

Geotechnical Reports: Contract Documents or Not?

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Construction documents prepared by architects and engineers (A/Es) frequently include references to other documents without any great concern. However, it may be of concern to A/Es and owners if some of those documents are incorporated into the contract documents. Of specific concern is the geotechnical report, commonly referred to as the “soils report.”

Although it may be the owner’s intention not to include the geotechnical report as a contract document, the prime A/E or one of its consultants may include it by reference in another area of the contract documents. Statements, such as “A Geotechnical Report is included...and by its inclusion is hereby made a part of the contract documents” (from an actual specification section) and “All paving, grading, excavation, trenching, pipe bedding, cut, fill, and backfill shall comply with the recommendations in the soils (geotechnical) report for this project” (from an actual drawing) may be contrary to the owners intent. So, what is wrong with these statements?

The first one explicitly includes the geotechnical report as a contract document. The second one indirectly makes the geotechnical report a contract document by requiring compliance with its recommendations. The problem is that the geotechnical report should not be included—or even considered—as a contract document. Before proceeding any further, it should be explained what the difference is between “construction documents” and “contract documents.”

Construction Documents vs. Contract Documents

The Construction Specifications Institute’s (CSI) *Project Resource Manual* defines construction documents as “the written and graphic documents prepared or assembled by the A/E for communicating the project design for construction and administering the construction contract.” Contract documents, on the other hand, are only those documents that are specifically listed in the agreement between the owner and contractor as being a part of the contract. Contract documents typically

include all construction documents except the procurement requirements such as the instructions to bidders, bid forms, and available information for bidders. That last item is what geotechnical reports should be considered: available information.

The geotechnical report is a document prepared by a geotechnical engineer (who is typically hired by the owner) and consists of factual data, such as boring logs and findings from field and laboratory tests, as well as interpretations of the data. These interpretations usually take the form of opinions and recommendations for use by the design team in the preparation of the construction documents. It is these opinions and recommendations that prevent its use as a contract document. In the book *Subsurface Conditions: Risk Management for Design and Construction Management Professionals* (By David J. Hatem, Esq., 1998, Wiley-IEEE), it states:

Some persons believe that all of the opinions and recommendations in the GIR [Geotechnical Interpretive/Investigative Report] should also be made part of the contract documents, but it must be remembered that the GIR was prepared by the geotechnical engineer primarily for the use by the project designer. As such, not all of the geotechnical engineer’s recommendations will necessarily be accepted by the designer; the geotechnical engineer may not be allowed to participate in the preparation of the contract documents; and/or the geotechnical engineer may not be allowed to visit the site during construction. To simply include the GIR as a contract document, without any of the above follow-through activities by the geotechnical engineer, could be troublesome and could result in increased potential for claims...

The content of the geotechnical report is not contractual in nature—the text is not written in the mandatory language that is found in a contract document, such as specifications or general conditions. Geotechnical reports are replete with words such as “should be,” “can be,” “may be,” “should not be,” and “it is recommended,” which, if allowed as a contract document, would either conflict with the drawings and specifications, or leave the decision completely up to the contractor; the latter, of which may be contrary to the designer’s intentions. As an example, a report may recommend a pavement cross section of a certain thickness. The de-

signer will either accept the recommendation or make a professional decision to go with a thicker section. In either case, the contract documents should indicate the thickness, and not refer back to the geotechnical report.

Geotechnical Reports in Procurement Documents

Even though a geotechnical report should not be included as part of the contract documents, it is strongly recommended that it be available to bidders so they can draw their own conclusions based on the factual elements of the report when preparing their bids or proposals. This doesn't mean that the design team should suppress the nonfactual portions of the report that provide recommendations and options. Being selective in which parts of the geotechnical report are provided to bidders may put the A/E and owner at risk by inadvertently deleting significant information.

When making the geotechnical report available for bidders, there are two distinct practices that many A/E firms use:

- Bind the full report under 00 30 00 "Available Information" in the project manual. The advantage of binding the geotechnical report in the project manual is that it ensures that all plan holders have a copy—whether they read it or not is up to them. If this method is used, a disclaimer preceding the report may be advisable.
- Do not bind the geotechnical report in the project manual, but make it available upon request. Notice of its availability can be made in the advertisement or invitation for bid, or the notice can be provided on a single page in Division 00, under the number and title mentioned in the first bullet point, stating the availability of the report, the location of where a copy can be obtained, and possibly a disclaimer. The advantage to not including the report in the project manual is that it minimizes the perception that the geotechnical report is a contract document; also it saves on printing costs if it is printed only on demand.

A potential problem due to placing the geotechnical report in Division 00 or including a page indicating the availability of one, is the unintentional inclusion of the report into the contract documents by attaching or listing

the entire contents of the project manual in the owner-contractor agreement. The documents in Division 00 are not specifications; therefore, it is important that only the specifications—Divisions 01 through 49—and each applicable document in the contracting requirements be enumerated as contract documents in the owner-contractor agreement. In all cases, consultation with your attorney and professional liability insurer is recommended.

Even if bidders receive and read the geotechnical report, under most instructions to bidders, bidders are required to "examine the site and local conditions" (AIA Document A701-1997, *Instructions to Bidders*). Additionally, owners should allow bidders to access the project site to make their own independent soil investigations.

Legal Implications

One compelling argument for keeping the geotechnical report from becoming a contract document can be found in AIA Document A201-2007, *General Conditions of the Contract for Construction*. Section 3.7.4 allows the contractor to make a claim for unknown or concealed conditions if they "differ materially from those indicated in the Contract Documents." If the geotechnical report was included as a contract document, then any condition not indicated in the geotechnical report may be considered as being materially different.

One of the most well-known court cases involving a geotechnical report and a set of contract documents is *Millgard Corp. v. McKee/Mays* (49 F.3d 1070 5th Cir. 1995). In that case, Millgard Corp., a foundation subcontractor, made a claim against McKee/Mays, the general contractor, and Dallas County (Texas), the owner, for differing site conditions. Millgard Corp. cited a provision in the subcontract that allowed modifications for work performed if the actual conditions were "at variance with the conditions indicated by the Contract Documents..."

Fortunately for McKee/Mays and Dallas County, the owner's instructions to bidders indicated that the "[geotechnical] report is not a warranty of subsurface conditions, nor is it a part of the Contract Documents." The court noted that "if the soils report is not a part of the contract documents, it cannot form the basis of a claim

that conditions were ‘at variance with the conditions indicated by the Contract Documents.’”

In *Millgard v. McKee/Mays*, the owner effectively used a disclaimer stating that the owner does not warrant the accuracy of the report’s content. However, the content of the disclaimer cannot “gut the concealed conditions clause” of a construction contract (*Foster Construction v United States*, 435 F2d 873; 193 Ct. Cl. 587, 1970). In other words, the disclaimer cannot shift all risk to the contractor for unknown or concealed subsurface conditions.

Returning to Section 3.7.4 of AIA Document A201, the second condition in that section allows claims for unknown or concealed conditions if the discovered conditions are of an “unusual nature, that differ materially from those ordinarily found to exist...” Therefore, if subsurface conditions differ from the report and are so unique that it would not have been considered a possibility, then a claim would be justified. But, if the differing subsurface condition could be expected in that area, then a claim would not be justified, even if the condition was not indicated in the geotechnical report.

However, owners should not withhold information regarding soil conditions if it is known to be contrary to the findings of a geotechnical investigation. Just recently, the Pennsylvania Department of General Services (DGS) was found to have “engaged in constructive fraud, breach of contract, and active interference” with Pittsburgh Building Company, the contractor, when it was discovered that DGS was aware of unsuitable soils on the project site of a National Guard Armory, even though the geotechnical report, prepared by a DGS consultant, indicated no unsuitable soils (*DGS v. Pittsburg Building Co.*, 920 A.2d 973; Pa. Commw. 2007).

The bottom line is that construction contracts need to be fair, and they should balance the risk between the owner and contractor. Identifying the geotechnical report as a contract document will likely shift the risk more towards the owner; whereas onerous disclaimers that try to shift all the risk onto the contractor may also work to the owner’s detriment.

It is understandable that determining what constitutes “materially different” conditions is subjective at best. And when handling claims on the basis of such

conditions, the contract parties and the A/E need to be reasonable. Additionally, contractors need to follow the provisions of the contract when encountering differing conditions, including prompt notice to the owner and leaving the conditions undisturbed.

The geotechnical report is an important tool used in creating the design and preparing the construction documents for a project. But if this tool, like any hand tool, is used improperly, you can place yourself and others around you at risk.

To comment on this article, suggest other topics, or submit a question regarding specifications or construction documents in general, contact the author at ron@specsandcodes.com.

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