CONSTRUCTION IN BRIEF

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Differing Site Conditions

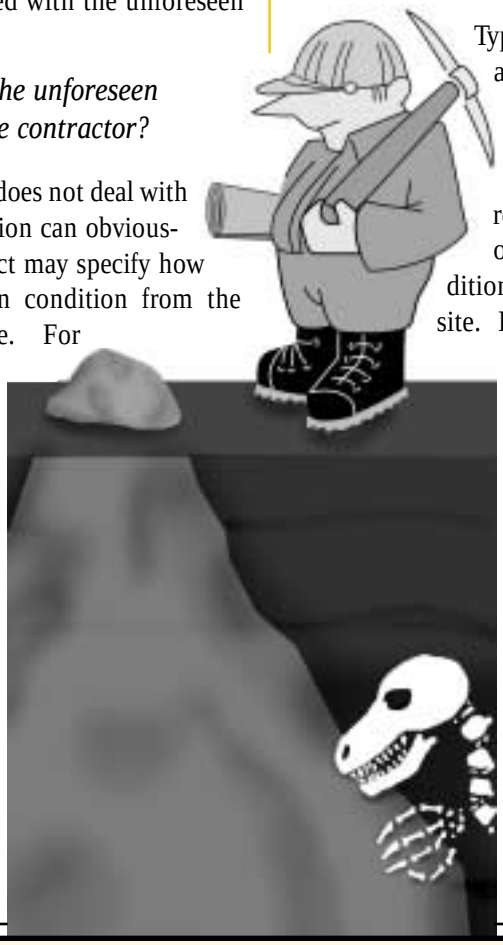
Who Bears The Risk?

Today, construction contracts are more sophisticated than ever, yet as construction lawyers we still see disputes over differing site conditions. These disputes typically arise when large amounts of unanticipated rock or other adverse subsurface conditions are encountered during the excavation process. The parties then examine the contract, plans and specifications to see who is responsible for the additional cost associated with the unforeseen site condition. The question is always:

Does the contract shift the risk of the unforeseen site condition from the owner to the contractor?

It should be noted that although this article does not deal with the issue of delay, an unforeseen site condition can obviously delay site work on a project. The contract may specify how the contractor is to handle an unforeseen condition from the perspective of its impact on the schedule. For example, the contractor may need to submit an extension of time request in order to get relief from the project completion date. The contractor's request for more time may be required when the unforeseen condition is first discovered, or the right to get additional time may be waived.

As to the cost of the added work, a party to a contract will generally not be excused from its obligations because of obstacles that arise after the contract is signed. This strict rule, however, has eroded over time by the inclusion of contractual clauses which seek to apportion the risk of unforeseen conditions among the parties. Claims for unforeseen site conditions are generally characterized as either Type 1 or Type 2 claims, which are discussed below. There are other legal theories which have been used for claims, such as constructive fraud, mutual mistake, and breach of implied warranty, which are not discussed in this article.



Type I claims are those in which the contractor alleges that the site conditions encountered are materially different from those indicated in the contract documents. The contract documents usually include requests for bid proposals, soil reports, boring logs and aerial photographs, all of which have been found to "indicate" the conditions which should have been anticipated on the site. If the contract documents make an affirmative representation about the conditions which are materially different from those encountered, a contractor may have a Type I claim for the expense which has been added to the project. Undoubtedly, the contract will require the contractor to give the owner notice of the unforeseen condition at the time it is encountered. If the contractor fails to give the owner such notice, the claim may be barred. The reason for the notice requirement is to give the owner the opportunity to review the situation and possibly select another design or method that is less expensive than simply excavating the unforeseen condition.

-- (continued inside page 3...) --

Cohen, Seglias, Pallas, Greenhall & Furman, P.C.

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WHO OWNS THE FLOAT?

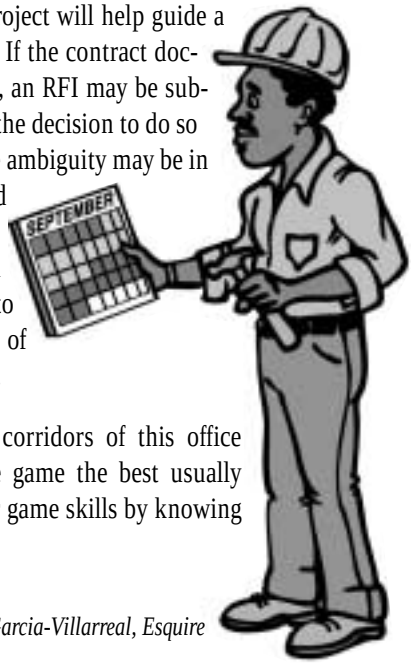
CPM Schedules And Project Delay

When a construction project that is being sequenced with a Critical Path Method ("CPM") schedule is delayed, claims often follow and then everyone *usually* wants to know "Who Owns the Float?"

As many of you know, CPM is a project scheduling technique that breaks the work down into a series of discrete tasks or activities. The tasks are then sequentially interconnected to identify the interdependent tasks which form an overall project schedule that identifies a "critical path" through the schedule of construction. If the critical path is delayed, the project's completion date cannot in theory be met. A typical CPM schedule, however, has a built in cushion, so that any single day of delay will not necessarily affect the completion date. This cushion is what is known as the "float" and represents the number of excess days both before and after the actual time needed to complete a particular task.

In a typical delay claim, the focus will be on determining who and what caused the delay. The question of float ownership comes into play when calculating the length of the delay and possibly in determining whether or not a contractor was entitled to additional time to complete its work. If the contract documents specify that the float is owned by the general contractor, the subcontractor may not be entitled to additional time and the period of delay the subcontractor caused may be greater. On the other hand, if the contract documents state that the float time within each task is owned by the contractor responsible for that task, the delay that has been caused may be reduced by using the float time.

On complex construction projects and those which have aggressive schedules, it is important to review the contract documents to determine if ownership of the float, and its definition, have been specified. If so, awareness of the float issue on the project will help guide a parties' actions in the event of delay. If the contract documents are silent on float ownership, an RFI may be submitted to clear up the ambiguity, but the decision to do so should be carefully considered, as the ambiguity may be in your favor. Some courts have held that the party that uses the float first gains the benefit of its use. Finally, in some situations, parties may want to consider designating the ownership of float time in the contract documents.



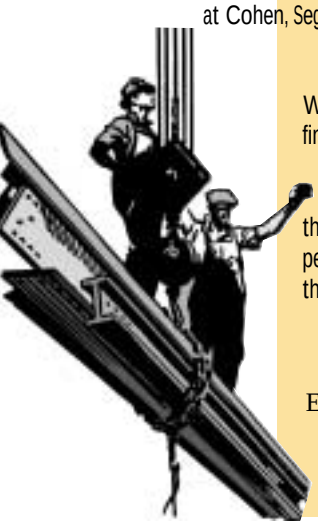
A phrase often heard through the corridors of this office comes to mind: "He who plays the game the best usually wins." It may be time to review your game skills by knowing ahead of time who owns the float.

-- David Garcia-Villarreal, Esquire

A Note From The Editor

Welcome! The firm is very excited about the favorable comments it received from the readers of the first edition of **CONSTRUCTION IN BRIEF**. We hope that this second issue is as well received. In an effort to bring you articles in the future which discuss construction and labor issues that may concern you, please submit suggestions to me by regular mail or e-mail at jcopley@cohenseglias.com.

This second issue features articles of interest such as: differing site conditions, the value of employee handbooks, ownership of float time in CPM schedules, the use of digital photography in construction, and an update on what's new at Cohen, Seglias, Pallas, Greenhall & Furman.



We hope that you will continue to find these articles interesting and informative. As always, for a specific legal concern we recommend that you speak with an attorney personally so that you may receive the best advice.

-- Jason A. Copley, Esquire
Editor, *Construction In Brief*

WHAT'S NEW?

As many of our clients are aware, CSPG&F is very active in various trade and civic associations and organizations. Recently, several of these associations and organizations have chosen CSPG&F attorneys to serve on their respective boards. **George E. Pallas** was recently selected as a board member of the South Jersey Mechanical Contractors Association. George was also recently honored by obtaining an "AV" rating from Martindale Hubbell, which distinguishes an attorney as "very high to preeminent" in his or her field of practice. This honor was also recently obtained by **Edward Seglias**. Congratulations George and Ed!

Also, **Jason A. Copley** was asked to serve on the board of directors of the Philadelphia Chapter of the Construction Financial Management Association.

CSPG&F attorneys are also actively engaged in speaking to the public. **Roy S. Cohen** recently gave a seminar for the National Business Institute on the subject of construction remedies in Pennsylvania. On May 9, 2002, **Edward Seglias** spoke to the Delaware Chapter of the Association of Builders & Contractors concerning risk management on construction projects. On June 6, 2002, **John A. Greenhall** spoke to the Philadelphia Bar Association concerning alternative dispute resolution in construction-related disputes.

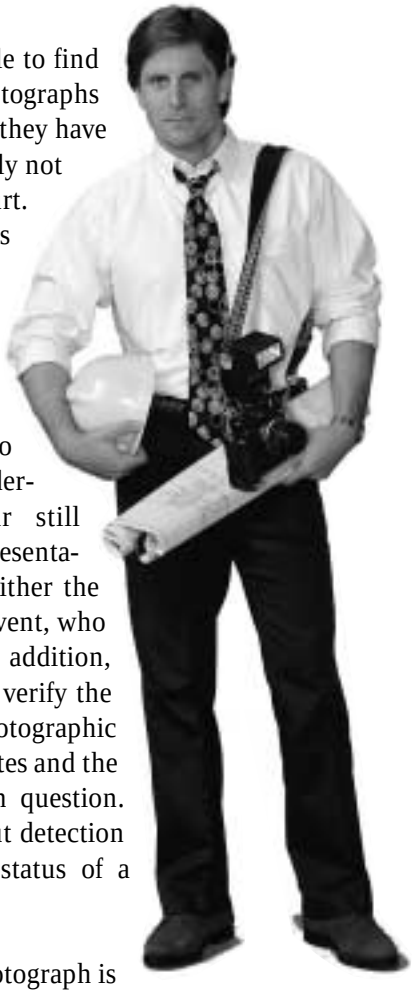
Finally, since our last edition, CSPG&F is proud to announce that it has continued to grow in leaps and bounds. In this regard, we welcome our five new associates:

Lane Kelman, Kimberly Gurvich, Julie DiSalvo, Stanley R. Gentile and **Alyson M. Sciacca.**

-- Edward T. DeLisle, Esquire

On-Site Photography As Documentation

As a firm, we love it when our clients use the latest technology to support their construction projects. This is true in part because the use of technology is often directly related to a client's ability to properly document events on a project which are later in dispute. Relying on digital photography, however, is probably not a prudent choice at this time.



The reason for our concern is that we were unable to find any authority for the admissibility of digital photographs in a civil court proceeding. This is not to say that they have not been so used, only that the issue has apparently not yet been in dispute and ruled upon by a civil court. The reason we see it as an issue in the future is because an adverse party may successfully object to the use of digital photographs that are in dispute in a legal proceeding.

Given the lack of authority on the issue, a brief analysis of the technology itself, as compared to traditional still photography, will give you an understanding of our concern. At trial, regular still photographs are deemed to be an authentic representation of an event, as long as there is a witness, either the photographer or someone else familiar with the event, who can verify the accuracy of the photograph. In addition, the negatives of still photographs can be used to verify the authenticity of a photograph. This firm uses photographic evidence whenever possible in construction disputes and the validity of a still photograph has never been in question. Still photographs are very difficult to alter without detection and are typically the best evidence as to the status of a project at a given point in time.

In the case of digital photographs, the original photograph is the digital image. A print of a digital picture is not the "original". In addition, it is very easy for anyone of even moderate technological skill to alter a digital image and there is no easy way to detect the change. As a result, it would be nearly impossible for any witness to authenticate a digital picture with any degree of certainty. For these reasons, we believe a challenged digital picture may not have the evidentiary weight of a real photograph.

We recommend that our clients continue to use standard film photography until such time as there are reported cases which accept digital photography as authentic documentation. If you are set up to use digital photographs on projects already, we recommend that you supplement this effort with traditional still photographs. We believe that digital pictures will be accepted as evidence in the future, but recommend that you let someone else pave the way by litigating the issue and developing authority for their admission in legal proceedings.

-- By Jamie Sandman, Esquire

COVER STORY: (Continued...)

– "Differing Site Conditions" –

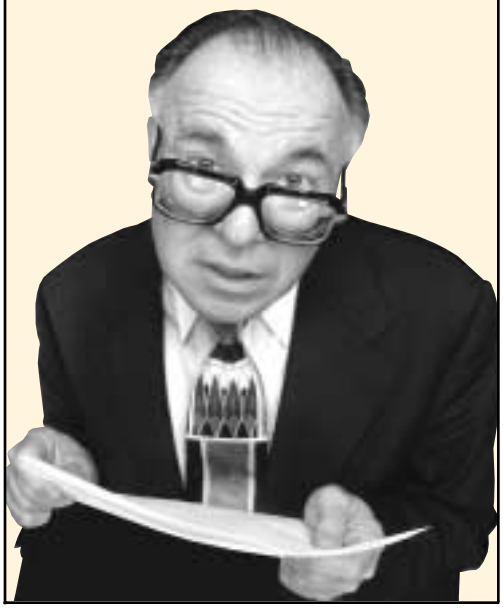
Type II claims are those in which the contractor alleges that the site conditions encountered are materially different than those ordinarily found in that geographic area. Type II claims are pursued with less frequency than Type I claims because any naturally occurring condition in the ground is arguably foreseeable. A Type II claim could be supported more readily if an old foundation or oil tank was encountered. The key to a Type II claim is foreseeability, and it will be important for the contractor to have been diligent in its analysis of the required site work during the bidding process. The main difficulty for the contractor in this kind of claim is that they will be presumed to have certain knowledge because of their status as a professional contractor.

Another twist in this area is the use of the terms "classified" and "unclassified" conditions. Classified conditions are those which have been indicated in bid proposal documents by an owner. For example, the documents might classify the conditions as sixty (60) percent solid rock and forty (40) percent soil. If the bid documents are wrong, a contractor may have a Type I claim. On the other hand, an owner may state in the bid documents that the sub-surface conditions are unclassified. This means that the owner is not making any representation about the subsurface conditions at the site. It is up to the contractor to determine the conditions that exist at the site and an error in this determination will probably not be compensable.

In summary, unforeseen site conditions can sour relationships and create costly disputes. To reduce the risk of an unwelcome surprise, know your contract and the risk you are accepting. Where appropriate, consult with counsel to fully understand your obligations.

-- J. Andrew Wallace, Esquire

WE DON'T NEED AN EMPLOYEE HANDBOOK...



OR DO WE?

Imagine this: The employee that you recently terminated (the one that turned out to be the worst employee ever) just filed a discrimination claim against you and your company with the Equal Employment Opportunity Commission (EEOC). When the EEOC investigator arrives, you tell her the sordid tale of the employee who couldn't arrive on time, do the job correctly, or get along with your other employees. You finish by emphasizing that the final straw was when the employee failed to show up to work for days and never bothered to call out. You had no choice but to fire him – as that is your company's policy. The investigator says this sounds like an open and shut case. You allow yourself to smile. She says, "Just show me where in your handbook it says you treat employees equally under the law and that employees may be terminated for failing to come to work without notice." Your smile disappears. You say: "We're a small company. We don't have a handbook. That's not how we operate. I didn't discriminate against him – trust me." "Oh, I trust you," says the investigator, "but without a handbook containing these policies, I must speak to your current and former employees and review their personnel files to ensure that you treat everyone equally under the law." Right about now, as you imagine the conversations that will take place between the investigator and your former employees, you're wishing you had a handbook.

Generally, an employee handbook is very useful for two reasons: (1) it is a handy outline for you and your employees which describes the terms and conditions of their employment (health benefits, vacation and attendance policies, discipline rules, etc.); and (2) it can act as a sword or shield in litigation. For instance, a properly drafted zero-tolerance sexual harassment policy will set forth an internal procedure to be used to resolve conflicts efficiently and with discretion. However, if a lawsuit is filed by an employee, that same policy can protect the company from liability in certain circumstances.

There are those who still believe that "if I don't write it down, it can't be used against me." Unfortunately, in a day and age where employees' rights continue to expand, not having a handbook is more likely to hurt you. No matter how big or small your company may be, an employee handbook can be prepared to fit your needs. If you already have a handbook, be sure that it is updated periodically to comply with the ever-changing law. In any event, we encourage you to consult with counsel and protect yourself to the fullest extent of the law.

-- *Thomas C. Zipfel, Esquire*

Questions regarding a specific legal matter? We recommend you speak with a CohenSeglias attorney:

PHONE: 215-564-1700 **E-MAIL: jgreenhall@cohenseglias.com**

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