Return to Contract Appeals Board, D.C.

GOVERNMENT OF THE DISTRICT OF COLUMBIA

CONTRACT APPEALS BOARD

APPEAL OF:

Capital Engineering Company, Inc.
4619 Brandywine Street, N.W.
Washington 16, D.C.

Under Contract No. DCF-C-17,820

CAB No. 4

FINDINGS, OPINION AND DECISION OF THE BOARD

FINDINGS AND OPINION

This is an appeal from an action of the Contracting Officer, Department of Highways, D.C., in denying Appellant's claim for compensation for increased costs of performing its contract with the District of Columbia. These increased costs are claimed because of (1) underground water conditions at the site and (2) the necessity of maintaining an existing stormwater sewer.

The contract, which is dated March 29, 1954, was for the construction of a bridge across Watts Branch on the west side of Kenilworth Avenue, N.E., Federal Aid Project U-45 (4), and work was commenced April 19, 1954 and completed January 24, 1955. Final payment was made to Appellant March 30, 1955 after its submission of a release dated March 2, 1955 from which had been excepted the claims involved in this appeal.

Jurisdiction

By letter addressed to this Board under date of September 17, 1954, filed with this Board on September 21, 1954, Appellant

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stated that the claims asserted therein were denied by the Alternate Contracting Officer "in letters dated June 30, 1954 and August 23, 1954". In its Answer filed July 8, 1957 the District of Columbia asserted that this Board is without jurisdiction inasmuch as Article 15 of the Contract requires that appeals be taken within 30 days from the decision of the Contracting Officer, that the decision in this case was rendered on June 30, 1954, and that the appeal filed September 21, 1954 was filed 83 days after the date of the decision. At the beginning of the hearing on August 20, 1957 counsel for the District of Columbia made an oral motion to dismiss the appeal for lack of jurisdiction (Tr.6) which the Board overruled with the statement that its reasons would be set forth in its written opinion (Tr.11).

The disputes were presented to the Contracting Officer by Appellant's letter of June 23, 1954 and the decision of the Alternate Contracting Officer rendered on June 30th. On July 8 Appellant again wrote the Contracting Officer including additional information in support of its position and concluded:

> "If you cannot allow our claims, we would appreciate you forwarding our letters to the Contract Appeals Board, and notifying us as to the usual procedure followed in making an appeal."

It was not, however, until August 23, 1954 that the Alternate Contracting Officer replied that the decision of June 30, 1954 would not be modified and he concluded:

> "Your request, that if we do not approve your claims that your letter be forwarded to the Contract Appeals Board, cannot be complied with under required procedure, which requires that you apply directly to the Contract Appeals Board in such case. Therefore, if you wish to pursue this claim, it will be necessary for you to write directly to the Contract Appeals Board giving them all pertinent information including previous correspondence with this office."

As previously stated Appellant wrote directly to this Board on September 17, 1954.

The contract contains the following provision:

"Article 15. Disputes. -- Except as otherwise specifically provided in this contract, all disputes concerning questions arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within thirty (30) days to the Contract Appeals Board, whose decision shall be final and conclusive upon the parties thereto, subject to the limitations of Sec. 3 (b) (2) of Reorganization Plan No. 5 of 1952. In the meantime the contractor shall diligently proceed with the work as directed."

Counsel for the District of Columbia, both in his Answer and in argument before the Board on August 20, 1957, pointed out that the requirement that the contractor appeal within 30 days of the decision of the Contracting Officer is a jurisdictional requirement which cannot be waived; and contended that the only appeal to this Board was by the letter to this Board of September 17, 1954 which was written more than 30 days after the June 30, 1954 decision of the Contracting Officer. He further contended that the Contracting Officer never reconsidered the June 30 decision since it would have been necessary for him to have advised the contractor, within 30 days of such decision, of his intention to reconsider in order not to lose jurisdiction upon the expiration of such 30 days, and therefore the time for taking the appeal did not begin to run with the August 23 letter which confirmed the June 30th decision. He did point out, however, that other Contract Appeals Board's have been rather liberal with contractors in determining this jurisdictional question.

It is not necessary to determine whether it is jurisdictional to the authority of the Contracting Officer to reconsider a decision made by him that, within 30 days from the date of such decision, he notify the contractor of his intention to grant the contractor's request for such reconsideration, since the Motion to Dismiss should be overruled on another ground.

Eight days after the decision of the Alternate Contracting Officer Appellant not only requested reconsideration by the Contracting Officer, but also requested that his letter be forwarded to this Board as its appeal in the event the Contracting Officer adhered to his initial decision. In the opinion of the Board this letter of July 8, 1954, although addressed to the Contracting Officer, constituted an appeal to this Board which the Contracting Officer should have for-

warded to the Board. This Board is not aware of any "required procedure" which ever prevented a Contracting Officer from forwarding an appeal to this Board at the request of an Appellant, and the Rules of this Board (adopted several years after the Alternate Contracting Officer's letter of August 23, 1954) expressly provide for filing of appeals with Contracting Officers who are required to transmit them to this Board with a notation of the date of filing.

For the foregoing reasons the appeal was timely and the Board has jurisdiction.

Underground Conditions At The Site

A part of the work under this contract was the construction of a bridge to cross Watts Branch at a location to which Appellant was required to divert the stream. Before diverting the stream, Appellant constructed the south abutment of the bridge at the required location which was somewhat south of the existing stream bed. In making the excavation for the abutment Appellant encountered a large volume of underground water which required the installation of a well-point system and continuous pumping. Appellant called the attention of the Engineer to the condition, claimed that it was "not shown on the drawings or indicated in the specifications" and requested an equitable adjustment under Article 4 of the contract which reads:

> "Article 4. Changed Conditions. -- Should the contractor encounter, or the District discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specification, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds they do so materially differ he shall make such changes in the drawings and/or specifications as he may find necessary, and any increase or decrease of

cost and/or difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract, but no such change involving an estimated increase or decrease in cost in excess of Five Thousand Dollars shall be made by the contracting officer unless approved in writing by the Commissioners."

The Alternate Contracting Officer's decision of June 30, 1954 concluded:

"The first item mentioned is the fact that water was encountered in the excavation, while its presence was not noted on the published record of borings, requiring you to install a de-watering system.

"Under Article 4 of the Contract, it appears that no unforeseen conditions were encountered. It is obvious that the presence of water is to be foreseen in an excavation immediately adjacent to, and below the level of a flowing stream. Therefore this claim is not allowed."

At the hearing Appellant's president conceded that water from the adjacent stream would be expected to find its way into an excavation carried below the elevation of the stream bed, that it was Appellant's obligation to handle such water, and that it was not entitled to compensation for the cost of protecting the excavation from the water in the stream (Tr.50-51). But Appellant contended that the soil at, and immediately below, the elevation of the stream bed was an impervious material and that the water which it pumped was from an underground source which flowed below this impervious stratum.

The Board finds from the evidence adduced at the hearing that the water which Appellant pumped, and for the cost of which pumping it seeks an equitable adjustment of its contract price, was underground water which did not come from Watts Branch. But this finding alone does not dispose of the question of Appellant's right to all or part of the $7,644.81 claimed as compensation.

The contract drawings or plans, upon which Appellant based its bid, show the results of seven borings at the site of the contract work, two of which, numbered 7 and 8, were on opposite sides of the

existing Watts Branch. For each boring the plans bear a report consisting of 3 columns, the first showing depth in feet, the second containing a description of the soil, and the third showing blows per foot. Nowhere is there shown any indication of the presence of water. Appellant conceded at the hearing that the description of the soil as shown in the boring data on the plans was an accurate description of the soil conditions actually encountered at the depths indicated.

Testimony of witnesses for the District of Columbia established that:

(a) the borings were "wash borings" but were not so indicated on the contract plans, and that it was customary for the Highway Department to withhold the fact that its borings are wash borings (Tr.52);

(b) the field records of the borings showed water elevations and

> " . . In hole number 7 the water rose to 7.8 feet above the elevation of bottom of footings in four days and rose nine feet more in six days, to an elevation about six feet above the water surface in the stream. In hole number 8 the water rose to 11.7 feet above the bottom of footings within three days after perforated casing was placed or about to water elevation in the stream. This information is not necessarily indicative of the water elevations to be anticipated in the excavation because the borings were drilled much deeper where there is a possibility of encountering artesian water. . " (Witness for District of Columbia reading from notes made by him at the time the question first arose; Tr.26-27);

(c) the information concerning the water level was not put on the contract drawings because "it was considered obvious that the footing would run into water conditions which would require a cofferdam or some similar construction method to de-water" (Tr.50);

(d) subsequent to Appellant's encountering the water condition on which this appeal is based, the Director of Highways invited bids

for other work to be performed immediately adjacent to Appellant's work and the plans furnished bidders showed the identical borings numbered 2 through 6 that appeared on Appellant's plans; however, these plans included water data for the borings in addition to the data shown on Appellant's plans (Tr.28-30).

Section 11 of the Special Provisions of the Appellant's contract, entitled "TEST BORING DATA AND FOUNDATION CONDITIONS" states that:

> "Data from borings made at the site is shown on the plans. The contractor must draw his own conclusions as to the materials to be encountered, as to whether piles will be required, and as to the methods required to complete the construction shown on the plans. Decision by the Engineer as to the necessity for piles under foundations will be made after excavation for footings. The District assumes no responsibility in regard to the accuracy of the borings, which represent the best information available." (Emphasis supplied by Board.)

Despite its disclaimer of responsibility for the accuracy of the borings, Section 11 constituted a positive representation by the District that the boring data shown on the plans set forth all boring information available to the District at the time the plans were prepared. In fact the District knew at the time it prepared the plans that water had been found in the borings and it had records showing the elevations of water in the boring holes, but this information was not put on the plans. Therefore, the District falsely represented that "the borings, * * represent the best information available", and thus falsely represented to the Appellant that no water had been encountered in the borings which were described on the contract plans.

The Supreme Court of the United States has many times held that a contractor is entitled to recover from the Government the additional costs of performing work due to the existence of conditions which were different from those which had been positively represented by the Government. Exculpatory statements, such as those in section 11 of the Special Provisions of Appellant's contract, furnish no relief to the Government.

> " * * We think this positive statement of the specifications must be taken as true and binding

upon the Government, and that upon it rather than upon the claimants must fall the loss resulting from such mistaken representations. We think it would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of facts which the specifications furnished by the Government as a basis of the contract left in no doubt. * * * " Hollerbach v. United States, 233 U.S. 165, 172 (1914).

"It makes no difference to the legal aspects of the case that the omissions from the records of the results of the borings did not have sinister purpose. They were representations made which were relied upon by them, as they were positive." Christie v. United States, 237 U.S. 234, 242 (1915).

In the two quoted cases the contractor was granted a judgment for damages for breach of contract. Article 4 of Appellant's contract was intended to provide a contractual remedy in similar circumstances, and requires the Contracting Officer to make adjustments under the contract.

The Board finds that Appellant encountered "subsurface * * conditions at the site materially differing from those shown on the drawings or indicated in the specifications", that the procedural requirements of Article 4 of the contract were complied with, and that the Contracting Officer should have made such changes in the specifications as were necessary to provide for the handling of the underground water and should have adjusted the contract price to provide for any increase in cost resulting therefrom. The Board further finds that the means adopted by the Appellant to handle the underground water were appropriate and that its contract price should be adjusted to provide for the increase in cost resulting therefrom. Determination of the amount of such increase should be made by the Contracting Officer, Department of Highways, subject to appeal to this Board.

Maintaining Existing Stormwater Sewer

The contract plans show a number of sewers, including a portion of a 21" terra cotta stormwater sewer running in a northeasterly direction to Watts Branch (Sheet 2 of 9). This sewer is shown as

crossing the site of the east wing wall of the south abutment of the bridge (Sheet 2), and is also shown on Sheet 4 of the plans (rev. 1-29-54) coming through the completed wing wall, with the notation on the plan:

> 21" storm sewer. * * Provide a pipe sleeve thru wall and fill space between the sewer pipe and sleeve with cement mortar.

Prior to commencing excavation for the south abutment Appellant requested that the sewer be blocked off or be relocated pursuant to paragraph 2 of Section 4 of the Special Provisions of its contract:

> "2. The sewers shown on the plans as emptying into Watts Branch in the vicinity of the proposed construction will probably be relocated by others. Location for these sewers has not been determined at this time."

This request was denied by the District and, during the entire time of the construction work, the sewer was kept in service to drain streets in the area. In making its excavation for the south abutment and wing wall Appellant destroyed the sewer pipe, installed sheet piling to hold back the bank under the sewer, and used sixteen-inch galvanized pipe suspended across the excavation to carry the storm water to Watts Branch (Tr.61).

In his decision of June 30, 1954, from which this appeal is taken, the Alternate Contracting Officer held:

> "The second item mentioned is the presence of a 21" storm sewer in the site of the South abutment, which was required to be maintained by you during the construction of this abutment, and a portion of which must be reconstructed by you so that it may remain in service after the completion of your contract.
>
> "This sewer is shown on the contract drawings, so that its existence was known; therefore it appears that its maintenance during construction was primarily for your benefit, preventing storm water from entering your excavation. However, it appears that the permanent reconstruction of this sewer, necessarily required,

is a legitimate claim. Therefore you are requested to furnish us with an estimate of the value of such reconstruction, as a basis for negotiation of a change order compensating you for this work." (Emphasis supplied by Board.)

Appellant has urged that it made no allowance in its bid for the maintenance of sewers during construction work since the specifications did not provide for such maintenance and it is customary to specify the utility maintenance work which the contractor is expected to provide (Tr.62). Furthermore, Appellant contends,

> " * * As the 21" sewer, in its final location, is shown passing through the new South Abutment wall, in its original position at that point, the only reason for relocating this storm sewer would be for construction purposes, and we so interpreted it in preparing our estimate. * * * " (Letter to Contracting Officer, July 8, 1954; see also Tr. 68-69).

Appellant claims $827.75 as the cost of maintaining the sewer.

The argument in support of the Alternate Contracting Officer's decision rested largely upon the word "probably" in the quoted section of the Special Provisions, and we have been told that the Appellant had no right to rely upon a probability; that the plans showed the sewer crossing the excavation and the Appellant should have anticipated the probability of being required to maintain it (Tr. 64).

Certainly it is not clear whether the word "probably" in the phrase "sewers * will probably be relocated by others" relates to the work of relocation or to the parties to perform such work or to both. Also, while it might appear that "relocation" related to the final position of such sewers (see Tr. 76, lines 1-5) Appellant has consistently contended that it understood the Special Provisions to mean that the sewer would be relocated for construction purposes (e.g., Dobyns, Tr. 66-67).

Section 4 of the Special Provisions is entitled "EXISTING UTILITIES", and paragraph 1 specifically requires the Appellant to maintain a 6" high-pressure gas main on the foot bridge crossing Watts Branch. Paragraph 2, dealing with the sewers, is silent as to maintenance except for the reference to probable relocation.

Appellant's president testified (Tr.77-78) that if the reference to probable relocation had been omitted from the Special Provisions Appellant would have expected to maintain the sewer and would have put something in its bid to cover the cost.

If nothing more appeared than the foregoing, the Board well might conclude that Appellant had no reasonable basis for construing the reference to probable relocation as an affirmative representation that it would not be required to maintain this sewer. And this conclusion might be reached despite the fact that there is no justification for the use of indefinite words, such as "probable", in contract documents, and despite the fact that it is customary for the District - even the Department of Highways (Tr. 78-79) - to specify any maintenance of utilities that will be required of a contractor.

However, there is much more to this question.

The District's Superintendent of Bridge Construction and Maintenance testified that Section 4 of the Special Provisions put Appellant on notice that at the time Appellant began work the location of the sewer was undetermined (Tr. 73 line 22 - Tr. 74 line 2), the flow might have been reversed (Tr. 75 lines 10-11), the line might have been changed so that it did not even go in the vicinity of the bridge (Tr. 75 lines 19-21), or it might have been completely abandoned (Tr. 75 lines 22-23). He further testified that it was "highly probable" that Appellant itself would have to do the work of relocating the sewer (Tr. 75 lines 5-9). Nevertheless, the plans as bid upon definitely show this sewer coming through Appellant's wing wall in the same line in which it was originally running, and Appellant was paid to reconstruct the sewer along this line and through the wall. Moreover, Appellant had been told "I would have to keep it flowing during my construction operations" (Tr. 77). The testimony of the Superintendent of Bridge Construction and Maintenance concerning the indefiniteness of final location for this sewer is not borne out by the June 30, 1954 decision of the Alternate Contracting Officer, which clearly relies upon the plans for his conclusion that Appellant was required to maintain the sewer and reconstruct it "so that it may remain in service after the completion of your contract."

At all events, the testimony of the Superintendent of Bridge Construction and Maintenance is consistent with the statement in the Alternate Contracting Officer's decision that

"This sewer is shown on the contract drawings, so that its existence was known; * * " (Emphasis supplied by Board.)

On the other hand, three months after that decision and nearly three years before giving his testimony to this Board, the Superintendent of Bridge Construction and Maintenance justified the issuance of Change Order No. 1, under which Appellant was paid for "replacing" this storm sewer, by endorsing on the reverse thereof:

"The existence of a permanent 21" sewer now in service and to remain in service after completion of the entire project was overlooked when the contract was awarded. * * " (Emphasis supplied by Board.)

The Change Order was issued by the Contracting Officer and this endorsement must be construed as a finding by him upon which he based such Order.

The foregoing recital of contradictions among testimony, findings, plans and Special Provisions indicates a certain confusion on the part of District officials concerning this sewer. This Board cannot attribute to Appellant a higher standard of understanding. Moreover

"It is so well established as not to require citation of authority that * * * where an instrument * * * is drafted and prepared entirely by one party thereto, * * * subsequent doubts as to the meaning and applicability of the language and provisions thereof to definite facts, conditions, situations, and circumstances should * * * be interpreted more favorably to the other party who did not and could not, in the circumstances, have anything to say as to the language and provisions of the instrument as prepared. The reason for this rule is that since the contract, the detailed drawings, and the specifications were not the result of negotiations between the parties before execution it is only reasonable to presume that the party who prepared and wrote the contract, drawings, and specifications intended to express or clearly indicate his requirements in the language used rather than leaving them to be determined by resolving doubts and inferences in his favor." Callahan Construction Co. v. United States, 91 C.Cl. 538, 611-612 (1940).

Appellant contends it interpreted the plans and Special Provisions to mean that it would not be required to maintain this sewer in service during construction. Under all the facts this interpretation was not unreasonable. Nevertheless Appellant was required to maintain it, presumably as work included in its contract. The Board finds that such work was not required by the contract but was work additional to contract requirements.

The contract contains the following provisions:

Article 3. Changes. - The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the cost of performing the work under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease in excess of Five Thousand Dollars shall be ordered unless approved in writing by the Commissioners. Any claim for adjustment under this article must be made in writing to the contracting officer within (10) days from the date the change is ordered; Provided, however, That the contracting officer, if he determines that the facts justify such action, may receive and consider and adjust any such claim made at any time prior to the date of final settlement of this contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Article 15 hereof. Nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 5. Extras. - Except as otherwise herein provided, no charge for any extra, or additional, work or material will be allowed unless the same has been ordered in writing by the contracting officer under the authority of article 3 or 4 of this contract and the price or basis for payment stated in such order; nor will payment be allowed for any work performed or material furnished which is not in strict compliance with every applicable provision of this contract.

Pursuant to these Articles of its contract, Appellant should have demanded a written change order from the Contracting Officer before undertaking the work of maintaining this sewer. At least, the Contracting Officer should have advised Appellant in writing that such work was required so that Appellant could have claimed an adjustment of the contract price within the contractual ten days after issuance of such advice (order).

Although not strictly in conformity with the procedure set forth in the contract, we find that the June 30, 1954 decision of the Alternate Contracting Officer constituted a written order to perform this work, that the June 23, 1954 letter of Appellant was a claim for adjustment, and that no adjustment was made.

Appellant is entitled to an adjustment of its contract price, but the determination of the amount of such adjustment should be made, in the first instance, by the Contracting Officer.

DECISION

1. The appeal was filed within the time prescribed by the contract, the Board has jurisdiction of the appeal, and the oral motion of the District of Columbia to dismiss this appeal was properly denied by the Board at the hearing.

2. Appellant is entitled to an equitable adjustment of its contract price to reflect the increase of cost resulting from the use of a well-point system to keep its excavation free from underground water, the existence of which was known to the District but was not shown on the contract plans.

3. Appellant is entitled to an equitable adjustment of its contract price to reflect the increase of cost resulting from the work of maintaining a storm water sewer over its excavation as ordered by the Alternate Contracting Officer, Department of Highways, D.C.

4. The decision of the Alternate Contracting Officer, Department of Highways, D.C., dated June 30, 1954, is hereby reversed; and the case is remanded to the Contracting Officer, Department of Highways, D.C., to determine the adjustments to which Appellant is entitled under paragraphs 2 and 3 of this decision.

5. Appellant will be entitled, under Article 15 of its contract, to appeal to this Board from the determinations of the Contracting Officer which are made pursuant to paragraph 4 of this decision.

Dated: JUN 23 1958

/s/ ROBERT E. MATHE
ROBERT E. MATHE, Member

/s/ DAVID V. AULD
DAVID V. AULD, Member

/s/ LEE F. DANTE
LEE F. DANTE, Chairman

CONTRACT APPEALS BOARD, D. C.

I hereby certify that the foregoing is a true copy of the findings and decision of the Contract Appeals Board, D.C., in CAB No. 4, appeal of Capital Engineering Company, Inc., under Contract No. DCF-C-17,820. I further certify that the foregoing decision has become final under the Rules of the Board.

Dated: JUL 17 1958

Lee F. Dante
LEE F. DANTE, Chairman
CONTRACT APPEALS BOARD, D.C.