

Expect The Unexpected: Contracts For Underground Projects

By **Jill Jaffe and Brenda Lin** (July 5, 2024)

Construction of the Mountain Valley Pipeline project, a \$7.85 billion, 303-mile underground pipeline built to transport natural gas to the East Coast, was completed last month, after a part of the pipe burst on May 1 in Roanoke County, Virginia, during hydrostatic testing of the pipe.[1]

The hydrostatic testing process uses water pressure to identify potential areas of leaks that may have been caused by weather exposure, such as heavy rainfall.[2] Before obtaining approval from the Federal Energy Regulatory Commission, the Mountain Valley Pipeline project faced challenges with erosion control due to heavy rainfall in May.[3]

Such environmental conditions and challenges encountered by the Mountain Valley Pipeline project underscore the importance of understanding underground site conditions and associated risks when engaging in new construction projects.

Inherent in the nature of infrastructure projects is underground work — including excavations and installation or replacement of buried structures, such as pipeline or pump stations. During this construction, one of the major risks a public entity and contractor face is encountering an unexpected site condition.

If it turns out that the site condition is different from what is indicated in the contract, questions arise regarding which party should be responsible for resulting increases in construction costs. One option for making it clear who holds the risks of a differing site condition is a contractual disclaimer.

For example, a general disclaimer in a construction contract may state that it is the sole responsibility of the contractor to evaluate the job site and make its own technical assessment of the site conditions prior to bidding. However, disclaimers need to be carefully drafted to comply with applicable state law.

California Public Contracts Code Section 7104

California Public Contract Code Section 7104 lays out requirements for certain public works contracts with local public entities for work that involves digging trenches or other excavations deeper than four feet below the surface. Section 7104 requires that such contracts include a clause setting forth a basic procedure the parties must follow in the event of a contractor's discovery of a differing site condition.

The statute designates the two types of differing site conditions. One type, described in Section 7104(a)(2), is a subsurface or latent physical condition found at the site that differs from the site conditions indicated by information made available to contractors prior to the deadline for submitting bids.

The other type, described in Section 7104(a)(3), is an unknown physical condition of any



Jill Jaffe



Brenda Lin

unusual nature that is materially different from a condition ordinarily encountered and generally recognized as inherent in the construction work.

Under Section 7104(b), the first step that a contractor must take when encountering either of these conditions is to promptly give written notice to the public entity before disturbing the site.

The public entity must then promptly investigate the condition, to determine whether it: (1) is material; and (2) causes a decrease or increase in the contractor's cost of, or the time required for, performance of any part of the work. If the public entity finds both elements exist, then the public entity must issue a change order to compensate the contractor for the differing site condition.

Essentially, under Section 7104, a public entity subject to that provision bears the risk of a differing site condition, but also has discretion over what is considered material and what increases the cost of, or time required for, performing the work. The contractor may dispute the findings, but is still obligated to complete the work under Section 7104(c), and must pursue the dispute resolution procedures contemplated in the contract.

California Common Law

In one of the few cases that analyzes Section 7104, *Condon-Johnson & Associates Inc. v. Sacramento Municipal Utility District*, the issue before the California Court of Appeal was whether a disclaimer in a Sacramento Municipal Utility District contract supported the district's decision to deny a change order request based on differing site conditions.[4]

The disclaimer stated, "it is the sole responsibility of the Contractor to evaluate the jobsite and make his own technical assessment of subsurface soil conditions for determining the proposed drilling process, equipment and make his own financial impact assessment prior to bidding." [5]

In its 2007 decision, the court held that if the public entity provided information that invited the contractor to make certain inferences of what subsurface site conditions may be expected, then a general disclaimer that wholly denies responsibility for subsurface conditions is inconsistent with Section 7104.[6]

While the case leaves open questions regarding the validity of disclaimers, *Condon-Johnson* does provide an example of when a general disclaimer may be unenforceable.

Practice Tips in Drafting Contracts

Specific Disclaimers

The parties to the construction contract should be wary of relying on disclaimers that are overly broad, or directly disclaim responsibility for site conditions that differ from what is expected or provided in reference documents.

Disclaimers covering conditions for which there are no reference materials may be more likely to be upheld as valid, notwithstanding Section 7104.

Definition of Differing Site Condition

The construction contract for a water infrastructure project may affirmatively define a

"differing site condition" using the Section 7104(a)(2) and (3) language as to subsurface, latent and unknown physical conditions.

However, in doing so, a public works contract may incorporate a list of conditions that are excluded from the definition of a "differing site condition." These exclusions would narrow the definition to carve out information the contractor may not rely on. For example, the parties might exclude:

- Conditions that a contractor had, or should have had, actual or constructive knowledge of as of the deadline for submitting a proposal;
- Conditions that could have been discovered by the contractor by reasonable investigation or review of other available information; and
- Variations in certain relevant physical conditions at the site from those that are represented in reports, tests or other data included in the contract.

These exclusions clarify that to the extent a contractor has or should have knowledge of a certain condition, either by way of publicly available information or the opportunity to perform its own site inspections, it will not be considered a differing site condition eligible for a change order.

Including these exclusions encourages the parties to coordinate, so that the contractor may take advantage of the opportunity for early site inspections and other assessments.

Conclusion

Given the legal uncertainties surrounding disclaimers, it is imperative for parties entering into such contracts to meticulously define what constitutes a differing site condition and which party bears that risk.

Clear and carefully crafted contractual provisions can help mitigate disputes regarding the allocation of risk between the parties involved, ultimately contributing to the successful execution of construction projects.

Jill Jaffe is a partner and co-chair of the real estate group at Nossaman LLP.

Brenda Lin is an associate at the firm.

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[1] Strupp, Julie, "\$7.85B Mountain Valley Pipeline construction complete," Construction

Dive, June 12, 2024 (available at <https://www.constructiondive.com/news/mountain-valley-pipeline-construction-complete/718660/>); Tate, Curtis, "A week after Mountain Valley Pipeline rupture, Equitrans Midstream says testing works," VPM, May 9, 2024 (available at <https://www.vpm.org/news/2024-05-09/mvp-rupture-may-1-roanoke-equitrans-midstream-update>); McElhinny, Brad, "Mountain Valley Pipeline, after years of delay and booming costs, is at the verge of completion," West Virginia MetroNews, May 5, 2024 (available at <https://wvmetronews.com/2024/05/05/mountain-valley-pipeline-after-years-of-delay-and-booming-costs-is-at-the-verge-of-completion/>).

[2] Tate, Curtis, "A week after Mountain Valley Pipeline rupture, Equitrans Midstream says testing works." VPM, May 9, 2024 (available at <https://www.vpm.org/news/2024-05-09/mvp-rupture-may-1-roanoke-equitrans-midstream-update>).

[3] Tate, Curtis, "Erosion a concern to those living near Mountain Valley Pipeline," VPM, June 6, 2024 (available at <https://www.vpm.org/news/2024-06-06/mountain-valley-pipeline-erosion-concern>).

[4] Condon-Johnson & Associates Inc. v. Sacramento Municipal Utility District, (2007) 149 Cal. App.4th 1384.

[5] Id at 1386.

[6] Id at 1387.