



Differing site conditions in construction projects

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Site conditions in a construction project (also referred to as latent conditions) are generally taken to be conditions that could not reasonably have been foreseen during the tender process and/or prior to the commencement of construction. They may be on the site itself, beneath it or adjacent to it. This article provides some basic strategies to help both principals and contractors to deal with differing site conditions when [negotiating a construction contract](#).

It is good practice to decontaminate a brownfield project site, including removing things underground, prior to the start of a new construction project. Encountering something underground that is unplanned and unbudgeted can potentially delay the entire project. In principle, a greenfield site that has no prior construction should be a clean slate for a construction project.

However, whether a brownfield or greenfield site, a project site which is “materially different” from what was expected can add significant cost and time to the project.

Latent site conditions clause in a construction contract

In a typical [construction contract](#), the aim of the latent conditions clause is to [transfer the risk](#) of differing site conditions from the contractor to the principal.

The principal will typically arrange for all available records of the existence of pipes, cables, and other utilities on or near the site to be made available to the contractor as early as possible [during the tender period](#). The latent conditions clause will generally state that if the contractor encounters a “materially different” condition during the execution of the work, the principal will compensate the contractor for the resulting cost and/or time.

Why would a principal take on the risk of latent conditions?

Two of the main reasons for the principal to take the risk of latent conditions are as follows:

1. You attract more savvy contractors to submit a bid

A “good” contractor may walk away from a tender if it is deemed too risky due to the lack of adequate information on the site conditions. You may end up receiving bids from less experienced and less savvy contractors who are less desirable to complete the project. As a principal, providing as much detail as possible on the site conditions ensures that your tender is attractive to those sophisticated and experienced contractors that you would want to bid on your project.

1. You entice contractors to reduce their contingency cost and time at tender time

If there are too many unknowns during the preparation of a bid or proposal, a contractor who chooses to even place a bid will add extra time on their construction program to mitigate any latent conditions. It is also more likely that the bids received will be higher than they would have been because it is more difficult for a contractor faced with unknown conditions to properly estimate their bid.

At the end of the tender, you then end up with a variety of bids which are extremely varied and highly inconsistent from one contractor to the next. This makes the job of evaluating a tender even more difficult. At the end of the day, the principal may still end up paying a high price when they accept a bid with high contingencies but with the added headache of managing the contract variations that arise as a result.

Tips for dealing with latent conditions

Studies have shown that the most significant cost and time issues in a construction project are caused by:

- the cost to work through the latent conditions; and
- the time delay due to a stop of work at the site until further decisions are made to deal with the latent conditions.

To minimise the risk and impact of latent conditions, the following tips are generally advisable for the contractor and the principal.

Tips for contractors to deal with latent conditions

1. Attend site visits

During a tender, a principal will often offer a site visit to all the tenderers. Even if the site is familiar to you, it is advisable to accept any such invitations and take notes and/or photographic evidence. Document your findings so that they can be included in your bid as part of your site investigations.

1. Ask for documents

When a tender document identifies that site condition reports and investigative reports are “available upon request”, you should request and review all such information and incorporate the

knowledge gained into your bid.

1. Use experts

Wherever possible, while you might be able to review all the documents provided on your own, it would be advisable to request an independent geotechnical expert to review the principal's data and documents and provide advice on how to interpret the data and prepare this portion of the bid. If this is done, it will need to be documented in the event of a later differing site condition claim.

1. Do some homework

Be prepared to perform and document your own independent investigation of site conditions that can potentially affect the project. It would be unwise to assume that the principal is the only party required to provide all possible information. Make certain that the bid cost reflects this independently discovered information.

1. Spread your focus

When performing any investigation concerning subsurface conditions, it would be advisable to include the areas surrounding the construction site; for example when you need heavy vehicle access on adjacent land and suitable laydown yards adjacent to the actual construction site. The tender documents may be silent on matters that, logically, would affect the areas surrounding the site itself.

1. Put it in writing

It is critical to document **how** you relied on the available information and **why** your method of interpreting the available site information should be relied upon, in your tender bid. It is sometimes not enough to list your assumptions in the bid. Your clearly documented information should then form part of the contract as it is critical to refer to it when you want to make a claim under the latent site conditions clause.

1. Negotiate your contract accordingly

During the tender negotiations, you will need to understand and properly negotiate the latent conditions clause and any related clauses carefully. This is to ensure that the risk of differing site conditions is assigned in an appropriate manner throughout the contract.

1. Good contract administration

During the execution of the works, your contract administrator or project manager will need to strictly attend to the notice and documentation requirements when making a claim for differing site conditions.

Your claim should also contain separate accounting of all costs related to the differing condition and include a program or schedule that tracks the delay impact of the differing site condition. Maintaining careful and separate cost and schedule records of your additional costs and time flowing from differing site conditions is critical.

Tips for principals to deal with latent conditions

1. Gather and disclose information

It is important to provide all known conditions during the tender time and give adequate time for the bidders to consider that information prior to the submission of bids. This helps obtain a higher number of quality bid documents from bidders.

Where relevant, ensure that the design professionals and geotechnical consultants identify, search out and capture all site conditions reports, including any that were previously done on or near the site to add to the tender documents.

1. Clearly state what documents form the contract

If you are of the view that the available geotechnical reports are not part of the contract documents, this should be clearly stated during the tender. This means that the contractor should not rely on your reports, and they should instead rely on their own expertise and investigations.

1. Negotiate your contract accordingly

During the contract negotiations, you will need to be certain that you understand how the contract allocates the risk of latent or differing site conditions. It is also important to be conscious of making positive representations about the site or subsurface conditions in the contract (see point 2 above) even when communicating with your contractor after the tender has been awarded.

1. Provide a clear administrative process

The latent conditions clause in the contract should provide clear steps on the notice requirements that the contractor should follow when making a claim. You should also consider limiting the reimbursable costs of latent conditions to only those direct job site costs incurred by the contractor and ensuring that this is clearly stated in the contract.

Get help

Dealing with latent site conditions starts during the tender time and is likely to affect a construction project until most of the civil works are completed.

Wambeti Legal can assist you with:

- ensuring that tender documents have noted what kind of information and baseline reports are to be relied upon by bidders;
- preparing or reviewing bid documents to ensure that any assumptions are clearly articulated. A comprehensive bid increases the chances of success;
- negotiating your contract to ensure that risk of latent conditions is allocated appropriately;
- contract administration to ensure you issue timely responses to claims for differing site conditions; and
- reviewing any claims you have prepared or intend to prepare, to ensure that all contractual requirements are covered, prior to submitting them to the principal.

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