

BEFORE THE
MARYLAND DEPARTMENT OF TRANSPORTATION
BOARD OF CONTRACT APPEALS

Appeal of FRUIN-COLNON CORPORATION)
AND HORN CONSTRUCTION CO., INC.) MDOT NO. 1001
Under MTA Contract No. NW-03-02)

December 6, 1979

Constructive Change — A directive to place contractually required compressed air lines outside of the Bolton Hill Station right of way was held to constructively change the contract and require an equitable adjustment to the contract price under the "Changes" article.

Contract Interpretation — The objective test of contract interpretation was used to ascertain a clear and definite contract requirement that essential compressed air lines be placed within the Bolton Hill Station right of way.

Contract Interpretation — The contract was interpreted as an entity, with effect given to each clause and contract drawing, so as to provide a clear and definite requirement that compressed air lines be located within the Bolton Hill Station right of way.

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OPINION BY CHAIRMAN BAKER

This dispute concerns the interpretation of the contract plans and specifications relative to the placement of temporary compressed air lines. The appeal has been submitted for decision on the written record pursuant to Rule 11. Quantum is not now in issue.

I. FINDINGS OF FACT

A. Introductory

On May 20, 1976 the Mass Transit Administration (an administrative unit of the Maryland Department of Transportation) issued a Notice To Contractors inviting bids on the construction of approximately 11,300 linear feet of single track earth tunnel, with associated mined cross passages, temporary bulkheads, two mid-line vent structures, and two access shafts. Bids were opened on July 27, 1976 and the lowest responsive and responsible bidder was identified as the joint venture of Fruin-Colnon Corporation and Horn Construction Co., Inc. (hereafter Appellant). On September 16, 1976, Contract No. NW-03-02 was awarded to Appellant in the amount of \$41,658,000, subject to approval by the Maryland Board of Public Works, subsequently granted on November 12, 1976. A Notice To Proceed was issued on December 13, 1976.

Contract No. NW-03-02 was one of a series of contracts for the construction of the northwest line of the Baltimore Region Rapid Transit System. The tunnel work which Appellant was to perform ultimately will connect the Bolton Hill Station with the Laurens Street Station to the North and the Lexington Market Station to the South. The subway station structures themselves are not part of the contract.

In order to restrict the inflow of ground water during tunneling operations, Appellant planned to use compressed air to balance the air pressure in the tunnel with the water pressure in the surrounding earth. The use of compressed air for this purpose is mandated by Section 2.33, Part 1.1(A) of the Contract Technical Provisions as follows:

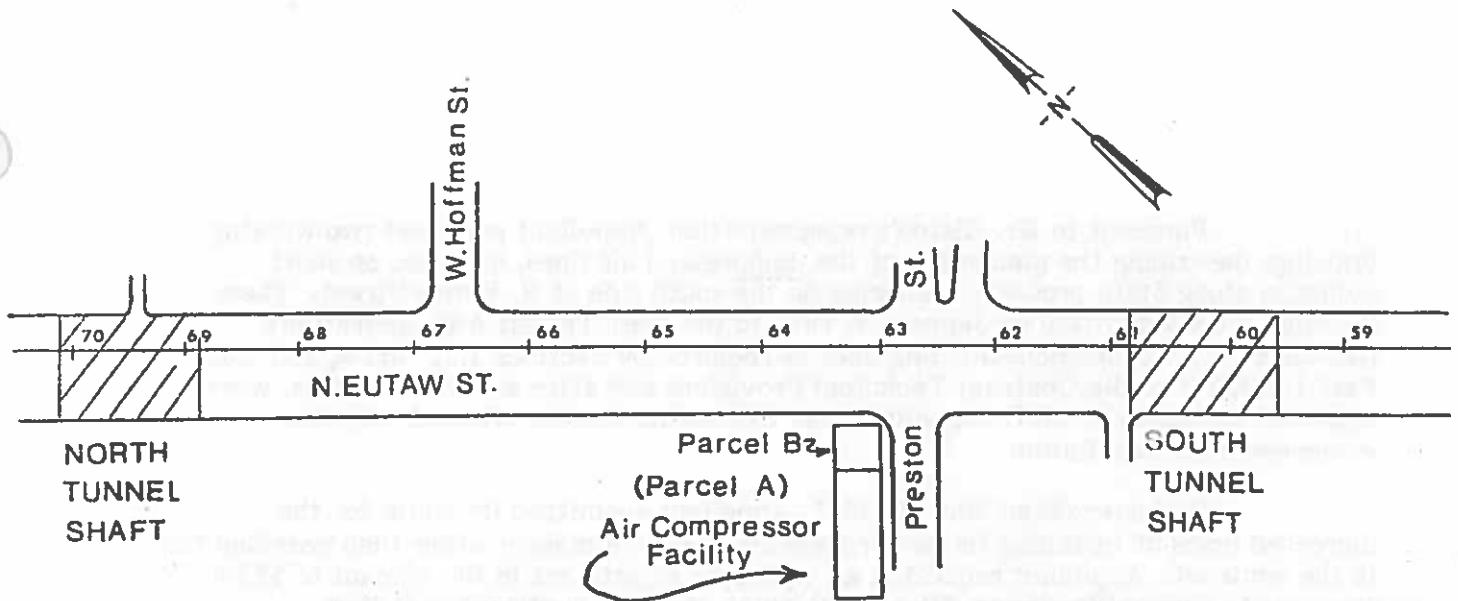
"The Work Under This Section: Construct shield driven tunnels and related temporary bulkheads as specified herein, as shown on the Contract Drawings, and in accordance with the requirements of the Contract Documents. Working in compressed air at a pressure less than 12 psig and equal to or greater than 4 psig is required for the full length of the tunnels, except for a distance of 150 feet maximum adjacent to the access shafts."

Contract Special Provision SP-11.0(B)(3) further provides in pertinent part that:

"...Parcel "A" is intended for the Contractor's compressed air plant installation. Parcel "B" is intended for use by the Contractor in routing his compressed air piping from the compressed air plant (Parcel "A") to N. Eutaw Street...."

Parcels "A" and "B" are shown on Contract "Right of Way" Drawing R-4A-3 (Sheet Number 13-A).

Appellant's tunneling operations were to begin at the North and South Tunnel Access Shafts which were to be constructed within the confines of N. Eutaw Street under the contract. The geographical relationship between these tunnel shafts and the compressed air facility is shown as follows..



Appellant thus had to pipe compressed air from right of way Parcel "A" approximately 600 feet¹ to the North tunnel access shaft and 200 feet to the South tunnel access shaft. The routing of this piping network is the subject matter of this dispute.

B. Development of Dispute

The parties agree that in December 1976, Mr. George Williamson, Appellant's Project Manager, phoned the Mass Transit Administration's Resident Engineer, Mr. William C. Alston, to determine the contractually intended location of the compressed air piping. Although the record is in dispute as to the precise dialogue, both Mr. Williamson and Mr. Alston agreed that the most practical location for the compressed air piping would be outside of the planned right of way for the Bolton Hill Station. This right of way is delineated on Contract Drawing R-4A-3 (Sheet No. 13-A) and essentially includes a minimum of the center four lanes (lanes 3, 4, 5 & 6) of N. Eutaw Street between the two tunnel access shafts. Mr. Alston, however, promised to check with the designer, Bechtel, Incorporated, to ascertain the actual design intent. Later that afternoon Mr. Alston informed Mr. Williamson that the designer intended for the compressed air lines to be located outside of the Bolton Hill Station right of way. Mr. Alston subsequently further apprised Mr. Williamson that the compressed air lines could be positioned along State owned property² adjacent to N. Eutaw Street. This area was not initially available to Appellant under its contract.

¹Parcel "A" is located at approximately Station 63. The North access shaft is at Station 69. Since each station represents 100 feet, the difference between Station 63 and 69 is a distance of 600 feet.

²This property is comprised of parking lots used by State employees. It is referred to in the record as the detour road area and depicted on Drawing NW-03-02 TM 201 (Sheet No. 319) which was included in the contract drawings for information only and was not part of the contract.

Pursuant to Mr. Alston's representation, Appellant prepared two working drawings describing the placement of the compressed air lines, elevated on short columns, along State property bordering on the south side of N. Eutaw Street. These drawings were submitted on January 8, 1977 to the Mass Transit Administration's (hereafter MTA or Respondent) Engineer as required by Sections 1.3, Part 3, and 2.33, Part 1.3(B)(11) of the Contract Technical Provisions and after several revisions, were approved on March 7, 1977. Appellant was then authorized to proceed with the compressed air installation.

By letter dated May 10, 1977, Appellant submitted its claim for the increased costs of installing its compressed air lines in a manner other than provided for in the contract. Appellant requested an equitable adjustment in the amount of \$23,051 pursuant to General Provision GP-4.05(D) which states in pertinent part that..

"If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this Contract, whether or not changed by any order, an equitable adjustment shall be made and the Contract modified in writing accordingly ..."

Mr. Alston, on behalf of the MTA, denied the claim by letter dated May 13, 1977. A final decision thereafter was issued by the Mass Transit Administrator on September 28, 1978 from which this timely appeal was taken.

C. Contentions of the Parties

1. Appellant's Position

Appellant represents that it reasonably interpreted the contract at the time of bid to require placement of the compressed air piping beneath the median strip of N. Eutaw Street. This interpretation principally was based upon Contract Drawing NW-03-02 TM 3-3 (Sheet No. 207) which sets forth the suggested staging³ of construction and maintenance of traffic along N. Eutaw Street between the two tunnel access shafts. The suggested construction sequence appears, in pertinent part, as follows..

³Note 12 on Contract Drawing TM 1-4 (Sheet No. 205) provides:

"All stages shown on the Drawings TM 3 thru TM 4 are suggested sequence of construction and maintenance of traffic. If the contractor desires to change all or any portion of the sequence as shown before or after construction has started, he must submit the necessary traffic and construction staging drawings for this contract showing his proposed changes. The revised drawings must be submitted through the Engineer to the Baltimore City Department of Transit and Traffic for approval."

Article 6.0 of the Contract Special Provisions required Appellant to operate generally in accordance with the staging plans and to utilize only those areas indicated on the contract drawings for staging the work.

Stage 1 Sta. 67+ to 70+

Close

1. Lanes 3, 4, 5 and 6 (the center four lanes).

Construct

1. Traffic Light Pole left of Sta. 70+ 0 to be relocated (by others).
2. Remove existing median.
3. Place air compressor lines.
4. Pave with temporary pavement.

Maintain

1. Lanes 1 and 2 southbound on Eutaw.
2. Lanes 7 and 8 northbound on Eutaw.
3. Maintain all other traffic.

Sta. 61+ to 67+

Close

1. Lanes 3, 4, 5 and 6.

Construct

1. Remove existing median.
2. Remove trees and construct air compressor facility.
3. Place air compressor lines.
4. Pave with temporary pavement.

Maintain

1. Lanes 1 and 2 southbound on Eutaw.
2. Lanes 7 and 8 northbound on Eutaw.
3. Maintain all other traffic.

Appellant's Mr. Williamson also states by affidavit that "...early in our own operation I realized that perhaps we could save MTA some money by suggesting a contract change which would move the compressed air lines out of our work area to an elevated installation through the parking lot on a series of short columns. "In his May 10, 1977 letter to Mr. Alston, Mr. Williamson estimated that the MTA would have incurred

costs in amount of \$139,425 under the Bolton Hill Station contract in supporting the compressed air lines had they been placed in the contractually prescribed location under the existing median strip along N. Eutaw Street. Further during excavation by the Bolton Hill Station contractor, the compressed air lines would have been susceptible to damage. For these reasons Mr. Williamson suggested the contract change to Mr. Alston. Mr. Alston is said to have agreed to this change which resulted in additional costs to Appellant.

2. Respondent's Position

Respondent contends that the contract when read as a whole precludes the placement of the compressed air lines in the median of N. Eutaw Street. Respondent argues that Contract Drawing TM 3-3 (Sheet No. 207) indicates only that the compressed air lines were to be installed during Stage 1 of the "Traffic and Construction Staging" plan and that the precise location of these lines was not set forth anywhere in the contract. Further, it is alleged that Appellant's interpretation of Contract Drawing TM 3-3 would be in obvious conflict with and render nugatory the following contract Special Provisions:

1. SP-11.0(B)(3)

"...The use of Parcel "B" and the compressed air piping installation must not interfere with the operations of the Bolton Hill Station Structure Contractor."

2. SP-11.0(E)

"The Contractor will be required to completely vacate and make available to the Bolton Hill Station Structure Contractor, the portion of N. Eutaw Street which is between the north and south access shafts at such a time as this area is required by the Bolton Hill Station Structure Contractor for his work operations. The Contractor will be given by the Engineer 30 calendar days notice of the time at which this area must be vacated." (Underscoring supplied.)

Respondent also contends that the support of compressed air lines within the station right of way would subject them to damage and create a potential safety hazard to workers within the tunnel.

II. DECISION

The parties each have submitted affidavits which seek to establish either the design intent or prebid interpretation of the contract documents relative to the positioning of the compressed air lines. The law is clear however that "...[t]he written language embodying the terms of an agreement will govern the rights and liabilities of the parties, irrespective of the intent of the parties at the time they entered into the contract, unless the written language is not susceptible of a clear and definite understanding, or unless there is fraud, duress or mutual mistake." Ray v. William G. Eurice & Bros., 201 Md. 115, 93 A.2d 272 (1952), Kasten Construction Co., Inc. v. Rod Enterprise, Inc., 268 Md. 318, 301 A.2d 12, 17 (1973). This well established objective test of contract interpretation mandates that the Board place itself in the position of

Appellant at the time of bid and ascertain the meaning attributable to the pertinent contract language by a reasonably intelligent bidder.

In order to estimate the cost of installing piping between the compressed air facility and each tunnel access shaft, a bidder necessarily must determine the length of piping required and the permissible locations for its placement. The length of piping is easily calculated from the contract drawings and is not in dispute here. The permissible areas for placement are contingent upon the available right of way parcels which are also depicted in the contract drawings.

Contract Drawing NW-03-02 R-4A-3 (Sheet No. 13-A) sets forth the right of way plan for the section of N. Eutaw Street between the two tunnel access shafts. When read in conjunction with contract Special Provision SP-11.0(B)(3) this drawing establishes that the compressed air piping was to extend from the air compressor facility at Parcel "A" through Parcel "B" to N. Eutaw Street. There were no other easements provided for the possible placement of the compressed air piping (also referred to as air lines) outside of the limits of N. Eutaw Street. Consequently, N. Eutaw Street was the only area contractually available to Appellant for placement of the compressed air lines and the Board so finds.

Contract Drawing NW-03-02 TM 3-3 (Sheet No. 207) sets forth the traffic and staging plan for the work to be performed in N. Eutaw Street between the two tunnel access shafts. The initial stage of the contract work requires the contractor to close traffic lanes 3, 4, 5 and 6 while removing the existing median, placing the air compressor lines and repaving the work area. Concomitantly, the remaining traffic lanes 1, 2, 7 and 8 were to be maintained for regular traffic use. Accordingly, the Board finds that Contract Drawing NW-03-02 TM 3-3 requires the compressed air lines to be placed within the confines of traffic lanes 3, 4, 5 and 6 and consequently within the Bolton Hill Station structure right of way.

Respondent maintains, however, that if Contract Drawing TM 3-3 reasonably may be interpreted to provide for the placement of compressed air lines within the Bolton Hill Station right of way, it is in obvious conflict with Special Provisions SP-11.0(B)(3) and SP-11.0(E). In order for such a conflict to exist, the placement of compressed air lines within the Bolton Hill Station right of way would have to interfere with the work effort of the station contractor.

The word "interference" suggests a delay to or resequencing of a contractor's activities resulting from some unexpected occurrence. Absent such an interference a contractor could expect to execute its contract work in a timely and efficient manner in accordance with its plan of performance. A reasonable bidder under the instant contract should have concluded that if the contract documents required the placement of compressed air lines within the station right of way, the Mass Transit Administration later would require support thereof under the Bolton Hill Station structure contract in a manner similar to that provided in Section 2.4 of the contract Technical Provisions. The support of compressed air lines therefore would be a contractual responsibility of the Bolton Hill Station contractor, would be included in its construction plan and schedule, and would not constitute an interference with its planned performance. The Board thus finds no inconsistency between Special Provision SP-11.0(B)(3) and the contract drawings.

Contract Special Provisions SP-11.0(B)(3) and SP-11.0(E) together establish a priority for the Bolton Hill Station work operations within the area of N. Eutaw Street between the tunnel access shafts. Appellant was to complete its work and remove all equipment and work crews prior to the arrival of the Bolton Hill Station contractor so as

to preclude any delay to the station work. In this regard contract Special Provision SP-8.0(A) informed Appellant that the Bolton Hill Station contract was expected to be awarded on or about February 1, 1977. The Board finds that contract Special Provision SP-11.0(E) requires only that Appellant physically vacate N. Eutaw Street, thereby providing unimpeded access to the Bolton Hill Station work area. As previously discussed in our decision, the requirement to support compressed air lines would not have constituted an impediment to the Bolton Hill Station work and therefore would not have rendered Special Provision SP-11.0(E) meaningless.

"A recognized rule of construction in ascertaining the true meaning of a contract is that the contract must be construed in its entirety and, if reasonably possible, effect must be given to each clause so that a court will not find an interpretation which casts out or disregards a meaningful part of the language of the writing unless no other course can be sensibly and reasonably followed." Sagner v. Glenangus Farms, Inc., 234 Md. 156, 198 A.2d 277, 283 (1964). Any interpretation of contract Special Provisions SP-11.0(B)(3) and SP-11.0(E) which would prohibit placement of the compressed air lines within the Bolton Hill Station right of way would render meaningless the Stage 1 requirements set forth on Contract Drawing NW-03-02 TM 3-3 (Sheet No. 207), mandating placement of the air lines within the confines of traffic lanes 3, 4, 5 and 6. Although Respondent contends that traffic lanes 1 and 2 along the west curb line of N. Eutaw Street were outside the station right of way and available for Appellant's use, Contract Drawing NW-03-02 TM 3-3 required that the compressed air lines be installed during a time when traffic lanes 1 and 2 were to remain open for traffic use. Accordingly, Special Provisions SP-11.0(B)(3) and SP-11.0(E) cannot be reconciled with the staging plan set forth on Contract Drawing NW-03-02 TM 3-3.

Respondent further contends that Section 2.33, Part I, Paragraph 1.4D required Appellant to maintain the compressed air system in good working condition at all times. In order to perform this maintenance obligation, it is alleged that Appellant necessarily would have interfered with the Bolton Hill Station contractor's work. Section 8.0(B) of the contract Special Provisions however would permit Appellant to perform required work in N. Eutaw Street provided such activities were coordinated, through the Engineer, with those of the Bolton Hill Station contractor. It is obvious therefore that the contract provisions contemplated some need for returning to the vacated area of N. Eutaw Street without impeding the Bolton Hill Station contractor's work and provided a procedure for doing so.

With respect to Respondent's contention that the placement of the compressed air lines within the station right of way would pose a potential safety hazard to those working in the tunnels in the event the air lines were accidentally ruptured, the record is devoid of any indication that such an installation would either violate applicable safety regulations or be contrary to accepted practice. While both parties agree that the compressed air lines were more appropriately placed outside of the station area, the Board finds that it was not unreasonable for a bidder to conclude that the compressed air lines could be located in the median area of N. Eutaw Street, within the right of way for the Bolton Hill Station structure.

Contract General Provision GP-4.05 entitled "Changes" provides that the Engineer may make any change in the work within the general scope of the Contract, including but not limited to changes.

- "(1) In the Specifications (including drawings and designs),
- (2) In the method or manner of performance of the work;..."

These changes may be made either by written order (GP-4.05(A)) or constructively as described in GP-4.05(B) as follows..

any other written order or an oral order (which terms as used in this paragraph B. shall include direction, instruction, interpretation or determination) from the Engineer, which causes any such change, shall be treated as a Change Order under this clause, provided that the Contractor gives the Engineer written notice stating the date, circumstances, and source of the order and that the Contractor regards the order as a Change Order." (Underscoring supplied.)

Mr. Alston's directive, as confirmed and ratified by the MTA Administrator and the MTA engineering consultants, requiring the placement of compressed air lines outside of the Bolton Hill Station right of way, constituted a constructive change to the contract thereby entitling Appellant to an equitable adjustment pursuant to contract General Provision GP-4.05(D).

The appeal is therefore sustained as to entitlement and is remanded to the parties for negotiation of an equitable adjustment.

These things may be made either by written order (B-459/A) or otherwise as provided in the regulations.

It is the policy of the Commission that the public interest is best served by the prompt and fair disposition of all cases brought before it.

The Commission is composed of the following members:

- Chairman: ...
- Members: ...
- Secretary: ...

The Commission is organized into several divisions:

- Division of ...
- Division of ...
- Division of ...

The Commission is authorized to exercise all powers and functions necessary to carry out its duties.

Joseph M. ...
Attorney General of Maryland

Robert B. ...
Assistant Attorney General

Charles W. ...
Special Legal Advisor

OPINION BY COURTIAN HART

These three appeals arise under a contract between the Maryland Port Authority and G. T. Lippert & Son, Inc. for the performance of dredging work in the Baltimore Harbor. Although the appeals were consolidated for hearing, they have been considered separately.

STATE CASE (Drydock Case)

STATE CASE

Dredging

The contract provides for the performance of dredging work in the Baltimore Harbor. The contract is for a fixed fee and the work is to be completed within a certain period of time.