

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of PAUL J. VIGNOLA
ELECTRIC COMPANY, INC.

Under DGS
Contract No. BA 000-767-301

)
)
) Docket No. MSBCA 1226
)
)

January 10, 1986

Contract Interpretation - Drawings - The general rule of contra proferentem providing that a contract is construed against the drafting party was applicable to a contractor's reasonable interpretation of contract drawings concerning take-off of the length of electrical conduit required to span a creek between manholes under a bridge. Any ambiguity as to length of conduit required created by the non-scale dimensioning of the length of the bridge over the creek was so subtle as to be properly characterized as a latent or hidden ambiguity excusing the contractor's failure to detect it prior to bid opening.

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OPINION BY CHAIRMAN HARRISON

This timely appeal has been taken from a Department of General Services (DGS) procurement officer's final decision denying Appellant's claim for the cost of additional electrical and telephone conduit necessary to span College Creek in connection with the construction of a ductbank along Rowe Boulevard, Annapolis, Maryland.

Findings of Fact

1. Contract No. BA-000-767-301 for construction of an electric ductbank along Rowe Boulevard, State Office Complex, Annapolis, Maryland, was awarded to Appellant on May 23, 1984.

2. The contract work included excavation and disposal of excess materials; construction of a concrete encased ductbank; modifications to existing manholes; installation of pre-cast concrete manholes; installing four (4) 4 inch PVC coated rigid steel conduits along the underside of College Creek Bridge; and backfilling of excavations and restoration of disturbed areas.

3. The specifications provide that the contract drawings, except where dimensions are given, are diagrammatic and intended to show the scope and general arrangement of the work to be installed.

4. The contract drawings, identified as "CONSTRUCTION OF ELECTRIC DUCTBANK ALONG ROWE BLVD," consist of four sheets. Sheets 1, 2, and 3 incorporate the plan and profile showing location and elevation of the new ductbank and structures. Sheet 4 contains details in sections including detail entitled "Partial Elevation College Creek Bridge." None of the detail on Sheet 4, given the Appellant's particular interest in matter contained therein, would have alerted it to the problem discussed below. (Tr. 171, 196-197, 205-209).

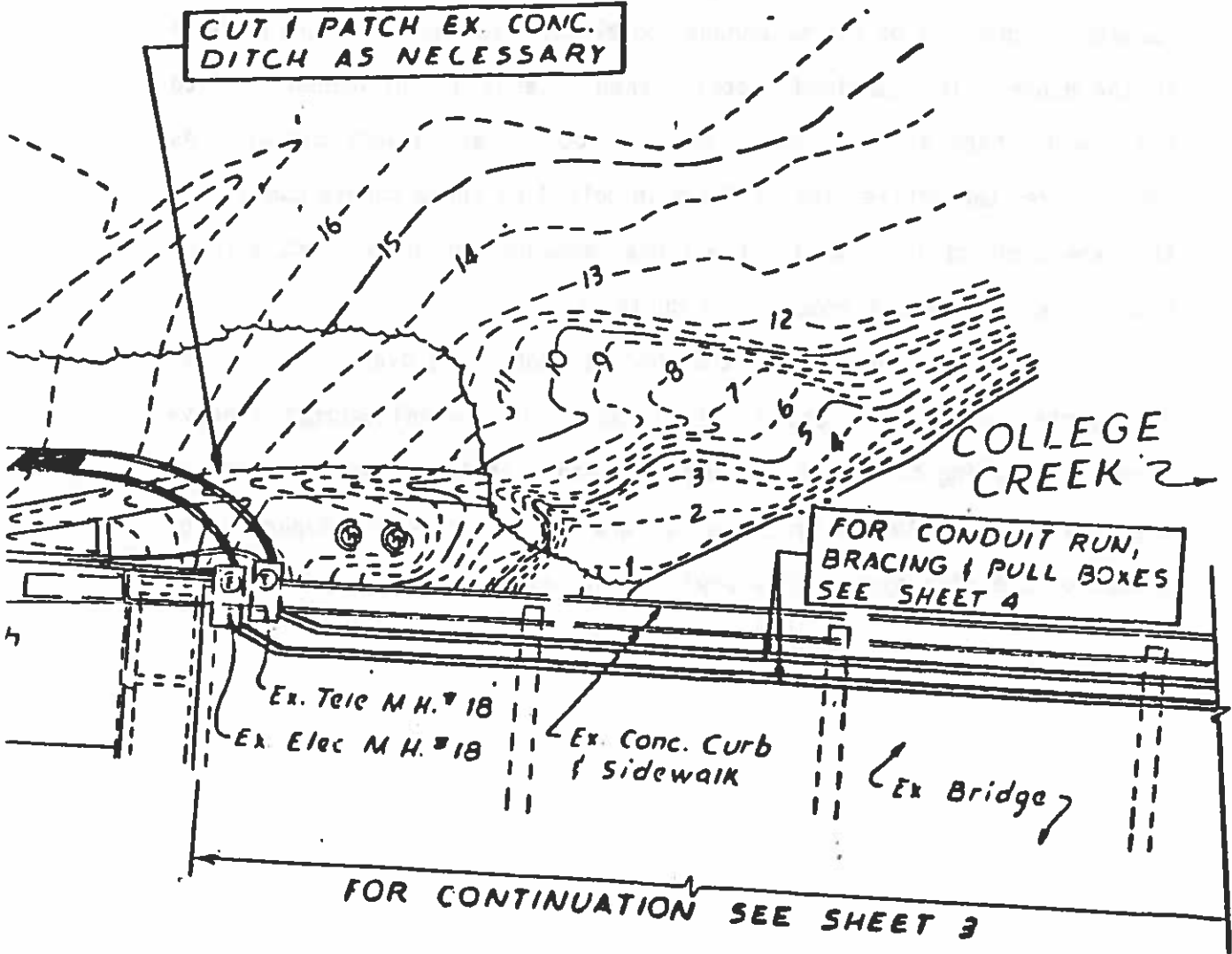
5. The entire length of the duct is depicted on Sheets 1, 2 and 3. The ductbank profile contains a scale, 1" = 30' on horizontal and a scale 1" = 4' on vertical. That scale holds true for all 3 sheets of profile. The site plan shows a scale of 1" = 30', again on all 3 sheets, reflecting the entire extent of the ductbank. The landside ductbank is shown in plan on Sheets 1, 2 and 3 as concrete encased and extending from vault to vault and structure to structure commencing at Manholes 24 on Sheet 1. A portion of the line to the west of and into College Creek is shown on Sheet 2. Separate electrical and telephone conduit is shown from Manholes 18 on Sheet 2 and extending over to Sheet 3 where it connects

into Manholes 17 on the east side of the bank with no break shown in the isometric depiction of the telephone and electrical lines from one manhole to the other. The combined ductbank then extends out of Manholes 17 to the new ductbank stub-out wall footings located at Calvert Street. As noted above, the entire line is shown in detail on three sheets containing the same scale of 1" = 30' for the linear measurement of the duct with no break shown within the area of the ductbank.

6. The passage of the conduit (ductbank) over College Creek is depicted on Sheets 2 and 3. It is shown in tow uninterrupted heavy lines delineating the ducts passing from manholes 18 on the west bank of the creek to Manholes 17 on the east bank of the creek and separated by a turn of the plan page. This depiction is as follows:

SHEET 2

CUT & PATCH EX. CONC.
DITCH AS NECESSARY



FOR CONDUIT RUN,
BRACING & PULL BOXES
SEE SHEET 4

COLLEGE
CREEK →

Ex. Tele M.H. #18
Ex. Elec M.H. #18

Ex. Conc. Curb
& Sidewalk

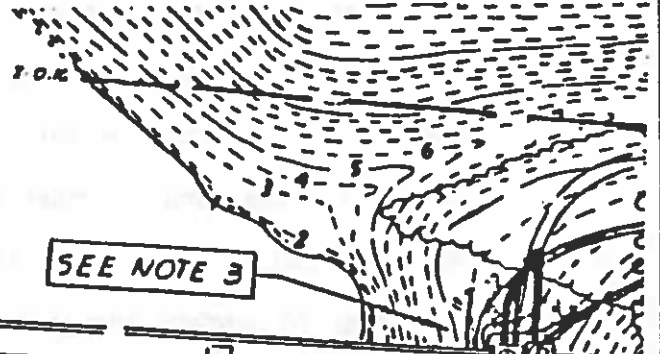
Ex Bridge

FOR CONTINUATION SEE SHEET 3

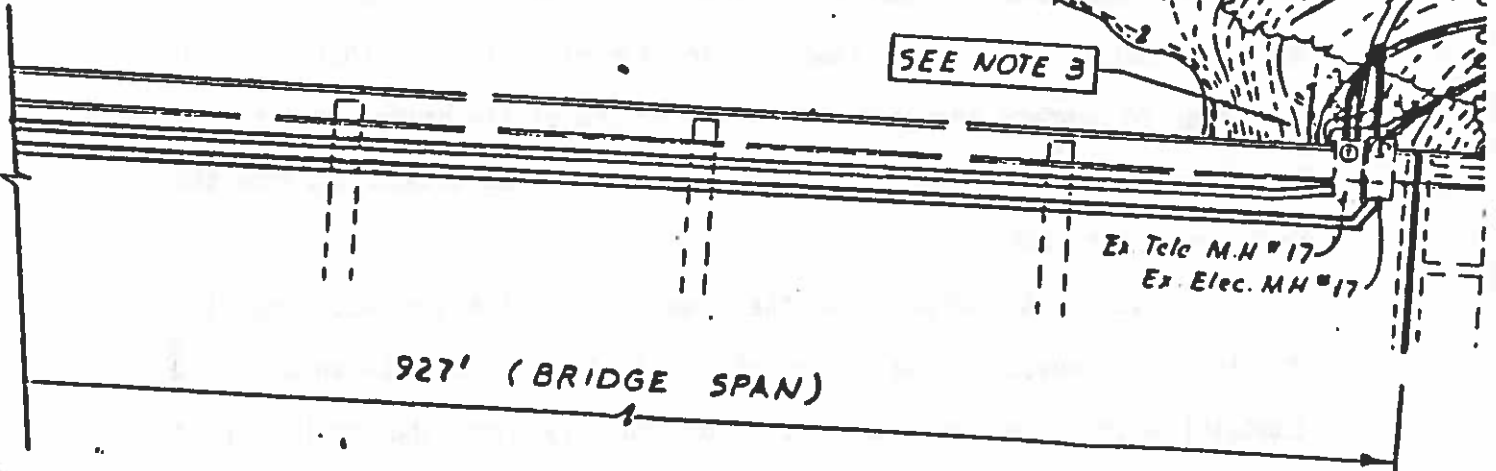
TO STATE CIRCLE

SHEET 3

COLLEGE
CREEK



SEE NOTE 3



927' (BRIDGE SPAN)

TO U. S. RTE. 50

7. Appellant's President, Mr. Paul J. Vignola, and Appellant's estimator, Mr. Max Blatt, individuals combining over fifty years experience both in estimating electrical projects and as electrical contractors,¹ visited the site prior to bid opening. Their major concern with respect to the bridge over College Creek was location of manholes and whether use of barges or hanging scaffold was the most appropriate method to install the conduit under the bridge. (Tr. 153-155, 178-180). They did not measure the bridge. However, Mr. Vignola testified that they had no reason to concern themselves with the length of the bridge because the length of conduit necessary to span the creek would be determined from the drawings. (Tr. 154).

8. Mr. Blatt did the take-off of the project from the drawings. He measured the extent of the ductbank (concrete encased and conduit) with an estimating wheel² continuously from the beginning at Manholes 24 on Sheet 1 to the end at the ductbank stub-out wall footings on Sheet 3 utilizing the scale of 1" = 30' for a total of 2,460 linear feet. (App. Exh. 3). Utilizing the 1" = 30' scale he specifically measured the uninterrupted heavy line of conduit between Manholes 18 and Manholes 17 at 400'. From this measurement he derived an estimate of the total length of conduit necessary to span the creek from Manholes 18 to

¹Mr. Vignola's experience dates back to 1955. He started his own company in 1973 and has primarily been involved in federal, state and local government electrical projects. Mr. Blatt's experience dates back to the 1930's. From 1952 to 1973 he owned his own company. Much of his work experience has involved government projects. (Tr. 150-152, 176-178).

²An estimating wheel is a hand held device that is run along the drawing and reflects the length and width configuration of what is being measured in inches. To derive the actual dimension of what is being measured, the number of inches reflected on the wheel is multiplied by the scale in feet contained on the drawing.

Manholes 17 including the portion to be suspended on the underside of the bridge superstructure at 1700' (400' for each of the two lengths of electrical and two lengths of telephone conduit and an additional 100' of conduit (25' per length) for wastage). (Tr. 182-183, 198-200). Appellant's bid price for the conduit necessary to span the creek was based on this total of 1700'.³

9. Sometime after award of the contract and before the pre-construction conference held on June 22, 1984, Mr. Vignola discovered that the length of conduit necessary to span College Creek from Manholes 18 to Manholes 17 was greater than as estimated by Mr. Blatt. Upon checking the drawings, he observed for the first time the dimensioning of the bridge span on Sheet 3 of the drawings at 927'. (Tr. 155, 164). Appellant's discovery of the discrepancy in the measurement between Manholes 18 and Manholes 17⁴ was brought to the attention of DGS personnel during the pre-construction conference and confirmed by letter of July 5, 1984. (Tr. 156-157; Agency Report, Exh. 6). Appellant's request to be paid for the cost of the additional conduit required to be installed was denied by DGS. However, Appellant purchased the extra conduit necessary to complete the crossing and completed the work under protest. The parties have stipulated that the additional cost of the conduit was \$38,719 and that no proof of quantum is necessary. The project was accepted by DGS on January 14, 1985. (Agency Report, Exh. 9).

³The electrical and telephone 4 inch PVC coated rigid steel conduit is several times more expensive than the concrete encased material. (Tr. 166-167, 210).

⁴Manholes 18 and 17 were several (15-20) feet within the outside limits of the bridge span (Tr. 168) such that the actual distance between manholes was approximately 900'.

10. Mr. Joseph Pitruzzella, a DGS employee and draftsman responsible for preparing the drawings from a site work standpoint, testified that an additional sheet showing the bridge at 1" = 30' scale which could have been developed from an existing as built drawing of the bridge (at 1" = 30' scale) was not prepared in order to save time (a day or two) because of a desire to get the project underway. Accordingly, Mr. Pitruzzella depicted the bridge with a break between Sheets 2 and 3 "to interrupt the bridge by not showing a drawing 927 feet long which would be one full sheet of this contract document." (Tr. 69). He was not attempting to show a break in the ductbank as such. (Tr. 65-69). However, he was of the opinion that the 927' dimension line on Sheet 3 should have alerted a contractor that the length of the conduit necessary to span the creek was more than the 400' derived from measuring the conduit at the 1" = 30' scale. (Tr. 97). He further testified that the appropriate method for the contractor to have determined the length of conduit necessary to span the creek under the bridge between manholes was to have physically measured the distance at the site. (Tr. 98-102).

11. Mr. Blatt, an individual with over 30 years of experience in estimating electrical projects and as an electrical contractor, (Tr. 176-178) testified that the vertical line at the righthand edge of Sheet 2 with the horizontal line and note underneath it stating "FOR CONTINUATION SEE SHEET 3" was a direction to turn to Sheet 3 and continue to measure the conduit commencing at the lefthand edge of Sheet 3 at the scale of 1" = 30'. He further testified that in order for the line at the edge of Sheet 2 to have been interpreted as indicating a break in the dimensioning of the ductbank (i.e., as a break line) there should have been a dimension given under the horizontal line on Sheet 2 rather than

the note regarding continuation. (Tr. 184-195, 201-205). The testimony of Mr. Vignola, also an individual with a number of years of experience in estimating electrical projects and as an electrical contractor, indicates that he concurred in Mr. Blatt's interpretation of the drawings. (Tr. 150-152, 155-163; Agency Report; Exh. 6).⁵ Significantly, the testimony of Mr. Blatt concerning the appropriateness of the interpretation he placed upon the note on Sheet 2 as indicating continuous measurement of the conduit at the 1" = 30' scale at the time he was doing the take-off was not specifically rebutted; it only being the testimony of Mr. Pitruzzella that the 927' dimension line on Sheet 3 should have alerted contractors that the length of conduit necessary to span the creek was more than the 400' derived from measuring the conduit at the 1" = 30' scale. (Finding of Fact No. 10, supra).

Mr. Blatt candidly testified that he did not see the dimension line on Sheet 3 and that if he had seen the dimension line he would have made inquiry concerning proper measurement of the length of the duct. (Tr. 188-193). Nevertheless, his unrebutted testimony was, inter alia, that despite the increased cost of PVC coated rigid steel conduit required to be placed under the bridge compared with the landside concrete encased material he was not alerted to the dimensioning of the bridge depicted on Sheet 3 nor, more importantly, should he have been because of (1) the passage of the duct (conduit), over College Creek as shown by two uninterrupted heavy lines delineating the ducts passing from manhole to manhole from the bank on one side of the creek to the bank on the other

⁵In a July 5, 1984 letter to DGS authored by Mr. Vignola he stated that ". . . the drawings do not indicate a complete breakline on Sheets E-2 or E-3. In ordinary drafting procedures a break would have been shown on either or both drawings rather than omit a section of the bridge between sheets E-2 and E-3".

separated by a turn of the page plan (2) the instruction on Sheet 2 to continue to Sheet 3 and (3) the internal consistency of this section of the drawings with the structure to structure, vault to vault depiction of the entire length of the duct as shown elsewhere on Sheets 1-3.

12. Pursuant to agreement of the parties, the appeal was heard solely by Chairman Harrison. The other Board Members have read the record.

Decision

DGS argues that Appellant simply made a mistake in measurement of the length of conduit required to span College Creek in failing to notice the dimensioning of the bridge span in its take-off from the drawings of the length of duct across College Creek as depicted on Sheets 2 and 3. Since mistakes discovered after award are not compensable pursuant to COMAR 21.05.02.12D, DGS maintains that the appeal must be denied. See: Md. Port Adm. v. John W. Brawner Contracting Co., 303 Md. 44 (1985); Hanks Contracting, Inc., MSBCA 1212 (August 20, 1985). DGS's contention that Appellant merely made a mistake is predicated on the following assertions: (1) The breaklines indicated at the end (right side) of Sheet 2 and the beginning (left side) of Sheet 3, both pertaining to the bridge, and the dimension line shown on Sheet 3 with the note "927' (Bridge Span)" clearly alert contractors that the bridge is actually much longer than the 400' derived from measuring the duct over the creek on a 1" = 30' scale; (2) the detail contained on Sheet 4 pertaining to the bridge contained sufficient information to alert Appellant that its estimate of the length of the duct associated with the bridge span was erroneous; and (3) physical observation and/or measurement of the bridge

erroneous; and (3) physical observation and/or measurement of the bridge during a prebid site investigation would have indicated that the bridge was longer than the 400' Mr. Blatt estimated as the distance between Manholes 18 and Manholes 17 on either side of the creek.

The assertion concerning the dimensioning of the bridge is most seriously pressed by DGS and requires some discussion. The remaining assertions may be dealt with summarily. DGS asserts that the bridge detail contained on Sheet 4 should have alerted Appellant that its estimate of the length of duct associated with the bridge was erroneous. Regarding this assertion Appellant observes that the specifications state that except where dimensions are given, everything else is diagrammatic and intended to show the scope and general arrangement of the work to be installed. Accordingly, Appellant maintains that it was not concerned with diagrammatic depictions of the bridge and appurtenances as shown on Sheet 4 except for purposes of the approximate location of the bridge itself in relation to the entire project and the approximate location of the pull boxes⁶ attached to the bridge. Appellant further argues that there was nothing in the detail on Sheet 4 to alert it to the problem herein. We agree. (See Finding of Fact No. 4).

Concerning the assertion respecting site investigation, the record reflects that Mr. Vignola and Mr. Blatt did conduct a site investigation but that their major concern respecting the bridge was how to install the conduit on its underside. We cannot say that their failure to notice the length of the bridge or to physically measure it was

⁶A pull box is a box placed in a length of conduit, through which the cables can be pulled.

unreasonable, particularly since measurement of the length of ductwork was to be accomplished through take-off from the drawings.

We turn now to DGS' assertion that the dimensioning of the bridge demonstrates the error in Appellant's determination of the length of the duct (conduit), necessary to span College Creek from manhole to manhole. Appellant contends that it reasonably measured the extent of the ductbank from the beginning on Sheet 1 to the end on Sheet 3 including the electrical and telephone conduit between Manholes 18 and Manholes 17 suspended under the bridge utilizing the scale of 1" = 30' for a total of 2,460 linear feet. It argues that a prudent bidder would have had no reason to believe that the scale of 1" = 30' for the ductbank did not apply to the entire line to be installed including the conduit to be installed along the underside of the bridge since the passage of the duct over College Creek is shown in two uninterrupted heavy lines delineating the ducts passing from manhole to manhole from the bank on one side of the creek to the bank on the other side of the creek and separated by a turn of the plan page. Appellant concedes that had its estimator seen the note on Sheet 3 "927' (BRIDGE SPAN)" it would have questioned the correctness of its method of measuring the length of the duct associated with the crossing of College Creek from Manholes 17 to Manholes 18 and sought clarification. However, Mr. Blatt, an experienced estimator of electrical contractor, testified that he did not see the bridge dimension note. More importantly, he testified he would not have been alerted to the existence of any such note because of (1) the depiction of the passage of the duct over College Creek as shown by two uninterrupted heavy lines delineating the ducts passing from manhole to manhole from the bank on one side of the creek to the bank on the other side of the creek separated by a turn of

measurement of the conduit. Further, the internal consistency of this section of the drawings with the depiction of the entire length of the duct on Sheets 1-3 is such as to not patently call into question the reasonableness of Appellant's interpretation of the method to measure the extent of the duct as being from manhole to manhole from existing Manholes 24 on Sheet 1 to the ductbank stubout wall footings on Sheet 3 at the plan scale of 1" = 30'.

Based on our assessment of the respective contentions of the parties, we conclude that the Appellant's interpretation is reasonable, that it did not make a mistake in the legal sense contemplated by COMAR 21.05.02.12D precluding fiscal relief and that it is entitled to be paid for the extra conduit it was required to purchase to span College Creek.

In reaching our decision, we have also considered DGS's suggestion that the drawings are ambiguous and that the ambiguity is patent. In DGS' view the depiction of the bridge with breaklines and nonscale dimensioning of 927 is in conflict with the manhole to manhole depiction of the conduit respecting measurement of the extent of ductwork involved. Therefore, assuming arguendo the reasonableness of Appellant's interpretation, it is not the only approach presented by the drawings concerning measurement of the duct spanning the creek. DGS further asserts that the measurement of bridge approach should have been obvious to a reasonably prudent contractor. Accordingly, DGS contends that the appeal should be denied since Appellant failed to seek prebid clarification of the patent or obvious ambiguity presented by the drawings concerning which of the two approaches should be used to measure the length of duct necessary to span College Creek.

concerning which of the two approaches should be used to measure the length of duct necessary to span College Creek.

This Board has stated on several occasions that a bidder has an affirmative obligation to seek prebid clarification of patent or obvious ambiguities. See: Hanks Contracting, Inc., MSBCA 1212 (August 20, 1985); American Building Contractors, Inc., MSBCA 1125 (June 24, 1985) at pp. 9-10; Dominion Contractors, Inc., MSBCA 1041 (February 9, 1984) at pp. 13-15, 31-33. The rule is one of common sense.

"The doctrine of patent ambiguity is an exception to the general rule of contra proferentem which requires that a contract be construed against the party who wrote it. If a patent ambiguity is found in the contract, the contractor has a duty to inquire of the contracting (procurement) officer the true meaning of the contract before submitting a bid. This prevents contractors from taking advantage of the Government; it protects other bidders by insuring that all bidders bid on the same specifications; and it materially aids the administration of Government contracts by requiring that ambiguities be raised before the contract is bid on, thus avoiding costly litigation after the fact." (Footnotes omitted).

George E. Newsom v. United States, 230 Ct.Cl. 301, 303 676 F.2d 647 (1982). However, it is our opinion, based on the unrebutted testimony of Mr. Blatt, that any ambiguity as to the proper method of taking off duct across College Creek created by the existence on the drawings of the nonscale dimensioning of the bridge itself is so subtle as to be properly characterized as latent or hidden ambiguity excusing the failure of the Appellant to detect it prior to bid opening. Since we have found that the Appellant's determination of how to measure the ductbank was reasonable, the doctrine of contra proferentem requiring that a contract be construed against the party who wrote it applies, and, accordingly, the appeal is sustained.

Concurring Opinion of Board Member Levy

I concur in the opinion authored by Chairman Harrison with some reluctance since Mr. Ketchen's dissent may set forth from a technical standpoint the appropriate means of interpreting the contract drawings. However, I recognize that the appeal was solely heard by Chairman Harrison who was the only one to actually hear the testimony of the witnesses, particularly the testimony of Mr. Blatt. Therefore, I concur in the Chairman's opinion believing it to be premised on the absence of technical evidence to refute Mr. Blatt's testimony concerning proper interpretation of the drawings and his failure to notice the bridge dimensioning.

Dissenting Opinion by Mr. Ketchen

I dissent from the Appeal Board's decision sustaining the instant appeal. A fundamental principle of contract interpretation is an objective one that contract documents be given the plain meaning

attributable to them by a reasonably intelligent bidder. Dominion Contractors, Inc., MSBCA 1041 (February 9, 1984) at 9. See: Hol-Gar Mfg. Corp. v. United States, 169 Ct.Cl. 384, 388, 351 F.2d 972, 975 (1965). Here, the contract drawings clearly depict a large interval in the representation of the bridge and the duct containing the electric conduit between Sheets 2 and 3 of the drawings. This is shown by: (1) the duct on the righthand side of Sheet 2 running into a vertical line containing a standard break line symbol;⁷ (2) the duct beginning on the lefthand side of Sheet 3 extending from a vertical line, similar to the one on Sheet 2, containing a break line symbol; (3) a dimension line for the bridge on Sheet 2, containing a break line symbol; and (4) a dimension line on Sheet 3 for the bridge that is an extension of the dimension line beginning on Sheet 2, and that contains a break line symbol and a dimension of 927; for the bridge. These drawing representations clearly indicate that the length of the duct shown on Sheet 2 and Sheet 3 could not simply be determined by applying the scale shown on the drawings but had to be calculated from the dimensions shown for the bridge. In contrast, Sheet 1, on its righthand side, and Sheet 2, on its lefthand side, each contain matchlines indicating that the duct runs between these two drawing sheets is continuous and thus the length of the duct shown beginning on Sheet 1

⁷A standard architectural and engineering symbol for depicting a "break line", i.e., a line used when the entire view of the object is not needed, or the object is so large that it could not be properly illustrated on the print, is shown as follows:

Break Line - Long

Break Line - Short

Construction Dictionary, Construction Terms & Tables, Greater Phoenix, Arizona Chapter #98 of The National Association of Women In Construction, p. 619 (June 1979).

and running to the righthand side of Sheet 2 could be obtained by using the scale shown on the drawings. Based on the above facts, I find that a reasonably prudent bidder reading the contract drawings as a whole and harmonizing the information found there would have concluded that Sheets 2 and 3 of the drawings did not show the full length of the bridge and suspended duct across College Creek, although the correct length of duct could be readily determined by the information that was shown. See Cam Construction Co., MSBCA 1088 (October 25, 1983); Clevecon-Au-Vianini, MDOT 1007, 1013 (January 7, 1983).

On the other hand, Appellant's interpretation that it could simply scale the entire run of the duct directly from the drawing would make the drawing dimensions, the break line symbols, and attendant drawing notes meaningless. Appellant's interpretation thus is unreasonable. See: Concrete General, Inc., MSBCA 1062 (November 7, 1984).

Although Appellant's estimator had extensive experience in the type of work involved in the instant contract, it is significant that he testified that he would have questioned his estimating method if he had noticed the bridge dimension of 927' shown on the drawings. However, the fact that Appellant's estimator missed seeing this note does not entitle Appellant to an equitable adjustment. It should have been clear from even a cursory review of the drawings that the interrupted line between Sheet 2 and 3 indicated that the length of the duct was not fully shown and that other information on the drawings, including the bridge dimension shown, would have to be considered.

Assuming arguendo that there were discrepancies on the drawings regarding the depiction of the length of the duct to be suspended beneath the bridge, they were patently obvious as illustrated by the break line

symbols shown interrupting both the duct run and the dimension lines and by the 927' dimension provided for the bridge. This raised an affirmative obligation for Appellant to seek clarification of the contract drawings prior to bidding. Appellant failed to do so in this instance at its own risk. Dominion Contractors, MSBCA 1041 (February 9, 1984) at 14, 19; see: Beacon Construction Co. v. United States, 161 Ct.Cl. 1, 67, 314 F.2d 930 (1971).

For the foregoing reasons, therefore, I would deny Appellant's appeal.