



LEGAL ISSUES PRESENTING AND PRESERVING CONSTRUCTION CLAIMS

MICROTUNNELING SHORT COURSE

April, 2022

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OWNER'S RESPONSIBILITIES

- Provide full information in a timely manner regarding requirements for the project.
- Furnish evidence of sufficient funds for the costs of the Project, including a reasonable allowance for changes in work.
- Give prompt written notice to Contractor of any error, omission or failure to perform or defect in the work when Owner becomes aware of it.

OWNER'S RESPONSIBILITIES

- Communicate with Contractor's subcontractors and material suppliers only through or in the presence of the Contractor.
- Promptly pay Contractor for its work in accordance with the schedule set in the contract.

OWNER'S RESPONSIBILITIES

- Furnish all data and testing services required by Contract or law.
- Implement Project Safety Program.
- Process change orders.
- Monitor performance of Engineer and other Trade Contractors.

OWNER'S RESPONSIBILITIES

- Provide accurate and reliable plans and specifications.
- Provide accurate and reliable geotechnical information.

- How sophisticated is Owner?
- Does Owner delegate everything to engineering firm?

PLANS AND SPECS

- Prescriptive vs. Performance
- Complete
- Duty of Contractor to advise of errors
- Acceptance of the plans and specs

CONTRACTOR'S RESPONSIBILITIES

1. Perform per plans and specs, per submittals
2. Coordinate work
3. Timely submission of documentation
4. Review all contract documents
5. Work with Owner's other contractors
6. Stay on schedule and within budget

DEVELOPMENT OF A CLAIM

- What are the contract documents?
- What is incorporated into the contract documents?

GEOTECHNICAL DATA REPORT

- Its purpose:
 - Description of the geologic setting
 - Log of all borings, trenches, and other site investigations
 - Description of all field and laboratory test programs
 - Results of all field and laboratory testing

GEOTECHNICAL BASELINE REPORT

- Purpose – to set clear baselines for conditions to be encountered during subsurface construction
 - To provide a single interpretation that can be relied upon by bidders in preparing their bids
 - To allow bidders to assess their risks and price the work accordingly

City of Minneapolis, Minnesota | 15th Avenue Water Main River Crossing

1.0 Introduction

This Geotechnical Baseline Report (GBR) describes the geotechnical conditions that can be assumed during bidding and construction of the shaft and microtunneling portions of the Tunnels Water Main under the Mississippi River Project in Minneapolis, Minnesota.

1.1 PURPOSE

This GBR establishes a contractual statement of the subsurface conditions, referred to as the baseline conditions. The purpose of this GBR is to:

- Set baselines for geotechnical conditions and material behavior that can be assumed to be encountered during construction.
- Identify important design and construction considerations, key project constraints, and selected requirements to be addressed by contractors during bid preparation and construction.
- Provide guidance to Owner and their representatives in administering the Contract.

The contractual baselines do not represent warranties by Owner of the actual subsurface conditions that will be encountered by the Contractor. Rather, this GBR presents the subsurface conditions, referred to as baselines, which establish a contractual understanding of the subsurface site conditions. The purpose of the baselines is to translate the results of the geotechnical investigation and previous experience into clear, definitive, and verifiable descriptions of subsurface conditions upon which the Contractor may rely. Using the baselines, the GBR establishes the allocation of risk between Contractor and Owner for the actual conditions encountered.

The GBR is the sole document for geotechnical interpretations for the Project and provides the basis for determining the merit of claims for differing site conditions. The GBR is based upon several assumptions regarding the sequence of construction, the means and methods, and workmanship to be employed by the Contractor. The anticipated behavior of subsurface materials, as described herein will be influenced by the means and methods selected by Contractor to be used during construction; and therefore, behavior may vary from that described in this report. Contractor shall evaluate the soil, rock, and groundwater conditions described herein as they relate to, and interact with, the means and methods selected by the Contractor for construction.

Any means and methods proposed by Contractor where the Contractor believes the baseline becomes invalid or requires modification shall be raised by the Contractor and discussed during the bid phase prior to bid opening. Contractor has a duty to inform Owner of the baselines the Contractor believes are invalid or require modification during the bid phase.

1.2 RELATION TO THE CONTRACT DOCUMENTS

The GBR references the Tunnels Water Main under the Mississippi River Project Geotechnical Data Report (GDR) dated November 8, 2018, prepared by Black & Veatch. The GDR presents the factual details of the geotechnical field investigations completed at the project site. Included in the GDR are the results of the laboratory testing performed on soil and rock samples collected during the investigations and detailed descriptions of the field and laboratory testing data, methods, and procedures. This GBR and the GDR are Contract Documents. If there are any inconsistencies between the GBR and GDR, the GBR shall take precedence.

15th Avenue Water Main River Crossing
 Geotechnical Baseline Report
 November 15, 2018

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drawings

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officers, directors, members, partners, employees, agents, consultants, or subcontractors, with respect to:

1. the completeness of such reports and drawings for Contractor's purposes, including, but not limited to, any aspects of the means, methods, techniques, sequences, and procedures of construction to be employed by Contractor, and safety precautions and programs incident thereto; or
2. other data, interpretations, opinions, and information contained in such reports or shown or indicated in such drawings; or
3. any Contractor interpretation of or conclusion drawn from any Technical Data or any such other data, interpretations, opinions, or information.

C. Geotechnical Baseline Report:

1. This Contract contains a Geotechnical Baseline Report ("GBR"), identified as follows: titled 10th Avenue Water Main River Crossing Project – Geotechnical Baseline Report, dated November 2018, prepared by Black & Veatch Corporation. This Contract also contains a Geotechnical Data Report (GDR), identified as follows: titled 10th Avenue Water Main River Crossing Project – Geotechnical Data Report, dated November 2018, prepared by Black & Veatch Corporation.
2. The GBR and GDR are incorporated as Contract Documents. The GBR and GDR are to be used in conjunction with other Contract Documents, including the Drawings and Specifications. If there is a conflict between the terms of the GBR and the GDR, the GBR's terms shall prevail.
3. The GBR describes certain subsurface conditions that are anticipated to be encountered by Contractor during construction in specified locations (referred to here in the Supplementary Conditions as "Baseline Conditions"). These may include ground, geological, groundwater, and other subsurface geotechnical conditions, and baselines of anticipated Underground Facilities or subsurface structures.
4. The Baseline Conditions shall be used to assist in the administration of the Contract's differing site conditions clause at locations where subsurface conditions have been baselined. If a condition is baselined in the GBR, then only the pertinent Baseline Conditions shall be used to determine whether there is a differing site condition; and no other indication of that condition in the Contract Documents or Technical Data, or of a condition that describes, quantifies, or measures a similar characteristic of the

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Supplementary Conditions
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subsurface, shall be used for the differing site condition determination.

5. The Baseline Conditions shall not be used to make differing site conditions determinations at locations that have not been baselined in the GBR, or at any location with respect to subsurface conditions that the Baseline Conditions do not address. If Underground Facilities or Hazardous Environmental Conditions are expressly addressed in the Baseline Conditions, then comparison to such Baseline Conditions shall be the primary means of determining (a) whether an Underground Facility was shown or indicated with reasonable accuracy, as provided in Paragraph 5.05 of the General Conditions, or (b) whether a Hazardous Environmental Condition was shown or indicated in the Contract Documents as indicated in Paragraph 5.06.H of the General Conditions. As indicated in Paragraph SC/GBR-5.04 below, the GDR shall be the primary resource for differing site conditions determinations in cases in which the GBR is inapplicable.
6. The descriptions of subsurface conditions provided in the GBR are based on geotechnical investigations, laboratory tests, interpretation, interpolation, extrapolation, and analysis. Neither Owner, Engineer, nor any geotechnical or other consultant warrants or guarantees that actual subsurface conditions will be as described in the GBR, nor is the GBR intended to warrant or guarantee the use of specific means or methods of construction.
7. The behavior of the ground during construction depends substantially upon Contractor's selected means, methods, techniques, sequences, and procedures of construction. If ground behavior conditions are baselined in the GBR, they are based on stated assumptions regarding construction means and methods.
8. The GBR shall not reduce or relieve Contractor of its responsibility for the planning, selection, and implementation of safety precautions and programs incident to Contractor's means, methods, techniques, sequences, and procedures of construction, or to the Work.
9. The Contractor may implement additional exploration and geotechnical evaluations necessary to further delineate subsurface conditions and/or provide data necessary for the Contractor's chosen means and methods.

SC/GBR-5.04. Differing Subsurface or Physical Conditions. Delete Paragraph 5.04 in its entirety and replace with the following provisions:

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ROLE OF CLAIMS CONSULTANTS

- Helps quantify claim
- Necessary if dispute follows

TYPES OF CLAIMS

- Delays
- Acceleration
- Additional Manpower
- Interference
- Differing Site Conditions

DIFFERING SITE CONDITIONS

- Type 1 – A site condition that is materially different from what is shown or indicated in the contract documents.
- Type 2 – An unknown physical condition of an unusual nature and which differs materially from that ordinarily encountered and generally recognized as inherent in the type of work encompassed by the contract.

KNOW YOUR CONTRACT

- Notice
- Notice
- Notice
 - Type
 - Where
 - Duty to supplement

SC/GBR-5.04. Differing Subsurface or Physical Conditions

- A. Notice by Contractor: If Contractor believes that any subsurface condition that is uncovered or revealed at the Site:
1. differs materially from conditions shown or indicated in the GBR; or
 2. differs materially from conditions shown or indicated in the GDR, to the extent the GBR is inapplicable; or
 3. differs materially from conditions shown or indicated in Contract Documents other than the GBR or GDR, to the extent the GBR and GDR are inapplicable; or
 4. to the extent the GBR and GDR are inapplicable, is of such a nature as to establish that any Technical Data on which Contractor is entitled to rely as provided in Paragraph 5.03 is materially inaccurate; or
 5. to the extent the GBR and GDR are inapplicable, is of such a nature as to require a change in the Drawings or Specifications; or
 6. to the extent the GBR and GDR are inapplicable, is of an unusual nature, and differs materially from conditions ordinarily encountered and generally recognized as inherent in work of the character provided for in the Contract Documents;
- then Contractor shall, promptly after becoming aware thereof and before further disturbing the subsurface conditions or performing any Work in connection therewith (except in an emergency as required by Paragraph 7.15), notify Owner and Engineer in writing about such condition no later than three (3) days after the first observance of such condition. Contractor shall not further disturb such condition or perform any Work in connection therewith (except with respect to an emergency) until receipt of a written statement permitting Contractor to do so.
- B. Engineer's Review. After receipt of written notice as required by the preceding paragraph, Engineer will promptly review the subsurface or physical condition in question; determine the necessity of Owner's obtaining additional exploration or tests with respect to the condition; conclude whether the condition falls within any one or more of the differing site condition categories in Paragraph SC/GBR 5.04.A above; obtain any pertinent cost or schedule information from Contractor; prepare recommendations to Owner regarding Contractor's resumption or continuation of Work in connection with the subsurface or physical condition in question and the need for any change in the Drawings or Specifications; and advise Owner in writing of Engineer's findings, conclusions, and recommendations.

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C. **Owner's Statement to Contractor Regarding Site Condition:**

After receipt of Engineer's written findings, conclusions, and recommendations, Owner shall issue a written statement to Contractor (with a copy to Engineer) regarding the subsurface or physical condition in question, addressing the resumption or continuation of Work in connection with such condition, indicating whether any change in the Drawings or Specifications will be made, and adopting or rejecting Engineer's written findings, conclusions, and recommendations, in whole or in part.

D. **Possible Price and Times Adjustments:**

1. Contractor shall be entitled to an equitable adjustment in Contract Price or Contract Times, or both, to the extent that the existence of a differing subsurface or physical condition, or any related delay, disruption, or interference, causes an increase or decrease in Contractor's cost of, or time required for, performance of the Work; subject, however, to the following:
 - a. such condition must fall within any one or more of the categories described in Paragraph SC/GBR 5.04.A;
 - b. with respect to Work that is paid for on a unit price basis, any adjustment in Contract Price will be subject to the provisions of Paragraph 13.03 of the General Conditions; and,
 - c. Contractor's entitlement to an adjustment of the Contract Times is conditioned on such adjustment being essential to Contractor's ability to complete the Work within the Contract Times.
2. Contractor shall not be entitled to any adjustment in the Contract Price or Contract Times with respect to a subsurface or physical condition if:
 - a. Contractor knew of the existence of such condition at the time Contractor made a commitment to Owner with respect to Contract Price and Contract Times by the submission of a Bid or becoming bound under a negotiated contract, or otherwise; or
 - b. the existence of such condition reasonably could have been discovered or revealed as a result of any examination, investigation, exploration, test, or study of the Site and contiguous areas expressly required by the Bidding Requirements or Contract Documents to be conducted by or for Contractor prior to Contractor's making such commitment; or
 - c. Contractor failed to give the written notice as required by Paragraph SC/GBR 5.04.A.

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Is failure to give proper notice per the contract fatal to a claim?

Relaxed Notice States
Strict Notice States

Can you waive your rights to a claim?

Waiver of Lien and Claim Documents Final Payment Acts as a Waiver

PARTIAL WAIVER OF LIENS & CLAIMS

WHEREAS, [redacted] and [redacted] entered into a contract dated as of February 27, 2015 (the "Contract"), pursuant to which [redacted] agreed to construct a new office building and related structures and improvements at [redacted] (the "Project");

WHEREAS [redacted] assigned and delegated to [redacted] ("Indemnitee") the Contract and all benefits, rights, obligations and liabilities thereunder, and Indemnitee accepted such assignment and delegation;

WHEREAS, the undersigned supplier, vendor, subcontractor, design professional, consultant, worker or laborer ("Subcontractor") has furnished to [redacted] (directly or indirectly through lower-tier subcontractor(s) or supplier(s)) materials, consumables, fixtures, facilities, equipment, apparatus, labor, work and/or services utilized in connection with the Project (collectively, "Work");

WHEREAS, Subcontractor submitted its Progress Invoice No. 7, dated [redacted] ("Prior Invoice"), in the amount of [redacted] Dollars (\$ [redacted]) for Work furnished or performed at or relating to the Project through and including [redacted] (date through which prior month progress invoice applies) ("Prior Progress Date"); and

WHEREAS, Subcontractor submitted its Progress Invoice No. 8, dated [redacted] ("Current Invoice"), in the amount of [redacted] Dollars (\$ [redacted]) for Work furnished or performed at or relating to the Project through and including [redacted] (date through which latest progress invoice applies) ("Current Progress Date"); and

WHEREAS, Subcontractor has agreed to release liens and claims which it has had or may have had with respect to Work performed in connection with the Project, as provided below:

NOW, THEREFORE, in consideration of prior payments received for Work provided on the Project, and other good and valuable consideration, Subcontractor, on behalf of itself and anyone acting or claiming through or under it:

- (1) represents and warrants it previously received payment in full for the Prior Invoice and thus has been paid in full for all Work furnished or performed in connection with the Project at any time through and including the Prior Progress Date; and
- (2) represents and warrants it has been paid in full for all Work furnished or performed in connection with the Project at any time through and including the Current Progress Date (collectively, the "Furnished Work"), excepting only the sum of [redacted] Dollars (\$ [redacted]), which represents payment in full for the Current Invoice; and
- (3) upon receipt of payment in full of the Current Invoice, hereby waives and releases any and all claims, causes of action, debts, counterclaims, set-offs, and any liability whatsoever

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HOW DO I PROTECT MYSELF

- Document Document Document
- Know your Notice requirements
- Logs – read them

What Should I Worry About

- Underfunded Projects/Owners
- Logs, Daily Reports
- E-Mail; E-Discovery
- Texts

E-MAIL AND TEXTS

- It is company not personal property
- Employees have very little right to privacy
- Professionalism must always be followed
- People are too informal in their messages

BUT SOMETIMES YOU JUST
HAVE TO WRITE A
LETTER

GEORGE W. BERRY, Chairman
 DANIEL C. ANDRESS
 JOYCE W. LAMAR
 GEORGE W. ROONEY
 RICHARD S. GUSTEN
 DAVID L. STRAIN
 KENNETH H. MILLARD
 K. EDWARD JOHNSTON
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 EDWARD J. STUMP
 THOMAS W. STEINBOCK
 THOMAS W. DIX
 ALBERT J. JONES
 WALTER B. HANCOCK
 THOMAS J. GIBBERNETT
 ROBERT A. BARNHART
 STEVEN W. ROSE
 JAMES H. FIDELLAK
 JAMES G. BIRCH

November 18, 1974

HEDCIVCO

Cleveland, Ohio

The Cleveland Browns
 Cleveland Stadium
 Cleveland, OH


Gentlemen:

I am one of your season ticket holders who attends or tries to attend every game. It appears that one of the pastimes of several fans has become the sailing of paper airplanes (generally made out of the game program). As you know, there is the risk of serious eye injury and perhaps an ear injury as a result of such airplanes. I am sure that this has been called to your attention and that several of your ushers and policemen witnessed the same.

Please be advised that since you are in a position to control or terminate such action on the part of fans, I will hold you responsible for any injury sustained by any person in my party attending one of your sporting events. It is hoped that this disrespectful and possibly dangerous activity will be terminated.

Very truly yours,

ROETZEL & ANDRESS

By 
Dale O. Cox

RDC:pey

**CLEVELAND STADIUM, CORP.**

CLEVELAND STADIUM - CLEVELAND, OHIO 44114

Phone: 783-8600

NOV 21 1978

Dale O. Cox, Esquire
Roetzel and Andress
20th Floor
One Cascade Plaza
Akron, Ohio 44308

Dear Mr. Cox:

Attached is a letter that we received on November 19, 1978. I feel that you should be aware that some asshole is signing your name to stupid letters.

Very truly yours,

CLEVELAND STADIUM CORP.

James W. Bailey,
General Counsel

JWB:bjp

cc: Arthur E. Madall

HOME OF CLEVELAND INDIANS AND CLEVELAND BROWNS