



## OPINION BY CHAIRMAN BAKER

This is a timely appeal from the Mass Transit Administrator's decision dated April 2, 1980 denying Appellant's request to be additionally compensated for the restoration of a telephone duct bank to its preconstruction position earlier than was planned. The Appellant has elected to proceed under the Board's accelerated procedure (Rule 12.3) and only the issue of entitlement is to be resolved in these proceedings.

### FINDINGS OF FACT

1. Contract No. NW-04-04 was awarded by the Mass Transit Administration (MTA or Respondent) to Granite Construction Company (the Appellant) on May 17, 1978. This contract, in the amount of \$36,283,000, involved the construction of approximately 615 linear feet of cut and cover station structure with associated vent shafts, approximately 2,320 linear feet of twin bore rock tunnel with associated mined cross passages, 43 linear feet of mid-line vent shaft, and approximately 282 linear feet of twin bore horseshoe tunnel. The contract also included certain utility work.

2. This work was to comprise a segment of the northwest line of the Baltimore Region Rapid Transit System. Principally it included the Laurens Street Station structure and a portion of the tunnels north towards the North Avenue Station and south to the Bolton Hill Station.

3. In order to permit excavation for the Laurens Street Station structure, it first was necessary to perform certain preliminary utility work. This involved the relocation, support and/or replacement of a multitude of utility lines in the area to be excavated.

4. Of particular significance was an existing telephone duct bank which ran along the eastern half of Pennsylvania Avenue between Laurens Street and Robert Street. This duct bank was located slightly to the west of a recently installed 8" gas line.

5. Section 02550 of the contract Special Provisions contained the requirements for the utility work. Paragraph 1.01A of this section states as follows:

"This Section includes 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 construction work. Except as modified herein, the work shall be in accordance with Standard Specifications Section 02550." (Underscoring added.)

Article 5.03 of the contract Special General Provisions further provides that the Special Provisions of the contract shall govern over the Standard Specifications in the event of a conflict.

6. Paragraph 3.01(A) of Section 02550 of the Standard Specifications requires Appellant to conform to the specifications and standard practices of the affected utility owners.

7. Paragraph 3.12 of contract Special Provision Section 02550 contains the C & P Telephone specifications relating to the support of telephone ducts. The pertinent subparagraphs are as follows:

**Existing Conduit:** Carefully excavate and expose existing conduit avoiding damage to the existing conduit material. After the existing conduit is exposed, carefully remove the existing concrete encasement. Existing tile, concrete and fiber cement duct cannot be supported in place, therefore, the existing duct material must be carefully broken away and the cables supported in accordance with Article 3.12.C below. Existing cables in steel and plastic duct can be supported in place in the existing duct materials. If inspections or other factors indicate a failure, or a likely failure of cable or conduit, the contractor shall stop work in the affected portion of the conduit or cable until appropriate remedial action is taken.

**Plastic Conduit:** Section 622-340-200 and 622-395-300. Place split conduit around existing cables and support on 1-3/4 inch planking supported on cross members and enclose on top and sides with 3/4 inch plywood lag banded to the support planking under the direction of C & P Telephone Company. Encase in concrete after remaining ducts of existing run are placed by contractor and additions are made by C & P contractor and backfill."

8. The existing telephone duct bank in the Laurens Street Station area was comprised of clay tile, encased in concrete. Approximately eight to ten inflexible lead lined cables were housed in this eleven-way duct.

9. Appellant planned to replace the telephone duct bank and then support it during excavation for the Laurens Street Station in the following manner:

- a. Excavation would proceed directly adjacent to the east side of the existing duct bank.
- b. Earth would also be removed from the top of the existing duct bank.
- c. Concrete lining and clay duct would then be broken away in fifty foot lengths working from the top and side.
- d. A protective plywood box would be constructed approximately two feet below and two feet east of the original duct bank location.
- e. The bottom half of the split PVC ducts would be placed in the plywood box. Telephone cable, one by one, would then be transferred thereto and the upper half of these ducts would then be positioned on top of each cable.
- f. The protective plywood box would next be sealed and backfilled until the remaining utility work was completed. Upon subsequent excavation for the Laurens Street Station, the entire plywood box would be supported on brackets hung from overhead decking supports.

- g. After the Laurens Street Station structure was completed, Appellant planned to backfill to the level of the supported telephone ducts and then slide them two feet to the west to their original location.

10. In September 1978, Appellant, pursuant to the requirements of Article 1.02(A) of contract Special Provision Section 02550, submitted shop drawings numbered GU-60, 61 and 62 which set forth the aforementioned replacement and support procedures for the telephone duct bank. These drawings were revised and resubmitted on October 25, 1978 and thereafter approved both by the MTA Engineer and by the C & P Telephone Company as required by the contract.

11. Shop Drawing GU-61 contained the following note: "Construction Sequence For Lowering Duct System

- 1. Excavate alongside telephone duct to req'd [sic] depth for clearing deck bms. [sic]
- 2. Break away conduit taking extreme caution in avoiding damage to cables.
- 3. Lower cables and cover with split duct & straps.
- 4. Encase ducts with plywood and planking as shown on Dwg. GU-60."

12. Respondent contends that it understood from these shop drawings that the telephone duct bank would be lowered by approximately two feet in order to avoid interference with the beams used to support the decking placed on Pennsylvania Avenue. Respondent did not understand these drawings to provide for a horizontal shifting of the ducts.

13. Regardless of how Shop Drawing GU-61 was interpreted by Respondent, both the Resident Engineer and the C & P Telephone Company were made aware, prior to performance of this work, that Appellant planned to move the telephone lines two feet to the east, near the 8" gas line, and support them in that location until the restoration phase of the project. The parties agreed to this plan and no exception was taken during the actual performance of this work. (Tr 102) The work was performed during the period September 22 to October 18, 1978.

14. By letter dated April 20, 1979, Mr. Edward P. Krause, an engineer for the Baltimore Gas & Electric Company (BG&E informed Respondent's construction consultant that BG&E had overlooked the placement of expansion joints in its design of the 8" gas lines placed along the east side of Pennsylvania Avenue. In order to permit BG&E to rectify this error, pipe guides would be required to support the gas mains in the vicinity where each expansion joint would be installed. These pipe guides were to be installed by Appellant as part of its decking installation.

15. Mr. Horace H. Carmichael, Respondent's Resident Engineer, forwarded a copy of the BG&E letter to Appellant on April 27, 1979.

16. Appellant agreed to perform this additional work as a change to its contract and submitted its written notice of claim by letter dated May 7, 1979.

17. By letter dated May 14, 1979, Respondent's Resident Engineer advised Appellant that Change Notice 029 would be prepared and issued to provide for performance of the pipe guide work as a change to the contract.

18. By letter dated May 30, 1979, Mr. Krause, on behalf of BG&E further advised Respondent's construction engineer that the proximity of the telephone ducts to the gas main did not provide sufficient work space for the installation of the gas expansion joints. It was therefore requested that the telephone ducts be returned to their original location.

19. On June 11, 1979, Appellant was directed by the Resident Engineer to restore the C&P telephone ducts to their original location.

20. By letter dated June 12, 1979, Appellant submitted a notice of claim for the relocation of the C&P telephone ducts. This claim letter was followed by a cost proposal dated July 17, 1979. Because Appellant was directed to move the C&P telephone ducts prior to the restoration phase of the project it was necessary to alter its planned method for returning the ducts to their original location. Instead of sliding the telephone ducts two feet to the west onto compacted earth, Appellant had to widen the bracket support for the plywood box encasing the ducts and then move the box approximately two feet to the west. It is the cost of this work which was included in Appellant's proposal.

21. On August 13 and September 17, 1979, the Resident Engineer met with Appellant to negotiate a change order for the work associated with the gas main expansion joints. It was agreed to pay Appellant \$5,470.00 as the cost both of installing pipe guides and constructing a working platform for use by BG&E. The cost of relocating the telephone ducts was disallowed.

22. The basis for the Resident Engineer's rejection of Appellant's claim was Standard Specification Section 02550, Article 3.OIB which provides that:

"Unless otherwise specifically indicated on the Contract Drawings or otherwise authorized in writing by the Engineer, maintain all utility facilities complete in place."

Respondent interpreted the term "maintain complete in place" to mean that the telephone ducts were to be supported solely at their original location.

23. The contract utility drawings are inconsistent with regard to support of the telephone duct bank. Contract Drawings U-8-1 (Sheet No. 42) and U-63-1 (Sheet No. 97) both depict a plan view of the telephone duct bank in the 1800 block of Pennsylvania Avenue, the location of the Laurens Street Station work. The symbol /M/ is used to refer to the telephone duct bank in each instance. The meaning of this symbol is set forth on Contract Drawing U-1 (Sheet No. 35) as indicating "maintain complete in place." Contract Drawings U-18 (Sheet No. 52) and U-19 (Sheet No. 53) contain cross-sectional views of the utilities at every fifty feet along the 1800 block of Pennsylvania Avenue. On Contract Drawing U-18 however, the telephone duct bank is flagged by the symbol /MR/ which is indicated on Contract Drawing U-1 as meaning "maintain service and replace." Contract Drawing U-19 again uses the symbol /M/ in referring to the telephone duct bank. These two different symbols thus make conflicting reference to the identical telephone utility work.

## DECISION

The paramount issue for resolution by this Board is whether the contract language obligated Appellant strictly to maintain and support a telephone duct bank in its original location during construction of the Laurens Street Station. Respondent contends that Article 3.01(B) of Standard Specification Section 02550, providing that all utility facilities be "maintained complete in place," is dispositive of this issue. The Board finds however that the more specific language of the contract Special Provisions concerning the telephone utilities is to be given precedence over the general language of the Standard Specifications under the terms of the contract. Article 3.12(B) of contract Special Provision Section 02550 incorporates the C & P Telephone Company specifications which Appellant was required to follow and provides in pertinent part that "...existing tile, concrete and fiber cement duct cannot be supported in place, therefore, the existing duct material must be carefully broken away and the cables supported in accordance with Article 3.12.C below...." (Underscoring added.) This latter language mandates Appellant's contractual responsibility for the telephone ducts and explicitly provides that the existing duct bank be replaced and not maintained complete in place.

Respondent has also referred the Board to Contract Drawings U-8-1 and U-63-1 which depict the telephone duct bank and indicate, by symbol, that it is to be maintained complete in place. These drawings are contradicted however by Contract Drawing U-18 which shows a cross-sectional view of the existing telephone duct bank with a symbol indicating that Appellant was to "maintain service and replace." This latter drawing is consistent with the requirement of the contract Special Provisions and recognizes that the existing telephone duct bank had to be broken away and replaced while service was being maintained. Considering all of the pertinent contractual provisions and drawings together, the Board finds a reasonable and clear expression that the parties intended the existing telephone duct bank to be replaced and not maintained complete in place. Respondent's present reliance on Contract Drawings U-8-1 and U-63-1 is therefore misplaced.

This conclusion is supported by the actions of the parties prior to the onset of the present dispute. Such actions are particularly significant as recognized by the U.S. Court of Claims in Macke Co. v. U.S., 199 Ct. Cl. 552, 467 F.2d 1323 (1972) as follows:

"In this inquiry, the greatest help comes, not from the bare text of the original contract, but from external indications of the parties' joint understanding, contemporaneously and later, of what the contract imported. The case is an excellent specimen of the truism that how the parties act under the arrangement, before the advent of controversy, is often more revealing than the dry language of the written agreement by itself. We are, of course, entirely justified in relying on this material to discover the parties' underlying intention."

Here both parties understood the contract to require replacement of the existing duct bank. Further Appellant informed both Respondent's Resident Engineer and the C & P Telephone Company that it planned to temporarily relocate the telephone duct bank two feet to the east of its original location in performing this work. No objections were raised by either the Resident Engineer or C & P Telephone Company and the work proceeded to completion. It was not until months later, when BG&E recognized its design oversight and requested the necessary working space to install expansion joints in its 8" gas line, that Respondent first raised the issue concerning the telephone duct bank

location. The actual course of events prior to the onset of this dispute is indicative of the parties contemporaneous understanding that the telephone duct bank need not be maintained complete in place due to the necessity of replacing the existing clay conduit.

Assuming arguendo that the contract could be interpreted as presenting a clear requirement for the support of the telephone duct bank "complete in place," the Board further finds that Respondent waived such right to strict compliance by affirmatively acquiescing in Appellant's plan of performance. Where a party administers a contract in such a way as to give a reasonably intelligent and alert opposite party the impression that a contract requirement has been waived, the requirement cannot be suddenly revived to the prejudice of the party who has changed his position in reliance on the supposed waiver. Gresham & Company, Inc. v. U.S., 200 Ct. Cl. 97, 470 F.2d 542 (1972). Here Respondent's Resident Engineer agreed, without qualification, to Appellant's plan of performance and then waited until Appellant had incurred the expense of supporting the reconstructed telephone duct bank two feet to the east of its original location before seeking strictly to enforce what he considered to be the contract requirement. His initial acquiescence and later silence during the performance of the relocation work now estops Respondent from enforcing the contract requirement to Appellant's detriment. In arriving at this finding the Board is mindful that such silence or acquiescence must be attributable to a public officer having authority to act on behalf of the Mass Transit Administration. Titamus v. Mayor of Baltimore, et al, 128 Md. 105, 96 A. 1030 (1916). Mr. Carmichael, the Resident Engineer, testified that he was the "...construction manager, and MTA's on site representative, responsible for administering construction contract [sic] and performing technical inspection." Within this scope of responsibility, he was the authorized official to direct Appellant to comply with contract provisions where it might appear that Appellant had gone astray. This authority should have been exercised affirmatively by the Resident Engineer upon learning of Appellant's plan rather than waiting until after it had been fully executed.

By way of conclusion the Board finds that Appellant's maintenance and support plan for the telephone duct bank in the 1800 block of Pennsylvania Avenue was entirely consistent with contract requirements. Respondent's directive to relocate these ducts required Appellant to alter an acceptable plan of performance which had been fully executed and thus constituted a change to the contract.

For these reasons the appeal is sustained. In accordance with the parties' prehearing stipulation, this appeal is now remanded to the MTA Administrator for negotiation of an equitable adjustment.

The main source of revenue is the sale of the product. The revenue is used to cover the costs of production and distribution. The profit is used to fund research and development and to pay dividends to the shareholders.

The company is a public company and its shares are listed on the New York Stock Exchange. The company has a long history of success and has been a leader in its industry for many years. The company's products are sold in over 100 countries and the company has a strong reputation for quality and reliability.

The company's revenue is primarily derived from the sale of its products. The company's products are sold through a network of distributors and retailers. The company's revenue is also derived from the sale of its services. The company's services are sold through a network of sales representatives and service centers.

The company's revenue is used to fund research and development and to pay dividends to the shareholders. The company's revenue is also used to fund marketing and sales expenses. The company's revenue is also used to fund general and administrative expenses.

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