

Legal Strategies for Contractors Facing Unforeseen Site Conditions



A Tishkoff PLC eBook



Table of Contents

Introduction	01
Defining and Understanding Unforeseen Site Conditions	02
Types of Differing Site Conditions (DSC)	03
Legal Strategies for Dealing with Unforeseen Site Conditions	07
Relevant Legal Principles and Contractual Clauses in Detail	11
Hypothetical Scenarios	14
Implications for Dispute Resolution	16
Conclusion	18
Contact Us	19
Further Reading	20

Introduction

Construction projects, by their very nature, often involve working with or altering existing environments, frequently encountering conditions that were not fully anticipated during the planning stages. These unforeseen site conditions can range from unexpected soil compositions and subsurface obstructions to the presence of hazardous materials or historical artifacts. Such discoveries can significantly impact project timelines, budgets, and the overall feasibility of the planned work. The discrepancy between anticipated and actual site conditions frequently becomes a point of contention between project owners and contractors, leading to disputes that can be costly and time-consuming. In this context, a thorough understanding of legal strategies becomes paramount for contractors to effectively manage these risks and protect their interests.

This report aims to analyze the legal strategies available to contractors when confronted with unforeseen site conditions. This analysis will explore the key legal principles, contractual mechanisms, and practical steps that contractors can utilize to mitigate the negative impacts of such unexpected discoveries. The information presented herein is intended to be valuable for legal professionals advising clients in the construction sector, as well as for business stakeholders involved in construction, real estate development, and related industries.

For contractors, understanding these legal strategies is crucial for navigating the complexities that arise when site conditions deviate from expectations. This knowledge empowers them to protect their contractual rights, seek appropriate compensation for additional work or delays, and ultimately manage the financial and operational risks associated with construction projects. Similarly, for project owners, a comprehension of these legal frameworks is essential for effectively allocating risks within construction contracts and for understanding their potential liabilities when unforeseen conditions are encountered. This understanding can contribute to more equitable risk sharing and potentially reduce the likelihood of protracted and costly disputes. For legal professionals specializing in construction law, this analysis provides a framework for advising their clients on these intricate issues, enabling them to offer informed guidance on contract drafting, risk management, and dispute resolution.

Please note this eBook should be used for learning and illustrative purposes. It is not a substitute for consultation with an attorney with expertise in this area. If you have questions about a specific legal issue, we always recommend that you consult an attorney to discuss the particulars of your case.

Defining and Understanding Unforeseen Site Conditions

The term "unforeseen conditions" carries specific legal weight in the context of construction contracts. Various legal definitions emphasize the element of surprise and the adverse nature of these conditions. For instance, such conditions are often defined as hidden and significantly adverse circumstances present on a project site that were not known to the contractor and were not disclosed in any form by the owner. These definitions frequently highlight that the contractor generally assumes certain risks but is protected against extraordinary conditions that could not have been reasonably anticipated. The impact of these conditions on the project's financial aspects and timeline is also a recurring theme in legal interpretations. It is important to recognize that the determination of whether a condition was truly unforeseen is often subject to interpretation and can be a significant point of contention in disputes. What might appear unexpected to one party could be deemed reasonably foreseeable by another based on their experience and the available information.



Types of Differing Site Conditions (DSC)



Type I DSC

Type II DSC

Contractual
Allocation of Risk

A widely accepted classification within construction law categorizes unforeseen site conditions into two primary types: Type I and Type II Differing Site Conditions (DSC).

Type I DSC

Type I DSC refers to subsurface or latent physical conditions encountered at the site that differ materially from the conditions indicated in the contract documents. This type of claim necessitates that the contract provided some indication of the expected site conditions, which then proved to be significantly different in reality. A key aspect of a Type I DSC claim is establishing that the contractor reasonably relied on the information provided in the contract when preparing their bid. For example, in the case of H.B. Mac, Inc., a contractor encountered significantly different soil conditions at one building site compared to soil borings taken from another site 300 yards away, leading to additional costs and delays. However, the court ruled against the contractor, emphasizing that the borings could not have been reasonably interpreted as representative of the other location. Conversely, in Pitt-Des Moines, Inc., the walls of an existing structure were substantially thicker than represented in the provided drawings, and the board held this to be a Type I DSC because the contractor was not obligated to undertake a costly investigation to uncover the discrepancy. Similarly, in P.J. Dick, Inc., the discovery of a 30-inch thick slab instead of the anticipated 6-8 inches, which also provided crucial lateral support, was deemed a Type I DSC as a reasonable inspection would not have required such extensive testing.

These cases illustrate that Type I DSC claims often turn on the interpretation of contract documents and the reasonableness of the contractor's reliance on those indications. The recent case of Nova Group/Tutor-Saliba v. United States involved a contractor claiming a Type I DSC due to difficulties in pile driving, arguing misrepresentation in contract documents about the expected driving depth. However, the court denied the claim, emphasizing the design-build nature of the contract where the contractor had input into the design depths, thus weakening the argument of reliance on owner-provided representations.





Type II DSC

Type II DSC involves unknown physical conditions encountered at the site that are of an unusual nature and differ materially from those ordinarily encountered and generally recognized as inherent in the type of work outlined in the contract. Unlike Type I, this type of claim does not require explicit representations about site conditions in the contract. Instead, it focuses on whether the conditions encountered were so unusual and unexpected that a reasonably experienced contractor would not have anticipated them. A notable example is the case of *Reliance Ins. Co. v. County of Monroe*, where a contractor encountered toxic creosote leaking into a tunnel being dug 30 feet below a riverbed. The court granted an equitable adjustment because the contractor had no prior knowledge of the contamination, could not have reasonably anticipated it through inspection or general experience, and the condition was deemed unusual for similar tunnel boring operations.

In contrast, the claim in *Martin Paving Co. v. Widnall*, where a contractor discovered that removed asphalt could not be recycled due to contaminants, was dismissed because the court determined that the contractor assumed the risk related to the disposal of the asphalt. The *Nova Group/Tutor-Saliba, Joint Venture v. United States* case also considered a Type II DSC claim based on undisclosed cobbles and boulders hindering pile driving. The court rejected this claim, finding that the contractor should have been aware of the potential for such subsurface obstructions based on the contract documents. These examples highlight that proving a Type II DSC requires demonstrating that the encountered conditions were genuinely unusual and beyond what a contractor would typically expect in the relevant locale and type of work.

Contractual Allocation of Risk

Construction contracts play a critical role in determining which party bears the financial and schedule impact of unforeseen site conditions. Contracts can allocate this risk in various ways. In some instances, the owner may assume all subsurface condition risks, often as a strategic decision to potentially lower the overall contract price by avoiding inflated bids from contractors who would otherwise include contingencies for unknown risks. Conversely, contracts may stipulate that the contractor bears all risks associated with site conditions, regardless of their foreseeability. More commonly, contracts involve a shared risk allocation, where certain types of unforeseen conditions trigger adjustments to the contract price or schedule. Owners often include "site inspection" clauses that require contractors to conduct due diligence in examining the site and disclaim any warranties about the project conditions, aiming to limit their exposure to risks that could have been reasonably discovered.



The presence and specific language of these clauses are paramount in determining the rights and responsibilities of both parties when unforeseen conditions arise. The absence of a site condition provision in a design-bid-build contract, for example, could inadvertently shift all site condition risks to the contractor. Therefore, a clear and comprehensive allocation of risk within the contract is essential for preventing future disputes.

Legal Strategies for Dealing with Unforeseen Site Conditions

➔ Proactive Measures and Due Diligence

While unforeseen conditions are, by definition, unexpected, contractors can employ proactive measures to minimize their potential impact. Conducting thorough pre-bid site investigations is a crucial first step. This includes carefully reviewing all available project documents, such as geotechnical reports, drawings, and specifications. Attending pre-bid conferences and site walk-throughs provides an opportunity to visually inspect the site and ask clarifying questions. In some cases, contractors may choose to conduct their own independent site investigations, although the scope of what is considered a reasonable pre-bid investigation is often limited by factors such as time constraints and restrictions on site access. While contracts frequently include clauses requiring contractors to exercise due diligence, the interpretation of what constitutes "reasonable" effort can be a point of contention. Courts and boards generally recognize that contractors are not typically expected to perform detailed subsurface borings or coring during the limited timeframe of bid preparation. The disparity in resources and time available to owners for their site investigations compared to contractors is also a relevant consideration.

➔ Identifying and Documenting the Unforeseen Element

Upon encountering a condition that appears to be unforeseen, contractors must act promptly and systematically. The first step involves clearly identifying and defining the nature of the condition. This requires a detailed comparison between the actual conditions encountered and the information provided in the contract documents, as well as a consideration of what could have been reasonably expected based on the site and the nature of the work.



Comprehensive and accurate documentation of the encountered conditions is absolutely critical. This documentation should include detailed written descriptions, photographs, videos, and any other relevant data that supports the claim that the condition was unforeseen and has impacted the project. Maintaining a clear record from the moment the condition is discovered is essential for substantiating any subsequent claims for additional time or compensation.

➔ Understanding Contractual Obligations and Risk Allocation

A thorough understanding of the construction contract is paramount when dealing with unforeseen site conditions. Contractors must carefully review the contract to determine which party bears the risk of the specific type of unforeseen condition encountered. This involves analyzing clauses such as the differing site conditions clause, the site inspection clause, any warranties provided by the owner regarding site conditions, and any disclaimers that attempt to limit the owner's liability. The way these clauses are worded and interact will significantly influence the contractor's legal options.

➔ Assessing Warranties and Disclaimers Related to Site Conditions

Owners often provide site investigation data, such as soil reports, to bidders but frequently include disclaimers stating that this information is for informational purposes only and that contractors should not rely solely upon it. The legal implications of such disclaimers are complex. While they aim to shift the responsibility for site conditions to the contractor, courts and boards generally do not favor broad disclaimers, particularly when the bidding contractor has made reasonable efforts in their own pre-bid site investigation. The enforceability of these disclaimers can depend on various factors, including the specificity of the disclaimer language, the adequacy of the owner's disclosure of available information, and the reasonableness of the contractor's pre-bid investigation efforts.

➔ Utilizing Variation and Remeasurement Clauses

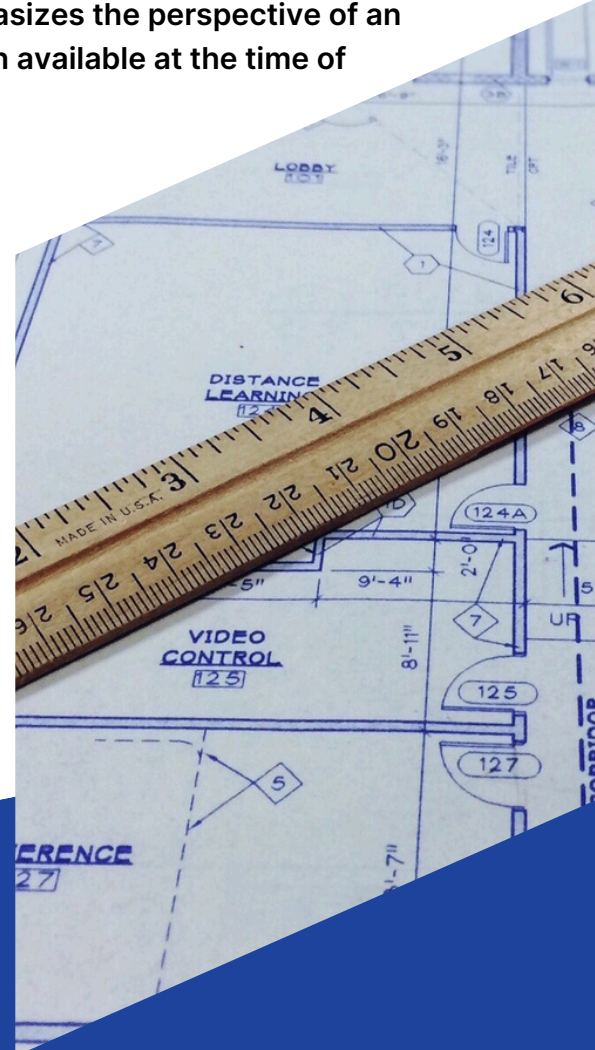
Unforeseen site conditions often necessitate changes to the planned scope of work. In such instances, contractors should consider utilizing the variation or change order clauses within their contracts. These clauses typically outline the process for requesting and obtaining approval for changes to the work, including adjustments to the contract price and schedule. If the unforeseen condition requires the contractor to perform work outside the original scope, a change order can provide a mechanism for fair compensation. Additionally, in remeasurable contracts, the unexpected quantities of work arising from unforeseen conditions may be subject to remeasurement and payment according to the contract's unit rates.

➔ Understanding the Definition of "Unforeseeable" in the Contract

Some construction contracts include a specific definition of what constitutes an "unforeseeable" condition. It is crucial for contractors to understand this definition, as it will govern whether a particular condition qualifies for relief under the contract. Standard form contracts, such as FIDIC 2017, often define "unforeseeable" as something that was not reasonably foreseeable by an experienced contractor by the base date (the date of the tender). This definition emphasizes the perspective of an experienced professional in the field and the information available at the time of bidding.

➔ Establishing a Causal Link Between the Condition and Impact

To successfully claim for additional time or compensation due to unforeseen site conditions, contractors must demonstrate a clear and direct causal link between the unforeseen condition and the resulting impact on the project's program or costs. Even if a condition is proven to be unforeseeable, a claim may fail if the contractor cannot demonstrate that this condition directly led to the claimed damages or delays. Thorough documentation of the sequence of events, the nature of the impact, and the associated costs is essential for establishing this causal link.





➔ Providing Timely and Proper Notice

Most construction contracts, particularly those containing differing site conditions clauses, require the contractor to provide prompt written notice to the owner upon discovering an unforeseen condition. This notice typically needs to be given before the condition is disturbed to allow the owner an opportunity to inspect it.

Failure to comply with the specific notice requirements outlined in the contract, including the timing, form, and content of the notice, can have severe consequences and may result in the contractor losing their right to claim for the unforeseen condition. Therefore, strict adherence to the contractual notice provisions is a fundamental prerequisite for successfully pursuing a claim related to differing site conditions.



Relevant Legal Principles and Contractual Clauses in Detail



DSC Clauses

Site Inspection
Clauses

Owner's Duty to
Disclose

Differing Site Conditions (DSC) Clauses

Differing Site Conditions (DSC) clauses are standard provisions in many construction contracts designed to allocate the risk associated with unexpected subsurface or latent physical conditions. The primary purpose of these clauses is to prevent contractors from having to inflate their bids to account for potential unknown risks, as the owner agrees to bear the risk of genuinely unforeseen conditions. As discussed earlier, DSC clauses typically recognize two main types of claims: Type I, where encountered conditions differ materially from those indicated in the contract, and Type II, where unknown and unusual conditions differ materially from what is normally encountered. Upon establishing a valid DSC claim, the contractor is usually entitled to an "equitable adjustment," which may include an increase in the contract price, an extension of the contract time, or both. The federal government's standard DSC clause, for example, mandates prompt written notice from the contractor before the conditions are disturbed and provides for an equitable adjustment if the conditions materially differ and cause an increase or decrease in the contractor's cost or time. These clauses fundamentally aim to create a fairer risk allocation in construction projects.

Site Inspection Clauses and Contractor's Duty to Inspect

Site inspection clauses are commonly included in construction contracts, requiring contractors to conduct a reasonable examination of the project site before submitting their bids. The intent of these clauses is to ensure that contractors familiarize themselves with the existing conditions to the extent reasonably possible within the constraints of the bidding process. The standard for "reasonableness" in this context is typically judged by what a rational, experienced, prudent, and intelligent contractor in the same field of work could discover. Contractors are generally expected to review readily available information and conduct a visual inspection of the site. However, they are not usually required to undertake extensive subsurface investigations, such as detailed borings or coring, during the bidding phase. The case examples of the undisclosed underground stream and omitted boulders in soil boring logs, as well as the Hoffman Constr. Co. case regarding unshown ducts, illustrate situations where the extent of the required pre-bid investigation was disputed. In these instances, the courts or boards recognized the limitations on what a contractor could reasonably discover during the bidding process. Therefore, while contractors have a duty to inspect the site, this duty is bounded by the concept of reasonableness, considering the time, resources, and access typically available during the bid preparation period.





Owner's Duty to Disclose Superior Knowledge

In addition to the contractor's duty to inspect, the law recognizes an implied duty on the part of the owner to disclose any superior knowledge they possess regarding site conditions that could materially affect the contractor's performance or costs. This duty arises when the owner is aware of a fact that the contractor has no knowledge of and no reasonable means of obtaining, and that fact would significantly impact the contractor's bid or execution of the work. The rationale behind this principle is to prevent owners from withholding critical information that could lead to inaccurate bids or unexpected difficulties for the contractor.

Examples from case law, such as *Piedmont Painting Contractors*, where the owner withheld information about the deteriorated condition of a water tank, and *Triad Mechanical, Inc.*, where the government had prior knowledge of a subsurface clay liner that complicated the contractor's dewatering operation, demonstrate instances where the owner's failure to disclose superior knowledge led to contractor claims. This duty to disclose helps to ensure a more level playing field during the bidding process and protects contractors from being unfairly prejudiced by information known to the owner but not reasonably discoverable by them.

Hypothetical Scenarios

➔ Unexpected Rock Formation

A contractor is excavating for a building foundation based on a geotechnical report provided by the owner that indicated predominantly soil. However, at a certain depth, the contractor encounters a substantial and previously unidentified rock formation that requires specialized equipment and blasting, significantly increasing the cost and duration of the excavation. This scenario could potentially constitute a Type I DSC if the contract documents, including the geotechnical report, materially misrepresented the subsurface conditions regarding the presence and extent of rock. The contractor would need to demonstrate their reasonable reliance on the provided information and provide timely notice of the differing condition.

➔ Undocumented Underground Storage Tank

During site grading for a commercial development, a contractor unearths an old, undocumented underground storage tank containing residual petroleum products. There was no indication of such a tank in any of the project documents, and it was not reasonably discoverable through a visual site inspection. This situation could likely be classified as a Type II DSC, as it represents an unknown physical condition of an unusual nature that differs materially from what would ordinarily be expected on a construction site, especially if there was no prior industrial use of the land indicated. The contractor would need to demonstrate that they had no prior knowledge of the tank and that its presence was not reasonably foreseeable.

➔ Unexpected Rock Formation

➔ Undocumented Underground Storage Tank

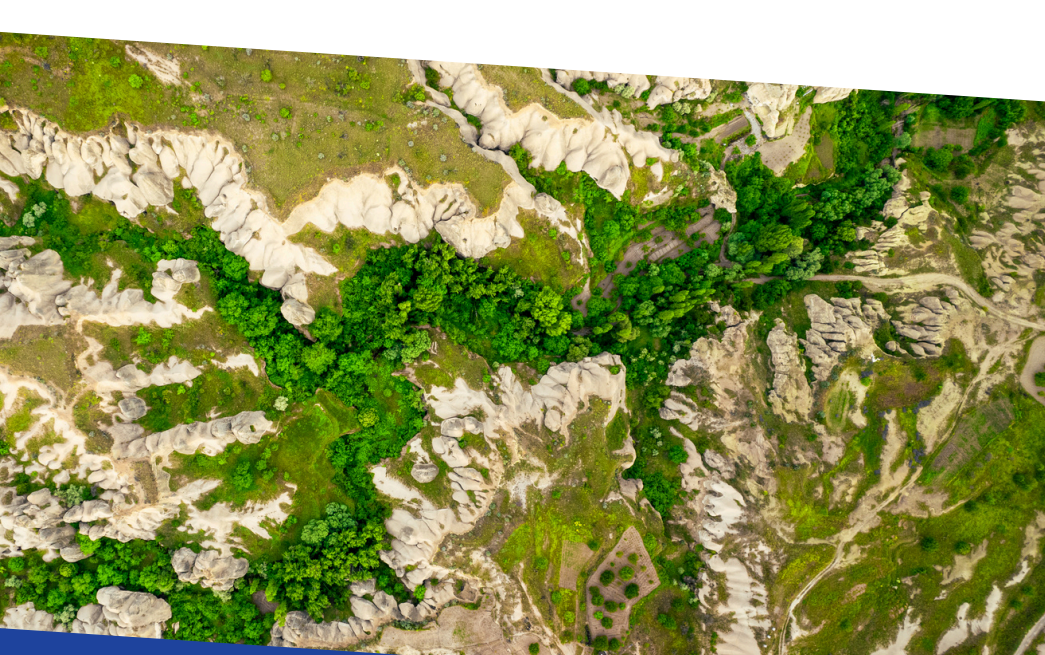
➔ Unstable Soil Due to Geological Fault



➔ Unstable Soil Due to Geological Fault

A contractor is constructing a pipeline in a rural area. The contract documents and available geological surveys did not indicate any significant geological issues. However, during excavation, the contractor encounters unexpected soil instability and slippage due to a previously unknown or unmapped geological fault line. This condition requires extensive soil stabilization measures not anticipated in the original bid.

This could potentially be a Type II DSC, as it is an unknown physical condition of an unusual nature that differs materially from the generally expected soil conditions for the region. The contractor would need to provide evidence that this geological feature was not reasonably foreseeable based on available information and general industry knowledge.





Implications for Dispute Resolution

A contractor's thorough understanding and diligent application of the legal strategies discussed significantly enhance their position in negotiations with the project owner. When a contractor has meticulously documented the unforeseen condition, clearly understands their contractual rights and the relevant legal principles, and has provided timely and proper notice, they are better equipped to articulate their claim and negotiate a fair resolution. This preparation can lead to more productive discussions and potentially avoid the need for formal dispute resolution processes. Similarly, in mediation, where a neutral third party facilitates communication and helps the parties reach a mutually acceptable settlement, a well-prepared contractor with a strong legal basis for their claim is more likely to achieve a favorable outcome. The ability to present a clear and well-supported case based on contractual terms, legal precedents, and factual evidence strengthens the contractor's negotiating leverage and increases the likelihood of a successful resolution through these less adversarial methods.

When negotiation and mediation fail to resolve a dispute related to unforeseen site conditions, the matter may proceed to arbitration or litigation. In these more formal settings, the legal principles and case law precedents discussed throughout this report become central to the decision-making process. Arbitrators and judges will consider the contract language, the specific facts of the case, the reasonableness of the contractor's actions, and the foreseeability of the encountered conditions. Expert testimony, particularly from geotechnical engineers and construction professionals, often plays a crucial role in establishing the nature and unforeseeability of the site conditions and their impact on the project. A strong understanding of the relevant legal framework and the ability to present a well-documented and legally sound argument are essential for contractors pursuing claims through arbitration or litigation.

Construction contracts typically include clauses that outline the agreed-upon methods for resolving disputes. These dispute resolution clauses can specify a preference for negotiation, mediation, arbitration, or litigation. The presence of clear and well-defined dispute resolution clauses is significant in providing a framework for addressing disagreements related to unforeseen site conditions. Familiarizing oneself with these clauses is crucial for understanding the available options and the required procedures for resolving conflicts. Mediation and arbitration are often favored as alternatives to litigation, as they can potentially save time and costs. However, the specific terms of the dispute resolution clause will govern the process that must be followed.

While having effective legal strategies for resolving disputes is essential, the most effective approach is to proactively manage risks and avoid disputes altogether. This starts with drafting clear and comprehensive contract language that explicitly addresses the allocation of risk for unforeseen site conditions. Conducting thorough site investigations within reasonable limits before bidding can also help to identify potential issues early on. Open and proactive communication between the owner and the contractor when unexpected conditions arise is crucial for fostering collaboration and finding mutually acceptable solutions. The use of Geotechnical Baseline Reports (GBR) is another proactive measure that can be employed, particularly for projects involving significant subsurface excavation. A GBR establishes a baseline of expected ground conditions, clearly defining and allocating the risks associated with subsurface work. By implementing these proactive measures, parties can minimize the likelihood of disputes arising from unforeseen site conditions and promote a more collaborative and efficient project environment.

Conclusion

When faced with unforeseen site conditions, contractors should prioritize the following legal strategies: meticulously document the encountered conditions, comparing them to contract documents and reasonable expectations; thoroughly understand their contractual rights and the allocation of risk within the contract; provide prompt and written notice to the owner as required by the contract's terms; establish a clear causal link between the unforeseen condition and any resulting damages or delays; and, if necessary, utilize variation or change order clauses to seek compensation for additional work. Consulting with legal and geotechnical experts can be invaluable in navigating these complex issues .

Business owners and developers should ensure that their construction contracts clearly and comprehensively allocate the risk of unforeseen site conditions. Engaging qualified geotechnical experts to conduct thorough site investigations and provide detailed reports is a critical step in mitigating potential risks. Furthermore, fostering a culture of clear communication and collaboration with contractors when unexpected conditions arise can facilitate quicker and more amicable resolutions, potentially avoiding costly disputes.

Legal issues surrounding unforeseen site conditions in construction projects are complex and can have significant financial and operational implications for all stakeholders. A proactive and legally informed approach, encompassing clear contractual terms, diligent site assessment, and effective communication, is essential for mitigating risks and resolving disputes efficiently.

Questions about business law or litigation?

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