor is dilatory in completing punch list work, and the amount assessed for direct engineering costs is not enough to be an incentive to complete the work promptly. If the situation becomes too bad, default termination may be an option, coupled with recovery for costs incurred by the owner in completing punch list items.[431]

Liquidated damages save the time and expense of attempting to prove delay damages. This may have particular significance when the specified sum includes damages for inconveniences to the state and the traveling public.[432] Liquidated damages are generally viewed with favor by the courts and will be enforced if they are reasonable. All an owner has to do, to enforce the clause, is introduce the clause in evidence and prove the number of days of delay that are inexcusable. The burden is on the contractor, as the defaulting party, to prove that the clause is not enforceable.[433] There are caveats, however. Care should be taken in drafting liquidated damage clauses for particular projects. Liquidated damages that are too high may be unenforceable and discourage other contractors from bidding, thus reducing competition. Worse yet, those who do bid may include a contingency in their bids to cover the assessment of liquidated damages. When liquidated damages are too low, some contractors may decide to accept liquidated damage assessment rather than take more expensive steps to avoid delay.

Historically, liquidated damages assessed by state highway departments were equated with increased engineering and administration costs. The AASHTO *Guide Specifications for Highway Construction* included tables representing an estimate of the nationwide average of construction engineering (CE) costs. State agencies were left on their own in setting rates for projects. For years, the FHWA regulations referred to, and included, these tables for guidance. [434] Currently, FHWA regulations allow liquidated damage sums to include daily CE costs and such other additional amounts as liquidated damages in each contract, "to cover other anticipated costs of project related delays or inconveniences to the SHA or the public. Costs resulting from winter shutdown, retaining detours for an extended time, additional demurrage, or similar costs as well as road user delay costs may be included."[435]

The modern view is that liquidated damages should not only reflect daily CE costs applicable to the project, but also the more intangible, but equally real, impacts on the traveling public caused by the delay in completing an urgently needed public facility. The liquidated damage rates may be project specific, or they may be in the form of a table or schedule developed for a range of projects based on project costs or project types.[436]

b. Termination for Default

Construction contracts usually contain a termination for default clause. The clause specifies events that constitute contractor default. One of the events specified in the clause is the contractor's inability to meet the contract schedule.[437] The default provision allows the owner to terminate the contract when it becomes reasonably apparent that the contractor's lack of progress has reached a point where it is unlikely that the contractor can complete the contract on time.[438] When this occurs,

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[427] L. Romano Co. v. Skagit County, 148 Wash. 367, 268 Pac. 898, 901 (Wash. 1928).

[428] Pacific Employers Ins. Co. v. City of Berkeley, 158 Cal. App. 3d 145, 155–56, 204, Cal. Rptr. 387 (1984).

[429] Phillips v. Ben Hogan Co., 267 Ark. 1104, 594 S.W.2d 39, 49 (1980).

[430] Olympic Painting Contractors, ASBCA No. 15,773, 72-2, BCA ¶ 9549 (1972). Substantial completion has been defined as

> [w]hen the contract work has progressed to the extent that the Contracting Agency has full and unrestricted use and benefit of the facilities, both from the operational and safety standpoint, and only minor incidental work, replacement of temporary substitute facilities, or correction or repair remains to physically complete the total contract…"

Washington State Standard Specification 1-08.9 (2000).

[431] F&D Constr. Co., ASBCA No. 41,441, 91-1 BCA ¶ 23, 983(1991) ("If a contractor refused to complete punch list work or the corrections are unduly prolonged, the contractor may be deemed to have abandoned the contract.").

[432] The state transportation agencies may, with FHWA concurrence (for federally-aided projects), include amounts as liquidated damages to cover user benefit losses caused by delay. 23 C.F.R. ch. 1, 635.127(c).

[433] DJ Mfg. Corp. v. United States, 86 F.3d 1130, 1134 (Fed. Cir. 1996).

[434] O.F. FINCH, *Legal Implications in the Use of Penalty and Bonus Provisions of Highway Construction Contracts: The Use of Incentive and Disincentive Clauses as Liquidated Damages for Quality Control and for Early Completion*, SELECTED STUDIES IN HIGHWAY LAW 1582 - N63.

[435] 23 C.F.R. ch. 1 § 635.127(c).

[436] 23 C.F.R. ch. 1 § 635.127(a). Subsection (f) of the regulation also authorizes the use of incentive provisions for early completion.

[437] McDonnell Douglas Corp. v. United States, 182 F.3d 1319, 1328 (Fed. Cir. 1999) (contractor's ability to meet the contract schedule is a fundamental obligation of a government contract).

[438] The owner's determination that the contractor is in default may be reviewed under one of two standards. The majority rule is that the owner determination should be based on whether a reasonable person in the owner's position would be satisfied with the contractor's performance or believe that the

the owner may demand a revised progress schedule showing how the contractor intends to complete the project on schedule.[439]

An owner has several options under the default clause when the contractor defaults. The owner may tender the work to the performance bond surety to complete the project. If the surety "accepts the tender," it will retain a completion contractor and enter into a takeover agreement with the owner.[440] If the surety refuses the tender, the owner can sue the surety and the defaulting contractor for increased costs in completing the project, including damages for late completion.[441]

There are limitations on the owner's power to terminate. For example, the owner may waive the contractor's failure to complete the work on time by establishing a new completion date and by not assessing liquidated damages.[442] Another example is the effect of a Chapter 11 bankruptcy filing while the contract is ongoing. An unfinished contract is an executory contract, and as such, an asset of the debtor's (contractor's) estate. The owner must obtain an order from the bankruptcy court granting relief from the automatic stay imposed when the bankruptcy petition is filed. A termination, in violation of the automatic stay, is null and void.[443] A third limitation is substantial completion. Once substantial completion is achieved, the contract cannot be terminated for default.[444] Substantial completion occurs when the agency has full and unrestricted use of the facility, both from an operational and safety standpoint.[445]

The burden of proving that the contractor could not complete on time rests with the owner.[446] A wrongful default termination is a breach of contract entitling the contractor to damages, unless the contract contains a termination for convenience clause.[447] When the contract contains a termination for convenience clause (most contracts do), a wrongful termination is automatically converted to a termination for the owner's convenience. This eliminates a breach of contract claim, including recovery for lost profits on uncompleted work, and restricts the contractor's recovery to the remedy provided in the clause.[448]

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work could not be timely completed. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 383 (1980). The other standard is whether the owner's determination that the contractor would not complete on time was made in good faith. Action Eng'g. v. Martin Marietta Alum., 670 F.2d. 456, 458–60 (3d Cir. 1982) (applying California law).

[439] Construction contracts usually contain a provision requiring a supplemental progress schedule when the contractor is behind schedule. Refusal to provide a supplemental schedule may be further proof of the contractor's unwillingness or inability to complete the project on time.

[440] La. Ins. Guaranty Ass'n v. Rapides Parish Police Jury, 182 F.3d 326 (5th Cir. 1999).

[441] *See* discussion in Part A of the preceding Subsection.

[442] APAC-Georgia, Inc. v. Department of Transp., 221 Ga. App. 604, 472 S.E.2d 97, 100 (1996); Sun Cal, Inc. v. United States, 21 Cl. Ct. 31, 38–40 (1990) (waiver of liquidated damages and negotiation of new liquidated damages clause, even without execution of new agreement, waived right to terminate).

[443] 11 U.S.C. § 362; Harris Products, Inc., ASBCA 30426, 87-2 BCA ¶ 19,807 (1987).

[444] Olson Plumbing & Heating Co. v. United States, 602 F.2d 950 (Ct. Cl. 1979); *but see* note 431 concerning contractor's refusal to complete punch list work.

[445] *See* note 430 *supra*.

[446] Lisbon Contractors, Inc. v. United States, 828 F.2d 759, 763 (Fed. Cir. 1987).

[447] Morrison Knudson Corp. v. Fireman's Fund Ins. Co., 175 F.3d 1221 (10th Cir. 1999).

[448] District of Columbia v. Organization for Envtl. Growth, 700 A.2d 185, 199–200 (D.C. App. 1997); A.J. Temple Marble & Tile, Inc. v. Long Island R.R., 172 Misc. 2d 442, 659 N.Y.S.2d 412, 414 (N.Y. Sup. 1997) (contractor terminated for convenience on a fixed-price contract could not receive more than the contract price.); *see also* Best Form Fabricators, Inc. v. United States, 38 Fed. Cl. 627, 637 (Ct. Cl. 1997).