GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

JAMES A. FEDERLINE, INC.	)	
	)	CAB No. D-834
Under Contract No. 0519-AA-02-1-4-KA	)	

For the Appellant: Herman M. Braude, Esquire, and Samuel M. Morrison, Jr., Esquire. For the Government: Warren J. Nash, Assistant Corporation Counsel.

Opinion by Administrative Judge Cynthia G. Hawkins-León, with Administrative Judges Zoe Bush and Terry Hart Lee concurring.

OPINION AND ORDER

This is a timely appeal by James A. Federline, Inc. ("Appellant" or "Federline") of the final decision of the Director of the Department of Administrative Services, which sustained the decision of the contracting officer, Department of Public Works, to disallow payment to Federline for eighty-one (81) days of contract delays. Only the issue of entitlement is for consideration before the Board, with the issue of quantum, if any, to be remanded to the Director of the Department of Administrative Services.[1/]

Procedural Background

Appellant filed its notice of appeal on November 16, 1989. The Complaint was filed on December 19, 1989. On January 29, 1990, the District filed a Motion for a More Definite Statement and filed the Appeal File on February 7, 1990. The Appellant filed an Opposition to the District's motion on February 8, 1990 and requested a hearing on the motion. The Board denied the District's motion by Order dated February 7, 1991 (Booker, A.J.), and the District filed its Answer on February 8, 1991.

A hearing was held on August 20, 1991 before Administrative Judges Bush, Davis (retired) and Marlin (retired). The witnesses at the hearing were as follows:

[1/] See Memorandum of Conference, issued February 11, 1991, Booker, AJ.

For the Appellant: Mr. Thomas C. Coyte
Vice President, Federline

For the District: Mr. James E. Higgins
Project Manager, DPW

Mr. Calvin Thomas
Chief, Water and Sewer Design Unit
WASUA, DPW

The Appellant filed its Post-Hearing Brief and Reply Brief on September 13, 1991 and October 21, 1991, respectively. The District filed its Response to Appellant's Post-Hearing Brief on October 11, 1991.[2/]

Findings of Fact

1. Federline was the prime contractor under Contract No. 0519-AA-02-1-4-KA for Roadway Rehabilitation of New York Avenue, N.W. from 13th Street to 15th Street, Federal Aid Project No. FZ-2108(1). (Stipulations of Fact No. 1; A.F. 1.1).[3/]

2. The contract included the "Standard Specifications for Highways and Structures, 1974" and "Standard Contract Provisions for the District of Columbia Government Construction Projects" dated 1973, and amendments thereto, and Addendum No. 3, relating to traffic flow restrictions. (Stipulations of Fact No. 2; A.F. 1.4, 1.5, 1.6C).

3. The scope of work included traffic control, removal of existing trolley tracks, curbs, pavement, subbase, and subgrade, construction of drainage structures, replacement of subgrade, subbase, curbs, and repaving. (Stipulations of Fact No. 3).

4. The following standard clauses were included in the contract:

ARTICLE 4. DIFFERING SITE CONDITIONS

The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of:

[2/]Pursuant to a Board Order issued during the hearing, the District filed the contract plans and specifications on September 25, 1991. These documents were deemed to be a part of the original Appeal File and were numbered A.F. 1.6, 1.6A through 1.6J, and 1.7.

[3/]References to the Appeal File will be designated as "A.F.____"; references to the Supplement to the Appeal File submitted on August 19, 1991 will be designated as "A.F. Supp.____"; references to the Transcript of the Hearing held on August 20, 1991 will be designated as "Witness, T.[page]".

1. Subsurface or latent physical conditions at the site differing materially from those indicated in the Contract, and

2. Unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered or indicated in the Contract and generally recognized as inhering in work of the character provided for in the Contract.

The Contracting Officer will promptly investigate the conditions, and if he finds that such conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of any part of the work under the Contract, whether or not changed as a result of such conditions, an equitable adjustment shall be made and the Contract modified in writing accordingly.

No claim of the Contractor under this Article will be allowed unless the Contractor has given the notice required.

No claim by the Contractor for an equitable adjustment hereunder will be allowed if asserted after final payment under the Contract. (A.F. 1.4).

ARTICLE 16. CONDITIONS AFFECTING THE WORK

A. GENERAL - The Contractor shall be responsible for having taken steps reasonably necessary to ascertain the nature and location of the work, and the general and local conditions which can affect the work and the cost thereof. Any failure by the Contractor to do so will not relieve him from responsibility for successfully performing the work as specified without additional expense to the District. The District assumes no responsibility for any understanding or representation concerning conditions made by any of its officers or agents prior to the execution of the Contract, unless such understanding or representation by the District is expressly stated in the Contract.

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E. UTILITIES AND VAULTS - The Contractor shall take necessary measures to prevent interruption of service or damage to existing utilities within or adjacent to the project. It shall be the Contractor's responsibility to determine exact locations of all utilities in the field.

In case of damage to utilities by the Contractor, either above or below ground, the Contractor shall restore such utilities to a condition equivalent to that which existed prior to the damage by repairing, rebuilding or otherwise restoring as may be directed, at the Contractor's sole expense. Damaged utilities shall be repaired by the Contractor or, when directed by the Contracting Officer, the utility owner will make needed repairs at the Contractor's expense.

No compensation, other than authorized time extensions, will be allowed the Contractor for protective measures, work interruptions, changes in construction sequence, changes in methods of handling excavation and drainage or changes in types of equipment used, made necessary by existing utilities, imprecise utility or vault information or by others performing work within or adjacent to the project. (A.F. 1.5).

5. The following notes were included in the plans for the project:

GENERAL NOTES

1. The location of utilities shown on the plans are based on field survey data and or record drawings of the original installations. The information shown is not necessarily complete and the location of utilities shown is approximate. It shall be the responsibility of the contractor to varify [sic] the existence and location of all utilities well in advance of conducting construction operations which could damage these facilities. In the areas where proposed construction may conflict with existing utilities, the contractor shall take all necessary precautions to avoid damage to existing utilities. Where the contractor's operations damage any existing installations, it shall be his responsibility to repair any such damage immediately and at his own expense. These repairs shall be made at the direction and to the satisfaction of the engineer. (A.F. 1.7, Sheet 4 of 57).

6. Work was to be completed within 365 days after the date of Federline's receipt of the Notice to Proceed. The Notice to Proceed was issued on February 12, 1987, with construction operations to begin on April 1, 1987. (Stipulations of Fact No. 4).

7. The project area is located in downtown Washington, DC and is heavily congested with traffic. (Coyte, T.17; A.F. Supp. 4.0).

8. The District required that traffic be allowed through the project area at all times. Addendum No. 3 to the solicitation required that two-way traffic be maintained on

New York Avenue during construction. Addendum No. 3 also allowed the contractor to work in no more than 450 foot sections at a time on New York Avenue, and allowed work in only one intersection at a time. (A.F. Supp. 5.0; A.F. 1.6C; Coyte, T. 17).

9. During the design phase, the District made a survey to locate all existing utilities, and had the utility companies also move all known utilities out of the way so they would not interfere with the work. All utility companies attended the preconstruction meeting, which was conducted by the District. At the preconstruction meeting, there were statements made and confirmation by the District that all utilities would be moved out of the project area prior to the commencement of the repaving project. (Coyte, T. 20; Higgins, T. 55, 84; Thomas, T. 100).

10. C&P Telephone Company had not completed all of its necessary work prior to the commencement of the contract and at the time of the preconstruction meeting. It is standard practice in the industry that utility work be completed prior to the commencement of street repaving. (Higgins, T. 70, 72, 77).

11. The solicitation documents contained a set of approximately 60 drawings showing the locations and elevations of existing utilities in detail. (A.F. 1.7). Federline relied upon these drawings for utility locations. (Coyte, T. 18, 44, 49, 62; A.F. 1.2; A.F. Supp. 6.1, 6.2).

12. It was unusual for the District to issue such detailed utility drawings for roadway rehabilitation work. Such work is normally done utilizing a simple set of relatively few drawings indicating the general location of utilities. (Coyte, T. 18).

13. Prior to bidding, Federline reviewed all of the solicitation documents. (Coyte, T. 16, 23, 28, 38, 49).

14. Prior to bidding, Federline conducted a site investigation. During the site visit, Federline officials "looked at the condition of the surface work and basic nature of access to the work as well as the line traffic and the traffic problems." The existing underground telephone ductbanks could not be seen. (Coyte, T. 16, 17, 38, 60, 61).

15. There were no documents existing outside of the solicitation documents which showed the actual elevation of the existing telephone ductbank. (Higgins, T. 102, 110, 115; Appellee's Exhibit 1 (McRobie Affidavit, ¶ 5)).

16. Federline reviewed Drawing No. 37 prior to bidding. On Drawing No. 37, the existing telephone ductbank is shown to be five feet (5') below the existing pavement of New York Avenue. (A.F. 1.2; A.F. 1.7; Coyte, T. 26).

17. Federline reviewed Drawing No. 38 prior to bidding. On Drawing No. 38, the existing telephone ductbank is shown to be three and one-half feet (3 1/2') below the existing pavement of New York Avenue. (A.F. 1.2; 1.7; Coyte, T. 27, 28).

18. The drawings and specifications indicated that the contractor would have to excavate one and one-half feet (1 1/2') to a little over two feet (2') deep. (A.F. 1.6, 1.7; Coyte, T. 23, 27).

19. Taken as a whole, the contract documents indicated that the existing telephone ductbank would not interfere with the contractor's work because it was shown below the lowe level of excavation. (Coyte, T. 28).

20. Based on its interpretation of the contract documents as a whole, Federline did not include a contingency in its bid for any delay or impact effect due to relocation of the telephone ductbank. (Coyte, T. 28, 29).

21. Because of the rigorous traffic control restrictions, Federline planned construction in seven phases. Each phase was critical because each phase had to be completed before the next could start. The District was aware of the critical phasing schedule. (Coyte, T. 21, 22, 23).

22. The first phase was located on New York Avenue between 14th and 15th Streets ("Phase I"). Federline started surface excavation there. (Coyte, T. 22, 29).

23. During excavation for Phase I, Federline uncovered a large existing concrete telephone ductbank. (Coyte, T. 29, 30; A.F. Supp. 11.1).

24. The depth of the existing telephone ductbank was measured and found to be only fourteen inches (14") below the surface of New York Avenue. (Coyte, T. 27, 30; A.F. 11.1).

25. The existing telephone ductbank was located in the area required to be excavated by Federline, at the same elevation as the proposed new roadway pavement. The ductbank was in a location that interfered with Federline's work. (Stipulations of Fact No. 6; Coyte, T. 35, 36, 37).

26. The ductbank was discovered on April 21, 1987. The Project Engineer for the District noted the occurrence in his log of that date. (Stipulations of Fact No. 5; Coyte, T. 31, 32).

27. The District instructed Federline to stop work in the area until the utility company could move the ductbank. (Stipulations of Fact No. 7).

28. On April 22, 1987, one day after the ductbank was discovered, the District's Project Engineer met C&P representatives on the project and told them the ductbank had to be lowered. (A.F. 1.3; Higgins, T. 89, 90).

29. By letter dated May 6, 1987, Federline notified the District in writing of the condition and reserved all rights to delay and impact costs -- both direct and indirect. (Stipulations of Fact No. 8; A.F. 3.6).

30. The telephone ductbank and cables were relocated (lowered) by the utility company. (Stipulations of Fact No. 9; A.F. Supp. 11.2; Coyte, T. 32, 33).

31. The ductbank was lowered approximately two to three feet (2'-3') to the elevation where it was originally shown in the contract drawings. (Coyte, T. 34; A.F. Supp. 11.3).

32. The utility company completed lowering the ductbank on July 10, 1987. (A.F. 3.3).

33. Between April 21, 1987 and July 10, 1987, Federline could not perform critical Phase I surface work because the ductbank was in the way. (Coyte, T. 35, 37, 59, 60).

34. Between April 21, 1987 and July 10, 1987, Federline could not perform critical Phase I tunneling because the ductbank restricted access to shafts. (Coyte, T. 35, 59, 60).

35. Completion of Phase I was delayed approximately three months by the ductbank work. Federline and the District negotiated a time extension. In the contracting officer's February 1, 1988 decision, the District agreed that critical work was delayed 81 calendar days by the relocation of the ductbank. (Coyte, T. 35, 36, 37; A.F. 3.2).

36. Between April 21, 1987 and July 10, 1987, Federline worked wherever the District would allow, but no Phase I work could be performed. (Coyte, T. 44, 45, 53). Relocation of the telephone ductbank and cables by the utility company suspended some activities by 81 calendar days during this time period. (Stipulations of Fact No. 10).

37. Federline interpreted the General Notes on Drawing No. 4 and Article 16 of the General Conditions as requiring the contractor to verify exact utility locations during contract performance to avoid excavation damage. (Coyte, T. 39, 40, 43; A.F. 1.2).

38. Federline started work on Phase I with a full complement of personnel. The personnel could not be let go because no one knew how long the delay would be, and time was critical. (Coyte, T. 58, 59, 60).

DECISION

In its Complaint, filed with the Board on December 19, 1989, Appellant alleged that the contract drawings incorrectly identified the location of a telephone ductbank. The drawings indicated that the ductbank was several feet below the road surface which was to be removed and resurfaced, thus outside of the area of excavation. However, Federline uncovered the ductbank within the area of excavation, at a position it contends to be materially different from the contract drawings. The ductbank had to be moved to enable the project to be completed. As a direct result of this error in the contract drawings, Federline alleges that its performance of the contract was hindered, resulting in an 81-day delay. Federline requests an equitable adjustment for the costs of this delay.

Appellant bases its request for an equitable adjustment on the "Differing Site Conditions" clause contained in the contract at Article 4. (F.F. 4).[4/] The Differing Site Conditions clause (formerly entitled the "Changed Conditions" clause) applies to "static physical conditions" existing at the time the contract was entered into, but not to events occurring during contract performance. The clause allows the bidder to rely on the Government's submissions and therefore not include a contingency element in its bid. The purpose of the changed conditions clause is thus to take at least some of the gamble on subsurface conditions out of the bidding process. As a result, both sides are more likely to have no windfalls and no disasters. Foster Construction C.A. & Williams Brothers Co. v. United States, 435 F.2d 873 (Ct. Cl. 1973); See generally Gregory H. McClure, Differing Site Conditions: Evaluating the Material Difference, 15 Public Contract Law Journal 138 (1984); and John Cibinic, Jr. and Ralph C. Nash, Jr., Administration of Government Contracts, p. 368-408 (2d. ed. 1986).

In its Answer, filed with the Board on February 8, 1991, the District denied that the contract drawings reflected the exact location/depth of the telephone ductbank. In addition, the District averred that the drawings contained a disclaimer warning the contractor of its responsibility to verify the location of all utilities. (F.F. 4 and 5).

The District further asserts that the Appellant should not be granted an equitable adjustment for the costs of the 81-day contract delay based on the meaning and intent of Article 16 of the Contract. (F.F. 4). In his February 1, 1988 final decision, DPW's Contracting Officer granted the 81-day time extension for the completion of "critical work" in accordance with Article 16. (F.F. 35).

The Board finds that the effect of the contracting officer's final decision was to ignore both the intent and meaning of Article 4 of the contract.

[4/]References to the Findings of Fact will be designated as "F.F.___".

In following established contract principles, the Board will not interpret one provision or portion of a contract document at the expense of another provision or portion. See The Sherman R. Smoot Corporation, CAB No. D-860, 40 DCR 4460 (July 9, 1992) citing Hol-Gar Manufacturing Corporation v. United States, 351 F. 2d 972 (Ct. Cl. 1965). Thus, the Board must review and interpret the contract as a whole without, in effect, rendering any of its sections inoperative. Taking both Article 4 and Article 16 into account, in light of the facts, it is necessary to determine whether the Appellant should be granted an equitable adjustment under Article 4, "Differing Site Conditions."

There are two types of differing site conditions: Category 1 and Category 2. As the language of the clause indicates, Category 1 conditions are "subsurface or latent physical conditions at the site differing materially from those indicated in the contract." Category 2 conditions are "unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered or indicated in the contract and generally recognized as inhering in work of the character provided for in the contract." (F.F. 4). The contract language is identical to that contained in Federal Acquisition Regulations (FAR) 52.236-2 (April 1984).[5/] In the case at hand, we are dealing with a Category 1 differing site condition.[6/]

To prevail on a Category I claim, the Appellant must demonstrate that the conditions described or indicated in the contract documents were materially different from those encountered during performance. The term "contract documents" is broad -- including the IFB drawings and specifications as well as documents and materials mentioned in the bidding documents. All that is required is that there be enough of an indication on the face of the contract documents for a bidder reasonably not to expect subsurface or latent physical conditions at the site that differ materially from those indicated in the contract. The burden of proof upon the Appellant is whether the preponderance of the evidence supports its position. Generally, to escape liability, the District must show, by the preponderance of the evidence, that the Appellant acted unreasonably or not efficiently. See generally Dawco Construction, Inc. v. United States, 18 Cl. Ct. 682 (1989); Ft. Myer Construction Corporation, CAB No. D-859, 40 DCR 4655 (November 3, 1992).

[5/] The District's Procurement Practices Act of 1985 and its attendant regulations, in many instances as here, are patterned after related Federal government law(s) and the FAR. Thus, interpretations of and decisions regarding FAR 52.236-2 are applicable to the case before the Board.

[6/] Thus, the cases cited by the District, namely Cee Tee Company, DOTCAB No. 1183, 82-1 BCA ¶ 15,467 and H. Walter Schweigert, ASBCA No. 4059, 57-2 BCA ¶ 1433, are not on point because they relate to Category 2 differing site conditions.

The United States Court of Federal Claims (formerly the United States Claims Court) in Dawco devised a three-pronged test which is applicable here:

> (1) Conditions encountered by plaintiff differed materially from those in contract documents;
>
> (2) Differing conditions could not reasonably be anticipated from a site examination and review of the contract drawings; and
>
> (3) Plaintiff, in fact, relied on its interpretation of the contract drawings.

Dawco, 18 Cl. Ct. at 688.

The first prong, which relates to material differences, is the most elusive to sustain. Federal Boards of Contract Appeals have

> found entitlement ... even though the contract contained a disclaimer stating that the drawings indicated only approximate locations which were to be field verified by the contractor. (citation omitted). ... [T]he Government must assume the risk of inaccuracies in the drawings where the Government furnished the drawing.... Whether an inaccuracy is minor or not depends on the effect the discrepancy has on the contractor. The test of materiality is different in each case. We find there to be a material difference where just a few feet of drawing discrepancy ... had a severe impact on appellant's operation.

Central Mechanical, DOTCAB No. 1234, 83-2 BCA ¶ 16,642 at 82,757 to 82,758. See also, Jack Crawford Construction Corp., GSBCA Nos. 4089, et al., 75-2 BCA ¶ 11,387.

With respect to the contractual requirement that a pre-bid site inspection be performed, the contractor is held to the standard of reasonableness. A reasonable site inspection is properly evaluated against what a rational, experienced, prudent and intelligent contractor in the same field of work could discover. Thus, "it is not necessary ... to poke a hole in the ceiling to discover latent defects." Liles Construction Company v. United States, 455 F.2d 527, 538 (Ct. Cl. 1972). In explaining its 3-pronged test, the court in Dawco stated that the contractor was not at all obligated to perform or conduct its own survey(s) of the project site, but a relatively simple site viewing was sufficient to satisfy the requirements of the second prong. See also, Gulf Construction Group, Inc., ENGBCA No. 5850, 93-1 BCA ¶ 25,229. The facts show that Federline conducted a reasonable site inspection: the ductbank was not visible and its location could not have been determined prior to the commencement of the repaving project. (F.F. 14).

In Foster Construction C.A. & Williams Brothers Co. v. United States, 435 F.2d 873 (Ct. Cl. 1973), the court opined that although proof of the case requires that the conditions encountered differed materially from those indicated in the contract, it was not necessary that the government withheld or concealed information. Further, the court stated that fault by the government was not a necessary element. The test was entirely dependent on what is indicated in the contract documents and nothing beyond contract indications need be proven. Even unmistakable language in which the government seeks to disclaim responsibility for information or data that the government provided does not lessen the right of reliance by the contractor. Id. at 878 to 887.

The United States Court of Appeals for the Federal Circuit (formerly U.S. Court of Claims) in the Morrison-Knudsen case further detailed the limited applicability of what is often referred to as "exculpatory language." In that case, the Court concluded that:

> [T]he contract drawings constituted material representations for the guidance of the bidders as to location of the borrow pits and the quantity of borrow material that was to be obtained from each. ... [T]his court has frequently held in comparable circumstances that broad provisions of this kind -- stating that the government does not guarantee the statements of fact contained in the specifications or drawings ... -- cannot be given their full literal reach and do not relieve the government from liability. (citations omitted). The short of the matter is that the information contained in the drawings constituted positive representations upon which plaintiff was justified in relying.

Morrison-Knudsen Company, Inc. v. United States, 397 F.2d 826, 841 to 842 (Ct. Cl. 1968).

Previously, the U.S. Court of Appeals for the Federal Circuit had succinctly stated that:

> [B]road exculpatory clauses ... cannot be given their full literal reach and 'do not relieve the defendant of liability for changed conditions as the broad language thereof would seem to indicate.' (citations omitted). ... [G]eneral portions of the specifications should not lightly be read to override the Changed Conditions clause.

United Contractors v. United States, 368 F.2d 585, 598 (Ct. Cl. 1966).

As noted above, Federal Boards of Contract Appeals and the U.S. Court of Appeals for the Federal Circuit and the Court of Federal Claims have consistently upheld the premise that broad warnings and general exculpatory language do not shift the liability resulting from positive representations made by the government and reasonably relied upon by the contractor.

In the case at hand, the District has argued that the language entitled "General Notes" on sheet 4 of 57 of the Contract Drawings (F.F. 5) relieves the District of any liability for conditions at the project site (relating to utilities) that differ from indications in the contract. Based on the case law, the District's argument must fail. The contract drawings indicated the location of the telephone duct bank to be, 5 feet and 3 and one-half feet (5' and 3 1/2') below the plane of the project site. (F.F. 16, 17). Upon excavation, the telephone ductbank was found to be squarely within the project site: 14 inches (14") below the surface. (F.F. 24). The Board finds that this nearly 3-foot (3') difference was material.

Evidence as to a material difference is most commonly illustrated by a showing that a larger amount of work was exerted than initially contemplated or that an alternative method of workmanship was needed in order to complete the contractual agreement. Dawco, 18 Cl. Ct. at 688. In this case, the nearly 3-foot (3') difference caused an 81-day delay of critical work. (F.F. 26-36). The Dawco court further opined that Plaintiff must also prove that it reasonably relied upon its interpretation of the contract and contract-related documents, and that it was damaged as a result of the material variation between the expected versus the encountered conditions. The Board finds that Federline's reliance upon the extensive contract drawings was reasonable. (F.F. 11, 13, 14, 15).

With respect to the requirements of the third prong of the test, it has been held that contractors are not required to inspect documents that are not part of the contract. Id. at 692 to 693; See also, American Structures, Inc., ENGBCA No. 3408, 75-1 BCA ¶ 11283.[7/] Thus, the Board will not consider the District's statements to the contrary that the Appellant should have reviewed old existing plans for the project site to determine that the exact depths of the utilities were unknown. See Appellee's Response to Appellant's Post-Hearing Brief, filed October 11, 1991.

The final factor to be considered is whether Appellant provided adequate notice to the District of its claim. Appellant was required to give the District prompt notice and was not to disturb the site until the District had an opportunity to investigate. See Dawco Construction, Inc. v. United States; Little Susitna Co., PSBCA No. 2216, 90-3 BCA ¶ 22,988. The District has not raised the issue of notice. In fact, the District was orally notified of the

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[7/]The Court in Dawco stated that included in its 3-pronged test were all of the elements of the 6-pronged test previously established in Weeks Dredging & Contracting, Inc. v. United States, 13 Cl. Ct. 93 (1987).

The six prongs of the Weeks test are: (1) Contract documents affirmatively indicated or represented the subsurface conditions; (2) Contractor acted as a reasonable prudent contractor in interpreting the contract documents; (3) Contractor reasonably relied on the contract documents' indications; (4) Actual subsurface conditions materially differed from the indicated conditions; (5) Encountered conditions reasonably unforeseeable; (6) Contractor claimed excess costs must be shown to be solely attributable to the materially different subsurface conditions within the site.

condition and inspected the site on the day that the duct bank was discovered by Appellant. (F.F. 26). Appellant provided written notice to the District two weeks later. (F.F. 29).

Therefore, based upon the facts, legal precedent and reasoning set forth above, the Appellant's claim for entitlement to an equitable adjustment is hereby SUSTAINED. This case is remanded to the Director of the Department of Administrative Services for a determination as to quantum.

So **ORDERED**.

DATE: December 15, 1993

Cynthia G. Hawkins-León

CYNTHIA G. HAWKINS-LEÓN
Administrative Judge

CONCUR:

Zoe Bush

ZOE BUSH
Chief Administrative Judge

Terry Hart Lee

TERRY HART LEE
Administrative Judge