



Superior Knowledge

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1. INTRODUCTION

Courts and Boards of Contract Appeals have repeatedly ruled that if an owner, having superior knowledge concerning a material fact which likely would impact a bidder's cost or schedule performance, fails to disclose the relevant information to the bidding contractor, the owner may be found to have breached the contract and the contractor may be entitled to extra compensation. Superior knowledge may include the withholding of technical or non-technical material facts relevant to the bidder's cost or schedule performance regarding, for example, design defects, schedules of other prime contractors, or defective work installed by another contractor.

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2. PRINCIPLE OF SUPERIOR KNOWLEDGE

The principle of superior knowledge defines, in the federal contract setting, the duty to disclose any special knowledge that is exclusive or not otherwise reasonably available elsewhere to the contractor and which is vital to its performance.¹ Breaching this duty to disclose could constitute a breach of contract. The difficulty in this principle arises with the fact that the owner does not need to disclose everything it knows about a specific contract. Only “specific information on matters of substance” must be provided to the contractor.

The stipulation is that the information must be specific to some fact that the contractor needs to know in order to produce an item that meets specifications and to properly price the work involved. Without such information, the contractor’s methods and schedule of performance may be inappropriate and its bid costs too low. If the owner’s failure to disclose vital information causes the contractor’s costs to increase, a constructive change is often the result and the contractor may recover its additional costs. It is, however, the responsibility of the contractor to anticipate any commonly known difficulties that are inherent in the work it is performing.

¹ 2 CCH Government Contracts Reporter ¶ 10,125.

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3. SUPERIOR KNOWLEDGE CASES

The owner is under no duty to volunteer information if the contractor can reasonably be expected to obtain such information elsewhere through its own efforts. Such was the case in *J.J. Welcome Construction Co.*,² where the contractor contended that the Government failed to disclose information regarding river height, historical precipitation, weather and river flooding. This information was not considered to be superior knowledge since it was available to the contractor through public records. The BCA also found that the contractor had made little attempt to ascertain site conditions prior to bid submittal and rejected the contractor's claims.³

The owner's responses to pre-bid inquiries can avert situations ripe for claims. Where the owner knows of the existence of site conditions that would be impractical or impossible for the contractor to inspect, such information must be divulged upon inquiry – even in pre-bid negotiations. The owner is always under the duty to deal in good faith.⁴

Entitlement based on superior knowledge is frequently applied to changed conditions situations and is often found to be a contributing factor in practical (economic) impossibility or physical impossibility situations. The most common issues involved are soils data and details concerning the physical condition of the existing property. Where a differing site conditions clause is not contractually incorporated, superior knowledge may be a contractor's only alternative for relief.

Tyroc Construction Company sought compensation from the Government for a differing site condition caused by on-site water requiring additional work. The existence of a nearby sump pump and soil borings indicating a water problem were not disclosed to the contractor. The judge stated that, "Under the doctrine of superior knowledge, when the contractor is not advised of information which is exclusively available to the Government, and the contractor, relying on those disclosures actually made, is misled in bidding or setting the price of the contract, then a breach of duty to provide such undisclosed information may occur."⁵

Under tort theory, circumstances could support causes of action including misrepresentation, nondisclosure, concealment, deceit—and even fraud.⁶ To determine the legal consequences of such actions, inquiry must be made as to whether the owner had a legal duty to make disclosure or not. Looking to the contractual obligations and stipulations provide many answers.

² *J. J. Welcome Construction Co.*, 86-3 BCA (CCH) ¶ 19,176 (1986).

³ *H. N. Bailey & Associates v. United States*, 16 CCF ¶ 80,783, 196 Ct. Cl. 166 449 F.2d 376 (Ct. Cl. 1971); *Acme Electric, Inc.*, 85-3 BCA (CCH) ¶ 18,372 (1985); *Central Dredging Co. v. United States* (1941) 94 Ct. Cl. 1; *Ruscon Construction Co.* (1964) ASBCA No. 9371, 65-1 BCA ¶ 4,599.

⁴ *Hardeman-Monier-Hutcherson v. U.S.* (1972) 17 CCF ¶ 81,368, 198 Ct. Cl. 472, 458, F.2d 1364; *Gevyn Construction Corp. v. United States* (Ct. Cl. 1979) 26 CCF ¶ 83,1000; *Dunbar & Sullivan Dredging Co. v. United States* (1928) 65 Ct. Cl. 567.

⁵ *Tyroc Construction Corporation*, EBCA No. 210-3-82, 84-2 BCA ¶ 17,308 at 86,261 (April 1984).

⁶ Steven G. M. Stein, Editor in Chief, Construction Law, New York, Mathew Bender, 1987, p. 5-283.

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Construction disputes involving superior knowledge may be complex, and thus, the courts have established numerous theories to assist in resolving the disputes. Typical questions often asked by the courts include the following:⁷

1. What express contractual duties and disclosure duties does the owner have concerning the information in question?
2. Are there implied duties? Is there recognition of implied warranties of the information supplied by the owner in the court's jurisdiction?
3. Is there a changed or differing site conditions clause?
4. Who assumed the risk? Is there an applicable contract disclaimer?
Is it enforceable?
5. Is there a non-contractual duty on the part of the owner that could give rise to a tort claim? Did the owner fail to show reasonable care or fail to act in good faith?
6. Was the contractor legally justified in relying on the asserted facts? Did it exercise reasonable care to discover any information in question?
7. Are there material differences between the actual conditions and those described in the information supplied by the owner?
8. Are the preceding questions affected by whether the contract is private or governmental?

Entitlement based on superior knowledge has not yet been widely accepted in private contract claims. Yet where this principle has been an issue, it has been dealt with under similar theories such as misrepresentation, defective specifications or nondisclosure. Widely accepted in government contracting, superior knowledge developed from the landmark *Helene Curtis* case.⁸

Helene Curtis Industries contracted with the Army in 1951 and 1952 to supply large quantities of disinfectant chlorine powder to be used by soldiers in the Korean War to disinfect mess gear, fresh fruits and vegetables. This disinfectant had been developed after World War II by the Office of the Quartermaster General in conjunction with two universities and two chemical companies. When dissolved, the disinfectant's active ingredient, chlormelamine, released chlorine molecules to kill bacteria and germs.

In 1951, chlormelamine was a new and patented chemical, and its properties were not widely known. Although the government had developed the chemical several years prior to 1951, the disinfectant based on it had never been mass-produced.

⁷ Ibid, p. 5-268.

⁸ *Helene Curtis Industries, Inc. v. United States*, 312 F.2d 774 (Ct. Cl. 1963).

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The Army's specification for manufacturing the disinfectant contained minimal information including a list of ingredients, percentages for combining the ingredients by weight and solubility requirements. The finished product was to be "a uniformly mixed powder or granular material."

The Army issued in September 1951 an invitation to bid for a contract to supply 2,251,000 pouches of the disinfectant. In response to the invitation, Helene Curtis obtained a sample of chlormelamine, formulated a small batch of chlormelamine in their own laboratory, examined technical literature on the chemical, studied the military specification, and manufactured by simple mixing several laboratory batches of the disinfectant to be produced. Helene Curtis concluded that chlormelamine was a fine, free-flowing powder, and that the disinfectant could be produced by simply mixing the powder with the other ingredients. Helene Curtis based its bid on this premise and, having submitted the lowest of 11 bids, was awarded the contract on November 8, 1951.

The plaintiff's problems began two months later. Production batches manufactured by simple mixing failed to meet the solubility test of the specification. Considerable study convinced Helene Curtis that simple mixing would not produce the required product, and that it was necessary to grind the chlormelamine so as to reduce its particle size in order to meet the solubility standard. Grinding the chlorine ingredient led to several production problems, unexpected difficulties and increased costs.

In seeking to recover these additional costs, Helene Curtis asserted that the Army knew that the product would require the expensive grinding process and actively misled the manufacturer by failing to provide this information in the specification. The government argued that it was not required to tell the contractor what methods to use in production. The court, however, disagreed, noting that the disinfectant was new, the government sponsored its research and development, and the government was aware of the contractor's ignorance. The court ruled that the government breached its duty of full disclosure and awarded \$60,315 to the contractor for costs associated with the grinding.

Failure by the owner to fully disclose specific data on matters of substance may entitle the contractor to recover damages resulting from such nondisclosure. As a landmark case of "superior knowledge," Helene Curtis illustrates that when the balance of knowledge is so clearly on the side of the owner, the owner may no more betray the contractor by silence than by the written or spoken word.

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4. FEDERAL CRITERIA FOR RECOVERY

A contractor working for the US federal government must prove each of the following elements to recover damages under the superior knowledge doctrine:⁹

1. The contractor must prove that the government had vital knowledge of a fact directly affecting performance, cost, or duration of the contract.
2. The government knew that the contractor did not have this data and the contractor had no reason to search for it.
3. Nothing in the contract or specifications alerted the contractor of a need to look for the data and the government failed to notify contractor to inquire further.
4. The government entity withheld or failed to provide the relevant information.

⁹ Lerner; Brams (2001). Construction Claims Deskbook. Aspen Publishers Online. p. 278. ISBN 0-7355-2364-9.

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5. CALIFORNIA ADOPTION OF THE FEDERAL REQUIREMENTS

On July 12, 2010, the California Supreme Court filed a ruling significant to public entities in California entering into contracts for public works projects, holding that a public entity may be liable to a contractor for nondisclosure of material information under the superior knowledge doctrine. The case concerned the construction of an elementary school by Hayward Construction Company in Los Angeles. Hayward contended that the Los Angeles Unified School District failed to disclose a consultant's report that showed the need for more extensive repairs to stucco work than indicated by the pre-punch lists provided to Hayward by the District. Hayward also alleged that the District was aware that some of its intended methods of repair would be ineffective. While the trial court decided in favor of the District, an intermediate Court of Appeals disagreed, and reversed the trial court's ruling, which lead to an appeal to the Supreme Court.

The California Supreme Court affirmed the Court of Appeals judgment and reiterated the criteria, corresponding to the federal doctrine of superior knowledge, under which nondisclosure by a public entity would result in liability. The California Supreme Court further clarified in its ruling that a "public entity may not be held liable for failing to disclose information a reasonable contractor in like circumstances would or should have discovered on its own, but may be found liable when the totality of the circumstances is such that the public entity knows, or has reason to know, a responsible contractor acting diligently would be unlikely to discover the condition that materially increased the cost of performance."¹⁰ The Court further elaborated that, "the circumstances affecting recovery may include, but are not limited to, positive warranties or disclaimers made by either party, the information provided by the plans and specifications and related documents, the difficulty of detecting the condition in question, any time constraints the public entity imposed on proposed bidders, and unwarranted assumptions made by the contractor."¹¹

¹⁰ Los Angeles Unified School District v. Great American Insurance Company, 49 Cal. 4 739 (July 12, 2010).

¹¹ Ibid.

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6. RECOVERABLE DAMAGES

If the government had superior knowledge regarding problems that it anticipated regarding the contract but failed to share this information with the contractor, the contractor may have a valid superior knowledge claim and be entitled to recover for delays and additional costs that were due to the government's wrongful withholding of the vital information.

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7. CONCLUSION

The doctrine of superior knowledge is based on the principle that when the government has relevant information that may affect a bidding contractor's cost or schedule performance, it is the government's duty to share that information. The information must be specific to some material fact that the contractor needs to know in order to perform the work according to the specifications and to properly price the work involved. The government's wrongful withholding of the vital information may entitle the contractor to be granted recovery for delays and additional costs.

About the Author



Andrew Avalon, P.E., PSP, is President of Long International, Inc. and has over 30 years of engineering, construction management, project management, and claims consulting experience. He is an expert in the preparation and evaluation of construction claims, insurance claims, schedule delay analysis, entitlement analysis, arbitration/litigation support and dispute resolution. He has prepared more than thirty CPM schedule delay analyses, written expert witness reports, and testified in deposition, mediation, and arbitration. In addition, Mr. Avalon has published numerous articles on the subjects of CPM schedule delay analysis and entitlement issues affecting construction claims and is a contributor to AACE® International's Recommended Practice No. 29R-03 for Forensic Schedule Analysis. Mr. Avalon has U.S. and international experience in petrochemical, oil refining, commercial, educational, medical, correctional facility, transportation, dam, wharf, wastewater treatment, and coal and nuclear power projects. Mr. Avalon earned both a B.S., Mechanical Engineering, and a B.A., English, from Stanford University. Mr. Avalon is based in Orlando, Florida and can be contacted at aavalon@long-intl.com and (407) 445-0825.



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