# Subsurface Disclaimers Don't Hold – Travelers v. U.S.

**Executive Summary.** The age old issue of whether or not the geotechnical information in, or associated with, the bid package can be relied upon has been in and out of courtrooms across the country. Perhaps the federal case which is the most well-settled on this matter is Travelers Cas. and Sur. Co. of America v. U.S., 75 Fed.Cl. 696 (2007) ("Travelers Case"). Here's a contractor's summary. It wasn't as helpful to contractors as I had hoped.

**The author is not a lawyer.** Before you read any further, note that I am not a lawyer and that you should be calling an attorney on your matter versus relying on this article as professional advice. Read on.

**The basis for the claim – the geotechnical report.** Underground projects, whether they're tunnels or utilities or structures or other, often have DSC (differing site conditions) claims from the Contractor to the Owner.

These DSC claims are usually based on the geotechnical report and/or borings not matching the conditions encountered in the field. Then, the entire claim and follow-on dispute argues over this engineering discrepancy and how it led the Contractor to additional cost and/or time.

**The report is often excluded from the Contract.** The issue as described above sounds simple: "You, Mr. Owner, told me to expect dirt, I hit rock." or "You, Ms. Owner, said the rock wasn't that hard, and it was super hard."

The wrinkle in this problem may not be an engineering matter, it may be a contractual one. The problem is the dance between the feuding parties on whether or not the applicable damning document is a part of the Contract and should have been relied upon.

**The document list and then the exculpatory language.** First thing the parties do is look to the Contract. If the list of documents includes the geotechnical report, this is a good start for the Contractor.

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However, the next hurdle involves whether or not this information can be relied upon. In most contracts there exists some exculpatory information like below taken from the Westlaw synopsis of the Travelers Case:

> The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that ***it has investigated and satisfied itself of the conditions which can affect the work or its cost***, including but not limited to ... (5) the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that ***it has satisfied itself as to the character, quality, and quantity of surface and subsurface materials to be encountered*** insofar as this information is reasonably ascertainable from inspection of the site, including all the exploratory work done by the Government. [emphasis added]

**What is exculpatory language and why do I care?** In layman's terms, exculpatory language, like the immediately preceding paragraph, is Owner and Engineer language which says "I did all this research for a large sum of money, designed my job using this research, and herein give the research to you. Although as a professional I used it to design the job, if you use it as a Contractor don't call me if your project is unbuildable using my information."

They're weasel words.

This issue is illogical in the eyes of the Contractor for two reasons:

> (1) the information obtained by the Designer pre-bid during the design phase required a lot of time and money, and using this data will save the Owner time and money since the Contractor will not have to regenerate this data. This is illogical because isn't this the goal of the Owner to receive a quicker and cheaper price on bid day, and wasn't this why the research was done pre-bid?
>
> (2) if the Owner didn't want me to use the information obtained, why was it made available to me?

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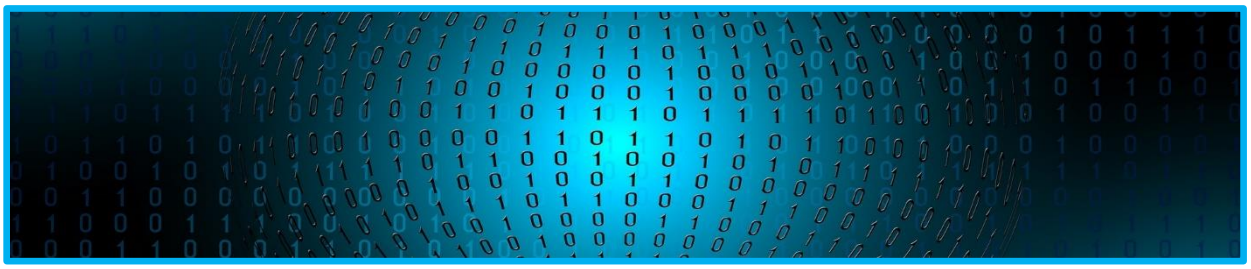
**Your natural assumption is incorrect. Look for this.** The natural and logical assumption that if the geotechnical information is provided it can be relied upon by the Contractor, is incorrect. As a Contractor you need to toss the exculpatory information out the window – ignore it – and look for what is actually written in the Contract. Look for discrete and specific information. What can lead towards a clear definition of legally useful information is (taken from Westlaw's synopsis of the Travelers Case):

> Good for Contractor – the Character of Materials specification did not say the Contractor should "decide for themselves the character of the materials" to be encountered.
>
> Good for Contractor – the contract did not include a warning like the test pits "should not be interpreted as indicating the [type] of material which may be encountered."

**Conclusion for Contractors.** It seems this is a relatively binary matter: either the Contract has disclaimers or not. If you find weasel language in the Contract to the effect of "contractor shall not rely on this information to establish their bid" or "this does not indicate materials to be encountered" you have a fight on your hands; this is bad for the Contractor. If your Contract does not contain disclaimers, you have a good argument.



**My story.** The problem is that the Conclusion for Contractors section above is a contractual scenario I don't think I've ever seen before. The geotechnical engineers are too savvy and well-coached through conferences to leave the disclaimers out of the Contract. So, the only chance at an easy fight for the Contractor is just pure negligence by the Engineer. This is also rare.

When I learned of this case, I was hopeful that the court came out and said something to the effect of "Hey owners and engineers, you can't provide all this

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great information and then not stand behind it during execution of the work. After all, the goal of the construction project is to save time and money and this is why you're [owner] spending all this money upfront to characterize the site – it's to save money from doing it again with the Contractor and, again, spending all this time and money. So, I hereby as the Judge rule that the geotechnical information provided at bid time is to be wholly relied upon by the Contractor in the formulation of his/her bid. No more having your cake and eating it too. If the Contractor cannot rely upon your information, flat out do not make it available.

The Travelers Case didn't do this in my opinion; it just gave Contractors another 1 in a hundred chance of winning. Not real helpful to contractors.

Work safe!

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