BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of HENSEL PHELPS CONSTRUCTION CO. Under MTA Contracts No. NW-07-05 & NW-07-08	))))	Docket No. MDOT 1016

April 5, 1983

Res Judicata - Principles of public policy which underlie the rule of res judicata in the courts have been deemed applicable to administrative decisions so long as the deciding agency is performing a quasi-judicial function.

Res Judicata - Here, three decisions of the Maryland Workmen's Compensation Commission were not found to be binding on this Board because it was not evident that the Commission decided the identical contractual issues before this Board.

Contract Interpretation - Appellant's interpretation of contract insurance provisions was found to be reasonable.

Contract Interpretation - Evidence of trade usage is admissible to explain or define a contract term, even in the absence of an ambiguity. Here, however, the MTA was unable to establish that the term "subcontractor" had a clear trade usage which limited its application to those entities performing on-site work.

Contract Interpretation - MTA was unable to establish that Appellant contemporaneously interpreted the contract to limit Davis-Bacon Act requirements to subcontractors.

Contract Interpretation - Appellant was not bound by the MTA's interpretation since it was unaware of this interpretation both at the time of bid and when entering into a subcontract agreement.

Equitable Adjustment - Proof - When Appellant failed to submit any evidence that its bonding costs had increased or that it was liable for additional bonding costs as a result of a contract change, it was not entitled to any markup for such costs.

Equitable Adjustment - Claim Preparation Fees - Although Appellant sought a 4% markup for the costs involved in processing its subcontractor's claim, such costs are not recoverable directly. While these costs could have been recovered indirectly under this pre-July 1981 contract, there was no evidence that Appellant's overhead increased as a result of this claim.

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OPINION BY CHAIRMAN BAKER

This timely appeal has been taken from a final decision issued by the Maryland Mass Transit Administrator denying Appellant's claim for workmen's compensation coverage for those employees of its off-site subcontractor, Strescon Industries, Inc. (Strescon), engaged in contract work. Appellant contends that the two contracts in question here both provided that workmen's compensation insurance would be furnished at no cost to the contractor and its subcontractors of any tier. The Mass Transit Administration (MTA) argues that the prime contracts reasonably could be interpreted only as providing such coverage to the contractor and those subcontractors whose employees perform on-site construction work. By agreement of the parties, this appeal was submitted on the written record pursuant to Board Rule 11 (COMAR 21.10.06.11).

I. Entitlement

A. Findings of Fact

1. Introductory

On November 3, 1977, the MTA issued an amended Notice to Contractors that sealed bids would be received on two contracts numbered NW-07-05 and NW-07-08. These contracts were for the construction of separate segments of the Baltimore Region Rapid Transit Project. Contract No. NW-07-05 was denominated "Cold Spring Lane Station and Line" and involved the construction of approximately 9140 route feet of double track aerial structures, with associated sound barrier walls, a center platform transit station, an aerial pedestrian walkway, a traction power substation, and all finish work associated with the station and substation. Contract No. NW-07-08 included the construction of approximately 2551 route feet of double track mainline aerial superstructure, 995 feet of single track mainline, and 1621 feet of double and three track ballasted construction at grade. This contract work was to comprise the trackway between the Rogers Avenue and Reisterstown Plaza Stations.

Bidders were required to submit bids for both projects and the responsive and responsible bidder who submitted the lowest combined bid was to be awarded the two contracts. On December 22, 1977, Appellant was identified as having submitted the lowest combined bid and, thereafter, was awarded the two contracts on March 29, 1978.

2. Pertinent Contract Provisions

Special General Provision §7.02 of both contracts is entitled "Liability Insurance" and provides, in pertinent part, that:

> A. The Administration will procure and pay premiums for the following insurance for the Contractor, subcontractors of any tier, and other entities covered during the term of this Contract:
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> 1. Workmen's Compensation and Employer's Liability covering statutory coverage in the State of Maryland, all State Endorsement, United States Longshoremen and Harborworker's Compensation Act, and Employer's Liability with limits of $5,000,000. (Underscoring added).

The term subcontractor, for purposes of this contract and the foregoing language, is defined in Contract General Provision GP-1.05 as follows:

> Any individual partnership [sic],[1] firm or corporation undertaking the construction of a part of the work under the terms of the Contract, by virtue of an agreement with the Contractor, who, prior to such undertaking, receives the consent of the surety and the approval of the Administration.

For "furnish and install" contracts where a contractor is required to manufacture equipment off-site and install it on MTA projects, the MTA employs a different standard clause. (Exh. B). This clause provides that:

> For work at the construction site, the Administration will procure and pay premiums for the following insurance for the Contractor, subcontractors of any tier, and other entities covered during the term of this contract:
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> 1. Workmen's Compensation and Employer's Liability covering statutory coverage in the State of Maryland. . . (Underscoring added).

(Appeal file, Tab AA, Attch. E). Regardless of the different language utilized in design and furnish contracts, however, the MTA contends that both forms of its insurance clause convey to bidders the understanding that workmen's compensation insurance is to be furnished only for employees involved in on-site construction work.

Although a pre-bid meeting was conducted on December 1, 1977 wherein the MTA insurance program was explained to prospective bidders, the record is silent concerning any mention of the applicability of MTA furnished

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[1]It is believed that a comma was intended between the words individual and partnership. The Board is unaware of any significance to be given to the term individual partnership.

workmen's compensation insurance to off-site subcontractors. After award of the contract, however, the MTA contends that it did explain the limitations of its workmen's compensation insurance coverage to Appellant and Strescon during a preconstruction meeting conducted on April 6, 1978. Testimony in this regard was furnished through the affidavit of Thomas S. Goodell, an MTA insurance representative, who states that he addressed those in attendance at the preconstruction meeting concerning the limitations of the MTA's workmen's compensation coverage. (Exh. 7). Both Appellant's representative, Mr. Barry DePauw, and Strescon's representative, Mr. J. Owen Bishop, attendees at the preconstruction meeting, deny having heard Mr. Goodell's explanation of the workmen's compensation insurance limitations. MTA minutes of this meeting do not mention the specifics of Mr. Goodell's talk.

3. Execution of Subcontracts

Under the terms of the two prime contracts, Appellant had an option to construct either steel or concrete aerial girders. (Contract Special Provisions, §1.03). The method of construction, however, had to be elected at the time of bid and was required to be the same for both contracts. Appellant bid on the basis of constructing prestressed concrete aerial girders. Pursuant to Special Provision Section 03341 of both contracts, this work entailed:

> . . . furnishing the concrete, prestressing and reinforcing steel, anchors, connections, embedded items, compression seals and preformed bearing pads; casting and curing the member, whether precast or cast-in-place; pretensioning or post-tensioning, as selected; transporting, storing, and erecting precast members complete in place; and placing the compression seals and preformed bearing pads.

Although it appears that Appellant bid the concrete aerial girder work on its own, it ultimately decided to subcontract for the performance of this work on both prime contracts.

In January 1978, Appellant obtained a proposal from Strescon offering to perform the concrete aerial girder work on both contracts for $7 million. During negotiations conducted later that month, Strescon reduced its price to $6.6 million. This reduction, in part, was due to the parties' understanding that the MTA would pay the workmen's compensation insurance premiums for those employed by Strescon in the performance of the subcontract work. Appellant accepted this proposal, but did not prepare a written subcontract until after it formally executed its prime contracts on March 29, 1978. This written sub-contract agreement, dated April 3, 1978, later had to be redrafted in the form of two contracts before Appellant's bonding company would issue performance and payment bonds on the two separate prime contracts.[2] (Appeal file, Tabs F, G, Exh.'s 1, 2). In redrafting the subcontract, Appellant

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[2]One subcontract, in the amount of $4,650,000, was for the furnishing and erection of the prestressed concrete girders required under MTA Contract No. NW-07-05. The other subcontract, in the amount of $1,950,000, was for the identical work required under MTA Contract No. NW-07-08.

also agreed to substitute the joint venture of Strescon and R. E. Linder Steel Erection Co., Inc. (Linder) as a party to the two subcontracts in lieu of Strescon. Strescon, under the terms of its joint venture agreement with Linder, had the full and complete responsibility for fabricating the precast concrete aerial girders and delivering them to the project site. Linder had responsibility for erecting and installing the girders in place upon delivery by Strescon. (Appeal file, Tab H).

Pursuant to General Provision §8.01 and Special General Provision §8.01 under both contracts, Appellant was to obtain the written consent of the MTA Engineer before "subletting" a portion of the prime contract. By letter dated June 23, 1978, Appellant's project engineer requested approval of Strescon-Linder as its subcontractor for the furnishing and erection of pre-stressed concrete box girders. This approval was granted by the MTA Engineer by letter dated August 18, 1978. (Appeal file, Tabs A, AA, Exh. B). In so acting, the MTA Engineer understood that Strescon would fabricate the pre-stressed aerial girders at an off-site location. (Appeal file, Tab AA, Interr. 9).

4. MTA Insurance Program

In 1976, the MTA awarded a contract to a joint venture comprised of the Fred S. James Company, a national insurance broker, and three local insurance brokers to provide administrative services for safety, loss control and insurance on the Baltimore Region Rapid Transit System. This joint venture became known as the Baltimore Region Insurance Transit Services (BRITS).

Under its contract with the MTA, BRITS was asked to develop a "wrap-up" insurance program under which the MTA would procure and pay premiums for workmen's compensation, general liability and builder's risk insurance for MTA contractors and their subcontractors. BRITS performed the necessary risk analysis and marketed the program to the underwriting community. Competitive procurements were undertaken to select a carrier for each type of insurance to be furnished under the wrap-up program. With regard to workmen's compensation insurance, Argonaut Insurance Company was the only company to respond to the MTA's request for proposals. Upon BRITS' recommendation, a contract was awarded to Argonaut for this purpose.[3]

The drafters of the MTA wrap-up plan sought to reduce insurance costs by consolidating coverage for all parties to MTA rapid transit contracts. In this regard, it was anticipated that gaps and overlaps in insurance coverage could be avoided. Further, the procurement of a master policy to cover all of the MTA's contractors was considered to be more cost effective than paying for each contractor to obtain its own individual coverage.

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[3]Although it is assumed that comparable procedures were employed to select carriers for the general liability and builder's risk policies, these forms of coverage were not in dispute in this appeal and their procurement process was not discussed.

The MTA's witnesses also testified that the cost effectiveness of wrap-up insurance is directly related to the owner's ability to control the risks of loss. Control of the risk was said to be dependent upon establishing a fixed base location where the owner could impose and enforce specified safety standards. Accordingly, the MTA wrap-up program was intended to cover only those contractors and subcontractors who performed work either on-site or at a site established exclusively for the performance of contract work.

5. Evolution of Dispute

Strescon's fabrication work was performed at its local facility in Curtis Bay, Md. A section of this plant had been set aside for the fabrication of the concrete girders required under its subcontracts with Appellant. The remainder of the plant was utilized by Strescon's Architectural Division in the performance of other work. Certain Strescon personnel responsible for such things as concrete mixing, concrete furnishing, raw material handling, crane operations, and supervision were used interchangeably on the MTA projects and other work being performed in the plant.

In January 1979, several Strescon employees submitted workmen's compensation claims for injuries occurring at the plant in connection with MTA work. These claims were forwarded to the MTA wrap-up carrier, Argonaut Insurance Company. By letter dated January 20, 1979, Mr. James M. Murphy, the Director of BRITS, wrote Argonaut Insurance Co. to apprise them that Strescon was " . . . not to be construed as a named insured" under the wrap-up program. (Appeal file, Tab A). Mr. Murphy took this action because Strescon, as an entity, had never been approved as a subcontractor and its plant was not being used exclusively for MTA work. (Exh. 9). A copy of Mr. Murphy's letter was forwarded to Strescon for informational purposes.

By letter dated February 22, 1979, Strescon's Joseph B. Nieberding requested that Mr. Murphy reconsider his decision. Mr. Nieberding explained that Strescon was performing as a subcontractor under an approved joint venture agreement and that it was seeking coverage only for its employees involved in the MTA project. (Appeal file, Tab A). No response was made to this letter by either BRITS or the MTA.

In calendar years 1978 and 1979, Strescon maintained workmen's compensation insurance for its local employees through Maryland Casualty Company. (Appeal file, Tab BB, Interr. 18). Premiums on this policy were based upon a percentage rate per $100 of wages paid. (Appeal file, Tab CC, Sch. A). Under the terms of this policy, premium payments were to be excluded for wages paid in conjunction with the MTA projects. As a result of Mr. Murphy's decision to deny wrap-up coverage to Strescon, however, additional workmen's compensation insurance premiums were paid to Maryland Casualty for calendar years 1978 and 1979 in order to provide coverage to those Strescon employees performing MTA contract work. (Appeal file, Tab BB).

By letter dated November 19, 1979, Strescon's attorney wrote Appellant to request that a claim be submitted to the MTA for the additional workmen's compensation premiums incurred by Strescon for calendar years

1978 and 1979. Appellant forwarded this claim to the MTA by letter dated November 20, 1979. This claim was denied by the MTA Administrator in a final decision dated June 13, 1980.

6. Workmen's Compensation Commission Proceedings

After workmen's compensation insurance coverage for Strescon employees was refused by BRITS and Argonaut Insurance Co., three Strescon employees filed workmen's compensation claims under their employer's policy with Maryland Casualty Company. Hearings were conducted at the Maryland Workmen's Compensation Commission (Commission) wherein representatives of both the Argonaut Insurance Company and Maryland Casualty Company participated. These hearings were not transcribed. In each instance, the Commission in a brief one page decision ruled for the claimant and found that Maryland Casualty Company was the proper carrier. The record, however, does not reveal the legal basis or other rationale for the Commission's determination.

B. Decision

Special General Provision §7.02 obligated the MTA to procure and pay workmen's compensation premiums for Appellant and its subcontractors of any tier. The issue to be considered here concerns whether Strescon reasonably may be construed as a subcontractor under the above provision.

At the outset, the MTA contends that this Board is bound by three prior determinations of the Workmen's Compensation Commission concerning the foregoing issue and parties. In those proceedings, Strescon employees filed claims relating to injuries incurred on the MTA project work. The Commission, after a hearing, found that Maryland Casualty Company, and not the MTA's wrap-up insurance carrier, was liable. The MTA contends that in so doing, the Commission necessarily had to conclude that Strescon was not a subcontractor for purposes of Special General Provision §7.02.

For many years, the Maryland Court of Appeals consistently ruled that an administrative agency never could perform a function sufficiently judicial for the principles of res judicata to become applicable. Dal Maso v. County Commrs., 182 Md. 200, 205 (1943); Knox v. City of Baltimore, 180 Md. 88 (1941). The view of the Court ultimately changed, however, and it now recognizes that many boards and commissions do perform a purely quasi-judicial function. White v. P.G. County, 282 Md. 641 (1978). Hence, the principles of public policy which underlie the rule of res judicata in the courts have been deemed applicable to administrative decisions so long as the deciding agency is performing a quasi-judicial function. Woodlawn Area Citizens, Inc. v. Board of Commrs. For P.G. County, 241 Md. 187 (1965); Gaywood Community Association, Inc. v. Metropolitan Transit Authority, 246 Md. 93 (1966).

There is no dispute that the Commission performs a quasi-judicial function. Our concern is whether the principles of res judicata otherwise may be applied under the present facts. In Cicala v. Disability Review Board For P.G. County, 288 Md. 254, 263 (1980), the Court of Appeals outlined the ground rules for this application as follows:

> The elements required for the application of the principles of res judicata are that the issue determined in a previous proceeding be identical to that presented in a subsequent proceeding, that the parties in successive proceedings be the same, and that there be a final judgment of a court on the merits in the previous proceeding.

Here the Commission did issue three final determinations concerning the same parties now before us. The determinative question, however, is whether the Commission grounded its decision upon an issue other than that which the MTA seeks to foreclose from consideration here.

The record before us indicates that the Commission considered the broad issue of whether the claimants were to be considered employees of Strescon or the joint venture of Strescon-Linder. In so doing, the Commission knew that Strescon secured workmen's compensation insurance for its workers through Maryland Casualty and that the MTA furnished the same coverage to its contractors through a wrap-up policy provided by the Argonaut Insurance Company. While the pre-hearing statement of issues prepared by the Commission indicates that the MTA wrap-up insurance policy was before the Commission, there is no record or transcript of the totality of evidence actually considered by the Commission in rendering its decisions. Accordingly, we do not know whether the Commission reviewed the contract between the MTA and Appellant or even was furnished a copy thereof.

The Commission's statutory responsibility is to determine the insurance carrier, if any, at risk when claimants are injured. Md. Ann. Code, Art. 101, §23. In the cases cited to us involving Strescon employees, the Commission concluded that Maryland Casualty was the correct carrier after reviewing the wrap-up insurance policy and hearing testimony concerning the intent of those who drafted the policy.[4] Did the Commission conclude on this basis that Argonaut Insurance Company was not obligated to Strescon under the terms of its policy with the MTA? Did the Commission determine that since Strescon separately was paying premiums to Maryland Casualty Co. for purposes of insuring its own employees and since the claimants were being paid by checks drawn from Strescon accounts, as opposed to those of the joint venture, that the employees were covered by the Maryland Casualty Co. policy? Did the Commission, after reading the prime contract, determine that the MTA contractually had no responsiblity to procure and pay for Strescon's workmen's compensation coverage? The record does not reveal which, if any, of these questions was considered determinative by the Commission. Since we cannot state with certainty that the Commission based its three decisions on the language of the contract between the MTA and Appellant, principles of res judicata cannot be applied in this appeal. Compare Cicala v. Disability Review Board, supra at pp. 264-65; Holloway v. State of Maryland, 14 Md. App. 703, 715-16 (1972).

Turning, therefore, to the substantive aspects of this appeal, our attention focuses on contract General Provision GP-1.05. Appellant contends that the joint venture of Strescon-Linder qualifies as a subcontractor under this provision and that both firms comprising the joint venture are entitled to MTA furnished wrap-up insurance. The MTA, however, states that GP-1.05

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[4] Affidavit of James M. Murphy (Exh. 9).

reasonably cannot be interpreted to include, as subcontractors, firms which do not undertake the construction of a part of the work. For this reason, Strescon is said to be ineligible for MTA furnished insurance because it merely fabricated and supplied precast aerial girders and did not partake in their erection on the MTA job site.

As this Board previously has stated, the standard for interpreting a written contract is an objective one. Our task, therefore, is to determine the meaning attributable to the contract language by a reasonably intelligent bidder acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the contract. Fruin-Colnon Corporation and Horn Construction Co., Inc., MDOT 1001, Dec. 6, 1979; Granite Construction Co., MDOT 1011, July 29, 1981.

Contract General Provision §GP-1.05, in essence, defines a subcontractor as an entity meeting the following requirements:

1. It is an individual partnership [sic], firm or corporation;[5]

2. It undertakes the construction of a part of the work under the terms of the prime contract;

3. It performs this work by virtue of an agreement with the prime contractor; and

4. It receives the consent of the surety and the MTA prior to undertaking the work.

The joint venture entity of Strescon-Linder met each of these requirements. On this basis, Appellant concluded that both members of this joint venture would be eligible to receive workmen's compensation coverage, at no cost, pursuant to Special General Provision §7.02A.

The MTA initially contends that the foregoing interpretation is unreasonable because it would require wrap-up insurance to be furnished to subcontractors performing work away from the job site where the MTA has no control over conditions. However, the economic premise of wrap-up insurance, i.e., reduced premiums through control of safety at the work site, was not demonstrated by the MTA as having been obvious to contractors bidding its work. It seems just as reasonable that bidders would have assumed that wrap-up insurance was being furnished because of the expense involved in having individual contractors and subcontractors on each MTA project otherwise procure coverage through a multitude of brokers and pass the costs along to the MTA through the bidding process. We, therefore, cannot say that Appellant's interpretation, on its face, was unreasonable or absurd.

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[5] A joint venture (joint adventure) is considered at law to be a partnership for a single transaction or for a limited number of transactions. Hobdey v. Wilkinson, 201 Md. 517, 526 (1953). The MTA has not taken issue with the principle.

In applying the contract definition of the term subcontractor to Strescon-Linder, the MTA next contends that the Board should look to the substance of the joint venture relationship with Appellant rather than to its form. The substance of this relationship is said to be a subcontract between Appellant and Linder to erect aerial girders on the MTA project, with Strescon serving as a materialman for Linder. In viewing the joint venture relationship in this manner, Strescon would not be entitled to wrap-up insurance coverage.

As the MTA correctly points out, an administrative body appropriately may look beyond the form of an agreement to its substance[6] where the form of a transaction seeks to avoid the purpose of a statutory or contractual provision. The key is the statutory or contractual provision

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[6]In its brief, the MTA cited the following instances where courts looked to the substance of a relationship rather than to its form. In United States v. Federal Insurance Company, 634 F.2d 1050 (10th Cir. 1980), a subcontractor obtained equipment from a supplier for the performance of the work. The parties to this transaction attempted to transform a printed "Retail Installment Contract - Security Agreement" form into a lease. When the subcontractor failed to pay under the terms of this agreement, the equipment was repossessed and sold. The supplier then brought a payment bond action for the remainder of the monies due under the lease. The court, however, held that the agreement, in substance, was a contract for the purchase of capital equipment. Since the cost of this equipment was not to be subsumed in the subcontract price, it was not the type of cost intended to be recoverable under the Miller Act. Similarly, in Glen Falls Insurance Co. v. Newton Lumber & Mfg. Co., 388 F.2d 66 (10th Cir. 1967) when a subcontractor could not furnish a Miller Act bond, a straw man was set up as the first tier subcontractor who then hired the unbonded subcontractor as a second tier subcontractor. When the unbonded second tier subcontractor defaulted on its payments to a materialman, a Miller Act suit was brought on the payment bond. The court held that the purpose of the Miller Act was to protect suppliers of materials to subcontractors of the prime contractor. In substance, therefore, the second tier subcontractor was found to be a subcontractor for purposes of the Miller Act. Finally, under the tax laws, the Supreme Court has looked at the substance of an agreement rather than its form to determine the appropriate tax consequences of a transaction. In Commissioner v. P.G. Lake, Inc., 356 U.S. 260, 2 L.Ed 2d 743, 78 S.Ct. 691, reh. den. 356 U.S. 964, 2 L.Ed 2d 1071, 78 S.Ct. 991 (1958), although a company reported the assignment of an oil payment right as a conversion of a capital investment, the Supreme Court found that in substance it was an assignment of the right to receive future income. This holding was based on the Supreme Court's review of the history and purpose of § 117 of the tax code and the facts before it. As is apparent, therefore, the court in each of the foregoing decisions, attempted to effectuate the legislative intent as expressed in the relevant statute.

involved and the intent expressed thereby. Here, therefore, if it does not appear from the contract language that the parties agreed to limit MTA furnished insurance to subcontractor employees engaged in on-site construction work, we cannot say that the form of the joint venture relationship is insignificant or that Strescon is not entitled to workmen's compensation coverage for its employees performing MTA work.

With regard to its interpretation, the MTA contends that the term subcontractor is used in the trade only to refer to a firm performing on-site construction work. For this reason, it is said to be unreasonable to construe a joint venture partner who does not perform on-site construction work as a subcontractor.

Evidence of trade usage is admissable to explain or define a contract term, even in the absence of an ambiguity. See Gholson, Byars & Holmes Construction Co. v. United States, 173 Ct. Cl. 374, 351 F.2d 987 (1965); W.G. Cornell Co. v. United States, 179 Ct. Cl. 651, 376 F.2d 249 (1967). In this regard, a trade usage is ". . . a usage having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to a particular agreement . . . ." RESTATEMENT (SECOND) OF CONTRACTS, §222 (1) (1981). Our concern, therefore, is whether a trade usage exists as to the term subcontractor which should have alerted Appellant that the language employed in the contract was unclear or subject to varying interpretations.

Although the MTA cites a number of cases wherein the courts have defined the term subcontractor, by resort to trade usage, as one who performs construction work, other decisions have been referred to by Appellant which apply the term to subcontractors, fabricators, suppliers, and to firms which both fabricate and install. See Deluth Steel Fabricators, Inc. v. Commissioner of Taxation, 237 N.W.2d 625 (Minn., 1975); Mac Evoy v. United States, 332 U.S. 102 (1944); Hebert v. Kinler, 336 So.2d 922 (C.A., La. 1976); F.D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116, 123-24, 94 S.Ct. 2157, 2162, 40 L.Ed. 2d 703 (1974); Frazier v. O'Neal Steel, Inc., 223 So.2d 661 (Miss., 1969). The varying usages determined by the Courts in each of these decisions has depended on the legislative intent of the statute being construed. As stated by the U.S. District Court for Maryland in Liberty Mutual Insurance Co. v. Friedman, 485 F.Supp. 695, 707 (D.Md. 1979):

> Someone who is a 'materialman' rather than a 'subcontractor' for purposes of the Miller Act may or may not be a subcontractor for the civil rights and/or procurement purposes of E.O. 11246.

Accordingly, the term subcontractor may have different usages depending upon the program being administered.

Here we are concerned with the MTA wrap-up insurance program. Although the MTA has presented testimony concerning the development of the wrap-up insurance program and its economic premise, it has failed to establish that such programs uniformly were employed in the construction industry, prior to the award of this contract, so as to provide workmen's compensation coverage only to those employees of the prime contractor and its subcontractors who performed construction work at the job site. In the absence of this

showing, it cannot be said that Appellant should have recognized that the term subcontractor, as used in this contract, applied only to a firm or joint venture whose employees actually were engaged in on-site construction work.

The MTA next contends that the contract also obligated subcontractors to comport with the Davis-Bacon Act requirements set forth in the Special General Provisions. By failing to follow these requirements with respect to Strescon, it is said that Appellant contemporaneously interpreted the term subcontractor as applying solely to those entities performing construction work on-site.

Special General Provision §SGP-10.09 of both contracts requires that the ". . . minimum wage rates paid to laborers and mechanics employed under this construction contract, shall be the wage rates prevailing in the locality as predetermined by The Secretary of Labor pursuant to the Davis-Bacon Act & Regulations thereunder . . . ." Special General Provision §SGP-10.10 of both contracts further requires, in pertinent part, as follows:

> C. Payrolls and Basic Records
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> 1. Payrolls and basic records relating thereto shall be maintained during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work . . .
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> 2. The contractor will submit weekly a copy of all payrolls to the Administration for transmission to DOT. The copy shall be accompanied by a statement signed by the employer or his agent indicating that the payrolls are correct and complete, that the wage rates contained therein are not less than those determined by the Secretary of Labor and that the classifications set forth for each laborer or mechanic conform to the work he performed . . . The prime contractor shall be responsible for the submission of copies of payrolls of all subcontractors. (Underscoring added.)

The foregoing provisions when read together require only that payrolls be maintained for laborers and mechanics working at the site of the work. The payrolls were to be used to assure that those laborers and mechanics working on the site of the work, whether employees of the prime contractor or its subcontractors, were being paid in accordance with Davis-Bacon wage rates determined by the Secretary of Labor. The fact that Appellant did not submit Strescon's payrolls or that Strescon did not pay Davis-Bacon wage rates to certain of its employees in our view indicates only that Strescon's employees were not considered to be within the purview of this language. There is no indication that Appellant necessarily concluded from the foregoing contract provisions that Strescon, as part of its joint venture relationship with Linder, was not a subcontractor.

In concluding that contract Special General Provisions §§ 10.09 and 10.10 do not define the term subcontractor, we recognize the fact that applicability of the Davis-Bacon Act and its regulations has been determined

judicially and administratively on the basis of whether a firm is a subcontractor. See H.B. Zachry Company v. United States, 170 Ct.Cl. 115, 128, 130-31; Comp. Gen. Dec. B-148076, 43 Comp. Gen. 84, 90 (1963). However, the Davis-Bacon Act and its implementing regulations were not applicable, per se, to Appellant under this contract. Appellant was obligated only to comply with the Davis-Bacon type requirements set forth in the contract Special General Provisions. For the reasons previously stated, these provisions do not impose wage requirements on the basis of whether an entity was a subcontractor under the contract.

Finally, the MTA contends that both Appellant and Strescon were aware of its interpretation of the contract prior to entering into a subcontract agreement. Under these circumstances, Appellant is said to be bound by the MTA's interpretation of the contract insurance provisions and definition of the term subcontractor. See RESTATEMENT OF CONTRACTS (SECOND), §201 (1981).

Appellant and Strescon allegedly were informed at a preconstruction conference on April 6, 1978 that the MTA would provide workmen's compensation insurance only to those employees performing on-site work.[7] This explanation, however, came after Appellant had negotiated a subcontract with Strescon. Although the final wording of this subcontract had not been agreed to as of April 6, 1978 and the subcontract later was redrafted as two separate agreements with the joint venture of Strescon-Linder, the subcontract price of $6.6 million and the basic terms of the agreement never were changed after January 1978. The subcontract price, in part, was negotiated on the premise that workmen's compensation insurance would be furnished by the MTA at no cost to Appellant and its subcontractors. Since Appellant clearly was unaware of the MTA's interpretation both when negotiating its subcontract and bidding the job, it neither is bound by the interpretation allegedly expressed by the MTA's representative on April 6, 1978 nor otherwise estopped from disputing it.

In conclusion, we have no doubt that the MTA intended to limit workmen's compensation coverage to those contractors and subcontractors having employees on the job site. Further, when drafting the contract language concerning its insurance coverage, the MTA most likely did not envision the creation of a joint venture arrangement for the fabrication and construction of concrete aerial girders. Nevertheless, for the foregoing reasons, we conclude that the MTA failed to communicate its intent clearly in the contract documents. Since Appellant reasonably construed the contract language to provide workmen's compensation coverage for all Strescon-Linder employees working on the MTA project, Appellant's interpretation must prevail. When the MTA refused to provide the contractually promised workmen's compensation coverage, therefore, it con-structively changed the contract under Contract General Provision GP-4.05B., entitling Appellant to an equitable adjustment.

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[7] As detailed in the findings of fact, supra., p.4, Appellant disputes the MTA's contention that the insurance limitations were explained on April 6, 1978. For purposes of this decision, it is unnecessary to make a finding in this regard.

II. Quantum

A. Findings of Fact

The parties have stipulated the following:

> If Appellant is successful on the issue of entitlement in the above-captioned appeal, Appellant would be entitled to recover the sum of $74,947, said sum representing the amount of workmen's compensation insurance premiums, paid by Strescon Industries, Inc. ("Strescon") under its policy with Maryland Casualty Company for the years 1978 and 1979 for employees working at the Curtis Bay plant who were engaged in fabrication work for MTA contracts NW-07-05 and NW-07-08.

An agreement has not been reached, however, on the issues of whether Strescon is entitled to interest on its claim and whether Appellant is entitled to an additional 5% overhead markup on the equitable adjustment due Strescon.

With regard to the overhead issue, Appellant contends that it is due a 1% markup as a result of an increase in the Strescon-Linder payment and performance bond premium which it is liable for under the terms of its subcontract agreement. (Exh. 3). Page 8A of the subcontract agreement does provide, in pertinent part, that the "[s]ubcontractor shall furnish Payment and Performance Bonds, with premium to be paid for by the Owner." (Appeal file, Tabs F, G.) However, the record is devoid of any evidence establishing that Appellant actually incurred an increase in bond premiums as a result of this change or otherwise is presently liable to the surety for such costs. All that Appellant argues is that a 1% markup for bond premiums has been paid to it in the past for work performed by Strescon-Linder on the MTA project. (Appeal file, Tab FF).

The remaining 4% of Appellant's markup is for the ". . . reasonable value of the extra administrative expenses incurred by it for processing, handling, and recovering Strescon's claim for additional costs." (Exh. 3, p. 2). These expenses have not been detailed or established by any evidence of record. The record indicates only that Appellant received the claim of its subcontractor, added a markup, and passed the claim onward to the MTA for resolution. (Appeal file, Tab B).

B. Decision

Although damages need not be proven with absolute or mathematical precision, they must be established with reasonable certainty. C. J. Langenfelder & Son, Inc., MDOT 1000, 1003, 1006, p. 22 (Aug. 6, 1980); McKeever v. Realty Corp., 183 Md. 216, 226 (1944). Since Appellant has failed to submit any evidence establishing that it actually incurred additional bonding costs, or otherwise is presently liable therefor, it is not entitled to any markup for such costs.

Appellant also seeks to recover a 4% fee representing its costs for processing Appellant's claim. It is well settled, however, that such costs are not includable directly as part of an equitable adjustment as they are not

incurred in the performance of changed work. J. E. Robertson Co., v. U.S., 194 Ct. Cl. 289, 297 (1971); Ramsey v. U.S., 121 Ct.Cl. 426, 434, 101 F. Supp. 353 (1952); Power Equipment Corp., ASBCA 5904, 1964 BCA ¶ 4025. Accordingly, Appellant is not entitled to recover these costs in the manner claimed.

There is an issue, however, as to whether claim processing fees may be recovered as indirect costs associated with the performance of changed work. In the absence of regulations expressly precluding the recovery of such costs as part of overhead, we see no reason why such costs may not be included in Appellant's overhead pool.[8] However, here Appellant has not demonstrated that its overhead costs were increased as a result of its efforts to process the Strescon-Linder claim. While Appellant's project engineer, Mr. DePauw, did write a letter to the MTA forwarding the subcontractor claim for decision, his actions did not increase the overhead costs incurred by Appellant since presumably he was a salaried employee. For this reason, therefore, Appellant is not entitled to an overhead markup for the costs associated with the processing of this claim.

In ruling on the foregoing overhead claims, we are aware that the MTA previously has agreed to pay Appellant a 5% overhead markup and a 1% bond fee on changed work performed by Strescon-Linder. However, the basis for that previous agreement is not before this Board. While Appellant may have incurred an increased bond premium and overhead expenses with regard to other work performed by its subcontractor, it was not demonstrated that those same costs were incurred here.

With regard to the payment of predecision interest, this issue effectively has been settled by the Court of Special Appeals in Md. Port Administration v. C. J. Langenfelder & Son, Inc., 50 Md. App. 525, 543 (1982) as follows:

> The underlying object [of an equitable adjustment], as we have seen, is to make a contractor "whole", to safeguard him against increased costs engendered by the modification that he is forced to complete. In that regard, the comment of the Senate Committees with respect to the Contract Disputes Act is apposite—that there can be no equitable adjustment until the contractor recovers the entire cost of doing the extra work, and that the cost of money to finance that additional work is a legitimate cost of the work itself. That is true whether the cost of the money is in the form of interest paid on borrowed funds or the loss of income on the contractor's own capital invested in the additional work. We

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[8]At the time this contract was entered into, regulations were not in effect in Maryland governing the cost principles to be applied in State contracts. With regard to contracts entered into on or after July 1, 1981, however, claim preparation costs relating to litigation by or against the State would not be recoverable even as indirect costs. COMAR 21.09.01.19E.

therefore think that compensation for such a cost—the cost of money—is an appropriate element in calculating an "equitable adjustment", and that the allowance of that cost may be expressed in the form of predecision interest.

Postdecision interest likewise can be assessed at the "legal rate". Md. Port Administration v. Langenfelder, supra. at p. 545.

Here Appellant submitted its claim for additional workmen's compensation premiums by letter dated November 20, 1979 (Appeal file, Tab B). Allowing 60 days for the MTA to audit the claim and make payment, Appellant asks that predecision interest be assessed at the legal rate of 6% from January 20, 1980 through June 30, 1980 and at 10% from July 1, 1980 to the date of this decision. In view of the relatively simple nature of the audit involved, we conclude that the 60 day period suggested by Appellant reasonably would have permitted the MTA to audit and pay the claim. The fact that payment was withheld under a claim of legal defense is irrelevant.

Although Md. Ann. Code, Courts, § 11-107 does establish the legal rate of interest on judgments at 10% beginning on July 1, 1980, this statute is inapplicable to decisions rendered by an administrative agency. C. J. Langenfelder & Son, Inc., 50 Md. App. 525, 546 (1982). The legal rate in effect here is 6%. Md. Const., Art III § 57.

C. Conclusion

For the foregoing reasons, Appellant is entitled to an equitable adjustment in contract price as follows:

1. Additional Costs Incurred by Strescon	74,947.00
2. Predecision Interest at 6%[9] from January 20, 1980 to April 5, 1983 ($12.32/day x 1171 days)	14,426.72
Total	89,373.72

Postdecision interest shall be assessed at the legal rate of 6% ($14.68 per day) until final payment.

[9]Predecision interest may be awarded at a rate equal to that incurred by the contractor. Here, however, since no proof was presented in this regard the legal rate of 6% was applied.