LEGAL IMPLICATIONS OF GBRs AND GDRs

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Representative Client Projects

- Public agencies - water and wastewater utilities, municipal governments, PUDs, public facility districts
- Pipe Ramming/MTBM default termination and trial (1999-2001)
- Water Transmission MTBM obstruction dispute (2010)
- Sewer MTBM termination dispute (2008-2010)
- Water transmission auger bore project planning (2010-2011)
- HDD Sewer Line Replacement planning and dispute (2007-2009)
- MTBM Retrieval and Shaft Flooding dispute (2005)
- Large diameter MTBM highway crossing project planning (2011)

Representative Presentations

- No-Dig Differing Site Condition Presentation (Washington DC 2011)
- No-Dig DSC Presentation (Chicago 2010)
- NASTT "DSC Boot Camp" (Everett WA 2008)
- MRSC/APWA "Bid Protests and Bidder Responsibility Criteria" Presentation (Tacoma WA 2008)
- "Legal Impact of Geotechnical Baseline Reports" (co-authored paper, 2010)
- "In-Depth Discussion on Geotechnical Baseline Reports and Legal Issues" (co-authored paper, 2011)
- AWWA-PNWS Presentation, "Legal Impact of Geotechnical Reports (Tacoma WA 2009)

The Hybrid Challenge

- Lawyer's perspective on how things can go wrong with geotech reports – and how to avoid this
- I am not an engineer
- But engineers aren't lawyers, yet the reports they write have significant legal implications
- ASCE Suggested Guidelines: "Baseline statements in the GBR are assumptions expressed as contractual representations"
- To be effective, GBR / GDR must necessarily meet both technical and legal standards – a hybrid challenge

Objective of this Presentation

- Have I sold you on the basic concept behind the hybrid challenge?
- If not, you might as well leave now to save yourself the agony of listening to a lawyer
- For the rest of you, my objective is describe how courts actually interpret your GDRs and GBRs – and suggest tips/practices
- The purpose is to equip you with knowledge to prevent mistakes and deliver a better work product

Organization of Presentation

- The context – small diameter trenchless projects
- General rules for how courts read and interpret GDRs and GBRs
- Some painful case studies
- Suggested ways to prevent problems and improve your work product

Focus on Small Trenchless Projects

- I am using small diameter (up to 100” OD or so) trenchless projects as my context tonight because this is where GBR/GDR issues frequently arise
- Why?
  - Highly dependent on contractor equipment and know-how
  - Equipment and operational choices can be difficult challenge (means/methods dilemma)
  - Ground conditions can be variable
  - Small bore size constrains both equipment power
  - Face access for retrieval is often problematic

Trenchless Planning Process

- Design process for trenchless projects is sometimes flawed by these problems:
  - Lack of disclosure and communication between consultants and client
  - Engineers drafting geotechnical reports without regard to how courts interpret them
  - Lack of coordination between specifications, geotechnical documents and contract
  - Insufficient expertise in unique trenchless challenges
  - Lack of Owner knowledge or leadership on trenchless issues – the “dumb owner” problem

Type 1 DSC

- Conditions encountered at the site that differ materially from those "indicated" in the Contract Documents
- Type 1 DSC therefore "stands or falls" on what is indicated in the Contract Documents
- The legal focus is:
  - *How* the conditions are indicated
  - *How* those indications will be interpreted

4 Pertinent Rules of Interpretation

1. "Reference Documents": Referring to a Geotechnical Document as a "reference document" does not negate the bidders right to rely on the document for a DSC claim.
2. Borings: Some courts regard boring logs as "the best indicators of subsurface conditions and bidders ought to be able to rely heavily on them."

4 Pertinent Rules of Interpretation

3. Disclaimers: "For information only" or "Bidders make their own explorations" holds little weight with some courts
4. Ambiguity: GBR is "ambiguous" if can be reasonably read to mean two different things. Contractor's interpretation need not be the best or only interpretation, only be "reasonable." Contractor must consider the entire set of documents, can't cherry pick

Case Study #1

- Open cut water transmission line in Snohomish County river valley
- GDR contains many narrative warnings about flood plain and high water table
- But Contract Documents (DSC Clause) instructs bidders to rely, for bidding purposes, only on "technical data" – without defining what "technical data" are
- Case settled because owner could not hold claimant to the obvious "narrative" warnings

Case Study #2

- Pierce County slurry MTBM alignment (1,200 LF, 36” OD)
- Boring logs in the GDR largely free of significant organic (i.e., wood) debris
- GDR silent on possibility of presence of randomly deposited wood
- Contractor hits a lens of wood, claims DSC
  - Steering system was broken
  - Overcut gone
  - Tunneler “should have known” about wood
- Case settled – too risky to go to trial with GDR as weak as it was

Case Study #3

- 1 Mile Concrete Utility Tunnel
- Boring Logs did not indicate high groundwater
- But Baseline Statement said: “Condition of high groundwater exists in this area”
- Contractor filed Type 1 DSC for groundwater pumping and dewatering costs

Case Study #3

- Government rejected the DSC based on the baseline statement
- Court ruled in favor of Contractor, because:
- "Condition of high groundwater" not enough
  - Low key message
  - "Muffled" by specific information
  - Obviously a "relative term"
  - Undefined and unexplained generality
  - Did not negate the bidder's reliance on specific borings

Case Study #4

- Federal Bridge Project with pier foundations
- Design had boring logs and profile
- Geotech Report said conditions are
  "Not guaranteed, not representations, and the bidder is urged to draw his own conclusions."
- Contractor filed Type 1 DSC
  - Soil is "wetter" than indicated in borings

Case Study #4

- Owner rejected claim - “The borings did not guarantee conditions or necessarily represent conditions”
- Court ruled in favor of Contractor
- Boring logs showed relatively impermeable material
- Mandatory investigation clause not a defense in that case

Case Study #5

- Water System upgrade
- Design contained geotechnical borings
- Special Provisions stated borings were
  - "representations only" and
  - "any localized variations characteristic of the region" were not the basis for a change.
- Contractor filed a Type 1 DSC:
  - Excessive cobbles (# and size)
  - High compressive strengths

Case Study #5

- Claim denied based on statements in the geotech report
- Court ruled in favor of Contractor, because:
- Statements in the Special Provisions were not specific or clear enough to override the inference of the borings
- Contractor could assume that only small rocks would be encountered because of small sizes collected with drill rig (auger size not disclosed in geotech report)

Case Study #6

H.B. Mac v. U.S. (1998)

- 8 boring logs
- 3 showed water table at 12 feet
- 5 showed no water table
- Contractor encountered water during sheet pile
- Closest bore (300' away) did not reveal water
- Project site 700 yards to ocean and intersected with streams
- DSC claim denied – reliance solely on closest boring not reasonable given overall geologic and topographic features of site

Case Study #7

Renda Marine v. U.S. (2005)

- Dredging project in Galveston
- 19 days of trial, 22 witnesses, 500+ exhibits, Court's decision over 100 pages
- DSC claim based on encountering stiffer clays than shown in borings
- Borings indicate "character and nature" of condition but not quantity or precise location
  - Bidder's extrapolation as to location/quantity between borings generally not binding on owner

Suggestions

- GBR/GDR problems seem to fall into four general categories:
  - The “Boring Wars”
  - Ambiguity
  - Lack of Coordination
  - Omissions, or “Should Have Knowns”

“Boring Wars”

- Illustrated by Case Studies #5 and #6
- How to avoid this?
  - Override borings with single, mandatory assumption expressed in GDR or Specifications
  - Clarify order of precedence, overtly
  - Identify the constraints/limitations of the boring data (drill rig size, inability to locate big rocks except by accident, etc.)

Ambiguity

- This is the most recurring problem, but it need not be so
- Why is it recurring? Do engineers have trouble making "the leap" from data description to the type of "assumptions" anticipated by ASCE Guidelines (see p. 27)
- Regardless of why, eliminating ambiguity should be Job #1 in the course of drafting
- Some suggestions...

How to Eliminate Ambiguity

- Potential solutions include:
  - Avoid vague, “hedgey” language
  - Don’t use technical mumbo-jumbo
  - Eliminate internal inconsistency
  - Clarify order of precedence with other bid documents
  - Coordination/Integrate with key project specifications
  - Write precise baselines with “Defined Terms”
  - Don’t recommend construction solutions to anticipated subsurface conditions – in other words, discuss conditions, not behavior

How to Eliminate Ambiguity

- Don't use soft language such as "may" "potential" "should" "can" "might" "some" "large" "minor" "major"
- Don't use ranges such as "5 to 10%"
- Don't use geotechnical design report as your baseline – often filled with soft (but not wrong) language
- Keep it short – 5 to 10 pages, readable in 2 hours or less (ASCE, p. 22)

Coordination

- Make sure your GBR/GDR actually works with totality of Bid Documents
- This requires that you consider how the GBR/GDR works with:
  - DSC Clause (Case Study #1)
  - Borings (Case Studies #3 and #5)
  - Specifications
- Some suggestions…

Coordination

- Fine tune specifications in order to implement the GBR/GDR, for example:
  - If GBR/GDR indicate high groundwater, say so in the Dewatering Spec and require detailed dewatering control plan submittal
  - Use the tunneling or shaft specs to establish baselines, rather than the GDR
- Specify the order of precedence
  - If you use the specs to create the baseline, tell the bidder that the spec prevails - otherwise, borings might trump

The “Should Have Known” Problem of Omissions

- GBRs/GDRs sometimes do not address a condition unless actually found in course of borings, yet everyone “knows” that boulders and wood are “down there somewhere” and are not hit with small drill rigs
- Possible disconnect between engineering view of legal view… Baseline statement as contractual “assumption” vs. engineering mindset leading to “tendency to use ambiguous words”
- How to address this aspect of hybrid challenge?

Solutions to Omissions Problem

- GDR is a set of "assumptions" (ASCE, page 18)
- Work with client to decide whether to include such assumptions
- If assumptions exceed conditions revealed in borings – that's OK, but make it explicit and instruct bidder to conform bid to the assumed conditions (i.e., organic debris example)
- Make sure assumptions are stated as superior in order of precedence

A Final Word…

- Disclosure and discussion with client
- Informed consent:
  - Pros/cons
  - Options
  - Choices
- Why? Because the GBR/GDR is a legal tool for risk allocation – the client's risk, unless …
- Thank you for listening