

APPEAL OF.

A S McGAUGHAN, CO , INC)
) CAB No. D-926
Under Contract No. 87-0038-AA-2-0-LA)

Opinion by Administrative Judge Matthew S. Watson, with Chief Administrative Judge Lorilyn E. Simkins and Administrative Judge Jonathan D. Zischkau, concurring

This appeal presents a claim¹ for \$24,839.10 of additional costs incurred to repair an electrical duct bank which sustained damage allegedly as a result of a third-tier subcontractor's reliance on information claimed by a second-tier subcontractor to have been received from a District inspector that there were no live electric circuits within the duct. The information proved to be erroneous. We deny Appellant's appeal.

Appellant, A.S. McGaughan Company, Inc. (“McGaughan” or “Appellant”) entered into a contract with the District of Columbia Department of Public Works (“DPW”) in the total amount of \$30,725,000.00 which included, among other items, removal or relocation of sub-surface electric utilities and construction of two utility tunnels traversing the site of the Blue Plains Wastewater Treatment Plant (“the facility”).

Within the path of the planned utility tunnels were existing underground electric utility duct banks. Removal of these existing electric duct banks was required in order to proceed with excavation for the tunnels to be constructed. Although some of the duct banks to be removed were unused, certain of the duct banks contained high voltage electric lines which were still energized.

¹ The original Complaint included 31 separate claims for equitable adjustments contained in paragraphs 6-27 of Appellant's Complaint. The parties settled all but the subject claim and appellant withdrew all claims except for the claim alleged in paragraph 27 of the Complaint. Notice of Partial Dismissal filed June 7, 1993.

During the entire period of contract performance, the facility continued in full operation, with utility service maintained without interruption. Previously abandoned utility structures could be demolished at any time. The Contract obligated Appellant to protect all active utility structures, whether they were to remain in place or to be relocated, and to maintain the operation of the utility structures to be relocated until the replacement structures were built. Only after the contractor had completed the new utility structure would the electric service be moved, and the utilities switched from the existing lines to the new lines without interruption. The contractor was not authorized to demolish the original utility structures until the new electric lines were energized and the replaced electric lines deenergized. The contract drawings indicated which electric lines were to remain in place, which were to be relocated, and which, although present on the site, had been previously deenergized and abandoned. The damaged duct bank was shown in the drawings as containing electric lines to be relocated.

In order to perform the contract, McGaughan subcontracted with Len Parker Mechanical and General Contractors, Inc. ("Len Parker") for civil and mechanical work. Len Parker further subcontracted with John J. Kirlin, Inc ("Kirlin") to install a temporary 24-inch water dilution line. Kirlin, in turn, subcontracted with Gebhardt, Inc ("Gebhardt") to perform the excavation and backfill for the temporary water line. McGaughan subcontracted all of the electrical work to John Miller Electric Co., Inc. ("Miller Electric")

The District had three inspectors on site, each of whom had a particular trade specialty. John Piagno was the senior resident inspector and supervisor, as well as the plumbing and piping specialist; Elvin Lewis was the electrical specialist; J Alberto Morales was the civil and mechanical specialist. The three on-site inspectors reported to James Ward, the DPW Project Manager. In addition, certain senior personnel of the District's former Water and Sewer Utility Administration ("WASUA") had responsibilities which interfaced with the contract performance. Dal C Van Dolsen, Branch Chief of the water treatment facility's Electrical Maintenance Branch, was responsible for de-energizing and energizing electrical circuits.

On February 16, 1988, while excavating for the water line, Gebhardt personnel encountered a concrete obstruction which appeared to be an electrical duct bank. The excavation personnel could not determine with certainty from the exterior of the obstruction what the concrete encased, and, if it contained electrical wiring, whether that wiring was live or abandoned. Gebhardt immediately stopped excavation. The Gebhardt Field Supervisor contacted the supervisor for the next tier contractor, Kirlin, who in turn contacted the on-site District inspectors. Only the civil and mechanical specialist was on site at that time.

Although the parties disagree as to what transpired thereafter, for the purposes of this decision, the Board accepts the facts as stated by Appellant's witnesses. The Kirlin foreman and Mr. Morales, the District's civil and mechanical inspector, reviewed the contract and as-built drawings of the facility which were located in the inspector's office. Neither the Kirlin foreman nor Mr. Morales consulted Miller Electric, the Appellant's electrical subcontractor, or Mr. Van Dolsen, the facility employee responsible for de-energizing and energizing electric lines. Appellant alleges that Mr. Morales advised the Kirlin foreman that the duct bank which had been uncovered was abandoned and could be demolished immediately. That information proved erroneous. Although there is conflicting evidence as to what the inspector advised, there is no dispute that the duct bank was actually in use at the time. When Gebhardt personnel began the demolition of the duct bank, they struck a high voltage electric line causing an explosion.

On September 5, 1990, McGaughan filed a claim for an equitable adjustment under the Changes Clause of the Contract to compensate it for the cost of repairing the damage caused to the duct bank as a result of the explosion. (Appeal File ("A.F.") 4 3) By letter dated November 5, 1990, the Alternate Contracting Officer denied the claim. (A F 3 1). McGaughan appealed the denial to the Department of Administrative Services ("DAS"). Based on a written presumption of denial issued by the Director of DAS, pursuant to 27 DCMR §3806.6, the contractor filed this appeal.²

POSITIONS OF THE PARTIES

Appellant contends that "the District's inspector viewed the site and informed McGaughan's sub-subcontractor that the existing utility was out-of-service and could be removed. McGaughan and its sub-subcontractors followed the normal procedure for ascertaining whether the utility was in service or could be removed. McGaughan contends that it acted prudently and reasonably in relying upon information provided by the inspector. When the inspector gave the approval to demolish the duct bank, this ultimately resulted in additional costs to McGaughan because it had to repair the damaged electrical lines. McGaughan should be compensated for those added costs incurred solely due to erroneous information supplied by the inspector" (Appellant's Post-Hearing Brief at 1-2).

The District contends that the inspector never advised the Appellant's second-tier subcontractor "that the electrical duct bank . . . had been abandoned" and that McGaughan, through its subcontractors, specifically Miller Electric, "should have known whether the

²By letter dated April 15, 1991, the Acting Director of DAS informed McGaughan of its right to file its claim as a deemed denial with the Board, since the "Claims Officer handling this matter had resigned."

feeders in the electrical duct bank had been deenergized.” (District’s Post-Hearing Brief, at viii) In the alternative, the District contends that “even if such advice had been given by the District’s inspector, . . . [the advice] would in no way bind the District or release McGaughan from liability . . . [since] the Contract specifically precludes the District’s inspectors from directing McGaughan’s work . . . [and] the facts and circumstances here do not justify application of the theory of implied authority.”(*Id*)

FINDINGS OF FACT³

1. A.S. McGaughan Company, Inc., entered into Contract No.87-0038-AA-2-0-LA, dated October 5, 1987, with the District of Columbia Department of Public Works (“DPW”) for demolition and construction of various structures and utilities at the Wastewater Treatment Plant Central Maintenance Facility. (A.F. 1.1).

2 The Special Provisions of the Contract provide, in part

1. Scope of Work - Work under this Contract consists of furnishing all labor, services, materials, tools, plant, insurance, and equipment needed for the construction, proper performance, and completion of the work in the manner and within the time hereinafter specified in strict accordance with the Drawings, Specifications, and other Contract documents, per directions and to the satisfaction of the Engineer, and at the agreed prices.

* * *

The following listing of the items of work included in this Contract is offered as a general guide only. It is not intended to determine the limitations of obligations under the Contract, the Contract Drawings and specifications being the sole determination of that. The items are

* * *

B. Selective removal/relocation of various subsurface utilities and construction of two utility tunnels traversing the construction site

* * *

2. Contract Drawings The location, general characteristics, and principal details of the work are indicated on drawings identified as Job No. PA-X18

³ In references to testimony, the names of witnesses are shown in parenthesis with Appellant’s witnesses in regular type and Government witnesses in *italicize* type

titled, Central Maintenance Facility, Wastewater Treatment Plant, 5000 Overlook Avenue, S W., Washington, D.C.

These drawings comprise the Contract Drawings or "Drawings" for the project. Reference drawings illustrating details which may apply to this project are on file in the Water and Sewer Utility Administration, Department of Public Works.

The Drawings are organized as follows.

Volume 1 - This set of Drawings, titled - Central Maintenance Facility, demolition and Utility Relocation - Volume 1, describes the work outlined in Item . . . B . . . of Paragraph No 1 of these Special Provisions.

* * *

20. Utility Relocations Existing utilities which are to be relocated or modified have been shown according to available data. Plans, profiles and details for the intended relocation or modification and specifications are included in the Contract Documents, however, the Contractor shall satisfy himself by performing test pits and any other investigations as he shall deem necessary, so as to determine the exact locations of existing piping prior to commencing any work.

* * *

21 Test Pits Underground utilities are shown as far as possible in their actual positions, however, their exact locations are not guaranteed. The Contractor shall test pit each and every underground utility to determine its exact location. This work shall be performed well in advance of proposed underground work and all interferences shall immediately be brought to the attention of the Engineer

* * * *

3 That General Requirements of the Contract provide, in part.

III Definitions - The intent and meaning of the following, whenever they appear in the Contract Documents, shall be interpreted as follows:

* * *

Engineer - The Chief, or Resident Engineer, of the Construction Management Division of the Department of Public Works limited by the special duties entrusted to them.

* * *

XI. Engineer's Authority - The Engineer will be the sole judge of the intent and meaning of the drawings, specifications, and other Contract documents and his decisions thereon and his interpretations thereof shall be binding on all parties

* * *

XII. Inspectors - Inspectors are authorized to inspect all work and materials furnished. Such inspection may extend to all or any part of the work and to the preparation and manufacture of Contract materials. Inspectors are authorized to reject material and to suspend work pending appropriate action by the Engineer on the question at issue. Inspectors are not authorized to revoke, alter, enlarge, relax, or release any Contract requirement nor to approve or accept any portion of the work. Inspectors will not act as foremen or perform other duties for the Contractor nor interfere with the Contractor's management of the work. Advice from inspectors in no way binds the Engineer and the District nor releases the Contractor from Contract requirements.

- 4 Drawing DC-1A⁴, Note 5, provides, in part.

* * *

All services to the Laboratory Building and Chemical Building remain until temporary facilities or relocated facilities are available

- 5 Drawing C-5 shows the duct bank which was encountered (Guido Tr 24-5).
6 Drawing E-1, Note 5, provides:

In each of the following pairs of feeders, one feeder shall be maintained in service at all times:

* * *

- I. SP-49 & SP-84

⁴ The drawings are contained in A F 2 1

* * *

7. Drawing E-12 describes the route followed by the existing Feeder SP-49 as:

From	To	Existing Route
------	----	-------------------

* * *

ASS#2	Chemical	G, F, EV1, EV10, EV7 & 12
CUB.2B15	Building	

* * *

Construction Note 13 on Drawing E-12 shows the replacement Feeder SP-49 as having the following route:

* * *

EV1, EV10, EV6 & EV7

* * *

Construction Note 14 provides

Once the replacement feeder segments are installed, the following procedure, fully coordinated with and approved by the District shall be followed:

1. The existing feeder shall be deenergized
 2. The replacement segment shall be spliced to the existing segment to be reused.
 3. The feeder shall be tested and returned to service.
 4. The existing segment not reused shall be removed.
8. McGaughan subcontracted construction of above-ground facilities to Len Parker (Guido Tr. 18, Itani Tr. 95).
9. Len Parker subcontracted "everything underground," except electrical work, to Kirlin. (Guido Tr. 18).
10. Kirlin subcontracted excavation work to Gebhardt. (Guido Tr 19)

11. McGaughan subcontracted electrical work to Miller Electric (Guido Tr 39, Itani Tr 94).
12. The District's contracting officer was the Director of the Department of Public Works, John E. Touchstone. (A.F. 1.1)
13. The District's Engineer was the Chief of the DPW Office of Engineering Services, Ken Donnelly. (*Ward* Tr. 119).
14. The District's Project Manager was James C. Ward. (*Ward* Tr.119).
15. The District had 3 on-site inspectors. John Piagno was the senior resident inspector and supervisor, and the plumbing and piping specialist (Guido Tr 37, 40, *Morales* Tr. 179); Elvin Lewis was the electrical specialist (Guido Tr 41, *Morales* Tr 179); J. Alberto Morales was the civil and mechanical specialist. (Guido Tr. 41; *Morales* Tr. 178).
16. McGaughan and DPW agree that the only point of contact between the contractor and subcontractors and District officials was through the inspectors (Guido Tr. 34) The contractor and subcontractors were not allowed direct access to the Engineer. Access was controlled by the inspectors, who the contractor and subcontractors believed acted as representatives of the Engineer, and the Project Manager. (Guido Tr. 36).
17. McGaughan or its subcontractors would initially raise questions to the inspectors who would provide an answer or, if uncertain, would raise the issue with the Project Manager The Project Manager "would normally work it out with the inspectors " (*Ward* Tr. 125) If McGaughan disputed the Project Manager's decision, the issue would be transmitted to the Engineer. (*Ward* Tr. 124)
18. The contractor "prefer[red] to go to [Inspector Elvin] Lewis if there was an electrical problem." (Guido Tr. 41).
19. The inspectors had in their trailer office at the site "as built" drawings of the facility which were not part of the contract documents. (Guido Tr. 33) Such drawings are apparently examples of the "[r]eference drawings illustrating details which may apply to this project [which] are on file in the Water and Sewer Utility Administration, Department of Public Works" noted in the Contract ("Reference Drawings") See Finding of Fact ("FF") 2, above.

- 20 Mr. Lewis, the electrical specialist, was "in charge to insure that . conduit . are deenergized." (*Morales* Tr 184, *Van Dolsen* Tr. 206) He also maintained records regarding the status of electric circuits. (*Morales* Tr 81)
- 21 Dal C. Van Dolsen, the Branch Chief of the Electrical Maintenance Branch of WASUA was responsible at Blue Plains for "deenergizing and energizing [electric] circuits." (*Van Dolsen* Tr. 202).
- 22 Mr Van Dolsen had blueprints from the original construction of the electrical duct banks which were not part of the contract documents. (*Van Dolsen* Tr.205) The blueprints were similar to other as-built drawings and were apparently examples of the Reference Drawings. (*See* FF 2 and 19, above).
- 23 Miller Electric, Appellant's electrical subcontractor, had dealt with Mr. Van Dolsen earlier in performance of the contract concerning damage to another energized electric line within the same duct bank involved in this appeal. (*Van Dolsen* Tr 206).
24. Victor F. Guido, Jr was a general foreman in charge of mechanical work for Kirlin. (Guido Tr. 18) He was responsible for excavation of the 24-inch dilution water line (Guido Tr. 46)
25. The contractor dug "test pits" in order to determine the actual location of underground electric lines existing on the site. (Guido Tr. 21).
26. On February 16, 1988, when excavating for the 24-inch water line, subcontractor Gebhardt encountered a buried concrete structure which its personnel assumed to be an electrical duct bank. (Guido Tr. 24, 31).
- 27 Although the contract did not require the contractor to receive approval before demolishing an unused electric line, Kirlin personnel made it a practice to confirm the identity and status of an electric line with the inspectors before demolishing the line, regardless of how clearly the line was shown on the drawing. "[E]ven if we saw one on the drawing that said dead line, we still checked with [the inspectors] prior to tearing it out." (Guido Tr. 24).
28. Mr Guido sought the assistance of John Piagano, the District's senior inspector, in identifying the structure. However, Mr. Piagano was not in the on-site trailer at the time Mr. Lewis, the District's electrical specialist, was similarly not in the trailer at the time. Mr. Morales, the District's civil and mechanical specialist, was the only

District representative in the on-site trailer at the time Mr. Guido sought assistance. (Guido Tr. 32)

29. When a problem arose in performance of the job where the relevant inspector was not available, the other inspectors would "help out with the situation." (Guido Tr. 37, *Morales* Tr. 181)
30. Mr. Guido and Mr. Morales together reviewed the contract and earlier "as-built" drawings (Guido Tr. 22 and 31); located the interfering duct on each set of drawings (Guido Tr. 57); and "came to the conclusion that there was a duct bank which was abandoned " (Guido Tr. 59)
31. Mr. Guido did not consult McGaughan's electrical subcontractor, Miller Electric, (Guido Tr. 54), even though another electric line, SP-71, contained in the same duct bank had been damaged earlier in performance of the contract and repaired by Miller Electric. (*Van Dolsen* Tr. 206).
32. Neither Mr. Guido nor Mr. Morales consulted the District's electrical inspector Mr. Lewis, or his records (*Morales* Tr. 181); nor did they consult Mr. Van Dolsen, the District employee responsible for deenergizing electric circuits, or review the detailed electrical Reference Drawings which were maintained in his office (*Van Dolsen* Tr. 207).
33. Acting on the erroneous information that the duct bank which had been encountered was abandoned, Gebhardt personnel began demolition. Almost immediately, the equipment struck a live electric wire causing an explosion and extensive damage to the circuits in the duct bank. (Johnson Tr. 68).

DECISION

A contractor is entitled to an equitable adjustment of the contract price if a condition affecting performance is materially different from the conditions depicted by the District in the contract documents, or otherwise officially communicated to the contractor. This appeal raises the issue of whether, under the specific circumstances of this matter, a factually incorrect statement of a District inspector as to the location and status of an electric line constitutes a contractually binding statement of the site condition, upon which the contractor may rely, and for which the contractor is entitled to an equitable adjustment. The Board finds that the Appellant could not, under the circumstances of this matter, rely on the factual statement of the civil/mechanical inspector who gave erroneous information as to the status of an electrical line. Accordingly, the appeal is denied, with prejudice

The Appellant contends that its subcontractor requested "the inspector to fill in a gap in information" and that "McGaughan and its subcontractors were entitled to rely upon the information provided by the inspector since this is the type of information which had routinely been provided by the inspector pursuant to his normal duties." Appellant asserts that past practice on the project established a procedure whereby McGaughan and its subcontractors inquired of the inspectors as to the condition and location of utilities it unearthed. McGaughan and Kirlin assert that they reasonably and properly relied upon the information supplied by the inspector. Appellant's Posthearing Brief at 8.

The District contends that "[u]nder the terms of the Contract, no advice [by an inspector] can bind the District." District Posthearing Brief, p 18. The Contract General Requirements provide that "[t]he Engineer will be the sole judge of the intent and meaning of the drawings, specifications, and other Contract documents and his decisions thereon and his interpretations thereon shall be binding on all parties." General Requirements ¶ XI. The General Requirements further provide that ". . . [i]nspectors will not act as foremen or perform other duties for the Contractor Advice from inspectors in no way binds the Engineer and the District nor releases the Contractor from Contract requirements." ¶ XII (FF 3). On this basis, the District contends that it is not liable for any statement made by an inspector, and thus is not responsible for the cost of repairing the damage caused by the erroneous information.

Implied Authority of a Subordinate Employee

It is clear from the Contract General Requirements that inspectors did not have actual authority to bind the District. The inspectors also lacked apparent authority, since the doctrine of apparent authority is inoperative to bind the Government to acts of its agents who exceed their authority. *Jascourt v United States*, 521 F.2d 1406, 207 Ct Cl. 955 (1975). Although a literal reading of Section XII of the General Requirements, the clause defining the authority of inspectors, declares that a statement by an inspector could never bind the District, this Board has, consistent with federal Boards of Contract Appeals and the Federal Circuit "upheld the premise that broad warnings and general exculpatory language do not shift the liability resulting from positive representations made by the government and relied upon by the contractor." *James A Federline, Inc* , CAB No. D-834 (Dec. 15, 1993), 41 D C Reg. 3853, 3863; see *Morrison-Knudsen Company, Inc v United States*, 397 F.2d 826, 841-2, 184 Ct.Cl. 661, 686-7 (1968). However, "such limitations are not meaningless" and, to be disregarded, require a showing that the Government, at least by implication, gave the representative authority to act. *Inet Power*, NASABCA No. 566-23, 68-1 BCA ¶7020 at 32441. "Such authority may be implied when considered an integral part of specific duties assigned to a government employee." *Dot Systems, Inc* , DOTCAB No. 208, 82-2 BCA ¶15,817 at 95,786. Authority may also be implied when the inspector is the key

Government person with regard to the performance of the contract *Urban Pathfinders, Inc*, ASBCA No. 23134, 79-1 BCA ¶13,709 at 67,260.

In the instant case, DPW, by its actions, vested authority in subordinate employees to exercise the authority specifically granted in the Contract to the Engineer. The parties agree that the inspectors and Project Manager controlled access to the Engineer. McGaughan's subcontractor testified that its only contact with District officials was through the inspectors, who acted as representatives of the Engineer. (FF 16). The District's personnel testified that the Engineer was inaccessible to contractors. Mr. Ward, the District's Project Manager, in response to a question from the Board as to which matters "would go to [the Engineer] or would [be worked out] ... with the inspectors," testified that he "would normally work it out with the inspectors. Only if it became an issue with the contractor where we didn't agree on an issue, maybe it would go up to Mr. Donnelly for a decision. If there was no dispute, normally it wouldn't" (FF 17). Clearly, the District cannot limit the contractor's access to the Engineer and then deny the authority of government personnel assigned to take action necessary for the contractor to perform. To do so would make it impossible to perform the contract. The authority of representatives assigned to act on behalf of the District must be implied to be sufficiently broad to permit expeditious action by the employee in performing the employee's delegated responsibilities *Urban Pathfinders, Inc*, 79-1 BCA at 67,260

The Board therefore concludes that, notwithstanding the contractual provision that the sole authority to interpret the contract drawings and specifications is vested in the Engineer, and the contractual disclaimer of any authority of the inspectors to bind the District, the District's restrictions on the contractor's access to the Engineer necessarily implies the authority of others to act in the Engineer's stead. The practice of the District of assigning other officials to render interpretations necessary to perform the requirements of the Contract vests the Engineer's authority in those subordinate employees to the extent of their assignments.

The authority implied to a subordinate employee can be no greater than the authority actually vested in the superior employee. Further, the authority must be essential to the performance of the contract and may not be utilized solely for the convenience or benefit of the contractor without value to the District. Further, the authority exercised by the subordinate employee must be within the clear scope of the subordinate employee's assignment.

No government official has the authority to gratuitously relieve a contractor of a contractual responsibility. *WRB Corporation*, 183 Ct.Cl. 409, 461 (1968). Appellant's claim is grounded on a statement by a District inspector that there were no live electric

circuits within a duct bank encountered in excavating for a new water line. Determination of the location of energized electric lines was the contractual responsibility of the Appellant under paragraphs 20 and 21 of the Special Provisions (FF 2)

Indeed, the contractor testified that it did "test pit" the area. (FF 25). The incident giving rise to the claim occurred during underground excavation work. The duct bank was shown on Drawing C-5 (FF 5), and should have been located and its contents identified through the required test pit process prior to beginning any underground work, in accordance with the general requirement of paragraph 21, to locate each and every underground utility. (FF 2). In addition, the feeder which was encountered, SP-49, was specifically identified in Drawing E-12 as an electric utility to be relocated, bringing it within the separate requirement of Paragraph 20 that the contractor shall "satisfy himself" as to the exact location of the line "prior to commencing any work " (FF 2)

The contractor was further on notice that Feeder SP-49 was likely to be energized. Drawing E-12 clearly stated that Feeder SP-49 runs to the Chemical Building (FF 7) General Note 5 on drawing DC-1A provides that "all services to the Laboratory Building and Chemical Building remain until temporary facilities or relocated facilities are available." (FF 4). General Note 5 of drawing E-1 further requires that "in each of the following pairs of feeders, one feeder shall be maintained in service at all times. . . SP49 & SP84." (FF 6). At a minimum, all lines specifically required to be maintained in service should have been identified by the contractor prior to beginning excavation. The contractor claimed to be unaware of the identity of the electric line it encountered, which was one of the lines identified in the contract drawings as feeding the Chemical Building, and specifically indicated as one of a pair of lines required to be maintained in service. This indicates that either the contractor's test pit procedure was inadequate, or, if the encountered line had been identified in the test pit process, that the information was not communicated to the excavation subcontractor.

The contractor's obligation to accurately locate, identify and determine the active status of the underground utilities by specific procedures, and the consequent liability for failure to do so, cannot be transferred to the Government by requesting assistance from a Government representative.⁵ As opposed to the required procedure for energizing or

⁵ The specific requirements to "test pit each and every underground utility" and the duplicative requirement to locate every utility required to be relocated distinguishes this case from the *Federline* case. In *Federline*, this Board held that a general requirement that the contractor verify the "location of utilities well in advance of conducting construction operations" would not absolve the District from liability resulting from a material discrepancy in the depth of a ductbank specifically stated on the contract drawings. That case concluded that a contractor in preparing a bid could not reasonably be expected to include a contingency for errors in the contract documents. In the instant matter, however,

deenergizing lines which requires a joint effort by the contractor and the District, identification of the utilities is within the sole responsibility of the contractor. (FF 7) The fact that a government official gave, or attempted to give, the information or assurance requested by the contractor does not change the responsibility for its accuracy or justify reliance upon the information. If the contract places sole responsibility on the contractor to obtain the requested information, then the government has no obligation to the Appellant in this respect. Even a specifically authorized official giving such information "is rendering a gratuitous courtesy to the [Appellant], rather than discharging a contractual obligation that rested upon the [government]. The [government] is not chargeable . . . in connection with an act which is not required by the contract, which is done for the benefit of the contractor, and which is taken advantage of by the contractor." *WRB Corporation*, 183 Ct.Cl. 409, 461 (1968).

If the law were to the contrary, a contractor could avoid responsibility for its own work by attempting to verify every determination it makes with a District representative. In fact, the subcontractor testified that it regularly did just that, seeking approval of the District prior to undertaking any demolition, even if the documents were clear that demolition was required. (FF 27).

Availability of Information

Even if identification of the underground utilities were not the responsibility of the contractor, reliance upon additional information provided by a Government representative is only appropriate if the information is not in the possession of the contractor and is not otherwise available to the contractor. *Townscot Contracting Co*, ASBCA No 13742, 71-2 BCA ¶8962. The duct bank in question is shown on several of the drawings (FF 5-6), and both its existing route and relocated route are specifically described by landmarks on Drawing E-12. (FF 7). Upon encountering the duct bank, the subcontractor sought an interpretation of the drawings by an inspector. (FF 28). Although the record indicates that the inspectors had a set of reference drawings showing details not contained in the contract drawings, there is no indication that the earlier drawings were not available to the contractor. (FF 19). Indeed, such drawings are noted in the contract itself. (FF 2) At the hearing in this matter, the line which was damaged was clearly identified on the contract drawings without referring to the Reference Drawings. (FF 5) There was no evidence that the Reference Drawings were necessary to identify the damaged line or had any relevance to the

bidders were required to include in their bid prices provision for a test pit process to locate each and every utility, as well as each utility being relocated or modified. Further, in *Federalme*, the error was contained in bid documents upon which the contractor could be expected to rely in preparing its bid, while in the instant matter, the alleged erroneous information was not given until well into performance

question of whether a line was currently energized. The contractor had no special concern as to the identity of the line which was damaged. It was the regular practice of the contractor to seek assurance from an inspector even if the specifications were clear. The information on the drawings was all that the contractor needed in order to properly identify the duct bank in question and to determine for itself whether it could be safely removed. By its gratuitously seeking the assurance of an inspector, the contractor cannot transfer the risk of an error in interpretation from itself to the government.

Beyond consulting the contract documents, the excavation subcontractor could have resolved its question by consulting Appellant's electrical subcontractor. Note 13 of Drawing E-12 provides that the contractor will "install replacement feeder segment" for a portion of the existing SP-49 feeder, the line which was damaged, and specifically designates the segments of SP-49 to be replaced. Note 14 requires a detailed procedure for deenergizing the existing feed and splicing in the replacement line. Such work clearly required the contractor to locate the feeder line to be partially relocated. McGaughan had subcontracted all of the electrical work to Miller Electric. (FF 11). Miller Electric had been working on the project for at least several months when the incident occurred, and had previously repaired another electric line, SP-71, contained in the same duct bank, which had been damaged earlier in contract performance (FF 23). Although there is no evidence in the record as to the exact knowledge Miller Electric possessed, it can be presumed that Miller was aware of the location and status of the electric lines which it was to relocate, particularly when it had recently worked on a circuit within the same duct bank. McGaughan and its excavation subcontractor are chargeable with knowledge possessed by the electrical subcontractor, Miller Electric. See *Edward L Kolbar Co*, ASBCA No. 15520, 73-2 BCA ¶10063. Nevertheless, neither McGaughan nor the excavation subcontractor attempted to consult Miller Electric. This failure precludes reasonable reliance on information supplied by the Government inspector.

Scope of Inspector's Assignment

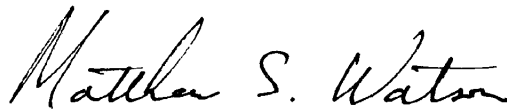
To justify reliance on advice of a government representative, the facts and circumstances of performance must imply the authority of the individual subordinate employee to speak on behalf of the government. Merely seeking the opinion of any government representative is not sufficient, even if the government representative responds to the request and provides information. In this matter, Appellant contends that it could properly rely on information provided by any one of the three inspectors. We conclude that it was unreasonable for the excavation contractor to rely on information from the inspector specializing in civil and mechanical trades with regard to an electrical question. Appellant's witnesses agreed that the division of authority among the three inspectors was clearly understood. One inspector was the supervisor and plumbing and piping specialist, one was

Mr Piagno, the senior inspector, nor Mr. Lewis, the electrical inspector, was present when the incident occurred. (FF 28). Appellant sought the assistance of Mr. Morales, the civil and mechanical specialist, who was the only inspector on site at the time. (FF 28). Appellant's witness candidly testified that Mr Morales was not his first choice in seeking clarification of an electrical question. (FF18 and 28). Appellant also did not seek direction from Mr Van Delsen (FF 33), the Branch Chief of the Electrical Maintenance Branch who had the responsibility to energize and deenergize the electric utility lines.

CONCLUSION

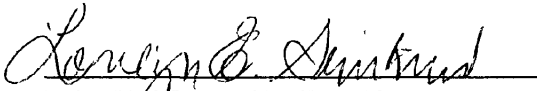
We have carefully considered and rejected the Appellant's arguments that it was justified in relying on information received from Inspector Morales that the electric line it encountered was not activated, and that the District was responsible for the resulting damage when the inspector's statement proved to be in error. We conclude that the Appellant was itself contractually responsible for determining the identity and status of electric lines and that no District official could gratuitously assume this obligation; that the correct information was available in the contract documents and was most likely known to Appellant's electrical subcontractor, and that the official from whom the Appellant received the erroneous information did not have the authority to transmit that information on behalf of the District. Accordingly, Appellant's appeal is denied.

DATED: November 18, 1999

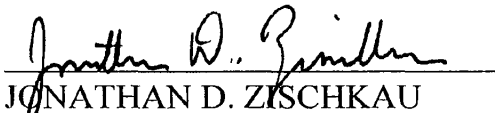


Matthew S. Watson
Administrative Judge

CONCURRING:



LORILYN E. SIMKINS
Chief Administrative Judge



JONATHAN D. ZISCHKAU
Administrative Judge