

What Lies Beneath - Ground Risk and Site Conditions

by Mark Pantry

Unforeseen site conditions cause delay and cost overruns for projects of all sizes. In 2019 Allan Cook, the chairman of HS2 Ltd, blamed (in part) increased costs for the flagship infrastructure project on ground conditions which were “significantly more challenging than predicted”.

The nature of the conditions that are encountered or could be encountered on site will vary from project to project. For HS2 a major issue was the changing soil types across the route. Projects redeveloping brownfield sites may encounter existing structures or contamination below ground, while projects refurbishing buildings may discover services not shown on a drawing or in the wrong place.

In circumstances similar to the above examples we are often asked: who takes the risk for unforeseen ground or site conditions encountered by a contractor carrying out works on site and what is the standard negotiated position? The answer, unfortunately, is often as varied as the types of condition that are encountered on site but it usually starts with all parties looking at the contractor.

The standard position is that, in promising to undertake works for a fixed price, the contractor is promising to complete those works even where the works are more difficult or more expensive for the contractor to complete. This is true even where the designs are supplied by the employer; there is no implied warranty from the employer that the designs provided are feasible or that the site is fit for the works intended on it. The employer is relying on the contractor’s professional expertise in determining the buildability of the works.

There is a long history of case law which states that the courts will not help a contractor escape a bad deal. If a contractor cannot build what he has promised to build it is, on the face of it, in breach of contract. Accordingly, it is on the contractor to determine the potential ground risks or site conditions and price for them accordingly or to ensure that its tender is qualified sufficiently.

As a general principle, parties to a construction contract are free to allocate risk how they see fit. On that basis, rather than rely on the common law position many parties negotiate contracts which expressly allocate the risk for adverse site conditions, and those contracts which do not are unlikely to have such a term implied into their contracts by the courts.

Many standard form engineering contracts include specific provisions on ground conditions; the two main domestic forms of standard form contract in the United Kingdom, the JCT and NEC contracts, adopt different approaches.

The NEC4 Engineering and Construction Contract includes as a compensation event (entitling the contractor to additional time and money) the encountering of "physical conditions" within the site which an experienced contractor would have judged to have such a small chance of occurring, having regard to all the information available to it, that it would have been unreasonable to allow for such conditions.

While, from an initial review, giving physical conditions as a compensation event sounds a beneficial position for the contractor, in reality this is quite a high hurdle for a contractor to leap over to get its compensation event. By introducing a concept of foreseeability of site conditions, the contract is requiring contractors to prove that an experienced contractor would not have foreseen the conditions encountered.

The JCT Design and Build Contract and the majority of JCT contracts are silent on site conditions and ground risk. This is intentional – the common law position applies which puts the risk for unforeseen physical conditions with the contractor without any mitigating foreseeability criteria.

A construction contract is not, however, just the terms and conditions but also includes the various contract documents. In *Clancy Docwra Ltd v E.ON Energy Solutions Ltd* the court held that a scope of works had been modified by a document appended to the contract which clarified the contractor's tender in relation to adverse ground conditions. This modification of the allocation of the risk for ground conditions was regardless of an express term of the contract which allocated ground risk to the contractor.

The above decision shows the importance of parties to a construction contract ensuring that all contractual documentation is consistent with the terms and conditions. It also shows that risk allocation clauses are not the "get out of jail free" card they are often thought of as being. It is a reminder for the parties to give due thought to the potential impact of adverse site conditions and how this risk should be allocated between the parties.