**Construction and Design Law: Managing the Network of Interdependent Relationships**

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**Lesson 8: Concealed Conditions and Other Anticipated Circumstances**

Lesson 7 addressed changes in plans or in the scope of work where the parties agree to a change order, where the owner issues a unilateral directive for a change, or under circumstances giving rise to a constructive change. As Lesson 7 briefly noted, however, unanticipated circumstances may also trigger the contractor’s right to a pricing or schedule adjustment (or both). To address this situation, construction contracts often include a special provision, commonly called a “differing site conditions” (DSC) clause, concerning concealed conditions or changed circumstances. See Phillip L. Bruner & Patrick J. O’Connor, Jr., 4A *Bruner & O’Connor on Construction Law*, §§ 14:1-14:59 (Westlaw Aug. 2023). Even in the absence of such a provision, when contractors encounter unanticipated circumstances during construction, they may seek pricing and schedule adjustments if they can establish that the owner either misrepresented the relevant conditions or knew of adverse conditions that the contractor could not reasonably discover.

Read the following authorities relating to contractor claims based on concealed conditions and other unanticipated circumstances:

* *I Know What I Know-Really Reminds Me of Money*, 43 Constr. Law., Spring 2024, at 9, by Christian C. Trevino and Robert J. MacPherson.

The authors explain how the common law viewed concealed conditions, and they thoroughly explore the development and application of DSC clauses. In the interest of economic efficiency, contracting parties routinely use a DSC clause to transfer to the owner certain risks of concealed conditions or unanticipated circumstances that common law contracting principles would otherwise allocate to a contractor who has agreed to perform the work for a fixed price (or subject to a guaranteed maximum price) or on a specified completion schedule. As this article explains, DSC clauses traditionally provide for equitable adjustments in two distinct categories—Type I claims (based on deviations from conditions that the contract documents indicate) and Type II claims (unknown and unusual physical conditions). In addition to these traditional bases, the authors explain that contracts regularly include separate provisions concerning a third category, dealing with unanticipated hazardous conditions. The article also provides a comparative analysis of how the law in other countries address these situations, along with an overview of the most common versions of DSC clauses in standard contracts. Finally, it briefly mentions misrepresentation and concealment theories that may support contractor claims not based on DSC clauses. (The authors’ abbreviated discussion of alternative methods for calculating the amount a contractor may recover for concealed conditions or other unanticipated circumstances broaches the much broader issue of damages, which later lessons cover.)

* Section 3:57 in volume 1A of *Bruner & O’Connor on Construction Law* (Westlaw Aug. 2023), by Phillip L. Bruner & Patrick J. O’Connor, Jr.

This section introduces the superior knowledge doctrine and the principle that an owner (especially a public owner) may have a duty to disclose to the contractor material information under certain circumstances.

* *U.S. v. Atlantic Dredging Co.*, 253 U.S. 1 (1920).

Be sure to read the court’s synopsis carefully because it, rather than the opinion itself, sets forth the relevant facts. The case arose at a time when federal construction contracts did not routinely include a DSC clause. The U.S. Supreme Court, reasoning from the basic principle of the Spearin Doctrine, recognized a contractor’s right to recover damages attributable to the owner’s misrepresentations and failure to disclose materially relevant information. These theories, while relatively difficult to prove, remain viable.

* *L.G. Everist, Inc. v. U.S.*, 231 Ct. Cl. 1013 (Ct. Cl. 1982).

Among other things, this case applies the “superior knowledge” doctrine. As the case shows, while superior knowledge, misrepresentation, and a DSC clause each can serve independently as the basis for a remedy when a contractor encounters unanticipated circumstances, each one imposes a relatively demanding standard of proof.

For Review and Discussion

1. Experience with concealed conditions and other unanticipated circumstances has convinced the federal government, many other public agencies, and the leading industry organizations to include DSC clauses in construction contracts. Can you think of circumstances in which you might counsel an owner not to accept a DSC clause?
2. How does the superior knowledge doctrine differ from misrepresentation theory as a basis for a contractor to recover damages attributable to concealed conditions?
3. Are there sound policy reasons for limiting the superior knowledge doctrine to public projects?