Changes to Differing Site Conditions Clause in VDOT Construction Contracts Specifications

by James Germano

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Contractors performing work on public construction projects in Virginia should pay close attention to the 2016 changes to the Differing Site Conditions (DSC) clause in the contract specifications issued by the Virginia Department of Transportation (the VDOT Specifications). While preserving the requirement for notice of DSCs, the DSC clause has been modified to add an enforcement mechanism such that no adjustment will be made to the contract price to the benefit of the contractor unless that contractor has provided the required written notice. Thus, contractors will want to be vigilant and timely in providing notice of a DSC claim, or they may be precluded from seeking a contract adjustment.

The VDOT Specifications "are standard for all contracts awarded by the Commonwealth Transportation Board or the Commissioner."[1] Therefore, the VDOT Specifications are part of the contract for public construction projects, and contractors performing work on public projects must abide by the terms in the VDOT Specifications, including requirements for DSCs.

There are generally two types of DSCs, which include: conditions that materially differ from those described in the contract documents (a "Type I" DSC); and conditions of an unusual nature that materially differ "from those ordinarily encountered and generally recognized as inherent" in the type of work required. The general rationale for DSC clauses is that they act to shift the risk (and the cost) from the contractor to the owner of encountering a materially differing condition that could potentially change the scope of work or contract price. DSC clauses promote the policy goals of allowing contractors to bid on projects in a more uniform manner, without having to include speculative markup for unforeseeable conditions, and thereby increasing the opportunity for competitive

pricing for the benefit of the owner. An owner can, in theory, evaluate those bids for a project in a more uniform manner and presume that all contractors have included the same factors in their respective bids. To ensure that the risk remains with owners, however, DSC clauses typically require contractors to notify the owner when a DSC is encountered so the parties can evaluate how to proceed and whether an equitable adjustment is merited with respect to the contract price, contract time, or the scope of work.

These principles remain true on a VDOT project. Specifically, when a contractor on a VDOT job encounters either a Type I or Type II DSC, the VDOT Specifications require that the contractor "promptly notify the [e]ngineer in writing of the specific differing conditions before the site is disturbed further and before the affected work is performed." This preliminary requirement was not changed materially in the 2016 version of the VDOT Specifications.

In 2016, however, VDOT modified the DSC clause to add: "No adjustment that results in a benefit to the [c]ontractor will be allowed unless the [c]ontractor has provided the required written notice."[2] This provision applies to both Type I and Type II DSCs and the original language requiring contractors to provide written notice remains. This new language arguably provides a tool to the owner to enforce the notice requirement by barring a DSC claim should the contractor fail to provide the requisite notice. Before this language was added, a contractor was required to give notice, but the VDOT Specifications did not address the effect of a failure to provide such notice.

Before 2016, the DSC clause in the VDOT Specifications tracked the language of the parallel Federal Acquisition Regulation (FAR) section.[3] Federal case law interpreting the parallel FAR section on DSCs clarified that, depending upon the circumstances, written notice may not always be required, even though the FAR also explicitly requires contractors to provide written notice. In *Engineered Maintenance Services, Inc. v. United States*,[4] for example, the contractor was awarded the construction contract for a federal government project to replace steam and condensate piping in Alabama. The contractor "encountered piping that was not indicated in the Government's drawings" and, as a result, was consistently behind schedule.[5] After the government terminated the contractor for default, the contractor claimed that the piping issue was a DSC for which it was entitled to additional time to complete the work. The parties agreed that the contractor did not submit a written DSC notice, but the court explained that "[federal] case law indicates that the notice need not be in any particular form (despite the FAR requirement of a writing) so long as it is sufficient to generally inform the Government of the facts surrounding the claim."[6] The court expounded further, however, that "[m]ere notice or knowledge that the contractor encountered a 'condition' falls short of the contractual requirement that the contractor notify the Government that it considered the condition to constitute a 'differing site condition.'"[7] Lastly, the court indicated that there was prior "authority that indicates that if the contractual notice requirement is deficient, yet the Government had *actual* knowledge of the differing site condition and suffered no injury or prejudice due to the deficiency, the contractor's failure to comply with the formal notice requirements does not bar its claim."[8] Under the facts of *EMS*, however, the court held that the contractor's failure to provide any notice whatsoever to the government proved fatal to its DSC claim. In this regard, federal courts interpreting the FAR DSC provision have been more flexible regarding notice than Virginia courts; the revised language of the DSC clause in the VDOT Specifications continues that trend.

As explained above, in federal cases, as long as a contractor was able to demonstrate that the owner received *actual* notice and that the owner was not prejudiced, courts have been willing to overlook the written notice requirement for DSC claims. In this regard, federal courts have taken a practical, substance-over-form approach to this condition precedent. In Virginia, however, courts have applied these notice requirements more strictly. Now that VDOT has added an enforcement mechanism to its written notice requirement for DSCs, the Supreme Court of Virginia may be called upon to clarify its meaning and effect as it pertains to whether the failure to comply strictly with the written notice requirement will bar a contractor's recovery on its DSC claim.

By way of example, the Supreme Court of Virginia, in *Commonwealth v. AMEC Civil, LLC*,[9] addressed the issue of written notice in the context of Virginia Code § 33.1-386.[10] In *AMEC*, after performing construction work on the Route 58 Clarksville Bypass in Mecklenburg County, the contractor submitted various claims to VDOT. Among those claims were various DSC issues, as well as delay claims due to soft ground encountered while drilling the shafts that formed the bridge foundation. On appeal from the Virginia Court of Appeals, the Supreme Court of Virginia held:

> Code § 33.1–386(A) is to be strictly construed, and is clear and unambiguous, stating that contractors "shall" provide "written notice" to VDOT. We hold that actual notice cannot satisfy the written notice requirement in Code § 33.1–386(A), and that written notice is required. *See also BBF, Inc. v. Alstom Power, Inc.,* 274 Va. 326, 331, 645 S.E.2d 467, 469 (2007) ("In construing a statute, we must apply its plain meaning, and we are not free to add [to] language, nor to ignore language, contained in statutes.").[11]

Thus, even though the Court did not specifically address DSC notice issues, it quickly dispensed with the notion that "actual" (and not written) notice was sufficient. Instead, the Court required strict compliance with a public contracts notice provision. The Court's holding in *AMEC* may be indicative of how it will interpret the revised DSC clause in the VDOT Specifications.

It is noteworthy, however, that the new language added in 2016 to the DSC clause only goes one way. To be clear, the new language expressly prohibits adjustment of a contract to *the benefit of the contractor* if that contractor fails to provide the required written notice. The negative implication of this language is that, even without notice, the contract price or scope of work could still be reduced for the benefit of the owner. Again, the Supreme Court of Virginia may be called upon to clarify VDOT's intent in this regard.

Regardless, contractors performing construction work on public contracts in Virginia will need to pay close attention to the new enforcement mechanism in the DSC clause and ensure that they provide timely written notice of DSCs. The failure to do so may preclude an adjustment to the contractor's benefit.

Endnotes:

1 The commissioner is "[t]he Chief Executive Officer of the Virginia Department of Transportation, whose full title is the Commissioner of Highways or as otherwise designated by the Code of Virginia."
2 *See* VDOT Specifications § 104.03 (2016).
3 48 C.F.R. § 52.236-2.
4 55 Fed. Cl. 637, 641–42 (2003), *aff'd*, 89 Fed. Appx. 267 (Fed. Cir. 2004).
5 *Id.* at 640.
6 *Id.* at 641 (citations omitted) (parenthetical in original).
7 *Id.* at 641-42 (citations omitted).
8 *Id.* at 642 (citations omitted) (emphasis in original).
9 699 S.E.2d 499 (Va. 2010).
10 Virginia Code Section § 33.1-386 was changed in 2014 to § 33.2-1101.
11 *AMEC*, 699 S.E.2d at 408 (emphasis in original).

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