Differing Site Conditions

is to allow the owner or its representative to investigate the condition and determine if it is in fact different from those indicated or anticipated. When the contractor fails to give notice of the condition, it runs the risk that the claim will be denied, even if it may otherwise have had merit. For example, in *M.D. Activities*, the Interior Board of Contract Appeals denied a contractor's claim because the contractor had not given timely written notice to the contracting officer. The decision seemed to turn, however, on the fact that the government had no actual knowledge of the claim and therefore was unable to investigate it at the time it occurred. The lack of notice thereby prejudiced the owner, and the claim was denied.

When the owner has actual knowledge and is not prejudiced by the lack of notice, the result is frequently different. For example, in *Roger J. Au & Son v. Northeastern Ohio Regional Sewer District*, the court allowed a differing site condition claim even though the contractor did not notify the owner of the condition. The court held that the owner had actual knowledge of the claim and had an opportunity to investigate it, and that there was no prejudice because of the lack of formal notice. The court held, "There is no reason to deny the claim for lack of written notice if the District was aware of differing site conditions throughout the job and had a proper opportunity to investigate and act on its knowledge, as the purpose of the formal notice would thereby have been fulfilled."

Other courts and bodies are not as liberal as the Ohio Appellate Court. The contractor who fails to give notice does so at its peril. For example, in *Emerald Forest Utility District v. Simonsen Construction Co.*, the court denied the contractor recovery when it encountered wet sand during performance but failed to notify the owner of the condition as required by the contract. Likewise, in *Blankenship Construction Co. v. North Carolina State Highway Commission*, the court refused to grant the contractor's claim under the differing site conditions clause because of its failure to give proper notice to the state. The court strictly interpreted the notice provisions of the contract and found that the contractor's oral notification was insufficient to apprise the state of the changed condition.

§ 7.15 Effect of Site Investigation and Other Disclaimer Clauses

Many contracts contain a clause that requires the contractor to conduct a site investigation and provides that the owner shall not be responsible for conditions encountered at the site. An example of such a clause is:

95 IBCA No. 2113, 88-1 B.C.A. (CCH) ¶ 20,328 (1988).
96 29 Ohio App. 3d 284, 504 N.E.2d 1209 (1986).
97 504 N.E.2d at 1210.
Site Investigation and Conditions Affecting the Work (APR 1984)

(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 costs, 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.\[100\]

In spite of the wording of the site investigation-type clauses, the general rule is that the contractor will only be held to have the knowledge or information that could have been gleaned from a reasonable site investigation.\[101\]

The general test for a reasonable site investigation is what an experienced and prudent contractor could have discovered rather than what a trained geologist or other expert might have found.\[102\]

If a contractor fails to conduct a site investigation, it will not be compensated for differing site conditions that a reasonable investigation would have revealed. For example, in Zenith Construction,\[103\] the Armed Services Board of Contract Appeals refused to find a differing site condition when the window frames were higher than indicated in the drawings and were not in straight lines. The board found that the contractor would have discovered these conditions if it had attended the scheduled walk-through site investigations. In Bo McAllister & Lloyd Thompson,\[104\] a differing site condition claim was denied because the

---

100 F.A.R. 32.236-3.
102 Stock & Grove, Inc. v. United States, 493 F.2d 629, 13 Cl Ct 209 (1974)
Differing Site Conditions

board found that rock outcroppings encountered during the performance of the project were visible to a person walking or riding a horse, even though the contractors stated that they did not conduct a site investigation because the area was dangerous and full of briars and snakes. Finally, in *AAAA Enterprises, Inc.*\(^{105}\), the contractor’s claim for a differing site condition was denied because the oil-saturated soil it encountered during contract performance would have been discovered during a prebid site investigation.

A contractor’s prior experience on a particular site or in a particular locality does not substitute for a reasonable site investigation. Thus, in *Stuyvesant Dredging v. United States*,\(^{106}\) a contractor who relied on his prior experience in a particular locale was not able to assert a differing site condition claim because a reasonable investigation of the particular site would have revealed the conditions encountered. In addition, the government’s failure to disclose site conditions may not protect the contractor who does not investigate the site. In *Cook v. Oklahoma Board of Public Affairs*,\(^{107}\) a contractor conducted a drive-through investigation of the site. It later asserted a claim for the existence of underground water. The court denied the claim because a more diligent investigation would have indicated the presence of surface water and mud at the project site. This result was somewhat surprising in light of the fact that the owner possessed a soil study that indicated the existence of an underground aquifer that it had not revealed to the contractor.

On the other hand, conditions that could only have been revealed by a detailed subsurface investigation are not chargeable to the contractor’s knowledge. The board in *Southern California Roofing Co.*\(^{108}\) determined that the additional roof encountered during the performance of the contract was not discernible by a reasonable site investigation. The contractor was not required to bore holes in the roof to locate a top roof system. Further, the Court of Special Appeals of Maryland held in *Raymond International, Inc. v. Baltimore County*\(^{109}\) that to require a contractor to conduct diving tests to verify the contract indications regarding underwater conditions would be unduly burdensome. And, finally, in *CFI Construction Co.*,\(^{110}\) the board refused to require the contractor to perform excavation before bidding in order to check the accuracy of the government’s plans and specifications.

Broader disclaimer clauses that attempt to relieve the owner of any liability for any subsurface site conditions are treated somewhat differently. When

---

\(^{105}\) *ASBCA* No. 28172, 86-1 B.C.A (CCH) ¶ 18,628 (1986).

\(^{106}\) 834 F.2d 1576 (Fed. Cir. 1987).

\(^{107}\) 736 P.2d 140 (Okla. 1987).


\(^{110}\) *DOT CAB* No. 1782, 1801, 87-1 B.C.A. (CCH) ¶ 19,547 (1987).
differing site condition clauses are required by statute, as they are on federal government contracts, some courts have held that a disclaimer clause does not override the differing site condition clause. Other courts have taken a different approach, especially when a differing site condition clause is not required by statute or regulation. State courts in New York and Ohio have enforced disclaimer provisions that are generally disregarded in federal tribunals. In *James McHugh Construction Co.*, the board upheld the language of a disclaimer that provided that the contractor, not the owner, would bear the risk of subsurface problems. With this provision, the owner exempted itself from responsibility for any unknown subsurface rock condition. The court enforced the disclaimer provision because the owner was not a federal agency and therefore was not bound by the strictures of federal law that hold that a mandatory differing site conditions clause may not be avoided with disclaimer language.

In some cases, whether a differing site condition clause or a disclaimer clause will be given effect is a matter of contract interpretation. For example, in *Roy Strom Excavating & Grading Co. v. Miller-Davis Co.*, the court found that as a matter of contract interpretation the differing site condition clause had effect over an exculpatory clause. In *Zontelli & Sons, Inc. v. City of Nashwauk*, the court held that a disclaimer clause would not be given effect when the conditions encountered were so different from what could possibly be anticipated that they could not possibly have been within the contemplation of the parties. A similar result was reached in *PT&L Construction Co. v. New Jersey Department of Transportation*.

The Supreme Court of New Jersey has also enforced disclaimer language in limited circumstances. The court held that the state remains liable to a contractor despite a general disclaimer in the contract if the state has made positive representations in the contract documents that are inaccurate. However, unambiguous language of disclaimer in the contract defeats a contractor's claim based on inferential conclusions from the contract documents.

---

113 ENGBCA No. 4600, 82-1 B.C.A. (CCH) ¶ 15,682 (1982).
115 373 N.W.2d 744 (Minn. 1985).
117 531 A.2d at 1342.

1 Excerpt taken from "Proving and Pricing Construction Claims" 2nd Edition by Robert F. Cushman, Craig M. Jacobsen, and F.J. Trimble