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WHAT'S IN THE GROUND?

- Adverse/unforeseen ground conditions (such as contamination, soil conditions and man-made obstructions) can have a significant impact on construction works and may entitle a contractor to an extension of time and additional money under the construction contract.
- It is important that parties understand how the risk of adverse ground conditions is allocated under their contract so that they are protected against unexpected consequences.
- What practical steps should developers and contractors take in relation to the investigation of site conditions?

WHY DOES IT MATTER?

The knock on effects of encountering unforeseen ground conditions can be significant.

From a developer's perspective, a contractor may be entitled to an extension of time and to reimbursement of additional costs incurred as a result. In developments that involve tight budgets and timescales, this can have a disastrous effect for developers and funders. In the longer term, a failure to deal with ground conditions can result in a requirement for remediation and/or defects in the development, leading in turn to additional costs, loss of income, lengthy disputes, wasted management time and legal fees down the line.

From a contractor's perspective, unforeseen ground conditions can lead to delays and additional costs, including as a result of more expensive working methods, changes to the design and additional or more costly works and/or materials.

HOW DOES YOUR CONTRACT DEAL WITH THEM?

Understanding how a contract deals with ground conditions is critical to minimising any argument as to who is responsible for them. Generally, the standard forms of building contract in use in the UK adopt one of two different approaches. JCT contracts (with the exception of the 2016 Major Projects form) do not expressly deal with responsibility for ground conditions. As such (save where the contract provides for remeasurement) the risk of discovery of adverse ground conditions lies with the contractor, as this is the default position at common law. It is the contractor's responsibility to do whatever is needed to construct the works, including dealing with the ground conditions.

The NEC contracts allow the contractor to claim time and money if it encounters 'physical conditions' which '… an experienced contractor would have judged at the contract date to have such a small chance of occurring that it would have been unreasonable to have allowed for them'. The FIDIC red and yellow books adopt a test of foreseeability, whereas the design and build based approach in the silver book passes the risk of unforeseen adverse ground conditions to the contractor. The approach in the emerald book may be instructive to anyone seeking a more detailed and balanced risk allocation, as it includes a more sophisticated mechanism for sharing the risk of sub-surface physical conditions by reference to a geotechnical baseline report produced by the employer.

PRACTICAL CONSIDERATIONS

As a first step consideration should be given to what surveys and reports are required having regard to (i) the nature of the works being undertaken; (ii) the historical use of the site and evidence of, for example, subsidence or landslips; and (iii) the site's proximity to other buildings and their use. At the time of commissioning the relevant surveys, the developer should consider whether any other parties may wish to rely on the reports produced (eg funders or purchasers) and should ensure that the terms of appointment of the consultant or contractors are robust and include requirements as to the provision of the requisite warranties, letters of reliance or re-addressed reports. This important requirement is often overlooked, particularly if the surveys are organised by (but don't fall within the services of) the structural engineer. This can cause problems down the line for the developer, as he will be obliged to seek a renegotiation of the terms of appointment after the work has been completed to get what he needs.

In most cases reports commissioned by the developer which are provided to the contractor are provided on the basis that the developer does not give any warranty as to their accuracy or completeness and does not authorise the contractor to rely on

them. Commonly a provision is included in the contract to state this expressly to prevent any claim for misrepresentation, and developers are strongly advised to do this. A health warning or similar statement could also be included on the front of the relevant reports. However, it is worth noting that in any event there is no implied warranty at common law that the employer's documents are accurate. As such a contractor who relies on a report provided by the employer may seek to obtain a warranty from (or other contractual link to) the provider of the report; although this is often resisted (for obvious reasons).

A contractor should accordingly always confirm the site conditions for itself, bearing in mind the fact that any reports only provide a snapshot of that part of the site that has been sampled and that generally it is the contractor's responsibility to fill in any gaps in the information provided and take an informed decision as to the overall conditions based on its assessment of the data and its expertise. In this respect it is important to understand what the site has been used for previously. In the Gibraltar Airport case (*Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar [2015] EWCA Civ 712*), the site's historical use as a 19th century rifle range was key in determining whether the ground conditions were unforeseen and how they were then dealt with under the building contract.

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