



Differing Site Conditions

Contractor Claim Preparation Checklist

Instruct project staff to follow the BASIC 3 RULES:

1. **Stop work immediately** (preserve the “crime scene”) when a differing site condition is discovered. If, after hours or days of working in this changed condition, the realization has just dawned on you that this may be compensable under the contract, then that moment of realization is the “discovery moment”. Stop.
2. **IMMEDIATELY notify the appropriate “contracting officer”** (check your contract for exactly who this is) in WRITING. Hand deliver the notice. If you are a subcontractor, deliver the Notice to the Prime, but assure they deliver it to the appropriate contracting officer. If you are just getting around to working up your claim and you think you blew the Notice provisions, contact your attorney or www.claimsleader.com immediately.
3. **Await the owner’s written direction.** If the owner delays giving written direction, call them, email them, and write them DAILY warning of possible project delays to the critical path.

If you fail to follow these procedures, you may jeopardize payment for your extra costs.

Site investigation

1. Utilize an Occurrence Report format (contact www.claimsleader.com if you do not have one).
2. Assemble all field documentation
 - a. Written notice of DSC
 - b. Photos and video
 - c. Statements of field personnel
 - i. Superintendent
 - ii. Foreman
 - iii. Equipment operator
 - iv. Subcontractors
 - v. Inspectors
 - d. Daily reports from several days before and after the moment of encounter
 - e. Job Costing reports from beginning of project (to track impacts on efficiency)
3. Analyze documentation, fill in any gaps
4. Discuss with owner or owner’s representative

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- a. Does the owner acknowledge the DSC?
 - b. What is the owner's intended action?
 - i. Any changes to the design or plan?
 - ii. Probable or requested delays?
 - iii. Termination for convenience?
 - c. Has owner given written direction?
 - d. What will probably be required to achieve compensation?
 - i. Negotiation?
 - ii. Written request for equitable adjustment?
 - iii. Request for Dispute Review Board, mediation, arbitration?
 - iv. Claim?
5. Compare site documentation to pre-bid site investigation
- a. Was there a pre-bid site investigation?
 - i. Documented?
 - ii. Photographed?
 - iii. Report?
 - iv. Missed pre-bid but conducted pre-mobilization investigation?
 - b. Were there any indications of this DSC?
 - c. What evidence supports the contractor's position that it could not have known or anticipated this DSC?
6. Consider independent testing?
- a. Is owner conducting additional testing or investigation?
 - b. Is there a need for the contractor to hire an independent testing engineer?
 - i. To fill in gaps of information
 - ii. To verify or dispute owner information
 - iii. To obtain independent opinion for claim

Preliminary analysis

1. Does the contract contain an "unknown conditions", "changed conditions" or "differing site conditions" clause?
2. Are there any related exculpatory clauses?
 - a. What is their effect?
 - b. Do you need to consult with a construction attorney regarding the legal issues?
3. Have all contract requirements been met?
 - a. Document this.
 - b. If not, endeavor to meet them now and get them acknowledged by owner.
4. Is this a Type 1 or Type 2 DSC?
5. If Type 1, list the elements the Type 1 changed condition would include:
 - a. Certain subsurface or site conditions were indicated on contract docs
 - b. Contractor reasonably relied on the representation made by the contract docs

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- c. The subsurface conditions encountered materially varied from those indicated
 - d. Contractor suffered damages (increased costs / inefficiency / time) as a result of the change
 - e. Contractor gave proper notice under the contract.
 6. If a Type 2, list the elements the Type 2 changed condition would include:
 - a. Contractor encountered a physical condition
 - b. The condition was unknown to the contractor at the time of bidding
 - c. The condition could not have been anticipated from the contract documents
 - d. The condition could not have been discovered by a reasonable pre-bid site investigation
 - e. The condition was such that an experienced contractor working under similar conditions would not normally expect to encounter such a condition.
 7. Is there evidence of owner fraud, misrepresentation or breach of warranty?
 8. What are the damages to the contractor?
 - a. Are the damages continuing?
 - b. Are they fully measured and provable?
 - c. Are they auditable?
 - d. Include:
 - i. Costs (from Daily Reports, timesheets, materials invoices, equipment records)
 - ii. Inefficiencies (from Cost Code reports using measured mile)
 - iii. Time delay (shown on CPM schedule)
- based on information provided by Eugene Schaffel and Brian Craig, Buckley, Treacy, Schaffel, Mackey and Abbate, New York.

Check the history of the site

1. Was there any prior construction at this site?
2. Was there other construction in the vicinity?
3. Contact contractors on those jobs:
 - a. What site conditions did they encounter?
 - b. Ask to see their contract documents:
 - i. Do they contain similar representations?
4. Are the contract representations inadequate or misleading?
5. Is there evidence that the owner knew or should have known more?
 - from a list provided by Eugene Schaffel and Brian Craig, Buckley, Treacy, Schaffel, Mackey and Abbate, New York.

DSC CONTRACTOR CLAIM PREPARATION CHECKLIST***Factual investigation***

1. Assemble and index all documents
 - a. Occurrence Report (Parts A & B)
 - b. Field reports (daily reports, cost code reports, subcontractor reports)
 - c. Notices and responses
 - d. Correspondence including emails
 - e. Diaries
 - f. Photographs & videos
 - g. Carefully choose indexing system
 - i. Date, arranged chronologically
 - ii. Type of document
 - iii. Area (if more than one included in DSC)
 - iv. Source of document
2. Conduct interviews
 - a. Home office initially
 - i. Determine onsite involvement
 - ii. Complete list of field personnel, titles, company, phone and fax numbers and email addresses
 1. Inclusive regard of company for whom they work
 - iii. Interview privately without supervisor present
 1. Goal: the truth, not just what the boss wants to hear
 2. Take notes (tape recording ok but not efficient and can be intimidating)
 - b. Field personnel
 - i. Determine their training and work experience
 - ii. Ask open questions
 1. Were there any problems?
 2. Then what did you do?
 - iii. Request copies of any documents relevant to DSC
 1. Reports
 2. Journals and diaries
 3. Photos
3. Assemble and analyze any independent testing
 - a. Borings
 - b. Core samples
 - c. Materials testing
 - d. Environmental testing
 - e. Independent inspections
4. Juxtapose all of the above
 - a. Put the pieces of the puzzle together
 - b. Identify and investigate any contradictions or inconsistencies
 - c. Note corroborating documents, interviews and tests