BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of GRANITE CONSTRUCTION COMPANY	)	Docket No. MDOT 1011
Under MTA Contract No. NW-04-04	)	

April 10, 1981

Contract Interpretation — The standard for interpreting a written contract was determined to be that meaning which would be attached to the written language by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the contract. In determining whether a particular meaning was reasonable, the contract was read as a whole with effect given to each clause.

Pre-bid Oral Explanation of Bid Documents — A government official's pre-bid oral clarification which was provided to a single prospective bidder over the telephone was not found to be binding upon the Mass Transit administration since the contract specifically provided that oral explanations or instructions would not be binding.

Pre-Bid Oral Explanation of Bid Documents — A government official's pre-bid oral clarification which was provided to a single prospective bidder over the telephone may be considered by the Board in assessing the meaning of contract language and determining the reasonableness of a contractor's interpretation.

Estoppel — The MTA was not estopped by the pre-bid oral explanation of its representative because the contractor had no right to rely upon this explanation.

Estoppel — The MTA was not estopped by the pre-bid oral explanation of its representative since the contractor could have avoided any harm suffered by requesting the issuance of a written addendum.

Pre-bid Knowledge of Other Party's Interpretation — While the contractor contended that the MTA should be bound by its alleged pre-bid knowledge of the contractor's interpretation, the record did not show that a person authorized to act contractually on behalf of the MTA had knowledge of the contractor's interpretation prior to award. Further, even if the MTA project engineer had reason to know of the contractor's interpretation, this knowledge could not be imputed to the MTA since the project engineer had no authority to act contractually and did not apprise his superiors of his pre-bid conversation until after award of the contract.

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OPINION BY CHAIRMAN BAKER

This is a timely appeal from the Mass Transit Administrator's decision dated October 18, 1979 denying Appellants request to be compensated for the additional costs and delay incurred during its relocation of three gas mains in the Laurens Street Station construction area. The issues of entitlement and quantum are before the Board for resolution.

FINDINGS OF FACT

A. Introductory

On November 22, 1977, the Mass Transit Administration (MTA) issued an invitation for bids for the construction of approximately 615 linear feet of cut and cover station structure, associated vent shafts, approximately 2,320 linear feet of twin bore rock tunnel, and about 282 linear feet of twin bore horseshoe tunnel. This work, denominated as the "Laurens Street Station Structure & Line," was to comprise a segment of the northwest line of the Baltimore Region Rapid Transit System. Bids on this project were received by the MTA on January 31, 1978 and the apparent low bidder was then identified as Granite Construction Company (Appellant). Contract No. NW-04-04, in the amount of $36,283,000, was awarded to Appellant on May 17, 1978, and notice to proceed was issued on June 1, 1978.

Pursuant to paragraph 1.02(B) of contract special provision section 01000, Appellant was to complete all contract work within 1095 days of receiving its notice to proceed. Interim completion dates for various segments of the work also were provided under this contract provision. Appellant was subject to liquidated damages if it failed to achieve either the interim or final completion dates in the absence of excusable delay.

B. Development of Pertinent Contract Documents

The MTA retained the firm of Tippetts, Abbett, McCarthy & Stratton Engineers & Architects (TAMS) to prepare the contract plans and specifications for the Laurens Street project. In 1974, TAMS subcontracted the civil and utility design work to the Wilson T. Ballard Company (Ballard), a Baltimore consulting firm. Ballard prepared that portion of the contract drawings and specifications which are the subject of this dispute.

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In performing the design of the Laurens Street civil and utility work, Ballard (via TAMS) was required to submit preliminary plans and specifications for review both by the MTA's general engineering consultant, Daniel, Mann, Johnson & Mendenhall/Kaiser Engineers (DMJM/KE) and the affected utility owners. These submittals were required at the 30%, 65%, 85% and 100% design stages. In this manner, both the MTA and affected utility owners were able to review and provide input to the design as it progressed to completion.

By letter dated April 18, 1977, Ballard transmitted its 100% design submittal to TAMS. The gas main drawings contained in this submittal included a series of notes defining the limits of gas main work responsibility decided upon during a March 25, 1977 meeting with the Baltimore Gas & Electric Company (BG&E). These drawings, and the notes thereon, later were included in the contract documents and bid upon by Appellant. Because of the importance of these notations to the resolution of this dispute, the following summary is set forth:

1. Contract Drawing U-55-1 (Sheet No. 89)

Contract drawing U-55-1 is the first of seven contract drawings entitled "Gas Mains." This drawing is a plan view of the gas main work to be performed in the vicinity of the rock tunnel required to be constructed between outbound stations 118+00 and 123+00. The following note appears along the top right hand corner of the contract drawing:

> "Gas main construction shown is to be done by B.G.&E. Co. The contractor shall support and maintain the relocated main within the limits of the proposed decking."

There are no other notes which appear on this drawing designating responsibility for gas main relocation work.

2. Contract Drawing U-56 (Sheet No. 90)

This drawing is a profile view of the 6" and 4" gas main work set forth on contract drawing U-55-1. There were no notations on this contract drawing designating responsibility for gas main relocation work.

3. Contract Drawing 0-57-1 (Sheet No. 91)

Contract drawing U-57-1 is a plan view of the gas main work between stations 107+81.50 and 111+00 outbound. This drawing contains flag notes which indicate that all gas main work from outbound station 109+10 to the limit of gas main relocation south of Presstman Street is "to be installed by others." There are no notes which assign responsibility for the gas main work south of outbound station 109+10.

4. Contract Drawing U-58-1 (Sheet No. 92)

Contract drawing U-58-1 is a plan view of the gas main work to be performed between outbound stations 103+31.50 to

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107+81.50. These station limits encompass a major portion of the cut and cover construction for the Laurens Street Station. A 20" gas main also is depicted along Laurens Street, running across the intersection with Pennsylvania Avenue. There are no flag notes on this drawing which delineate responsibility for gas main work. Flag notes are included however to indicate that the capping of existing lines and tie-ins between new service and existing service would be performed by "others."

5. Contract Drawing U-59 (Sheet No. 93)

Contract drawing U-59 is a plan view of the gas main work between outbound stations 100+00 and 103+31.50. This gas main work was to be performed in the areas of the cut and cover station and the twin bore horseshoe tunnel. Flag notes indicate that the gas main work between outbound station 101+65+ and the Bolton Hill Tunnels was "to be installed by others." There is no indication on the contract drawing as to responsibility for gas main work between outbound stations 103+31.50 and 101+65.

6. Contract Drawing U-60-1 (Sheet No. 94)

Contract drawing U-60-1 is a profile view of the project between outbound stations 111+ and 100+. The limits of the cut and cover excavation are shown on this drawing at outbound stations 108+57+ and 102+50. No flag note delineating responsibility for gas main relocation within the cut and cover limits appears on the drawing. Outside of the cut and cover area however, the gas main work is shown to be "installed by others" from outbound stations 109+10+ to 111+00 and from 101+65+ to the Bolton Hill Tunnels (Contract NW-03-02).

7. Contract Drawing U-61 (Sheet No. 95)

Contract drawing U-61 contains a profile view of the relocated 20" gas main along the south sidewalk on Laurens Street. The drawing indicates that the relocated main will be connected to an existing 20" gas main on both its east and west ends by "others." There are no flag notes indicating who is to perform the actual relocation of the 20" gas main. This drawing also shows that the 20" gas main relocation crosses Pennsylvania Avenue in the area of the out and cover excavation. A note appears on the drawing requiring that this 20" gas main be maintained during construction of the cut and cover work.

Contract specification section 02550 entitled "Existing Site Utilities" also was drafted by Ballard and submitted for review to the MTA and utility owners during each of four design stages. This section included "...specifications for the maintenance, support, protection, relocation, reconstruction and adjusting-to-grade, restoration, construction of new facilities and abandonment of existing utilities affected by the

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construction work." (Art. 1.01A) Included in this section were the following pertinent specification articles:

1.01C. Work Provided By The Utility Owners:

1. The Baltimore Gas and Electric Company, Gas Division, will:

a. Install relocated mains and service connections within the limits shown on the Contract plans.

b. Supervise and inspect all new gas mains installed by the Contractor and verify the Contractor's test on the new mains.

c. Construct all connections to existing mains and gas-up the new mains.

* * *

e. Connect gas main services after the Contractor has installed service connection to inside of existing building wall.

* * *

1.06 Product Delivery Storage and Delivery:

C. The Baltimore Gas and Electric Company will furnish and deliver to their nearest company store yard all gas main pipe and fittings that are to be installed by the Contractor. The Contractor shall load, haul, unload and stock such material at and from such yard to the jobsite at his own expense.

* * *

3.14 BG&E Gas Mains and Services: BG&E Specifications

A. Pipe Insulation: Section 19

B. Welding: Section 18

C. Service Connections: Section 20

D. Testing: Section 24

E. Corrosion Control: Sections 323.040 and 323.080

C. Preparation of Appellant's Bid for Gas Main Work

Appellant's bid was prepared in its division office in Watsonville, California. The bid preparation team included Appellant's chief estimator, Norm Lyons, its lead estimator for the project, Roy Vaught, the projects manager for east coast and southeastern operations, George Fryklund, and two other estimators. Mr. Vaught, in addition to supervising the total bid preparation effort, personally estimated the utility work required under the instant contract.

In reviewing the gas main contract drawings, Mr. Vaught testified that he was unclear as to whether Appellant would be required to relocate gas mains. The source of Mr. Vaught's difficulty was the note on contract drawing U-55-1 which if applied to succeeding gas main drawings would relieve Appellant of all gas main responsibility. In order to obtain clarification, Mr. Vaught telephoned a Mr. Lee at the MTA's headquarters office who referred him to Mr. Murray Weiner, the MTA project engineer for the design of the Laurens Street project. Mr. Vaught then telephoned Mr. Weiner on January 19, 1978 and inquired as to the designer's intent relative to responsibility for gas main relocations. Mr. Weiner, a structural engineer, promised to address Mr. Vaught's question to the MTA utility engineer and consultant. Unable to reach the appropriate people immediately, Mr. Weiner returned Mr. Vaught's call and then permitted himself to be pressed into providing his own understanding of the gas main requirements. After briefly reviewing the gas main drawings during the telephone conversation, Mr. Weiner stated that BG&E would Perform all gas main relocation work. Mr. Vaught thereafter prepared a utility work estimate which did not include money for gas main relocation. It was contemplated by Mr. Vaught that Appellant would be responsible solely for the support of the relocated gas mains.

The gas main work required under the contract was to be priced under bid item 82, "Gas Facilities Gold Street Line Vent" and bid item 87, "Gas Facilities Laurens Street Station." Mr. Vaught estimated the direct costs for these activities at $696 for bid item 82 and $11,238 for bid item 87. Overhead and profit allowances resulted in Appellant bidding $800 under item 82 and $12,000 under item 87. These figures compare to the MTA estimates of $1,800 and $126,000 for bid items 82 and 87 respectively.

Several days prior to the opening of bids, a bid review meeting was conducted by Appellant in Watsonville, California. The entire bid team and several home office executives participated. While the utility work estimate was reviewed briefly at this meeting, Mr. Vaught did not mention either his initial uncertainty concerning gas main responsibility or the pre-bid clarification. A post bid review meeting with the field personnel assigned to the Laurens Street job was not conducted. Consequently, Mr. Vaught was the only person within Appellant's organization who had any knowledge of the pre-bid clarification prior to the commencement of work under the contract.

D. Performance of Gas Main Work by Appellant

On April 5, 1978, Appellant met with BG&E to discuss scheduling and other general requirements for the gas and electrical work to be performed within the contract limits. During this meeting, Appellant was instructed that it had contractual responsibility for gas main and service line installation in the Laurens Street Station area. Appellant's utility and station engineer, Mr. Donnino, immediately recognized that Appellant had not included money in its bid for this gas main work, but did not raise an objection. Following this meeting, Mr. Donnino did inform Appellant's assistant project manager, Mr. Elmore, of this omission. Mr. Elmore then discussed this revelation with

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Mr. Fryklund, the projects manager, who surmised that an error must have been made by Appellant's estimators.

In late June 1978, Appellant submitted its preliminary work schedule for the first 90 days of performance. The gas main relocation work in the Laurens Street Station area was included in this schedule. Pursuant thereto, Appellant installed the 20" line at Laurens Street from July 17, 1978 through September 1, 1978. (Appeal File Tabs HHH, JJJ, 00) The 6" gas main excavation along Pennsylvania Avenue was performed between August 23, 1978 and the week ending September 15, 1978. (Appeal File Tab HHH) Finally, excavation for the 8" gas main along Pennsylvania Avenue commenced on September 1, 1978 and was completed on September 26, 1978. (Appeal File Tabs JJJ, 00) Excavation for house services began on October 11, 1978 and the placing of these service lines was completely finished on November 30, 1978. (Tr 448, Appeal File Tab JJJ)

E. Formation of Dispute

On November 8, 1978, Appellant's Mr. Fryklund received a phone call from Mr. Vaught who was preparing a bid on another project. Mr. Vaught, after obtaining the information he desired, inquired as to the status of the Laurens Street project. Mr. Fryklund informed him that gas line work which had not been priced as part of Appellant's bid was presently being completed. Several hours later, Mr. Vaught again called Mr. Fryklund and informed him that the relocation of gas mains in the Laurens Street Station area had been intentionally omitted from Appellant's bid. Mr. Vaught then detailed his initial uncertainty with the contract documents and revealed his pre-bid conversation with the MTA's Murray Weiner. Mr. Fryklund thereafter studied Mr. Vaught's interpretation of the contract drawings and instructed his assistant, Mr. Elmore, to file a claim.

On November 13, 1978 the parties agree that Mr. Elmore verbally informed the MTA resident engineer, Mr. Carmichael, that Appellant had not placed money in its bid for any gas main relocation work. The parties are in disagreement however as to other aspects of the conversation. Appellant's Mr. Elmore testified that he informed Mr. Carmichael that a claim was forthcoming based upon the pre-bid representation of Murray Weiner which was relied upon by Appellant's estimators. Mr. Carmichael, however, testified that Mr. Elmore simply inquired as to how Appellant could seek redress for the gas main work which it had not priced in its bid. Mr. Carmichael further testified that because he did not consider a mistake in bid to be redressable under the contract, he suggested that Mr. Elmore address Appellant's problem directly to the MTA Construction Manager.

By letter dated December 15, 1978, Appellant's Mr. Elmore formally requested issuance of a change order providing for additional compensation and a time extension. Mr. Elmore indicated in this letter that Appellant bid the contract work on reliance upon Mr. Weiner's confirmation that BG&E would perform all gas main work. On January 4, 1979, Mr. Eugene Clifford, the MTA's acting resident engineer on the Laurens Street contract, denied Appellant's claim based upon his belief that the contract drawings clearly indicated Appellant's obligation to perform certain gas main relocation work. Appellant promptly appealed this denial to the MTA Construction Manager, Mr. J. W. Maddox. By letter to Appellant dated January 18, 1979, Mr. Maddox concurred with the resident engineer's assessment that the contract drawings clearly set forth the gas main work to be performed by Appellant, but further concluded that Mr. Weiner's pre-bid confirmation justified the issuance of a change order. Accordingly, Appellant was directed to prepare a cost proposal.

By letter dated May 4, 1979, the MTA Director of Construction and Systems, Mr. Frank Hoppe, informed Mr. Maddox that the MTA's legal review revealed no basis upon which to authorize an equitable adjustment in contract amount and/or performance period. The MTA legal staff not only concluded that the contract was clear regarding Appellant's gas main responsibility, but that Mr. Weiner's pre-bid statement was not binding. Mr. Maddox was therefore directed to deny Appellant's claim.

By letter dated May 10, 1979, Mr. Maddox denied Appellant's claim, attaching a copy of Mr. Hoppe's May 4, 1979 letter. Appellant, thereafter, requested a final decision from the Mass Transit Administrator by letter dated June 4, 1979. After conducting an informal hearing on August 1, 1979, the Mass Transit Administrator also denied Appellant's claim by letter dated October 18, 1979.

DECISION

The critical issue in this appeal is one of contract interpretation. Before addressing this matter however, it first is necessary to consider the extent to which Mr. Weiner's oral pre-bid clarification assumes contractual significance. If Appellant is correct in its arguments, Mr. Weiner's statement may have either a controlling or substantial effect on the Board's interpretation of this contract as it pertains to gas main relocation.

Appellant initially contends that it was entitled to rely upon Mr. Weiner's explanation in interpreting the contract prior to preparing its bid. This is tantamount to concluding that the MTA was bound by this oral pre-bid statement. However, contract special general provision §2.06, Explanations, specifically provides that:

> "Explanations desired by a prospective bidder regarding the Contract Drawings, Specifications, and other Bid Documents shall be requested in writing from the Administration. Requests shall include the Contract number and name and shall be directed to the address indicated in the Notice To Contractors. Oral explanations or instructions will not be binding. Any addenda resulting from these requests will be mailed to all listed holders of the Bid Documents. The Bidder shall acknowledge the receipt of all addenda in the space provided on the Proposal Form." (Underscoring added.)

This clause repeatedly has been interpreted to mean that oral instructions or clarifications will not be binding on the government unless provided at a pre-bid conference where prospective bidders are invited to attend. Watson-Warren Construction Co., Inc., ASBCA No. 10579; 65-1 BCA ¶4867; Swan Construction Co., Inc., ASBCA No. 11000, 66-1 BCA ¶5398; C. L. Disheroon Painting Company, GSBCA No. 2788, 69-2 BCA ¶7791; Manloading & Management Associates, Inc. v. U.S., 461 F.2d 1299 (Ct. Cl. 1972). The basis for these holdings is best illustrated by the Armed Services Board of Contract Appeals (ASBCA) decision in LTD Industries Corporation, ASBCA No. 16565, 16886, 72-1 BCA ¶9332 wherein the Board reasoned that if it failed to enforce the

"Explanation To Offerors"[1] clause literally, the result would be to favor a bidder who received special, informal advice over the others who remain uninformed. See also Manloading & Management Associates, Inc. v. U.S., supra, 461 F.2d at pg. 1302. This concept of equal information for all bidders is an essential feature of the competitive bid process which this Board likewise shall preserve by enforcing the "Explanations" clause literally in this appeal.

Notwithstanding the "Explanations" clause, Appellant contends that the U.S. Court of Claims decision in Max Drill, Inc. v. United States, 427 F.2d 1233 (Ct. Cl. 1970) provides the precedent that a bidder may rely on an oral pre-bid clarification of ambiguous contract language when made by a knowledgeable government official. In Max Drill, the government's Contracting Officer designated a military engineer, Lt. Paynic, as her technical representative on a contract for the repair, renovation and painting of five dormitory buildings at Loring Air Force Base. Lt. Paynic had designed the project, prepared the bidding documents, and his name appeared on the contract drawings. During a pre-bid tour of the facilities by the contractor, Lt. Paynic confirmed the contractor's interpretation of the contract documents which excluded the painting of certain wood sashes covered by aluminum storm windows. After award, the contractor proceeded to perform, without government objection, in accordance with this interpretation. Prior to completion of the work however, Lt. Paynic was transferred to another base. His replacement thereafter interpreted the contract as requiring aluminum storm windows to be removed and the wood sashes to be painted. The contractor performed the work under protest and filed a claim which ultimately was considered by the U.S. Court of Claims on Wunderlich review. That Court ruled that the:

> "...unusual status of Lt. Paynic in relation to the contract cannot be ignored. At the minimum, his statements on the exclusion of the wood sashes from the contract are indicative that the plaintiff's contract interpretation was a reasonable one."

We find this decision to stand only for the proposition that an oral pre-bid statement when made to a single bidder may be considered by the courts or a board in assessing the meaning of contract language and determining the reasonableness of a contractor's

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[1]The "Explanation To Offerors (Bidders)" clause found both in Federal government contract forms and the cases cited herein is essentially the same as the "Explanations" clause in the instant contract. Both forms of the clause provide that oral explanations or instructions will not be binding.

interpretation.[2] Consideration of extrinsic evidence for the purposes stated is well established in contract law and does not violate the substantive provisions of the parol evidence rule. Williston On Contracts, Third Edition, §600A; Restatement of Contracts, §235(d)(1932); Levi v. Schwartz, 201 Md. 575, 95 A.2d 322, 328 (1953); McKeever v. Washington Heights Realty Corp., 183 Md. 216, 37 A.2d 305, 308 (1944); REDM Corporation, ASBCA No. 17378, 73-2 BCA ¶10,167; Unidynamics/St. Louis, Inc., ASBCA No. 17592, 73-2 BCA ¶10,360 at pg. 48,934; J. A. Jones Construction Co., ASBCA No. 6220, 61-1 BCA ¶2886 at pg. 15077.

Appellant further argues that the "Explanations" clause here is in conflict with the following provision appearing in the Notice To Contractors:

> "A Pre-bid (sic) meeting will be held on Dec. 13, 1977 at 2:00 p.m. local time in the MTA administrative offices, lst floor, 109 E. Redwood Street, Baltimore, Maryland, for the purpose of explaining the project. Questions regarding the Work (sic) should be directed by mail to Mr. R. Hampton or Mr. M. Weiner at the Administration offices at the above address, or by telephone at numbers (301) 383-4442 and (301) 383-4490 respectively." (Underscoring added.)

Appellant contends that this language specifically permits oral questions and thus impliedly authorizes similar responses. In W. Chester Williams, Inc., ASBCA No. 17527, 73-1 BCA ¶10,010 however, the ASBCA considered contract language containing both the "Explanation To Bidders" clause and a similar Notice To Contractors and concluded that a government representative had no authority under either clause to give oral clarification to a single bidder. In interpreting these two provisions together, the ASBCA further determined that the intent of these clauses was to provide a response mechanism which would assure that all bidders in a formally advertised procurement would have the same information concerning contract requirements. We concur with this reasoning and accordingly find that the Notice To Contractors did not authorize Mr. Weiner or anyone else to provide oral explanations.

Alternatively, Appellant contends that the MTA is now estopped from repudiating Mr. Weiner's pre-bid clarification. Under Maryland law, however, in establishing the facts necessary to create an estoppel, Appellant is required to show that it had a clear right to rely upon the clarification issued. Anne Arundel County v. Whitehall Venture, 39 Md. App. 197, 384 A.2d 780, 786 (1978). Since we previously have

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[2]One of the issues considered by the Court in Max Drill involved whether the contract documents contained an ambiguity which was so patent and glaring as to have imposed a duty upon the contractor to seek a pre-bid clarification from the contracting officer. The Court ruled that because the contractor reasonably had relied upon Lt. Paynic's confirmation of its interpretation in concluding that there was no ambiguity present, it had no duty to inquire further. We found nothing in this decision however which indicated the government otherwise was estopped by the contractor's reliance upon Lt. Paynic's pre-bid interpretation. Instead the Court's decision turned on the issue of whether the contractor ascribed a reasonable meaning to the written contract language. As we concluded in the body of our decision, Lt. Paynic's pre-bid statement was considered as extrinsic evidence in support of the meaning which reasonably could be attached to the ambiguous contract language before the Court.

concluded that Appellant had no right to rely on Mr. Weiner's statement, the MTA cannot be estopped by his actions. See also Max Drill, Inc. v. United States, supra, 427 F.2d at pg. 1243, n.6. The doctrine of estoppel also requires that the party seeking its invocation must have exercised proper diligence in preventing the harm suffered. The "Explanations" clause here anticipated the issuance of addenda[3] for purposes of officially responding to requests for clarification. The issuance of an addendum in this instance formally would have confirmed the MTA's interpretation by making it a contractual representation. In relying instead upon an oral clarification and not requesting this addendum, Appellant failed to exercise the prudence and diligence necessary under Maryland law to sustain the creation of an estoppel and this Board so finds. Compare J. F. Johnson Lumber Company v Magruder, 218 Md. 440, 147 A.2d 208 (1958).

Appellant next contends that when Mr. Vaught made his pre-bid inquiry to Mr. Weiner, the MTA was placed on notice of Appellant's interpretation and became bound by it upon entering into the subject contract. The principle relied upon by Appellant was stated by the U.S. Court of Claims as follows:

> "A party who willingly and without protest enters into a contract with knowledge of the other party's interpretation of it is bound by such interpretation and cannot later claim that it thought something else was meant." Perry & Wallis, Inc. v. United States, 192 Ct. Cl. 310, 314-15, 427 F.2d 722, 725 (1970).

Assuming that Mr. Weiner knew or should have known that Appellant prepared its bid in accordance with the clarification he provided, Appellant has failed to impute such knowledge to the MTA. The record establishes that Mr. Weiner had not been delegated authority to explain, vary or modify the contract provisions by means of either an addenda or a change order. Further, Mr. Weiner never communicated Mr. Vaught's inquiry and/or his own response thereto to any of his superiors until after the contract had been awarded and the instant dispute arose. Accordingly, since Appellant's interpretation was not made known to any person with authority to act contractually on behalf of the MTA, this Board finds that Mr. Weiner's purported knowledge may not be imputed to or otherwise bind the MTA. Compare Deloro Smelting and Refining Co. v. United States, 317 F.2d 382, 385 (Ct. Cl. 1963); Jansen v. United States, 344 F.2d 363, 369 (Ct. Cl. 1965).

We now turn to the ultimate issue in this appeal, namely, whether Appellant was required to relocate gas mains pursuant to the terms of its contract. Appellant's position is based upon its reading of the contract drawings. Specifically, Appellant submits that contract drawing U-55-1, the first of seven contract drawings pertaining to gas mains, contains a general note providing that BG&E will perform the gas main construction shown. Several of the succeeding gas main drawings include flag notes[4] which delineate the limits of certain gas main work to be performed by "others."

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[3] Written interpretations and revisions to the bid documents issued by the MTA prior to opening of bids. (Contract Special General Provision SGP-1.02 Definitions)

[4] A flag note, as the term is used here, is a note which references a specific portion of a contract drawing.

Appellant interpreted these notes as indicating that BG&E would perform all gas main work shown on each of the seven pertinent contract drawings unless this work was otherwise denoted as being performed by either itself or "others." Since no portion of the gas main work specifically was denoted on the gas main drawings as the contractor's responsibility, Appellant contends that all such work was to be performed by BG&E or "others."

In support of this interpretation, Appellant cites the pre-bid positions of Messrs. Vaught and Weiner. Mr. Vaught testified that when a note appears on the first of several utility drawings, it occasionally is intended to be applied generally to the entire series. Although he initially was not certain as to what the MTA's practice was in this regard, Mr. Vaught did consider that the note in question reasonably could refer to each of the contract gas main drawings. Mr. Weiner, the project engineer for the design phase of the Laurens Street project, also concluded that the note on contract drawing U-55-1 was generally applicable and that BG&E would perform the necessary gas main relocations. This conclusion was based upon his brief review of the contract drawings, without reference to the specifications. Prior to Mr. Vaught's telephone inquiry, Mr. Weiner had not considered these gas main work requirements either as a participant in the utility design or thereafter as a reviewer on behalf of the MTA. Further, his prior professional experience and principal review responsibility had been devoted to structural design.

The key question for our determination therefore is whether the note appearing on contract drawing U-55-1 reasonably may be applied to each of the seven gas main drawings. In the absence of a proven trade practice regarding the use of such notes, we must examine whether the resultant contract interpretation would be indicative of the meaning attributable to the pertinent contract language by a reasonably intelligent bidder acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the contract. Appeal of Fruin-Colnon Corporation and Horn Construction Co., Inc., MDOT 1001 (Dec. 6, 1979); Glassman Construction Co., Inc. v. Maryland City Plaza, Inc., 371 F. Supp. 1154 (D. Md., 1974). In determining whether this standard of contract interpretation has been satisfied, a number of rules have been recognized judicially as an aid.

A primary rule of contract interpretation requires that all written provisions be read together and interpreted as a whole. Restatement of Contracts, §235(c)(1932). In so doing, effect must be given to each clause, if reasonably possible. Sagner v. Glenangus Farms, Inc., 234 Md. 156, 198 A.2d 277, 283 (1964); Appeal of Fruin-Colnon Corporation and Horn Construction Co., Inc., MDOT 1001 at pg. 14 (Dec. 6, 1979). In the instant appeal however both Mr. Vaught and the MTA's Mr. Weiner based their interpretation solely upon an examination of the contract drawings. Consideration was not given to contract specification section 02550, paragraphs 1.06C, 3.14 and 1.01C(1)(b) which respectively provide for the furnishing of gas main pipe to the MTA contractor, the specifications to be followed in the installation of these gas mains, and the inspection and testing of the finished work by BG&E. For these contract specification sections to have meaning and significance, Appellant necessarily would have had to have responsibility for some portion of the gas main work. Interpreting the note on contract drawing U-55-1 as applying to all gas main drawings however, placed total responsibility for the gas main work on BG&E and "others" and rendered the preceding specification sections inutile. While it is true that the limits of Appellant's gas main responsibility were designated only in the contract drawings, neither Mr. Vaught nor the MTA's Mr. Weiner was justified in totalling ignoring the remainder of the contract. This is especially true where as here there was uncertainty as to how the note on contract drawing U-55-1 should be applied. Had Mr. Vaught or Mr. Weiner considered the

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specification and recognized that some gas main work was intended to be performed with Appellant's forces, the only practical interpretation of the drawings would be that the note in question applied solely to contract drawing U-55-1. Appellant then would have had performance responsibility for portions of the gas main work depicted on contract drawings U-57-1, U-58-1 and U-59, and all contract language pertaining to gas mains would have assumed special significance.

The post award conduct of the parties also is a significant aid in interpreting contract language. Restatement of Contracts, §235 (1932). Admittedly, Appellant, without complaint, performed virtually all of the gas main work before submitting its notice of claim. This occurred even though Appellant's project managers and engineer recognized that there was no money in their bid for this work. It wasn't until Appellant's Mr. Fryklund learned of Mr. Vaught's pre-bid conversation with Mr. Weiner that a claim was contemplated. This pattern of conduct, by those responsible for managing and monitoring Appellant's performance and costs, suggests a contemporaneous understanding that the contract required Appellant to perform certain gas main work.

Appellant however persists that its failure to protest the requirement to perform gas main relocation work did not amount to a conscious, affirmative interpretation. In this regard, both Mr. Fryklund and Mr. Elmore testified that they merely had assumed that the gas main work was Appellant's responsibility and that neither studied the contract documents to verify Appellant's liability until November 1978. This testimony however must be considered in light of other pertinent facts.

Appellant bid $12,000 for the work required in conjunction with the gas mains. Mr. Anderson, Appellant's project engineer, testified that it was known in June 1978, when Appellant's gas main costs exceeded $12,000, that a substantial amount of money would be lost. Mr. Anderson further testified that Appellant finally incurred $350,356 in direct costs for the gas main relocation and averaged $13,499 in costs for each of the 60 calendar days it was delayed thereby. While the Board can accept Appellant's testimony that it initially was concerned with mobilizing the work and not with the reasons for this purported bid omission, it is inconceivable that this experienced and knowledgeable contractor would not have assured itself of contractual responsibility once it perceived the magnitude of its potential losses on the gas main work.

Our application of these primary and secondary rules of contract interpretation thus fails to ascribe a meaning to the written contract as a whole which comports with that arrived at by Appellant's Mr. Vaught and the MTA's Mr. Weiner when applying the note on contract drawing U-55-1 to all seven gas main drawings. For this reason, we reject Appellant's interpretation as being unreasonable and find that Appellant contractually was required to perform the gas main relocation work complained of. We further conclude that the identical pre-bid interpretations of Appellant's Mr. Vaught and the MTA's Mr. Weiner do not constitute a contemporaneous interpretation which may be adopted by this Board since, for the reasons discussed, a reasonable person would not have attached their meaning to the written contract when read as a whole. See Restatement of Contracts, §235(e)(1932).

For these reasons the Board denies Appellant's claim in its entirety. Accordingly, the Board does not reach the remaining issues of notice and quantum which are rendered moot by this decision on entitlement.