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GOVERNMENT CONTRACTS FOR SUBSURFACE EXCAVATION: MISREPRESENTATION AND CHANGE OF CONDITIONS

Throughout the current century, federal, state and local governments have engaged the services of private construction companies in an increasing number of governmental construction projects. Many of these projects, such as the construction of roads, tunnels, dams, bridges, and buildings, require, at least to some degree, subsurface excavation. This comment deals with some of the legal problems facing contractors and governmental agencies in such excavation, and suggests possible solutions to these problems.

When a governmental agency has received proper authorization to proceed with the construction of a project, according to law it advertises for contractors to submit proposals.¹ The proposals by the contractors, if made in accordance with the law or agency rules, are submitted to the agency for approval.² The successful bidder is subsequently awarded the contract and begins construction pursuant to the contract.

In 1918, the Supreme Court stated, as a basic rule of contract law, that when one agrees to do a thing possible of performance, "he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered."³ Although this general rule may preclude recovery by the unfortunate contractor who discovers conditions different from those anticipated, in numerous cases involving subsurface construction and excavation, contractors have brought successful actions against the governmental agency involved when the situation actually encountered differed from that which was thought to exist.⁴

When the contractor has discovered that conditions differ from those anticipated, he is bound nevertheless to complete the project even if doing so causes him increased expense and greater difficulty than he had anticipated.⁵ When this situation arises, he has two avenues of pursuit that he can utilize to recover his losses—an action for breach of implied warranty or misrepresentation, and an action based upon a change of condition clause within the contract.

¹ *E.g.*, VA. CODE ANN. § 33.1-185 (1970).

² *E.g.*, VA. DEPT. OF HWYS. ROAD AND BRIDGE SPECIFICATIONS § 102.05 (1970).

³ *United States v. Spearin*, 248 U.S. 132, 136 (1918).

⁴ *United States v. Smith*, 256 U.S. 11 (1921); *United States v. Atlantic Dredging Co.*, 253 U.S. 1 (1920); *Christie v. United States*, 237 U.S. 234 (1915); *Hollerbach v. United States*, 233 U.S. 165 (1914); *Wunderlich v. State*, 65 Cal. 2d 777, 423 P.2d 545, 56 Cal. Rptr. 473 (1967); *Robert E. Lee & Co. v. Commission of Pub. Works*, 284 S.C. 84, 149 S.E.2d 55 (1966).

⁵ *United States v. Spearin*, 284 U.S. 132 (1918).

MISREPRESENTATION

In order for a contractor to be successful in an action for misrepresentation, he must be misled, at least to some degree, by the governmental agency. In a leading case, *Peter Salvucci & Sons, Inc. v. State*,⁶ the court stated that one who has contracted to do a thing for a stated price will not be entitled to extra compensation because he has encountered difficulties that have not been provided for in the contract.⁷ Recognizing a qualification of this general rule, however, the court noted:

A contractor of public works who, acting reasonably, is misled by incorrect plans and specifications issued by the public authorities as the basis for bids and who, as a result, submits a bid which is lower than he would have otherwise made may recover in a contract action for extra work or expenses necessitated by the conditions being other than as represented.⁸

Thus, a contractor has some basis for recovery when faced with a misrepresentation that has adversely affected the project.

An early case, *Christie v. United States*,⁹ indicated five elements necessary to maintain an action for misrepresentation.¹⁰ The first is that a material fact be represented. There are several ways in which the governmental agency can make representations to the contractor: actual assertions included in the contract,¹¹ a design of the project indicating the presence of a certain subsurface condition,¹² and diagrams indicating that certain conditions exist.¹³ The second element requires that the representation made

⁶ 110 N.H. 136, 268 A.2d 899 (1970).

⁷ *Id.* at —, 268 A.2d at 906; see SIMPSON, CONTRACTS § 180 (1965).

⁸ 110 N.H. at —, 268 A.2d at 907.

⁹ 237 U.S. 234 at 241 (1915).

¹⁰ Although the Court in *Christie* does not actually list the elements as such, the five necessary elements are easily discernible from the opinion.

¹¹ See, e.g., *Hollerbach v. United States*, 233 U.S. 165 (1914); *E. H. Morrill Co. v. State*, 65 Cal. 2d 787, 423 P.2d 551, 56 Cal. Rptr. 479 (1967).

¹² Usually the design of the project is incorporated into the contract. Because the parties are unaware of subsurface conditions, the design adopted by the governmental agency may be inadequate, and such design could be construed as representing a subsurface condition that does not exist. *E.g.*, *City of Richmond v. I. J. Smith & Co.*, 119 Va. 198, 89 S.E. 123 (1916).

¹³ Diagrams and drawings, such as those depicting cross sections of terrain through which the contractor is to excavate, may be available to the bidders. These diagrams and drawings may indicate the presence of subsurface conditions that do not exist, such as the location of solid rock or other material likely to affect subsurface excavation. When the contractor relies upon such diagrams and drawings to determine his bid, such could be construed as a misrepresentation of subsurface conditions. See Annot., 76 A.L.R. 268 at 275 (1932).

by the state be false. If the agency actually has knowledge that a certain condition exists and withholds such information, this requirement is fulfilled.¹⁴ In fact, if the governmental agency has made a misrepresentation to the contractor, whether intentional or not, the requirement is satisfied.¹⁵ The third and fourth requirements state that the contractor must have relied upon the misrepresentation and suffered injury as a result. The last and most important element, that this reliance be justified,¹⁶ is determined by a combination of factors. It must be determined whether the representation made by the governmental agency constituted a positive assertion or a mere suggestion.¹⁷ If the governmental agency makes a "positive and material representation as to a condition presumably within the knowledge of the Government, and upon which . . . the plaintiff had a right to rely,"¹⁸ the agency is considered to have warranted such a condition, despite a general provision requiring an on-site inspection by the contractors.¹⁹ If, however, statements made in good faith could be considered as suggestive only, expenses caused by unforeseen conditions will remain on the contractor, especially if the contract so stipulates.²⁰

In *C. W. Blakeslee & Sons v. United States*,²¹ the court held that the language was merely suggestive where the government informed the contractor that the material to be removed was "believed to be mostly sand with large and small boulders, and gravel."²² While most courts would concur and have no difficulty determining that such language was merely suggestive, other courts deciding cases in which the governmental agency apparently made a positive statement have held that such statements were merely suggestive.²³

¹⁴ *United States v. Atlantic Dredging Co.*, 253 U.S. 1 (1920); *Christie v. United States*, 237 U.S. 234 (1915); *Port Dist. v. Palmberg*, 280 F.2d 237 (9th Cir. 1960); *Robert E. Lee & Co. v. Commissioner of Pub. Works*, 248 S.C. 84, 149 S.E.2d 55 (1966).

¹⁵ In *Christie*, the government's engineer knew about logs buried in the excavation area but failed to mention them in his report, causing the contractor's bid to be inaccurate. The Court stated:

It makes no difference to the legal aspects of the case that the omissions from the records of the results of the borings did not have sinister purpose. There were representations made which were relied upon by Claimants and properly relied upon by them, as they were positive. 237 U.S. at 242.

See also *Kiely Constr. Co. v. State*, 154 Mont. 363, 463 P.2d 888 (1970).

¹⁶ *Wunderlich v. State*, 65 Cal. 2d 777, 423 P.2d 545, 56 Cal. Rptr. 473 (1967).

¹⁷ *Hollerbach v. United States*, 233 U.S. 165 (1914).

¹⁸ *Id.* at 169.

¹⁹ *Hollerbach v. United States*, 233 U.S. 165 (1914).

²⁰ *Wunderlich v. State*, 65 Cal. 2d 777, 423 P.2d 545, 56 Cal. Rptr. 473 (1967).

²¹ 89 Ct. Cl. 226 (1939), *cert. denied*, 309 U.S. 659 (1940).

²² *Id.* at 229.

²³ *E.g.*, *J. A. Thompson & Son v. State*, 51 Hawaii 529, 465 P.2d 148 (1970).

Another factor considered in determining if a contractor's reliance has been justified is whether the representation made by the governmental agency was within its knowledge. In *Peter Salvucci & Sons, Inc. v. State*,²⁴ the agency represented that the contractor could obtain a necessary material from a specific source; however, once the agency accepted his bid, the contractor was not able to obtain the material. Clearly, the agency should have known whether the material was available.²⁵ Similarly, in *Hollerbach v. United States*,²⁶ the plaintiff contractor was awarded a contract to construct a dam for the federal government. The government represented that the dam was then backed with broken stone, sawdust and sediment, when, in fact, it was not, as subsequent excavation revealed.²⁷ The Court noted that this was a representation of a fact "concerning which the government may be presumed to speak with knowledge and authority."²⁸

Additionally, some authority exists that has placed the burden of knowledge and expertise in the field of subterranean excavation upon the contractor when the government agency had represented that certain conditions existed.²⁹ For example, when the government represented that an excavation was primarily through lava rock, the contractor was charged with the knowledge that the character of this material through which he was to excavate could vary drastically within a short distance.³⁰

Usually, when a governmental agency decides to undertake a project involving some type of excavation, it will make test borings to ascertain the type of subsurface material that the contractor may expect to encounter. Such borings, along with any other information the government may have, are usually made available to the prospective bidders. As a result, a question arises whether a warranty, if any, will attach to this information. Clearly, where the government has indicated that it has made test borings to a certain depth, and the plaintiff has based his bid upon such alleged test results that subsequently prove to be incorrect, the government will be liable

²⁴ 110 N.H. 136, 268 A.2d 899 (1970).

²⁵ In *Salvucci* the commissioner of highways had notified the contractor by telegram that "free gravel and borrow could be obtained from the National Forest lands through which the highways were to be built." *Id.* at —, 268 A.2d at 901. Although a representative of the state government made the statement, a federal agency refused to allow the use of the material. Clearly the state should have made the necessary inquiries before making such a statement.

²⁶ 223 U.S. 165 (1914).

²⁷ The dam to be repaired was owned by the United States government. One should reasonably be able to rely upon a statement made by the government concerning the subsurface backing of a dam which it built.

²⁸ *Hollerbach v. United States*, 223 U.S. 165, at 172 (1914).

²⁹ *J. A. Thompson & Son v. State*, 51 Hawaii 529, 465 P.2d 148 (1970).

³⁰ *Id.* at 538, 465 P.2d at 154.

if, in fact, no test borings were ever made.³¹ However, the problem becomes more difficult when the agency has conducted test borings and accurately reported the results, but the contractor thereafter discovers that the test borings, although accurate, are not indicative of the total area to be excavated.³² In *Chris Nelsen & Son v. City of Monroe*,³³ the plaintiff contractor brought an action in assumpsit, alleging that the defendant city furnished him with faulty and incorrect information. The contractor was unable to show that the borings made by the city were incorrect. Here, the city disclosed all the information at its disposal to the contractor and allowed him to draw his own conclusions. The court, in holding for the city, noted that when true and accurate results of the test borings are given to a contractor, a city will not be liable for any incorrect conclusions that the contractor may draw from such information.³⁴

Even if the government itself forms a conclusion concerning the subterranean conditions and makes all of its borings and test results available to a contractor, the contractor is charged with knowledge that the test borings are determinative only of the precise location of the hole.³⁵ Thus, when a governmental agency makes its boring results available to a bidder, the latter is charged with the knowledge that the borings are not conclusive and are "merely indications, . . . from which deductions might be drawn as to actual conditions."³⁶

In general, the only warranty or guarantee that is made by the governmental agency, in cases decided in favor of governmental agencies, is that the borings and other tests were made and conducted by approved methods, and were accurately reported.³⁷

³¹ *Kiely Constr. Co. v. State*, 154 Mont. 363, 463 P.2d 888 (1970).

³² *Elkan v. Sebastian Bridge Dist.*, 291 F. 532 (8th Cir. 1923).

³³ 337 Mich. 438, 60 N.W.2d 182 (1953).

³⁴ *Id.* at 446, 60 N.W.2d at 186; see also *Warner Constr. Co. v. City of Los Angeles*, 2 Cal. 3d 285, 466 P.2d 996, 85 Cal. Rptr. 444 (1970).

³⁵ *J. A. Thompson & Son v. State*, 51 Hawaii 529, 465 P.2d 148 (1970).

³⁶ *Elkan v. Sebastian Bridge Dist.*, 291 F. 532, 538 (8th Cir. 1923).

³⁷ In *Wunderlich*, the court referred to *Chris Nelsen & Son v. City of Monroe*, 337 Mich. 438, 60 N.W.2d 182 (1953), stating that the implied warranty made by the defendant city applied only to the accuracy of the test made by the city. There are numerous other cases that have held in favor of the contractor when the results of the test given to him by the governmental agency were inaccurate. In *Warner Constr. Co. v. City of Los Angeles*, 2 Cal. 3d 285, 466 P.2d 966, 85 Cal. Rptr. 444 (1970), the court, referring to *Wunderlich* and *Nelsen*, stated that "the bidder takes the risk in making deductions from accurate test data, but the city retains responsibility for any inaccuracy in the data." *Id.* at —, 466 P.2d at 1000, 85 Cal. Rptr. at 448. In cases such as *Christie v. United States*, 237 U.S. 234 (1915) (where the report was inaccurate due to a withholding of information by the government), *United States v. Atlantic Dredging Co.*, 253 U.S. 1 (1920) (where the test had been conducted in an unreliable manner), or *Robert E. Lee & Co. v. Comm'n of Pub. Works*, 248 S.C. 84, 149 S.E.2d 55 (1966)

Furthermore, although the government will conduct test borings, it will often require the contractor to inspect the site and conduct his own test to satisfy himself that he has knowledge of the subsurface conditions that he will encounter.³⁸ Apparently, the purpose of this requirement is to prevent a contractor from claiming that he had relied upon the test borings of the governmental agency when he prepared his bid. Usually, however, such an effort by the government will not relieve it of liability if the bidder is not given ample time to perform his own test. *Peter Salvucci & Sons*³⁹ exemplifies this situation; the court, referring to a number of cases held:

Where bidder is allowed insufficient time within which to make a personal study, the State cannot invoke the general exculpatory clauses, to exonerate itself from liability. Particularly is this true in a case . . . where no specific warning is given in connection with the particular item the representation of which is in question; or in a situation . . . where the bidder has not time to make a personal and detailed inspection.⁴⁰

The question of what constitutes a sufficient period of time for such an independent investigation will obviously vary with the circumstances of the particular case, but when the government has spent months and even years conducting tests at the proposed construction site, clearly a few days or weeks is not sufficient time for the contractor to conduct his test.⁴¹

The effect of a disclaimer or other exculpatory language incorporated into the contract is another important element of justified reliance.⁴² The government may include a valid disclaimer regarding test conclusions, but this has no effect when the government has been negligent in conducting

(where the reports of the government did not accurately reveal the results of the test boring), the courts have held for the contractor. From the foregoing as well as other cases one can conclude that a governmental agency will be liable for inaccurately reporting test results to a contractor. See also, *Souza & McCue Constr. Co. v. Superior Court*, 57 Cal. 2d 508, 370 P.2d 338, 20 Cal. Rptr. 634 (1962); 43 AM. JUR. *Public Works Contracts*, § 111 (1962). However, where the test results are accurately reported and the contractor can draw his own conclusions therefrom, the agency will not be liable.

³⁸ VA. DEPT. OF HWYS. ROAD AND BRIDGE SPECIFICATIONS § 102.04 (1970).

³⁹ 110 N.H. 136, 268 A.2d 899 (1970).

⁴⁰ *Id.* at —, 268 A.2d at 906.

⁴¹ In *Haggart Constr. Co. v. State*, 149 Mont. 442, 427 P.2d 686 (1967), although the state gave the contractor the opportunity to bid nineteen days before the deadline, it furnished the necessary information, which was incorrect, only fourteen days before the deadline. One of the reasons for which the court allowed recovery was that the contractor himself did not have sufficient time to perform an investigation.

⁴² In *Wunderlich v. State*, 65 Cal. 2d 777, 423 P.2d 545, 56 Cal. Rptr. 473 (1970), the court indicated that a pertinent disclaimer is an element necessary to relieve the government of its liability. *Id.* at —, 423 P.2d at 550, 56 Cal. Rptr. at 478.

its test borings. In *Haggart Construction Co. v. State*,⁴³ a case in which the governmental agency was negligent in making its tests, the court held for the plaintiff and refused to allow the government to utilize exculpatory language in the contract to escape liability for its misleading statement.⁴⁴ General exculpatory language is usually insufficient to relieve the government of any liability. In *E. H. Morrill Co. v. State*,⁴⁵ the contract stated that the contractor would receive no additional compensation for difficulties caused by surface and subsurface conditions.⁴⁶ Although such language appears to be strong and fairly specific, the court would not allow the government to be relieved from its liability. Likewise, after a thorough examination of the pertinent law the court in *Wunderlich v. State*⁴⁷ said:

When there is no misrepresentation of factual matters within the state's knowledge or withholding of material information, and when both parties have equal access to information as to the nature of the test which resulted in the state's findings, the contractor may not claim in the face of a pertinent disclaimer that the presentation of the information, or a reasonable summary thereof, amounts to a warranty of the conditions that will actually be found.⁴⁸

Thus, it appears that if the government uses language that is merely suggestive, is not negligent in making or reporting its test, makes no misrepresentation of a matter presumably within its knowledge, and utilizes an appropriate disclaimer, the contractor will not be successful in an action of misrepresentation against the government. By following the appropriate procedure from the outset of the bidding, the government clearly can protect itself from liability resulting from any unforeseen conditions. Because of this, the contractor should be aware of his responsibility to complete the project regardless of any change in condition that may occur, and as a result, would have to raise his bid higher than ordinarily necessary in order to compensate for any possible obstacle that may arise. Thus, the ideal solution would seem to be for the parties to include a change of conditions clause in the contract.

⁴³ 149 Mont. 422, 427 P.2d 686 (1967).

⁴⁴ *Id.* at 428, 427 P.2d at 687-88.

⁴⁵ 65 Cal. 2d 787, 423 P.2d 551, 56 Cal. Rptr. 479 (1967).

⁴⁶ In the *Morrill* case the governmental agency used an exculpatory clause which stated that,

[the contractor] shall receive no additional compensation for any obstacles or difficulties due to surface or subsurface conditions actually encountered. *Id.* at 789, 423 P.2d at 553, 56 Cal. Rptr. at 481.

⁴⁷ 65 Cal. 2d 787, 423 P.2d 545, 56 Cal. Rptr. 473 (1967).

⁴⁸ *Id.* at —, 423 P.2d at 550, 56 Cal. Rptr. at 478.

CHANGE OF CONDITIONS

Some contracts do include a change of conditions clause,⁴⁹ and a number of cases have been brought by contractors to recover their losses due to conditions being other than those thought to exist at the outset of the contract.⁵⁰ In *City of Richmond v. I. J. Smith & Co., Inc.*,⁵¹ the actions of misrepresentation and change of circumstance were so intermingled and closely related that it was difficult to distinguish the two. The city represented that there was hard rock only a few feet below the river bottom suitable for a bridge foundation. Upon excavation of the site, the contractor found that the rock was considerably deeper than the drawings indicated. Although he mentioned the elements necessary to sustain such an action for misrepresentation, he brought his action on the ground that the conditions actually encountered were substantially different from those contemplated by the parties. Recovery for changed conditions was allowed by the court because the contractor was entitled to such, by virtue of the change of conditions clause within the contract.⁵²

Generally, such a clause allows the parties to renegotiate the amount of money to be paid to the contractor, and upon what basis it is to be paid when he encounters a change of conditions. The primary purpose of the clause seems to be to enable the government to change the design of the project, and still hold the contractor to his obligation, when conditions not anticipated occur that render the original plans and designs inadequate. Contractors, however, have been able to use such clauses to their benefit when conditions encountered have differed materially from those anticipated, although the plans and designs remained adequate.⁵³

In addition to an actual change of conditions, to maintain such an action, doubtless such a clause must be included in the contract. Without such a clause and without actionable misrepresentation by the governmental agency, the unfortunate contractor is bound to complete the project as long as its completion is possible.⁵⁴

⁴⁹ For an example of a change of conditions clause, see Annot., 85 A.L.R.2d 211 n.4 (1962).

⁵⁰ See, e.g., *Woodcrest Constr. Co. v. United States*, 408 F.2d 406 (Ct. Cl. 1969); *Fehlhaber Corp. v. United States*, 151 F. Supp. 817 (Ct. Cl. 1957); *John A. Johnson Contracting Corp. v. United States*, 132 F. Supp. (Ct. Cl. 1955).

⁵¹ 119 Va. 198, 89 S.E. 123 (1916).

⁵² In this case the court stated that the contractor had complied with the clause in the contract that provided for additional compensation when extra work was necessary. *Id.* at 207, 89 S.E. at 126.

⁵³ See note 52 *supra*.

⁵⁴ As stated in the general rule, as long as the contract can possibly be performed, the contractor is liable for full performance, regardless of difficulties he may incur. See *United States v. Spearin*, 248 U.S. 132, 136 (1918).

CONCLUSION

There is no question that a governmental agency can successfully disclaim any liability when the contractor's bid is insufficient to cover the cost and profit of a governmental construction project, except when the agency has been negligent. Knowing this, a prospective bidder will reflect in his proposal every possible change in circumstance that could arise, resulting in a substantially higher bid.⁵⁵ However, there appears to be a solution that could, at least to some extent, resolve this dilemma. The governmental agency should follow the appropriate procedure to insure that it will be protected from an action by the contractor for misrepresentation. Also, the parties should include a change of circumstances clause in the contract. Such clause should not be of a general nature, such as those that appear in agency regulations and that are incorporated in all agency projects by reference,⁵⁶ but should be drafted separately and specifically for each individual project, mindful of the changes of circumstances likely to be incurred. The primary purpose for such a clause should not be to allow the government to change its inadequate design, but rather to compensate the contractor for his increased costs resulting from unanticipated conditions. The clause should prescribe the method under which the contractor is to proceed, whether on a cost basis, a force account basis, or some other method amenable to the parties.

One major question that could conceivably arise with great regularity concerns who should determine when a change of conditions has actually occurred.⁵⁷ Clearly, the government's consultant engineers would be hesitant to declare that a change of conditions exist; conversely, the contractor's consultant engineers would be anxious to make such a determination. The logical solution seems to be to provide for the contractor to make his change of conditions claim, and if the government refuses to recognize the claim, the parties agree to submit to arbitration in some form.⁵⁸ The purpose of recommending this procedure that appears to allow the contractor an escape route when he bids too low is not to encourage careless bids,

⁵⁵ See *Haggart Constr. Co. v. State*, 149 Mont. 422, 428, 427 P.2d 686, 687-88 (1967).

⁵⁶ VA. DEPT. OF HWYS. ROAD AND BRIDGE SPECIFICATIONS § 104.02 (1970).

⁵⁷ The actual determination of the time that a change of condition occurs is a very important factor. Often when the contractor feels that a change has occurred and the representative of the government feels that it has not, the contractor will refuse to perform. As a result of the delay in construction, large sums of money may be lost and the project may be delayed unnecessarily.

⁵⁸ Some states may prohibit the settlement of government contract disputes by arbitration; however, that is beyond the scope of this comment. Arbitration is merely suggested as a possible solution to this problem.

as some authorities fear,⁵⁹ but rather to encourage the contractor to bid reasonably, knowing that should a condition occur, not in the contemplation of the parties at the outset of the project, he will at least be able to recover his costs.

J. H. J.

⁵⁹ In *J. A. Thompson & Son v. State*, 51 Hawaii 529, 465 P.2d 148 (1970), the court stated that "the State should not be placed in the position of encouraging careless bids by contractors who might anticipate that should conditions differ from optimistic expectations reflected in the bids, the State would bear the cost of the bidder's error." *Id.* at 539, 465 P.2d at 155.