TRANS-TEL CENTRAL, INC.

CONTRACT NO. V598C-1195 VABCA-6249

VA MEDICAL CENTER
LITTLE ROCK, ARKANSAS

Debby Walden, Esq., Midwest City, Oklahoma, for the Appellant.

Millicent Gompertz, Esq., Trial Attorney; ***Charlma J. Quarles, Esq.,*** Deputy Assistant General Counsel; and ***Phillipa L. Anderson, Esq.,*** Assistant General Counsel, Washington, D.C., for the Department of Veterans Affairs.

OPINION BY ADMINISTRATIVE JUDGE THOMAS

The Department of Veterans Affairs Medical Center (VAMC) Little Rock Arkansas (VA or Government), entered into Contract No. V598C-1195 (Contract) a tripartite agreement with the Small Business Administration and Trans-Tel Central, Inc., (Appellant or Trans-Tel) for the VISN 16 Cable project to install Category 5 and fiber cable. The work was to be done at VAMCs Jackson and Biloxi, Mississippi and Fayetteville, Arkansas. On January 28, 1999, an employee of Appellant working at Biloxi cut the main power line of the hospital while using a jackhammer, causing a power outage at the VAMC. The VA deducted

the costs of the outage from Appellant's invoices. A final decision was subsequently issued and Appellant timely appealed to this Board. A hearing was held in Biloxi on April 17, 2001. The Record before the Board consists of the Complaint; Answer; Appeal Files (R4, tabs A-P; R42, tabs A-Y); pages 14, 15, 25, 26 & 27 of the deposition of John B. Shepherd (Shepherd Depo.); Trial Exhibits (Exh. 1-6, which includes a video tape of the hearing conducted at the site as Exh. 5); and a one volume hearing transcript together with post hearing briefs filed by both parties.

FINDINGS OF FACT

The Biloxi portion of the Contract began as an installation of category 5 wiring in most of the buildings. On September 30, 1998, bilateral Modification 6 (Mod 6) was entered into to upgrade, repair and/or replace selected portions of the telephone distribution cable plant infrastructure in preparation for the installation of a new telephone system. Mod 6 increased the Contract price of $3,333,092.28 by $1,259,175.20. Among other things, the work included rebuilding the underground conduit and manhole system with 14 new manholes and approximately 26,000 ft. of new 4" PVC duct. (Tr. 21)

The Contract incorporated by reference the PERMITS AND RESPONSIBILITIES CLAUSE, FAR 52.236-7 (Nov. 1991):

> The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any Federal, State, and municipal laws, codes, and regulations applicable to the performance of the work. The Contractor shall also be responsible for all damages to persons or property that occur as a result of the Contractor's fault or negligence. The Contractor shall

> also be responsible for all materials delivered and work performed until completion and acceptance of the entire work, except for any completed unit of work which may have been accepted under the contract.

Mod 6 contained the following clause:

> 4.0 EXISTING UTILITIES
>
> 4.1 VAMC owned facilities
>
> 4.1.1 Plot Plans and other information pertaining to the existence and location of existing VAMC utilities will be furnished to Trans-Tel Central by VAMC Biloxi Chief, Engineering Service.
>
> 4.1.2 It shall be the responsibility of Trans-Tel Central to locate and protect all known existing VAMC utilities.
>
> 4.1.3 The cost of repairing damage to VAMC utilities caused by the negligence or carelessness of Trans-Tel Central shall be borne by Trans-Tel Central. The cost of repairing damage to VAMC utilities whose existence and location have not been made known to Trans-Tel Central will be borne by the VAMC.

Trans-Tel's subcontractor, Deviney Construction Company (Deviney), did all of the actual excavation work. In fact, Deviney did the digging and installing of the manholes. According to Mr. William Ladnier, Appellant's project manager, "I didn't have to show up, my people didn't have to show up. Deviney did all the excavation for us. Trans-Tel would then core the holes and Deviney would put all the ducts in." (Tr. 73)

The VAMC Biloxi engineering department furnished the Contractor with a complete set of drawings. There were separate drawings for electric lines, fire

alarms, miscellaneous utility and telecommunications (signal) lines. (Tr. 23) However, Mr. Ladnier testified that he had never seen many of the drawings, (Tr. 33-34). Mr. Ladnier relied primarily on Drawing E-1, Underground and Aerial Electrical Utilities Station Plat Plan and it was the drawing being used when the incident occurred. (Tr. 26)

Prior to the incident leading to this appeal, Appellant encountered various underground items that were not shown on the drawings, such as an old sidewalk, old drain lines, abandoned telephone cables and steam lines, old side wall and a piece of a bulldozer. (Tr. 24-25) When a power line to the heliport was cut, the VA engineers were called and agreed to repair the line at VA's expense because the line was not shown on the drawings. (Tr. 25) The Appellant and the VA were able to negotiate solutions to all these problems. Mr. Ladnier had an office at the site provided by the VA, a pager, and met almost daily with the VA engineering staff. (Tr. 22)

Sometime in mid-January 1999, a Deviney employee, Mr. John Shephard, used a backhoe/shovel to excavate around signal Manhole MH1A located in close proximity to Building 61, the VAMC's main electrical distribution building. (Tr. 48; Shepherd Depo. 14) A large chunk of concrete was exposed and Mark Gillum, Appellant's construction foreman, went to Mr. Ladnier and told him he could not find room around the manhole to core the required two four-inch holes. (Tr. 48) Mr. Ladnier went with Mr. Gillum to observe the problem, and he saw a large block of concrete on the east side of the manhole. Mr. Ladnier testified the concrete did not have any form that would indicate any sort of duct. It looked to them to be scrap concrete that had been dumped beside the manhole back when manholes were actually poured at the site. (Tr. 30) They studied the problem for several days and then contacted the VA engineering department for help. (Tr. 69) Mr. Ladnier testified that two VA engineers accompanied him to

the hole. According to Mr. Ladnier, they did not know what it was and did not give him any assistance. (Tr. 50)

On January 28, 1999, Mr. Ladnier told Mr. Gillum and Darryl Woods (Darryl was also known as Milton), who he testified had been trying for "a week or so" to figure out how to core the holes in Manhole MH1A, "Mark, I want you and Darryl to go back over to the manhole this morning and see if you can't work out something with that." Soon thereafter the lights went out. (Tr. 27) When asked on direct examination what had occurred, Mr. Ladnier stated:

> A It seemed like Milton and Mark had decided to use an air hammer to chip away at some concrete that was adjacent to this manhole.
> Q Okay. Why would they have chipped away at concrete adjacent to the manhole?
> A You would have to ask Milton and Mark about that.

(Tr. 29)

Mr. Shepherd seems to contradict Appellant's position that the concrete was exposed for some time. In deposition, Mr. Shepherd stated that Mark (presumably Mark Gillum) asked him to dig around the concrete so that they could drill into it. While doing that Mr. Shepherd encountered the top of the concrete. Although he was asked to dig further, Mr. Shepherd was concerned that "there could possibly be something in it." and "that's when I told Curtis that I didn't want to mess with that part of it." (Shepherd Depo. 15, 26) Mr. Shepherd knew that duct banks are "usually pretty squared up or a rectangle" and it was his opinion that it might be an electrical ductbank. (Shepherd Depo. 27) Mr. Ron Junkin, the Chief Engineer and Safety Officer for the VA, testified that the VA told Trans-Tel at the pre-construction conference that the electrical utilities were in concrete. (Tr. 132)

According to Mr. Ladnier, Mr. Gillum and Mr. Woods were acting on their own when they decided to use the jackhammer. In response to a question as to what the jackhammering had to do with putting cores in the manholes, Mr. Ladnier replied," Actually, it shouldn't have had anything to do with it. They should not have jackhammered. I didn't instruct them to get the jackhammer." (Tr.74) He went on to say that it is normally a general procedure to knock a hole in the manhole rather than boring in because its easier and faster. (Tr. 74) Such a procedure was not to be used on this job because "I did not instruct them. We were instructed to bore the holes with a drill which is what we were doing." (Tr. 75)

Unfortunately, Mr. Woods hit the main power distribution line and shorted out the incoming power for the VAMC. Fortunately, he was not killed and the Board is not aware what injuries, if any, he did incur. Inexplicably, Appellant's brief states that an employee of one of Trans-Tel's subcontractors cut into the line and ultimately sued the VA and the contractor he worked for. The Record clearly indicates that Mr. Woods was the individual who used the jackhammer, hit the power line and was an employee of Trans-Tel.

There is a difference of opinion as to the specific location of the jackhammering. Mr. Ladnier thought it was in the Northeast corner of the manhole area. (Tr. 82) Mr. Junkin testified that the jackhammering took place between the telephone cable and the ductbank coming into the manhole at a 90-degree angle. Photographs taken the day of the incident support Mr. Junkin's testimony. (Tr. 88; R4, tab W)

Ken Hodge, Vice President of Operations and a senior engineer for Trans-Tel, performed an accident investigation. Using digital electronic scale master, triangulation, and drawing E-1, (which has a scale of 1 inch=100 feet), and other procedures, he determined that the street was 20 feet from where the actual

electrical cable was located. (Tr. 95) He determined that the electrical line shown on E-1 was some 40+ feet from the street and on the west side of the manhole. (Tr.97) Mr. Hodge testified that, according to industry standards, Trans-Tel would not worry about electrical or other utilities unless they were going to cross them or come within 3 to 6 feet of where the utility would be located. (Tr. 97) Mr. Hodge concluded, "We would not have ever estimated that a high voltage main power feed would actually wrap around the outside of the communications manhole. If anything, that power feed would have been either through that electrical manhole or as it was shown on the print, approximately 20 feet on the other side of the manhole." (Tr. 100) Mr. Hodge limits his investigation to various drawings. He did not comment on the fact that, as explained by Mr. Chagon and observed at the site, there were a number of manholes in the area and an electrical switch gear house (Bldg. 61). A visual inspection of the area would have alerted any reasonable or prudent person that electrical utilities were in the immediate area. (Tr. 180)

Mr. David Boggs, VA Chief Engineer, testified that Drawings E-1, TS-1 and FA-1 all had information about the area where the incident took place. (Tr. 130) Drawing TS-1 shows a double manhole (1 signal, 1 electrical) labeled MH1A. The signal manhole is still a signal manhole. The electrical manhole was redone in the 1970's and a new single electrical manhole, also labeled MH1A, is shown on Drawing E-1, north of its original location. Drawing E-1 does not show the double manhole that is on Drawing TS-1 because there are no electrical wires in it. Drawing TS-1 does not show the new electrical manhole to the north because it is not an electrical drawing. (Tr. 137-139) Government Exhibit 4 consists of two Mylar drawings, TS-1 on top and E-1 underneath, which shows the power line going from double Manhole No. 17 to building 61 and passing very close to where the incident occurred. (Tr. 142) While this exhibit shows the relationship

between the signal lines and electrical lines, a contractor would not necessarily be expected to create Mylar drawings and make such a comparison - nor would one be necessary. The individual drawings, when read as a whole, clearly showed the approximate locations of the power line, as did the physical locations of the manholes in that area.

Both parties agree that the power line shown on Drawing E-1 goes into Manhole No. 17. (Tr. 144) All of the manholes in the area are visible. Mr. Ladnier testified that Mr. Gillum and Mr. Woods were using only Drawing E-1 prior to their ill-advised tryst with the borrowed jackhammer. Part of the hearing was held at the site and from that visit we know that from the location where the jackhammering took place, a contractor could easily observe the locations of the various other manholes and using the appropriate drawings, would conclude that the power line would be in a relative close proximity to where the jackhammering took place. Mr. Shepherd, who actually saw the concrete on the day of the incident, stated that he was concerned that something might be in it.

Mr. Boggs does not remember visiting the site with Mr. Ladnier, but he does recall a discussion in his office about Trans-Tel having trouble getting into the manhole and coming in from the top instead of the side. (Tr. 134)

The VA disagrees with the Appellant's characterization of the concrete being an "overspill." Mr. Junkin conducted an investigation of the incident for the VAMC. (Tr. 212) According to Mr. Junkin, it was obvious that the concrete was not just a chunk of concrete. It extended the entire face of the manhole and was about 12 inches wide and 6 inches thick. (Tr. 212) Contrary to Appellant's position that they were chipping away at the corner of the concrete, he says the jackhammer was going at a steep angle and struck wire and insulation inside a 3 inch conduit covered by 2 inches of concrete. (Tr. 213; R4, tab H)

DISCUSSION

Both parties spent significant time on post-incident investigations and activities. Both parties agree that the power line goes into Manhole No. 17. The drawings provided by the VA provide accurate information regarding the existence and location of the power line. These drawings, especially with a scale of 1 inch=100,' can only give general locations within which extra care should be used. Mr. Hodge made an investigation and measured *some* of the drawings, *after the incident*, finding the power line to be depicted as some 20+ feet west from where it was encountered. Appellant provided no reasonable explanation for its reliance on only a few of the drawings, to the exclusion of others, both before and after the incident. Mr. Hodge's conclusion is clearly unreasonable in light of the information on the drawings that he did not use and, more importantly, in his ignoring the actual locations of the manholes that were visible at the site.

Trans-Tel had encountered a situation that it felt required the involvement of the VA. Mr. Ladnier seems to be saying that they were reacting out of frustration because the VA was not giving them information on how to deal with the concrete. But Mr. Ladnier also stated unequivocally that they should not have been using the jackhammer. Appellant cannot have it both ways. While it is true that the VA had been informed but had not yet given them the information they thought they needed, Appellant's actions must still be responsible and prudent.

The VA proved that had the Appellant's personnel simply compared (with or without an overlay) Drawings TS-1 and E-1, they would have realized that there was a *strong probability* that the power line was within close proximity to where it was actually encountered. The most probative evidence, however, is the site itself. Part of the hearing was held at the site of the incident. The manholes

were visible. When you look at Manhole No. 17, and the relationship of the other manholes between it and Building 61, it can readily be observed that the power line most likely followed a route between those manholes. It is equally unlikely that the power line would detour, for no apparent reason, and wander about on a route some 20+ feet to the west.

The control of Trans-Tel over contract performance involved the use of employees to perform the contract. The employees were negligent. Whether defined as improper, unauthorized, careless, negligent, etc., the conduct of such employees cannot be segregated and treated as a matter beyond the control of the contractor in this factual situation.

We find that the Appellant knew or should have known that the power line was in the immediate vicinity of where they were jackhammering and to do so without first having the exact location determined amounted to negligence or carelessness. The fact that the employees were doing so without the knowledge of their supervisors, who would have stopped them, had they known, does not shift responsibility for their actions away from Appellant.

Appellant is responsible for the damages caused by the jackhammering incident. Under the PERMITS AND RESPONSIBILITIES CLAUSE the Government has a remedy for losses sustained as a result of a contractor's fault or negligence. ***Santa Fe Engineers***, ASBCA Nos. 27933, 28682, 85-2 BCA ¶ 18,001. The VA seeks $12,573.08 for its costs. The damages in question are the direct and proximate result of Appellant's actions and were foreseeable and within the contemplation of the parties at the time the contract was entered into. ***U.S. v. Franklin Steel Products, Inc.***, 482 F. 2d 400 (9th Cir. 1973) cert. denied, 415 U.S. 918. Appellant has taken no exception to this amount and does not question the amount in its brief. We have examined the receipts. The amount claimed by the VA is reasonable.

DECISION

The Appeal in VABCA-6249 is **DENIED**. The VA is entitled to recover $12,573.08.

DATE: **October 11, 2001**

WILLIAM E THOMAS
Administrative Judge
Panel Chairman

We Concur:

RICHARD W. KREMPSKY
Administrative Judge

JAMES K. ROBINSON
Administrative Judge