



Washington State Department of Transportation v. Seattle Tunnel Partners: Appellate Court Affirms Denial of DSC Claim

by David J. Hatem, PC

In a June 14, 2022 Unpublished Opinion, the Court of Appeals of the State of Washington in Washington State Department of Transportation v. Seattle Tunnel Partners, No. 54425-3-11, 2022 WL 2132780, (Wash. Ct. App. 2022), (“WSDOT-STP”) affirmed a Trial Court judgment denying entitlement of a Design-Builder’s differing site condition (“DSC”) claim.

The WSDOT – STP litigation arose out of the Alaskan Way Viaduct project, in Seattle, in which WSDOT, as project Owner, awarded a design-build contract to STP, as Design-Builder, for the design and construction of a tunnel.

In the procurement process, WSDOT provided proposers with multiple reports, some of which were classified as Contract Documents, while others were classified as merely Reference Documents, i.e. which were provided for information but were not part of the Contract Documents.

During tunneling, STP’s tunnel boring machine (“TBM”) encountered Test Well 2 (“TW-2”), a pipe that had a 3/8-inch-thick, eight-inch diameter, steel well casing. That encounter resulted in the suspension of tunneling due to damage to the TBM and the need for its repair.

STP submitted to WSDOT notice of a DSC on the basis that TW-2 was not properly or fully identified in the Contract Documents.

The following reports were relevant to the DSC claim:

Report	Status	TW-2 Relevant Indications
Geotechnical Baseline Report (“GBR”)	Contract Document	No indications
Geotechnical and Engineering Data Report (“GEDR”)	Contract Document	TW-2 shown as to location, but no information as to (steel casing) composition
2003 Supplement to GEDR	Reference Document	TW-2 identified including steel casing composition

The Contract Documents defined a DSC as “actual subsurface or latent physical conditions at the Site that are substantially or materially different from the conditions” indicated in the GBR or GEDR (i.e., the Contract Documents).

The GBR instructed that the GBR “must be read in conjunction with the GEDR.”

STP’s DSC claim was denied by WSDOT and the dispute proceeded to litigation and trial. The Trial Court entered judgment denying DSC entitlement, and STP appealed. On appeal, STP advanced 3 principal contentions:

Contention 1:

The Contract Documents – in particular, the GBR and GEDR – either did not disclose TW-2 (i.e. the GBR) or its steel casing composition (i.e., the GEDR), thereby entitling STP to a DSC remedy.

Contention 2:

Industry practice standards and expert opinion established that a GBR should disclose **all** relevant subsurface conditions expected to be encountered in the performance of tunneling; and accordingly, STP acted reasonably in relying upon the GBR which disclosed neither TW-2 nor its composition.

Contention 3:

Because the GBR disclosed **certain** subsurface conditions – such as boulders, timber, concrete and debris – but no conditions of steel composition – STP reasonably did not expect to encounter any steel-composed subsurface conditions, and the GBR impliedly represented and warranted that no such conditions would be encountered.

The Appellate Court rejected these contentions and affirmed the Trial Court judgment.

Contention 1: Discussion

In support of Contention 1, STP argued on appeal that the Trial Court erred in ruling that in addition to proving entitlement under the explicit terms of the contractual DSC provision, STP was required to prove that:

- a. It **relied** on the conditions indicated in the Contract Documents in preparing its pricing proposal (“reliance requirement”).
- b. the materially different condition was **not reasonably foreseeable** by STP at the time of its proposal submission (“foreseeability requirement”).

STP argued that the reliance and foreseeability requirements were not expressly stated in the contractual DSC provision and, as such, did not govern any DSC entitlement determination. The Appellate Court rejected that argument, holding that reliance and foreseeability were well-settled common law requirements to establish DSC entitlement “even if the contractual definition of a DSC did not include those terms” (P. 16).

The Appellate Court further held that while the GBR did not identify TW-2 (or indicate its composition), STP was obligated to read the GBR in conjunction with the GEDR (which did disclose the location of TW-2). On foreseeability, STP argued that the Trial Court erred in allowing the introduction into evidence of the 2003 GEDR Supplement (which showed the steel casing composition of TW-2) on

the grounds that the latter was merely a Reference Document and not a Contract Document. The Appellate Court held that the 2003 GEDR Supplement was relevant to the issue of whether STP should reasonably have foreseen the steel casing if the evidence established that STP actually reviewed that document, as the latter document – despite not being classified as a Contract Document - was furnished to STP (and other proposers) as a Reference Document for informational purposes.

Contention 2: Discussion

More specifically, in support of its contention that based on proffered industry standards and expert opinion STP acted reasonably in relying upon the GBR, STP claimed that “it is industry standard to disclose everything in the GBR.”¹

The Trial Court refused to consider industry standard evidence or expert opinion.

The Appellate Court agreed with the Trial Court’s ruling, stating:

“Regardless of the industry standards, the facts show that STP was not permitted to rely solely on the GBR and in fact STP was required, and did, rely on the GEDR as well.”

Put another way, the Appellate Court did not view the dispute as involving whether the GBR was adequately prepared and, therefore, expert opinion as to industry standards for GBR preparation was not relevant to the DSC dispute.

Contention 3: Discussion

In support of this contention, STP argued that the Trial Court erred in failing to instruct the jury that while the GBR identified **certain** subsurface conditions none of those conditions included steel or steel composition. STP further argued that the failure to instruct precluded STP from arguing that the silence of the Contract Documents to identify steel proved that the TW-2 steel casing was a DSC “when considered in context with the GBR’s disclosure of other conditions.” In its Reply Brief (4-12-21) STP more specifically argued that the GBR must affirmatively disclose **all** subsurface conditions and the failure to do so constituted an

¹ The relevant industry standards and risk allocation implications are discussed in D.J. Hatem, Should Geotechnical Baseline Reports be the Universal and Exclusive Contractual Basis for Subsurface Conditions Risk Allocation? [Design and Construction Management Reporter](#), (Donovan Hatem LLP 2022)

affirmative representation that no conditions would be encountered other than those conditions explicitly addressed in the GBR. Put another way, because the GBR addressed **certain** subsurface conditions, STP contended that it had the reasonable right to expect that **other** conditions would not be encountered and, if that occurred, the existence of a DSC would be established.

On appeal, STP's position was that the GBR is the singular, controlling basis to be utilized in the evaluation and determination of DSC claims; and the GBR did not identify or describe the steel encased pipe. As such, STP reasoned that WSDOT, in the GBR, impliedly (and contractually) represented that no steel encased pipe would be encountered, and its encountering of that pipe constituted a DSC. (More specifically STP based material change on the fact that the TBM could mine through concrete and boulders, but not steel).

STP bolstered its argument by pointing out that the GBR explicitly referenced the presence of subsurface boulders and concrete debris but contained no mention of the presence of steel objects (such as the pipe in question). STP emphasized that steel is materially and substantially different from boulders and concrete debris.

The Appellate Court rejected this contention and the subsidiary arguments as without merit (PP. 23-24).

Commentary

Allocation of risks and the evaluation and resolution of disputes involving subsurface conditions – especially on tunneling and other major underground projects- involve the consideration of several critical issues (“critical issues”), such as:

- What types and extent of information and evaluations regarding subsurface conditions should be provided to bidders?
- What types (e.g. data, interpretive, baseline) of reports should be prepared on behalf of the Owner and provided to bidders?
- Should an Owner commission the preparation of a Geotechnical Baseline Report (“GBR”); and, if so, what are the criteria for subsurface conditions to be addressed in the GBR?
- Should a Geotechnical Data Report (“GDR”) be prepared in conjunction with a GBR and

provided to bidders?

- Should both the GBR and GDR be classified as Contract Documents? If so should one report have priority (or precedence) over the other report?
- Should the GDR be classified as merely a Reference Document and have no contractual status? If so, what use of the information contained in a Reference Document should a Contractor reasonably be expected to rely upon?
- Should the GBR be the universal and exclusive basis for the allocation of subsurface conditions risk and the evaluation and determination of DSC disputes?
- Do baseline statements contained in the GBR constitute an implied warranty that no materially different conditions will be encountered?
- Should the GBR address **all** reasonably anticipated subsurface conditions? If not, should DSC disputes be evaluated and determined by reference to the GDR? Does the answer to the preceding question depend upon whether the GDR is a Contract Document or a Reference Document?
- In addition to proving that conditions encountered in the field are materially or substantially different from conditions indicated in the Contract Documents (including the GBR) as explicitly required under standard DSC contractual provisions, must a DSC claimant also establish that:
 - a. It relied upon the contractual indications in pricing and planning the work during the proposal phase.
 - b. The conditions encountered was not reasonably foreseeable.
 - c. The conditions encountered caused the claimed DSC cost or time impacts.
- Do answers to any of the preceding questions vary depending upon the project delivery method, e.g. Design-Bid-Build, Design-Build, etc.?

The WSDOT – STP case involved a number of these critical issues. In the author's opinion the Appellate Court Decision reflects a fair and bal-

anced consideration and resolution of the relevant issues as presented in the specific context of the particular facts, circumstances and contentions in that case.

Some of these critical issues are somewhat controversial in the underground industry, and for other such issues industry guidance is less than clear. On the controversial end, the FIDIC Emerald Book position that the GBR is the universal and exclusive basis for the evaluation and determination of DSC disputes is a prime example.² In other situations DSC disputes become more contentious when the contractual DSC provision does not explicitly require proof of reliance, foreseeability and causation to establish entitlement, as was the case in WSDOT-STP. As to critical issues requiring guidelines to provide clarity, the forthcoming update (anticipated Nov. 2022 publication) of the ASCE GBR Guidelines provides an excellent and commendable example of the industry's proactive efforts to promote greater transparency and fairness in subsurface conditions risk allocation by providing sound recommendations and clarity on a number of these issues.³

Of course, primary efforts should be directed to clarity and consistency in the preparation of all portions of the Contract Documents that are relevant to subsurface conditions risk allocation. Specific efforts should be made to be aware of these important issues in the preparation and coordination of the Contract Documents.

DSCs represent one of the highest types (frequency and severity) of disputes in the construction process; these proactive efforts are well worth it.

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²For a detailed discussion of the controversial aspects of the FIDIC Emerald Book Universality/Exclusivity approach to GBRs, see D.J. Hatem, Should Geotechnical Baseline Reports be the Universal and Exclusive Contractual Basis for Subsurface Conditions Risk Allocation? Design and Construction Management Reporter, pp. 10-11 (Donovan Hatem LLP 2022)

³R. Essex, D. Adams, D. Hatem, P. Madsen & J. Morrison, Updating the GBR Gold Book, North American Tunneling 2022 Proceedings, pp. 334-339.