

# Proposed Revisions to the Differing Site Condition Clause

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**ABSTRACT:** Industry task forces have long endorsed the use of a differing site conditions clause in construction specifications. However, while the underground construction industry has focused on various methods for utilizing or triggering the clause, it has largely ignored the clause language itself. This paper reviews the Federal Differing Site Conditions Clause to identify potential conflicts with other contract language and wording that is itself contrary to the intent of the Differing Site Conditions Clause, and then proposes revised language.

## INTRODUCTION

For many years, the underground construction industry has worked to provide viable triggers for the Differing Site Conditions (DSC) Clause, currently culminating in the use of two new contract documents, the Geotechnical Baseline Report (GBR) and the Geotechnical Data Report (GDR). However, the DSC Clause language itself, as exemplified by the standard Federal procurement language, has not received such attention, and has remained essentially unmodified since its inception.

This paper first examines the Federal Differing Site Conditions Clause with regard to language that may not only conflict with language elsewhere in the contract, but that also undermines the efficacy of the DSC Clause itself by encouraging the incorporation of bid contingencies. The paper then goes on to propose revised DSC Clause language.

Note that the discussion presented herein represents a business view and not a legal view for effecting changes to contract documents.

The Federal DSC Clause<sup>1</sup> states:

*(a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materi-*

*ally from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.*

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

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

*(d) No request by the Contractor for an equitable adjustment to the contract for differing site conditions shall be allowed if made after final payment under this contract.*

## 1 MODIFY THE REQUIREMENT TO LEAVE CONDITIONS UNDISTURBED

*“The Contractor shall promptly, and before the conditions are disturbed, give a written notice...”*

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<sup>1</sup> 48 FR 42478, Sept. 19, 1983, as amended at 60 FR 34761, July 3, 1995.

The intent of the requirement to leave conditions undisturbed is to give the owner an opportunity to verify the presence of a DSC and to mitigate its impact on the remaining work. Accordingly, this language is well suited to the more readily apparent Class 1-type DSC<sup>2</sup>, such as the encountering of an unknown utility or rock where soil is indicated. In such cases, direct observation justifies the existence of a Class 1 DSC and it is therefore appropriate that the owner verify the undisturbed condition.

Conversely, it is only through the act of disturbing the subsurface conditions that oftentimes alerts a contractor to the possibility of a Class 2 DSC; *e.g.*, increased cutter wear when tunneling through limestone that “doesn’t cut like typical limestone.” In such cases, it is not reasonable to require that the existing conditions be left undisturbed prior to giving notice.

The foregoing suggests that one solution may be to simply require leaving the condition undisturbed for Class 1 DSCs only, because the innate inability to identify Class 2 DSCs without disturbing the conditions would neither help an owner identify the DSC, nor mitigate its impacts on the remaining work.

However, this reasoning relies heavily on the assumption that *all* Class 1 DSCs are readily discernable as such, and that *all* Class 2 DSCs are not—a dangerously explicit supposition to incorporate into language that is best left in terms that are more general.

Perhaps a better solution is to rewrite the DSC Clause to simply require giving the owner the opportunity to verify the presence of a DSC.

## 2 STRENGTHEN NOTICE REQUIREMENTS

*“The Contractor shall promptly...give a written notice to the Contracting Officer...”*

This notification process is troublesome because it does not require the contractor to provide any information about a DSC as it is discovered and as it relates to justifying a subsequent request for change order. On the other hand, the impact of a DSC and therefore the basis for quantum calculations of the request for change may not be immediately apparent. The language attempts to address this by im-

parting a subjective (and, some may therefore argue, useless) sense of urgency with the use of the word “promptly” that ties in with the preceding discussion, but that nevertheless does not *require* the contractor to provide any immediate, hard information about the DSC.

Some owners eschew tying the notification of a DSC to an immediate request for change when the extent and amount of impact is often not readily ascertainable. They reason that such an action starts a number of administrative clocks ticking which pressure the owner, among other things, to make a determination of the estimated change order amount, and to issue a timely response to the request for change.

However, these administrative clocks are inserted in the contract language as a tool for an owner to manage the cost and schedule impacts of potential change orders and claims on the project budget and schedule. Therefore, the exclusion of the DSC notification process from the notice requirements of the Changes Clause serves only to distort the data upon which an owner relies to make critical project forecasts.

It therefore seems clear that these administrative pressures are much less onerous than allowing unknown or ill-defined DSCs to pile up at the end of the job for resolution.

## 3 AVOID SOLE RELIANCE ON THE GBR TO JUSTIFY A DSC

Many differing site condition tunnel claims are predicated on more or less of a particular condition, so some might argue that regardless of how much geotechnical investigation is performed, all tunnels are nothing more than one big DSC from portal to portal. Therefore, if an owner includes a Geotechnical Baseline Report (GBR) and Geotechnical Data Report (GDR) as contract documents, the DSC clause trigger is tied to the GBR baselines, regardless of where they are set, and data presented in the GDR. Since the GBR and GDR are not the only contract documents—and certainly not the only tools for determining the existence of a DSC—there is no compelling reason to specifically cite them; but to use them, their order of precedence must be established elsewhere in the contract.

A recent trend among owners has been to limit the contractor’s ability to justify a DSC founded solely on the baselines presented in the GBR. However,

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<sup>2</sup> So named for the subparagraph number of the DSC clause under which it appears.

this logic erroneously supposes that a GBR is a panacea for all DSCs, when in reality the GBR can only identify those DSCs for which a baseline has been established. Furthermore, if a GDR has been included as a contract document, its purpose is now muddled. Therefore, in a contract wherein DSCs are limited to those for which the GBR provides a baseline, bidders will include contingency for the downside risk that the GBR has not provided a baseline for a condition that may manifest in a DSC.

Clearly, such an approach serves only to increase bidder's contingencies—a tactic contrary to the purpose of the DSC clause itself.

#### 4 ELIMINATE CREDITS FOR BETTER THAN ANTICIPATED CONDITIONS

*“If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost...”*

There are many arguments for eliminating this language but perhaps the most compelling is that this language leads contractors to bid at the baselines established in the GBR, or if a GBR has not been prepared for the project, at the most unfavorable conditions indicated. It takes away a bidder's incentive to gamble on better-than-anticipated conditions because the bidder could be required to “return” the same savings that reduced the bid in the first place.

Bids on contracts containing this provision will therefore be generally high by a contingent amount that is anticipated to be returned; a result that is contrary to the intent of the DSC Clause.

However, to the extent that an owner is willing to accept higher bids in exchange for a potential credit, the owner must make the following administrative contract modifications:

- The DSC Clause language must permit either party to notify the other of a better-than-anticipated differing site condition.
- The Changes Clause must be amended to require the Owner to submit a timely credit change order request, including basis of entitlement, schedule savings analysis, and change order cost proposal for the credit amount due to the better-than-anticipated conditions. Similarly, the Contractor's role must be expanded to provide a prompt response to the credit change order proposal.

#### 5 TIE TIME IMPACT ANALYSES TO THE SCHEDULING SPECIFICATION

*“If the conditions do...cause an increase or decrease in the...time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions...”*

This language seems to imply that the DSC need not affect the project critical path but must simply prolong a portion of the work. Certainly, were a contractor to request a time extension citing the provisions of this clause, an owner could simply declare that a zero day time extension would be the equitable adjustment. However, a far simpler solution—and one that encourages reading the contract documents in whole rather than in part—would be to reference the clause specifying the means for analyzing schedule impacts.

#### 6 TIE COMPENSATION TO THE CHANGES CLAUSE

*“...An equitable adjustment shall be made under this clause and the contract modified in writing accordingly.”*

The DSC Clause does not specify how an equitable adjustment is to be made and furthermore, a typical contract usually does not require that contract adjustments be equitable<sup>3</sup>. Instead, a typical changes clause sets forth some uniform procedure for calculating compensation for a change that may not recognize and reimburse all of a contractor's actual additional costs.

If the DSC language retains this “equitable adjustment” language, a contractor may successfully claim that any DSC is to be reimbursed by an equitable adjustment to the contract and not via the prescribed method set forth under the Changes Clause because (a) the DSC clause does *not* reference the Changes clause, and (b) the interpretation given in (a) above resolves the apparent conflict within the contract General Conditions.

Therefore, the language should simply reference the Changes Clause, which establishes how *all* work not in the contract is to be compensated.

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<sup>3</sup> See 48 CFR 552, Equitable Adjustments Clause.

## 7 ELIMINATE REPETITIVE NOTICE REQUIREMENTS

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

This language essentially duplicates paragraph (a) of the DSC Clause and repeats what should already be in the Changes Clause. It is therefore unnecessary.

## 8 ELIMINATE REPETITIVE FINAL PAYMENT LANGUAGE

*“No request by the Contractor for an equitable adjustment to the contract for differing site conditions shall be allowed if made after final payment under this contract.”*

This language is also unnecessary. The General Conditions will already have language specifying the disposition of unfiled claims and requests for changes as they relate to making final payment.

## 9 PROPOSED REVISIONS TO LANGUAGE

Based on the foregoing, the following revisions to the standard Federal procurement language are proposed. Strikeout text represents existing text to be deleted, and underlined text represents new text to be inserted:

*(a) The Contractor shall ~~promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer~~ of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.*

*(b) The Contractor's notice shall be made in accordance with the Changes clause and shall provide the Contracting Officer the opportunity to ~~The Contracting Officer shall promptly~~ investigate the site conditions giving rise to the differing site condition ~~after receiving the notice~~. If the conditions do materially so differ and cause an increase ~~or decrease~~ in the Contractor's cost of, or ~~the time required for,~~ per-*

*forming ~~any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly~~ an adjustment shall be made to the contract in accordance with the Changes clause.*

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

*~~(d) No request by the Contractor for an equitable adjustment to the contract for differing site conditions shall be allowed if made after final payment under this contract.~~*