Changed Conditions – Theories of Liability and Defense in Massachusetts and Other Jurisdictions

I. Introduction

This article is intended to provide a review of pertinent case law examining differing conditions claims in Massachusetts as well as other jurisdictions and recommended best practices for public owners to be better prepared to deal with differing conditions that may be encountered on the projects for which they are responsible.

The issue of differing or latent conditions, also referred to as changed or unanticipated conditions, in the public construction context is one of particular concern for awarding authorities. Such conditions commonly arise in public construction projects and can have significant impacts on the ultimate costs of such projects, as contractors typically seek to recover for claimed increased costs to address such conditions and complete the project.

As stewards of the taxpayer money that predominantly funds public construction projects, it is important for awarding authorities for public projects to familiarize themselves with how such conditions may be addressed prior to projects through proper documentation of the project site conditions and through the inclusion of certain protections in contract documents, and during the project, through strict adherence to claim procedures and other protections afforded in the contract documents. Additionally, public owners must be prepared for the disputes over the existence of and requested adjustments to contract price and time for such conditions which often occur. With regard to such disputes, if the owner and the contractor fail to resolve a differing conditions claim, owners should be familiar with the typical theories which contractors use to pursue recovery for such claims and the typical defenses which owners use against them.

Case law in Massachusetts on differing conditions issues is unfortunately limited. However, the universal presence of differing conditions clauses in public construction contracts for the federal government and state governments throughout the United States has provided a wealth of case law from other jurisdictions which is instructive of how Massachusetts courts might apply the law under similar circumstances.

II. Origin and Underlying Policy Reasons for Differing Conditions Clauses

The differing conditions clause is a child of the early 20th century. Before it came into existence in construction contracts, contractors would "hedge their bets" against differing conditions that might be encountered in the course of a project by submitting bids with large built-in contingencies to the contract price to guard against the risk of encountering such conditions. This predictably resulted in an artificially high cost for underground construction projects. Further, if the contractor encountered differing conditions once the project was underway, it was generally limited to seeking recovery on a theory that the government had misrepresented site conditions.

The volume, complexity and scale of public works and public construction contracts expanded during the interwar period through New Deal agencies such as the Works Progress Administration, and further in expansion of the military-industrial complex during World War II and the early Cold War period. Over the course of this period, differing conditions clauses (or changed conditions clauses, as they termed in federal contracts) were introduced into and became a standard term included in federal contracts. Gradually, such clauses were adopted in public construction projects by state governments as well, primarily through rules, regulations, constitutional provisions or legislative enactments. In Massachusetts, public construction and works projects are generally required by G.L. c. 30 § 39 N to contain the following differing conditions provision:

> **If, during the progress of the work, the contractor or the awarding authority discovers that the actual subsurface or latent physical conditions encountered at the site differ substantially or materially from those shown on the plans or indicated in the contract documents either the contractor or the contracting authority may request an equitable adjustment in the contract price of the contract applying to work affected by the differing site conditions. A request for such an adjustment shall be in writing and shall be delivered by the party making such claim to the other party as soon as possible after such conditions are discovered. Upon receipt of such a claim from a contractor, or upon its own initiative, the contracting authority shall make an investigation of such physical conditions, and, if they differ substantially or materially from those shown on the plans or indicated in the contract documents or from those ordinarily encountered and generally recognized as inherent in work of the character provided for in the plans and contract documents and are of such a nature as to cause an increase or decrease in the cost of performance of the work or a change in the construction methods required for the performance of the work which results in an increase or decrease in the cost of the work, the contracting authority shall make an equitable adjustment in the contract price and the contract shall be modified in writing accordingly.**

The underlying purpose of these clauses is to lower the overall cost of public construction projects for the government by allowing contractors to rely to some extent on site conditions information provided to them by the contracting authority, and further providing those contractors with a remedy to recover their increased costs in the event differing conditions were actually encountered. Thus, differing site condition clauses are designed to benefit both the public owner as well as the contractor. The public owner benefits by the use of such a clause because the contractor no longer needs to add large contingency sums to its bid to cover the risk of encountering adverse subsurface conditions. The contractor benefits because it is awarded extra compensation if conditions are encountered which materially differ from those indicated in the contract. Thus, in theory, changed conditions clauses take the "gamble" out of underground construction. A public owner no longer has to pay the contractor a windfall price when only

normal conditions are encountered, and the contractor can seek compensation to avoid a disaster should unanticipated conditions arise.

Understanding these underlying purposes is important. The Court in Zontelli & Sons, Inc. v. City of Nashwauk, 373 N.W.2d 744 (Minn. 1985) relied on the reasoning behind differing conditions clauses generally in finding under the circumstances that, despite a contract provision limiting the contractor to recovery under unit price method, the provision was unconscionable and the contractor should be permitted to recover its actual costs for the excess work encountered due to differing conditions. The Court found that the number of issues encountered in the particular project which were so unusual as to not have been contemplated by the parties at the time of contracting. Differing conditions clauses essentially provide a measure of confidence to awarding authorities and contractors of fairness and equity when it comes to the risks inherent in underground construction, and this should be the "take-away" from decisions like the one in Zontelli. Differing conditions clauses offer an equitable result, and awarding authorities should take note that courts have and will likely continue to look beyond and sometimes disregard contractual provisions working against the equitable purpose of differing conditions clauses when the circumstances warrant.

III. Differing Conditions Explained

Under most typical differing conditions clauses, including the clause required by G.L. c. 30 § 39N, there are two types of differing conditions for which a contractor may seek recovery. There are conditions which differ from "those shown on the plans or indicated in the contract documents," which are commonly referred to as "Type I" changed conditions, and conditions which differ from "those ordinarily encountered and generally recognized as inherent in work of the character provided for in the plans and contract documents," which are referred to as "Type II" changed conditions.

The difference between these two types of changed conditions is primarily the degree of proof required to establish them. A Type I condition differs from the conditions in the plans or contract documents. The focus of litigation centered on a claimed Type I condition necessarily involves whether conditions shown in or indicated from the contract documents misrepresented or omitted the actual conditions the contractor encountered. Establishing the existence of a Type II changed condition is more difficult, as a contractor must show that it "had no notice of the existence of the condition and that the condition is somehow unusual." Gorman, Hugh J., *Massachusetts Construction Law and Litigation*, § 3.3.1(c), p. 3-11 (MCLE, Inc., 2006).

In addition to establishing one of the two types of differing conditions, the condition must also be shown to be "of such a nature as to cause an increase or decrease in the cost of performance of the work or a change in the construction methods required for the performance of the work which results in an increase or decrease in the cost of the work." G.L. c. 30 § 39N. Some changes to the work resulting from differing conditions may be cost neutral or ultimately reduce costs for the contractor.

Perhaps one of the cases most often cited by contractors in Massachusetts with regard to differing conditions claims is the lone Supreme Judicial Court case addressing this area of construction law, Sutton Corp. v. Metropolitan Dist. Comm'n, 423 Mass. 200 (1996). In the Sutton Corp. case, the Supreme Judicial Court held that the contractor had established the existence of a Type II changed condition and had further established that it was entitled to an equitable adjustment as the differing condition had necessitated a change in the construction methods required for the performance of the work which increased the costs of the work to the contractor.

Given the elements which must be established under G.L. c. 30 § 39N for a contractor to seek equitable adjustment for differing conditions, mere increases in quantity of work, without more, are typically not recognized as a valid basis for a differing conditions claim. 57 Mass. Prac. *Construction Law* § 6.35 n.6 (Lewin, Joel; Schaub, Jr., Charles E.) citing West Valley Corp. v. City of Worcester, 1998 WL 1248008 (Mass. Super.); see also J.D. Hedin Construction Co. v. U.S., 107 Ct. Cl. 558 (Ct. Cl. 1947) (similar outcome in circumstances where actual quantities were less than anticipated and unit price for credit was at issue.). There are exceptions to this generally applicable principle, however. In several cases, courts have permitted contractors to recover on equitable adjustment principles for differing quantities claims where there was otherwise no evidence in the decision of any increased cost or change in construction methods due to the difference in quantities. See e.g, Tony Zumbo & Son Construction Co. v. Ohio Department of Transportation, 22 Ohio App. 3d (Ohio App. 10 Dist., 1984) (court found in favor of contractor on claim for equitable adjustment despite unit price provision in contract); Clark Bros. Contractors v. State, 218 Mont. 490 (Mont., 1985) (contractor entitled to equitable adjustment for quantity underrun in on anticipated borrow work in highway construction project); Zontelli & Sons, Inc. v. City of Nashwauk, 373 N.W.2d 744 (Minn. 1985). The Zontelli decision, discussed earlier in the article, in favor of the contractor's claim for equitable adjustment was predicated on a finding that the number of issues encountered were so unusual as to not have been contemplated by the parties at the time of contracting. Among the issues for which the court permitted recovery on an actual cost basis was a quantity overrun on certain excavation and backfilling work for which the contract had provided a unit cost basis for payment.

IV. Theories of Liability and Defense

Despite best efforts, disputes regarding differing conditions claims often end up resulting in litigation between the contractor and the awarding authority. From a review of case law in Massachusetts and other jurisdictions, below is a discussion of some common issues that arise with regard to differing conditions litigation, along with typical arguments advanced by awarding authorities and contractors.

A. Differing Conditions Claims Relating to Pre-Construction Activities.

As much of a contractor's initial interaction with the contract documents occurs during the bidding process, many of the disputes that lead to differing conditions litigation concern the

acts or omissions of the awarding authority, its consultants, or the contractor during the design and bidding phases of the project.

G.L. c. 30 § 39N, while it generally requires inclusion of the differing conditions clause in the statute to be included in public construction and works projects, also provides that an awarding authority "may adopt reasonable rules or regulations in conformity with that paragraph concerning the filing, investigation and settlement of such claims." This additional flexibility is an important tool which the legislature has afforded awarding authorities. By instituting certain practices within the latitude provided by Section 39N, including (1) the adequate and accurate documentation of site conditions, (2) proper exculpatory provisions and disclaimers regarding the site data provided in bid documents, and (3) requiring bidders to conduct pre-bid investigations of the site conditions, public owners can plan projects in such a way to provide for fair and efficient resolution of differing conditions claims while at the same time maximizing protection of the public funds involved.

1. Adequate and Accurate Documentation of Site Conditions.

At the outset, awarding authorities should be aware of how project site conditions are being conveyed to bidders in the bid documents. In many projects, project site conditions may be documented by the project architect or engineer, or by sub-consultants retained by the project architect or engineer. Contract documents should be internally compared prior to issuance to ensure there are no inconsistencies. In one case examining this particular issue, a contractor claiming ignorance of such inconsistencies that successfully bid for work on a project was precluded from later claiming an equitable adjustment relative to the inconsistent information. See e.g., Gardner-Zemke Company v. State, 109 N.M. 729 (N.M., 1990) (affirming summary judgment for awarding authority despite inconsistencies in contract documents). The contractor in the Gardner-Zemke case had argued that a narrative summary of technical data was inconsistent with the technical data itself, and that a reasonable electrical subcontractor would have relied on the narrative summary and would not understand the technical data. Both the summary and the technical data were included in the bid documents. The Court rejected the contractor's argument, noting that "every party to a contract has a duty to read the document in its entirety and is charged with the knowledge of the document." Id. at 734. If the contractor did not understand the meaning of certain terminology used in the technical data, the Court found that the contractor "had a duty to ascertain what the term mean and its significance." Id. at 735, citing Leal v. U.S., 276 F.2d 378, 384 n.1 (Ct. Cl. 1960) ("Whenever there is any doubt respecting the government's representation in the solicitation of subsurface conditions, the bidder has the affirmative duty of seeking clarification."). As explained below, contract documents that are inaccurate or inadequate (i.e., omitting information customarily included in contract documents for similar types of projects) leave public projects at potential risk of Type I changed conditions claims. The goal for awarding authorities to minimize these potential claims therefore

should be to have contract documents that provide adequate and accurate "industry standard" data about the site to bidders.[1]

2. Exculpatory Provisions and Disclaimers.

Contract documents are often drafted with exculpatory provisions and disclaimers regarding the accuracy of data concerning the site conditions which may be supplied with the contract documents. Often seeing such provisions as contrary to the purpose of differing conditions clauses, a number of courts have declined to enforce such provisions. Regardless of whether such provisions are included, awarding authorities should still be concerned about the adequacy and accuracy of site conditions data provided to bidders, or else risk giving the contractor a potential argument that the awarding authority misrepresented the site conditions in bid documents.

If there were previous projects in the area with which the awarding authority was involved, award authorities should make sure available data for the previous projects is not inconsistent with data being made available for the current project, and are well-advised to simply disclose the previous available data in an abundance of caution. "When [a] government agency is in possession of information pertinent to construction work to be performed under a contract, there is a duty to fully disclose and furnish to the contractor the facts of which the agency has knowledge." D. Federico Co., Inc. v. New Bedford Redevelopment Authority, 723 F.2d 122, 125 (1st Cir. 1983), citing Wm. A. Smith Contracting Co. v. U.S., 412 F.2d 1235, 1338 (Ct. Cl. 1969).

A failure to fully disclose relevant information known to an awarding authority can have disastrous effects to the authority's potential defenses against a differing conditions claim. For example, in one case, the Court ruled in favor of contractor on an equitable adjustment claim where there was evidence that the awarding authority had prior knowledge, through an earlier report that was not made available to bidders, of the differing conditions the contractor encountered. Department of General Services v. Pittsburgh Building Company, 920 A.2d 973 (Pa. Commw. Ct., 2007) ("DGS"). The contractor prevailed despite the presence of an exculpatory clause in the contract documents which, like typical exculpatory clauses in construction contracts, (1) disclaimed the accuracy of the subsurface data made available to bidders, (2) provided that such data was not to be considered as part of the contract plans or specifications, (3) required that bidders make their own investigation of subsurface conditions and (4) provided that bidders were not to rely upon data provided by the awarding authority or its engineering consultant. Id. at 984-85. The court noted that while such clauses were generally enforceable in Pennsylvania, under the circumstances, the failure to disclose the data from the earlier report amounted to constructive fraud by the awarding authority and therefore the exculpatory provision would be disregarded. Id. at 985-86.

[1] Although outside the scope of this article, awarding authorities should also consider appropriate protections in contracting with design professionals that will prepare the contract documents to allow the awarding authority to seek indemnity for the errors and omissions of design professionals in documenting site conditions which result in differing conditions claims.

An exculpatory provision was similarly disregarded in Morris, Inc. v. State ex rel. South Dakota Dept. of Transp., 598 N.W. 2d 520 (S.D. 1999). In that case, an aggregate materials supplier sought an equitable adjustment based on clay seams encountered in a pit from which the supplier was supposed to draw materials for aggregate that resulted in extra work and delays to the project for supplier. The clay seams were not indicated on pit test boring data that had been supplied by the government in the bidding process, and the evidence developed in the case showed the pit data supplied with the bid documents was apparently over 10 years old at the time the bid documents were issued. In the interim, a substantial volume of material had been removed from the pit, thus resulting in the differing conditions encountered by the supplier. The awarding authority had not visited the site during the decade since the original test borings were done. The Court found in favor of the contractor, indicating that an affirmative false statement of material facts by the awarding authority gave the contractor a cause of action for a "breach of the implied warranty of accuracy," despite a general exculpatory clause disclaiming any responsibility for the accuracy of the data contained in the contract documents. In addition to the misrepresentation line of reasoning similarly set forth by the Court in the DGS case, the Morris Court noted that the awarding authority had failed to do even a minimal investigation of the site and the evidence further demonstrated the authority knew that bidders would rely on the information supplied, which had been supplied to secure lower bids, since bidders otherwise would have to do their own independent test borings.

Exculpatory provisions like those in the DGS and Morris cases are often contained within public construction contract documents. They may disclaim the accuracy of, expressly caution or otherwise forbid bidders from relying on the data supplied, or in unit price contracts where a quantity is listed in the invitation for bidders, provide that such quantities are estimates only to allow comparison of bids by the awarding authority. Despite the outcome in the cases discussed above, these provisions should still be required by awarding authorities, as there is a strong likelihood they will still be applied by courts to defeat contractor claims for Type I differing conditions absent fraud, misrepresentation or negligence by the awarding authority. See e.g., Candee Const. Co., Inc. v. South Dakota Dept. of Transp., 447 N.W.2d 339 (S.D. 1989) (disclaimer of quantities as estimate only upheld to defeat contractor claim); Air Cooling & Energy, Inc. v. Midwestern Const. Co. of Missouri, Inc., 602 S.W.2d 926 (Mo. App. W.D., 1980) (disclaimer that boring data not part of contract documents upheld to defeat contractor claim); Kenaidan Construction Corp. v. County of Erie, 4 A.D.3d 756 (N.Y. App. Div., 2004). However, awarding authorities must also be mindful of "order of precedence" provisions that may be in the contract documents and which may lead courts to apply changed conditions clauses over these exculpatory provisions. See e.g., Roy Strom Excavating and Grading Co., Inc. v. Miller-Davis Co., 149 Ill. App. 3d 1093 (Ill. App. 1 Dist., 1986).

Similarly, awarding authorities should be aware of the risk that provisions in conflict with G.L. c. 30 § 39N may be invalidated, as the statute limits awarding authorities to prescribing provisions that are "in conformity with" the differing conditions clause provided in the statute. Although there is no clear binding precedent in Massachusetts with regard to G.L. c. 30 § 39N, a California court held that an exculpatory provision conflicted with California's version of Section 39N and was therefore unenforceable. Condon-Johnson & Associates, Inc. v.

Sacramento Municipal Utility District, 57 Cal. Rptr. 3d 849 (Cal. App., 2007). There is not yet a published decision from a Massachusetts court at any level addressing the enforceability of these provisions to potentially preclude a differing conditions claim.

3. Pre-Bid Site Investigations.

Another mechanism that awarding authorities often use to protect against differing conditions claim is a requirement that bidders investigate site conditions prior to bidding. See e.g., General Conditions for the Contract of Construction, AIA Document A201-2007 § 3.2.1. Courts are mixed on whether a contractor's failure to adequately investigate site conditions prior to bidding precludes a subsequent differing conditions claim.

In Glynn v. City of Gloucester, 21 Mass. App. Ct. 390 (1986), the Appeals Court rejected a contractor's claim for recovery for latent "large rocks and boulders unearthed during excavation" in part upon the basis of the Court's finding that "there was no finding that would support a conclusion that the city had negligently or intentionally misrepresented the conditions." Id. The Court further noted as follows:

> It is conceded that the test borings furnished by the city to all interested parties were properly made and that the results disclosed that the subsurface materials were adequate for use in the project. There is no finding that the city expressly or impliedly warranted the accuracy of the results of the test borings. [The contractor] was apparently content to rely on the city's estimates rather than go to the trouble of taking its own test borings.

Id. at 395-96.

Case law outside of Massachusetts is replete with additional examples of awarding authorities prevailing against differing conditions claims by arguing that the contractor failed to adequately investigation site conditions (or in some instances, the contract documents themselves) during the bidding process. See Board of Regents of Oklahoma Colleges v. Nashert & Sons, Inc., 456 P.2d 524 (Okla. 1969) (test boring report in bid documents put contractor on notice to contents of report and plot plan showed conditions encountered, contractor "could not close its eyes to what was in plain sight."); Graham Const. & Maintenance Corp. v. Village of Gouverneur, 229 A.D.2d 815 (N.Y.App.3rd, 1996) (contract documents showed conditions encountered); Candee Const. Co., Inc. v. South Dakota Dept. of Transp., 447 N.W.2d 339 (S.D. 1989) (recovery precluded for excess rock removal where contract provided estimated quantities only and contractor had duty to accurately determine the amount of rock to be excavated prior to bidding); Air Cooling & Energy, Inc. v. Midwestern Const. Co. of Missouri, Inc., 602 S.W.2d 926 (Mo. App. W.D., 1980); Kenaidan Construction Corp. v. County of Erie, 4 A.D.3d 756 (N.Y. App. Div., 2004); Gardner-Zemke Company v. State, 109 N.M. 729 (N.M., 1990).

However, contractors have at times successfully defeated such arguments, usually by focusing on issues such as the time available, costs and other logistical issues associated with performing a more detailed pre-bid investigation, as well as whether there was any expectation

by the awarding authority that bidders would reasonably rely on data provided by the authority in lieu of a more detailed investigation by the bidder. See e.g., Clark Bros. Contractors v. State, 218 Mont. 490 (1985); Durkin & Sons, Inc. v. Dept. of Transp., 742 A.2d 233 (Pa. Commw. Ct., 1999) ("chaos would result if every party interested in bidding on a contract attempted to perform excavation work to inspect a site before submitting a bid.").

In the only case other than Glynn addressing this particular issue to date in Massachusetts, a Superior Court judge sided with the contractor, allowing the contractor's motion for summary judgment on its statutory claim for equitable adjustment, finding the contractor could not reasonably have determined the existence of the differing conditions encountered based on the contractor's pre-bid inspection. D'Allessandro Corp. v. City of Cambridge, 1996 WL 1250061 (Mass. Super.). The differing condition at issue in D'Allessandro was concrete base underlying brick pipe which the contractor had bid to repair. The city's design consultant was aware that some of the brick pipe may have been constructed with a concrete base, but omitted this information from the plans and specifications because it did not have exact information and did not want to mislead bidders by presenting imprecise information. As the brick pipe with concrete base was significantly more expensive to remove than plain brick pipe, the contractor submitted a claim to the city for an adjustment to the contract price. The city contended that the contractor could have learned about the differing condition through review of "as built" drawings on file with the city. The Court rejected the city's argument, noting that the city's design consultant had access to the same drawings, yet was unable or unwilling to provide the pertinent information from these drawings in the plans and specifications. Accordingly, the Court concluded it was not reasonable under the circumstances to expect the contractor to look beyond the contract documents and examine the "as built" drawings.[2] As noted above in the discussion on the adequacy of site data, perhaps the better approach on a similar project in the future would be to incorporate such as built drawings into the contract documents and invite bidders to review them in preparing their bids.

In a case with a similar outcome in Montana, Clark Bros. Contractors v. State, 218 Mont. 490 (1985), the Court vacated a trial court judgment in favor of the state and ordered a retrial on a contractor's claim for equitable adjustment to the contract price due to a quantity underrun on anticipated borrow work in highway construction project. The contractor had prepared its bid using quantity estimates provided by the state. The court found the contractor could justifiably rely on the data provided by the state under the circumstances despite the presence of standard disclaimers in the contract regarding the estimated quantities. The court noted that contractor had limited time - two to three weeks - to submit bid, which it found was not adequate time for the contractor to perform its own quantities estimate, and that contractor had done some investigation, including on-site investigation and inquiry about soils in the area. See also V.P. Loftis Co. v. U.S., 110 Ct. Cl. 551 (1948) (similar outcome in airfield construction project); Durkin & Sons, Inc. v. Dept. of Transp., 742 A.2d 233 (Pa. Commw. Ct., 1999) ("chaos would

[2] In dicta, a Supreme Judicial Court case rejected a similar argument that the contractor should have conducted its own independent testing of the subsurface conditions of a site, finding such a requirement "would frustrate the policy of G.L. c. 30 § 39N." Sutton Corp. v. Metropolitan Dist. Comm'n, 423 Mass. 200, 207 n. 13 (1996).

result if every party interested in bidding on a contract attempted to perform excavation work to inspect a site before submitting a bid.")

Other courts outside of Massachusetts have not been as forgiving to contractors. In a New York appellate case, Johnson, Drake & Piper, Inc. v. New York State Thruway Authority, 22 A.D.2d 321, 1965 N.Y. App. Div. LEXIS 5083 (1965), the Court rejected a contractor's appeal of the dismissal of a breach of contract claim which t in part had sought compensation for claimed changed conditions encountered which necessitated increased operational costs of excavation. The contractor had encountered an unanticipated vein of sand which was not discovered until excavation commenced. The Court found the state did not misrepresent or conceal the conditions in bid materials for the contract, and was highly critical of the contractor's "casual, cursory and inadequate" investigation, noting the contractor failed to review available records of subsurface explorations or the state's test borings of the area, and never inquired about the presence of sand. Had it done so, the Court commented that it would have been obvious to the contractor that it was likely to encounter sand in excavating the area at issue.

In another New York case, Constanza Const. Corp. v. City of Rochester, 147 A.D. 2d 929, 537 N.Y.S.2d 394 (N.Y. App. 4th 1989), the contractor on a road construction project attempted to counter the awarding authority's inadequate pre-bid investigation argument by arguing that the time available prior to the bid submission deadline was too limited to make an in-depth inspection of the site conditions, and that such an inspection would have been "prohibitively expensive." The contractor was seeking an equitable adjustment to the $25 per cubic yard unit price for rock removal where the actual rock removed was six times greater than the estimated quantity provided in the project specifications. The job drawings showed only about 20 cubic yards of rock to be excavated, and the contract provided an estimated quantity of 100 cubic yards. In upholding the dismissal of the contractor's claim, the Court found the contractor's argument as to the limited time available for the pre-bid investigation unavailing, noting that "[n]evertheless, this what [the contractor] obligated itself to do by signing the contract." Id. at 396; see also Air Cooling & Energy, Inc. v. Midwestern Const. Co. of Missouri, Inc., 602 S.W.2d 926 (Mo. App. W.D., 1980) (contractor claim denied based on contractor's unjustified reliance on boring data and neglect to further investigate site conditions prior to bidding).

Accordingly, for the most part courts appear to apply a reasonableness standard, with varying outcomes depending on the circumstances of a particular case, in determining whether contractual requirements for pre-bid investigations might preclude differing conditions claims. In this analytical framework, awarding authorities can best protect against differing conditions claims by continue to require pre-bid investigations, but ensuring as much as possible that such investigation requirements are reasonable and attainable within the bid preparation period.

B. Differing Condition Claim Issues During Construction

Once the construction phase of a public construction project is underway, the principal tool for awarding authorities in controlling differing conditions claims is ensuring contractor

compliance with the claim procedures set forth in the contract documents. These procedures typically establish timelines for claims to be submitted and require certain information to be supplied for a claim to be valid. See e.g., General Conditions for the Contract of Construction, AIA Document A201-2007 § 15. Prudent observance of the claims procedures by the awarding authority not only help to ensure these claims are properly documented and supported, but if they are not observed by the contractor, additionally may give the awarding authority further defense to the contractor's differing conditions claim if the contractor seeks recovery through the courts.

While not yet directly addressed by the Supreme Judicial Court, the Appeals Court and trial level courts in Massachusetts, with rare exceptions, have strictly enforced claim procedures for differing conditions claims in public construction contracts. See e.g., Glynn v. City of Gloucester, 21 Mass. App. Ct. 390 (1986), *rev. denied* 396 Mass. 1107 (1986) (table); Skopke Bros., Inc. v. Webster Housing Authority, 11 Mass. App. Ct. 947 (1981) (rescript) (contractor claim submitted 16 months after occurrence giving rise to claim untimely under contract documents and waived); Earth Tech Environment and Infrastructure, Inc. v. Perini/Kiewit/Cashman, 2004 WL2341397 (Mass. Super.) (allowing contractor's motion for summary judgment against subcontractor due to subcontractor's failure to file timely notice of claim pursuant to contract documents). In the Glynn case, the receiver of a construction contractor sought additional compensation under the differing conditions clause of the contract due to large rocks and boulders encountered by the contractor in the excavation of a roadway which differed from the conditions predicted by test borings furnished by the city to all bidders. The contractor had admittedly failed to follow the contract procedures to seek an equitable adjustment to the contract price. The Court found that the contractor's failure precluded recovery on its equitable adjustment claim. Glynn, 21 Mass. App. Ct. at 395-396.

Massachusetts courts have also required strict compliance with contract claims procedures with regard to similar provisions in public construction contracts, such as extra work provisions. In an earlier decision in the Glynn case dealing with requests for additional compensation by the contractor under other provisions in the contract, the Appeals Court held that "[o]n a public construction contract, if actions or requirements of the public agency necessitate changes in the work as it progresses, thereby causing the contractor to perform extra work or incur added expense, ... the contractor must follow the procedures spelled out in the contract ... to adjust the price before unilaterally accruing expenses to be pursued later on breach of contract or quantum meruit theories." Glynn v. Gloucester, 9 Mass. App. Ct. 454, 460 (1980), *rev. denied*, 396 Mass. 1107 (1986). "A contractor who fails to adhere to the strict claims provision of a public works contract forfeits all rights of recovery of damages or extra compensation unless the agency waives compliance therewith or the contractor is excused from compliance." Sutton Corp. v. Metropolitan District Commission, 38 Mass. App. Ct. 764, 767 (1995); D. Federico Co. v. Commonwealth, 11 Mass. App. Ct. 248, 252 (1981). Not surprisingly, waiver is a typical argument contractors make in advancing claims otherwise precluded by failure to follow the procedures in the contract documents. To establish waiver, the contractor must show "that there was clear, decisive, and unequivocal conduct on the part of an authorized representative of the agency indicating that it would not insist on adherence to the agreement." Glynn, 9 Mass. App. Ct. at 462.

There are two Massachusetts differing conditions cases in favor of contractors in this particular area of which awarding authorities should be aware and take heed. See D. Federico Co., Inc. v. New Bedford Redevelopment Authority, 723 F.2d 122 (1st Cir. 1983); Kiewit-Atkinson-Kenny v. MWRA, 2002 WL 31187691 (Mass. Super.). In the Federico case, although a bankruptcy judge had earlier ruled the contrary, see In re D. Federico Co., Inc., 8 B.R. 888 (Bankr. D. Mass. 1981),[3] the Circuit Court did not interpret the bankruptcy court's ruling as a finding that the contractor failed to follow the notice provisions of the contract or as provided by G.L. c. 30 § 39N. The differing conditions encountered were underwater obstructions in a project for the construction of two wharves. The Court noted that the contractor had notified the engineers employed by the authority at the time the underwater obstructions were encountered, and over the next few months found the parties "were in constant communication in an effort to determine the exact identity, location and character of the obstructions." D. Federico Co., Inc., 723 F.2d at 127. The Court credited the authority's meeting minutes as evidence of its awareness of the issue and involvement in discussions regarding the conditions encountered. Id. The Court then found that the contractor had filed a written notice "that the problem was beyond the scope of anticipated conditions and requested instructions on how to proceed" as soon as the exact character of the obstructions had been determined. Id. From these factual findings contained in the record, the Circuit Court found the contractor had provided adequate notice, rejecting the authority's argument on appeal. Id.

Kiewit-Atkinson-Kenny v. MWRA, 2002 WL 31187691 (Mass. Super.), involved a general contractor claim for increased costs during a tunnel construction project due to excess water inflows beyond those projected by a geotechnical design report included in the bid documents. The Court denied the MWRA's motion for summary judgment, which had argued that general contractor had failed to comply with the notice provisions in the contract documents. The Court noted that while it was "a very close legal issue," the MWRA's execution of a settlement agreement excepting claims including claims related to the inflows was "sufficient to constitute a waiver by the MWRA of the strict adherence to statutory and contractual notice requirements by [the general contractor] in order to preserve its rights to present its post-mining excess water inflow differing site condition claims," even though the Court had also found that prior communications regarding the issue from the general contractor to MWRA were insufficient to satisfy the notice requirements of the contract documents. Awarding authorities can argue that this decision by Judge Van Gestel is of limited general applicability to issues of waiver of contractual or statutory notice requirements for differing conditions claims, given the cautionary language permeating the decision, such as "this ruling is for purposes of the present motion and should not be considered the law of this case for any purpose other than that. In other words, the issues relating to proper notice are by no means closed to further exploration at trial." Unfortunately this case would give no further clarity to the law regarding differing conditions claims in Massachusetts. The case settled shortly after Judge Van Gestel's opinion was issued.

[3] The judge in the bankruptcy decision had ruled that Federico "fell short of proving its compliance with M.G.L. Ch. 30, Section 39N…[by] not sustain[ing] its burden of proving that a written request for an equitable adjustment was submitted as soon as possible after Federico discovered the actual subsurface conditions." In re D. Federico Co, Inc., 8 B.R. at 899. There was no express finding by the judge relative to Federico's compliance with any notice provisions in the contract.

Outside of Massachusetts, a number of states have strictly applied the claims procedures in public construction contracts to preclude differing conditions claims when not followed by the contractor, despite efforts to argue that "actual notice" is sufficient. Dan Nelson Construction, Inc. v. Nodland & Dickson, 608 N.W.2d 267 (N.D. 2000); Roy C. Knapp & Sons, Inc. v. County of Putnam, 212 A.D. 2d 770, 623 N.Y.S.2d 261 (N.Y.App.2d, 1995); Com. v. AMEC Civil, LLC, 54 Va. App. 240 (Va. App., 2009); Neal & Co., Inc. v. City of Dillingham, 923 P.2d 89 (Alaska, 1996). Other states have recognized an "actual notice" exception to contract claim procedures in certain circumstances. Ronald Adams Contr. v. Miss. Transp. Com'n, 777 So.2d 649 (Miss., 2000) (authority's engineer had actual knowledge of the differing condition having directed the contractor to perform the additional work, therefore there was a question of fact whether written notice was required precluding authority's motion for summary judgment).

In view of the precedent that does exist in Massachusetts with regard to claims procedures, in evaluating a contractor claim alleging differing conditions, the awarding authority must be prepared to carefully evaluate claims submitted by the contractor during the construction process against the claims procedures set forth in the contract documents to avoid inadvertently compromising or waiving defenses against such claims that would otherwise be barred if the matter eventually proceeds to litigation. For example, if the contract contained the claims procedures set forth in Article 15 of the 2007 edition standard AIA General Conditions for the Contract of Construction, an awarding authority should take the following steps:

1. Identify the date of "the occurrence of the event giving rise" to the claim;

2. Calculate whether the contractor provided notice of the claim within 21 days of such date;

3. Confirm that such notice was delivered in the manner required by the contract (e.g., in writing, to the proper parties, via required means of mailing/delivery, etc.);

4. In light of the waiver argument that is often made by a contractor who otherwise failed to comply with the claim procedures in the contract, confirm that no authorized representative of the awarding authority expressly waived strict compliance with any of the procedural requirements of the contractual claims provisions of the contract documents; and

5. Determine whether the contractor submitted cost and/or time proposals for the claim and any additional supporting data in support of its claim within the time provided by the contract documents.

6. Evaluate the initial notice, any cost and/or time proposals submitted and any additional supporting data provided, and timely prepare and file comments to the contractor's submission so that the project architect or engineer who will be rendering a decision on

the claim has the benefit of the awarding authority's comments when evaluating the contractor's claim.

While any deviation by the contractor from the contractual claim procedures may provide strong grounds for the awarding authority to reject such a claim, the awarding authority must be careful to itself observe the strict compliance with regard to the procedures demanded of the contractor. Otherwise, the awarding authority risks losing the protection of these important contractual provisions to an argument of waiver by the contractor.

CONCLUSION

Not every contractor claim for differing conditions will necessarily be disputed between the contractor and the awarding authority. In other cases, awarding authorities may understandably decide to compensate the contractor even for disputed differing conditions claims rather than risk costly litigation that exposes tenuous defenses.

At times, however, contractors will attempt to use differing conditions clauses to improperly recover for quantity overruns in excess of agreed unit prices or to otherwise indirectly increase profit margins after award, violating well-settled principles requiring fairness to all bidders and a level playing field for contractors in public construction projects, such as the system of competitive bidding established for public construction projects in Massachusetts through Chapter 149. Brasi Development Corp. v. Attorney General, 456 Mass. 684, 690 (2010), citing John T. Callahan & Sons, Inc. v. Malden, 430 Mass. 124, 128 (1999) (purpose of Chapter 149 includes ensuring "an open and honest bidding process and an equal playing field for all bidders").

Awarding authorities must be prepared to resist such claims appropriately, otherwise Massachusetts' system risks devolving into one where contractors bidding on public construction projects routinely "penny" or otherwise underestimate unit prices and thus increase the likelihood of being chosen over alternate bidders, only to seek an equitable adjustment thereafter when the work is underway at a time and it may be far more cumbersome for the awarding authority to terminate the contract and re-bid the project. Such claims not only thwart the competitive bidding system, but pervert the original intent behind differing conditions clauses in the first place.