BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of INTERCOUNTY CONSTRUCTION CORPORATION	)	
	)	Docket No. MSBCA 1056
Under MTA Contract No. NW-01-06	)	

June 12, 1986

Burden of Proof - The Appellant usually has the burden of proof in an appeal but the assertion of an affirmative defense by the Respondent, such as accord and satisfaction, shifts the burden of proof of that defense to the Respondent. However, where the Appellant places before the Board the issue of the interpretation of certain contract language and the Respondent disagrees with the Appellant's interpretation, the burden of proof does not necessarily shift to the Respondent where its interpretation might sound like accord and satisfaction but in fact is not the assertion of an affirmative defense.

Interpretation of Contracts - The Board in choosing between two divergent interpretations of a contract, will seek to discern the objective intent of the parties. This is measured by the meaning that would be placed upon the contract language by a reasonably intelligent person with knowledge of the circumstances prior to and contemporaneous with the making of the contract.

Interpretation of Contracts - Where contract language is susceptible of more than one interpretation, the Board will look to the circumstances surrounding the execution of the contract, including the negotiations leading up to the contract, in order to determine its meaning and the intent of the parties.

Interpretation of Contracts - The meaning given to a contract provision by one party will prevail over a conflicting interpretation asserted by a second party where the second party willingly enters the contract knowing or having reason to know, and without protesting, the meaning given to the provision by the first party.

Interpretation of Contracts - "Extended Overhead" means the normal overhead costs that a construction contractor incurs during a period of delay. It is the sum of the costs which are not directly identifiable with a single construction contract but which are identified with two or more such contracts or the business in general.

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OPINION BY MR. LEVY

This appeal is taken from a decision issued by the Maryland Mass Transit Administrator in the captioned contract denying a substantial portion of Appellant's claim for an equitable adjustment for compensable delay. The dispute concerns the interpretation to be given to a contract Change Order which preserved for future negotiation "an equitable adjustment for extended overhead for 167 calendar days of compensable time." Only the issue of entitlement is to be decided by the Board.

Findings of Fact

1. On August 8, 1977, the Maryland Mass Transit Administration (MTA), a constituent agency of the Maryland Department of Transportation, awarded Contract No. NW-01-06 (the "contract") to the Appellant, for the construction of the Charles Center subway station structure and line (the project) of the Baltimore Region Rapid Transit System. The original contract amount was approximately $32 million dollars, and the work was to be completed by July 1, 1981.

2. The Sun Building Claim. Shortly after commencing its support of excavation work in January 1978, Appellant encountered a series of underground obstructions, not depicted on the contract drawings, which consisted of the foundations and rubble of buildings that had been demolished or destroyed years earlier. (This has been referred to throughout the pleadings, briefs and hearing as the "Sun Building claim"). Appellant considered these subsurface obstructions to be a differing site condition and informed the MTA of this fact. The MTA acknowledged the existence of the differing site condition by issuing Change Order No. 3 on October 18, 1978. This compensated Appellant on a force account basis for the direct costs incurred in removing the obstructions. The change order contemplated that the removal of the obstructions could delay Appellant's progress and stated as follows:

> This Change Order does not include any time or related costs which may be added in the event that it is later determined that this work has delayed the total contract.

3. The Rebar Claim. In December of 1978, the MTA issued Change Notice No. 57 to the contract which modified the design of the station structure wall requiring the addition of 73.5 tons of reinforcing steel. Appellant and the MTA subsequently reached an agreement in 1980 whereby Appellant would be paid $198,430 for the additional rebar with a 30 day noncompensable time extension. The agreement did not include delay costs.

The above was incorporated into proposed Change Order No. 60 which was prepared by MTA, then submitted to and signed by Appellant in December, 1980. However, in June of 1981, the MTA rescinded Change

Order No. 60 arguing that the cost of the additional reinforcing steel was already included in earlier Change Order No. 29. Appellant disagreed and on July 30, 1981 requested a contracting officer's final decision on this issue.

4. The North/South Line Claim. The design for the Charles Center Station makes provision for the construction of a future North/South Line at the intersection of St. Paul and Baltimore Streets. Appellant was required to construct two concrete walls below the Charles Center Station at a deeper level to accommodate the future line. Based on the contract documents, Appellant expected to encounter sound rock at a depth of 26 feet, however, when it excavated to that depth, it was not found. MTA then issued revised drawings requiring Appellant to perform additional excavation.

In March 1981, Appellant submitted to MTA its claim of $828,000 for direct costs associated with the additional excavation. The claim did not include costs for delay. Subsequently, MTA took the position that there was no differing site condition and that the claim was without merit.

5. Appellant submitted its delay analysis with regard to the Sun Building subsurface obstructions to MTA on April 20, 1981. It requested a time extension of 199 work days (290 calendar days) but did not address the costs associated with the delay. Several meetings followed throughout July and early August 1981 at which Appellant's and MTA's representatives met in an attempt to reach a compromise on the number of compensable days due.

6. Meanwhile, in May 1981, the MTA decided to conduct an audit of Appellant's overhead accounts in the event the parties were unable to resolve the delays without including costs. This audit was conducted by the public accounting firm of Rubino and McGeehin commencing in July 1981 and ending sometime in September 1981. The result was an informal audit report that did not include items such as equipment, subcontractor costs, and material escalation. Appellant cooperated fully with the auditors even though not required to do so under the contract.

7. On July 13, 1981, the parties met, and MTA presented its evaluation of Appellant's delay analysis. MTA took the position that Appellant was entitled to only 82 work days of delay. The parties discussed the inclusion of other delay items in the negotiations, but there did not appear to be a discussion of costs.

8. The parties met again on July 21, 1981 to discuss delay days, but again no agreement was reached, and costs were not discussed.

9. On July 30, 1981, a larger group of representatives from both sides met again in an attempt to resolve the amount of delay days. Each side made new offers, but there was no agreement, and again there was no discussion of costs.

10. MTA sent a letter to Appellant on August 3, 1981 which provided for two alternative ways of proceeding with regard to the delay days issue. Alternative No. 1 was the execution of a bilateral change order for a contract extension of 137 work days for all delays through June 1, 1981, with

the 30 days attributable to the rebar claim to be reserved. Alternative No. 2 provided for the MTA to execute a unilateral change order providing for a contract extension of 113 work days. The letter did not discuss costs associated with the delays.

11. As a result of MTA's August 3rd letter, Appellant's and MTA's representatives met on August 6, 1981. They initially discussed Appellant's schedule in relation to the follow-on contractors as MTA needed to obtain firm schedules for its contractors. The MTA again offered an extension of time of 137 work days for all delays (119 of which would be compensable) excluding (a) the north/south line claim, (b) the rebar claim, and (c) the bulkhead excavation claim.[1] Appellant made a counter offer of 171 compensable work days excluding the rebar claim and the bulkhead claim. Additionally, Appellant proposed that the contract schedule be extended by 199 days. Again the matter was not resolved, but the evidence suggests that costs were first discussed at this meeting. They were certainly discussed at the meeting the following day.

12. At the August 7th meeting the MTA made two proposals, neither of which Appellant accepted. Then Appellant presented what it termed as its final offer:

a. $400,000 for the direct costs attributable for the north/south line and rebar claims;

b. 159 work day extension for all milestones, except for A and B;

c. 199 work day extension for completion of contract; and

d. 119 work days to be compensable.

The MTA representatives showed interest and said that they would take the proposal back for review.

13. It should be noted that the record reflects that Appellant was faced with a cash flow problem at the time of these negotiations. It also faced assessment of substantial liquidated damages. A meeting was held on August 11, 1981, for the purpose of discussing interim dates. The contract set forth certain milestone dates which were to be used as guidelines for the follow-on contractors. If Appellant did not get an extension of these interim dates, then it could be liable to the MTA for liquidated damages. There was no discussion of delay costs at this meeting.

14. As a result of Appellant's August 7th proposal, MTA prepared the first draft of Change Order No. 70 which contained five pages. The first page summarized the delays and noted that it "resolved any and all costs claimed" for the rebar steel and north/south line claims. Pages 2, 3 and 4 addressed the milestone dates as discussed during the August 11, 1981 meeting. This relieved Appellant of some potential liquidated damages. The last page contained the following paragraph:

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[1]The bulkhead excavation claim is a separate matter before this Board and is docketed as MSBCA 1036.

In consideration of the foregoing, the MTA agrees to

(a.) A lump sum in the amount of $400,000;

(b.) Negotiate an equitable adjustment for extended overhead for 167 calendar days of delay. (Underscoring added).

The dollar amount for overhead was not included in the draft because the audit of Appellant's books had not yet been completed.

15. After review of the draft Change Order by Appellant's representatives, Appellant revised paragraph (a) above as follows:

(a) Immediate single lump sum payment in the amount of $400,000.

The reason for this proposed revision was Appellant's fear that the payment would be broken up or delayed.

Paragraph (b) was also revised to read as follows:

(b) Commence prior to but no later than September 30, 1981 negotiations to determine the amount of the equitable adjustment to compensate for 167 calendar days compensable delay. Negotiations to be concluded by October 30, 1981, unless extended by mutual agreement of both parties. If no agreement is reached, the contractor shall be entitled to a final decision within 30 calendar days. Nothing herein is intended to eliminate or otherwise impair the contractor's right to claim for future actions of the M.T.A. or the C.M. which adversely affect the contractor's operations.

Appellant's Daniel Danaher testified that this change was made because "they clearly stated what the agreement was, and the agreement was that we [Appellant] were to get paid for 167 calendar days of delay . . ." (Tr. 62).

16. However, when MTA reviewed Appellant's changes to the draft of Change Order No. 70, they rejected the proposed change to paragraph (b) as not reflective of the parties' agreement.

There was a meeting on August 19, 1981 where MTA specifically rejected Appellant's changes to paragraph (b) while accepting other suggested changes. MTA did not explain its reasons for rejecting the paragraph (b) change nor did it inform Appellant that it did not intend to compensate Appellant for all of its delay costs. Additionally, MTA did not discuss its interpretation of the term "extended overhead," nor did Appellant ask any questions concerning the meaning of the term.

17. MTA prepared the final version of Change Order No. 70 immediately after the August 19th meeting incorporating the original paragraph (b) language with only the additional provision suggested by Appellant that negotiations would begin by September 30, 1981:

(b) Negotiate an equitable adjustment for extended overhead for 167 calendar days of compensable time commencing no later than September 30, 1981. (Underscoring added).

Appellant signed the final draft including the above language of paragraph (b).

18. Appellant returned the signed copy of Change Order No. 70 to MTA with a cover letter dated August 20, 1981. The executed change order retained the MTA's version of paragraph (b), but the cover letter made reference to it by stating Appellant's understanding of paragraph (b). The letter stated, in pertinent part, as follows:

> . . . Because of the importance of the matters addressed by this Change Order, we would like to take this opportunity to clarify several elements of the Change Order, as follows:
>
> * * *
>
> 2. On page 6, sub-paragraph (B), the MTA has agreed (a) that Intercounty is entitled to 167 calendar days of compensible time and (b) that negotiations for an equitable adjustment for associated costs for the 167 calendar days of compensible time will commence on or before September 30, 1981.
>
> We believe that the above points represent the understandings of both Intercounty and the MTA. (Underscoring added).

This language attempts to set forth Appellant's understanding that it was to be fully compensated for the 167 calendar days of compensable delay. However, the MTA did not consider this language to be a deviation from the agreement reached during the negotiations that 167 days of extended overhead would be negotiated. The parties never discussed this letter.

19. MTA took steps to expedite Change Order No. 70 through the administrative approval process in order to accommodate Appellant's request to be paid as quickly as possible. MTA prepared two documents explaining the change order and the negotiations that had led up to it: A "Finding of Fact and Summary of Negotiations" and a draft "Action Agenda" item for submittal to the State Board of Public Works. Neither document specifically mentions delay costs or the intention to negotiate extended overhead. There was testimony that this was not intentional, but that the extremely accelerated manner in which the administrative review and processing of Change Order No. 70 was handled resulted in a less thorough review than is normal (Tr. 409-411), and because of this cursory review, the Findings of Fact and the Action Agenda are not completely accurate. (Tr. 283-285). For example, there were no specific statements in these documents that the bulkhead claim was being reserved, that all change notices from 001 through 165 would be resolved, or that Appellant was giving up its right to recover any of its delay costs, although Change Order No. 70 at p. 7 does contain the following clause stating that this constitutes a full accord and satisfaction . . . for all costs and time of performance.

> The terms and conditions of this change order, including the amount and time contained in the summary of changes above, constitute a full accord and satisfaction of the Administration and

the Contractor for all costs and time of performance related to the actions described or referenced herein. Except as amended herein, all provisions of said contract remain in full force and effect.

20. The Board of Public Works approved Change Order No. 70 on September 3, 1981, and it was then executed by the MTA. The Board had been assured that MTA's exposure for the reservation to negotiate the extended overhead was estimated at around $500,000 based on an estimate of $4,000 per day. (Tr. 414).

21. On September 28, 1981, Appellant forwarded to the MTA its claim for 167 days of compensable delay in the amount of $6,026,754. This was based on $36,088 per day.

The next day MTA responded with a letter rejecting Appellant's claim submission and characterizing it as "monstrous." This is the first time Appellant alleges that it became aware of MTA's view of the language in the change order, and the submission of the claim was the first time that MTA had an indication of exactly for what costs Appellant felt it was entitled to be reimbursed.

22. On September 29, 1981, Appellant demanded a final decision from the MTA Administrator.

23. By letter dated November 9, 1981, the MTA informed Appellant of its intent to issue a change order in the amount of $769,859 which was based on 167 calendar days of extended overhead at the rate of $4,170 per day. On November 9, 1981 Appellant returned the change order, unsigned, and requested that a unilateral change order and a final decision be issued.

24. On December 7, 1981, the administrator of the MTA issued his final decision which stated in pertinent part that:

> Change Order 70 clearly establishes that extended overhead costs for 167 calendar days of compensable delay were the only costs remaining to be resolved resulting from the delays included in that Change Order.
>
> Change Order 74 has been issued to provide compensation to the contractor in the amount of $769,859 for extended overhead. This amount was determined based on . . . an audit of the contractor's records.

25. By letter dated December 10, 1981 Appellant appealed from the final decision to this Board. The hearing addressed only the question of entitlement.

Decision

I

Prior to addressing the issues of this appeal a preliminary procedural matter needs to be resolved. At a prehearing conference, Appellent contended that MTA was taking the position that Change Order No. 70 was a release or accord and satisfaction of the bulk of Appellant's delay claim. Therefore,

the burden of proof for this affirmative defense rested upon MTA. On the other hand, MTA asserted that it viewed the issue as a simple case of contract interpretation for which the burden of proof would traditionally rest with the Appellant. The Board ruled preliminarily that it would not impose upon the MTA the burden of going forward with the evidence during the hearing. However, the Board reserved the issue and requested the parties to address it in their Post Hearing Briefs, which they have done.

It is well established that the plaintiff usually has the burden of proof but that the assertion of an affirmative defense by the defendant, such as accord and satisfaction, shifts the burden of proof of that defense to him. Appeal of Blake Construction Company, GSBCA No. 2283, 68-1BCA ¶6779 (1967). Thus, if the MTA were actively asserting that it views Change Order No. 70 as an accord and satisfaction then it would have the burden of proving it. But that is not how this Board views this matter. We do not believe there was an assertion of an affirmative defense; we do believe it is a case of contract interpretation.

Appellant's appeal is to enforce Change Order No. 70 in accordance with its interpretation of subparagraph (b) on page 6. Appellant is asserting that its delay claim comes within its interpretation of "extended overhead." MTA merely disagrees with Appellant's interpretation and has responded accordingly. Appellant placed this issue before the Board and therefore, it assumes the burden of proof since it is the party which asserted the affirmative on the issue.

II

As noted, the overriding issue of this appeal is the appropriate interpretation to be given to Change Order No. 70. Specifically, the interpretation is to be given to the following language of Change Order No. 70:

> (b) negotiate an equitable adjustment for extended overhead for 167 calendar days of compensable time commencing no later than September 30, 1981.

Appellant asserts that all aspects of its claim for an equitable adjustment for delay should be paid pursuant to its interpretation of this paragraph. MTA on the other hand argues that the above language is limiting and would exclude certain substantial items of Appellant's claim.

Appellant's initial argument is that it negotiated an agreement with MTA whereby (a) Appellant was to be paid $400,000 for the direct costs of its rebar claim and north/south line claim, (b) MTA acknowledged that Appellant was entitled to 167 calendar days of compensable time and (c) Appellant and MTA agreed to negotiate an equitable adjustment for that delay. Appellant maintains that this is the only reasonable reading of the change order language and is consistent with the intent of the parties and the circumstances surrounding the negotiations and execution of the change order.

MTA argues that the parties negotiated over several months and hammered out an overall, omnibus agreement which settled everything, all outstanding disputes between the parties, through August 1, 1981 except those specificially reserved therein. The $400,000 payment was related to nothing specific but was a negotiated amount of cash that MTA would pay in the

overall settlement. MTA also maintains that forgiveness of liquidated damages was even more important to the agreement. Most significant is the language found at the end of the change order:

> The terms and conditions of this change order, including the amount and time contained in the summary of changes above, constitute a full accord and satisfaction of the Administration and the Contractor for all costs and time of performance related to the actions described or referenced herein.

MTA further contends that the language of subparagraph (b) was intended to limit Appellant's equitable adjustment to MTA's perception of extended overhead and excluded other delay costs such as equipment, escalation and subcontract costs.

It is well established that a court or board, in choosing between two divergent interpretations, will seek to discern the objective intent of the parties. This objective intent is measured by the meaning that would be placed upon the contract language by a reasonably intelligent person with knowledge of the circumstances prior to and contemporaneous with the making of the agreement. Hol-Gar Manufacturing Corp. v. United States, 175 Ct. Cl. 518, 360 F.2d 634 (1966); Katz v. Pratt Street Realty Co., 257 Md. 103, 262 A.2d 540 (1970); Appeal of Granite Construction Company, MDOT No. 1011 (1981) at pp. 19-20.

First, looking at the language of the change order we find that it provides, at page 1, that "it is understood and agreed that this change order resolves all time extensions due the contractor for any cause up to August 1, 1981." It then lists specific delays which are included, but does not mention the costs concerned with those delays. The change order goes on to state that:

> It is understood and agreed by both parties that this change order resolves any and all costs claimed by the contractor for:
>
> (a) Alleged differing site conditions involving construction of the north-south line * * *
>
> (b) Change to re-steel in the station structure by CN 57.

This language clearly states that the change order resolves all costs claimed by Appellant for (a) the north/south line differing site condition claim and (b) the rebar claim. It does not state that the change order resolves any other kind of cost. Further, there is no statement anywhere in the change order to the effect that any of Appellant's delay costs have been resolved. Finally, the fourth paragraph on page 6 states as follows:

> In consideration of the foregoing the MTA agrees to:
>
> (a) A lump sum single payment in the amount of $400,000.
>
> (b) Negotiate an equitable adjustment for extended overhead for 167 calendar days of compensable time commencing no later than September 30, 1981.

This language must be read in the context of the entire change order. Paragraph (b) recognizes that Appellant is entitled to 167 days of compensable time. While this paragraph does not state that "any and all costs" attributable to the claim are "resolved", as was done in reference to the north/south line and rebar claims, it does have three extra words that can be viewed as a limitation - "for extended overhead." While the MTA could have been more specific and delineated exactly what it considered extended overhead to include, the addition of these words does make it clear that the MTA is agreeing to compensate Appellant for only its extended overhead incurred during the 167 calendar days of compensable time, and not the rest of its delay costs; that is why delay costs are not mentioned.

Appellant further argues that a review of MTA's own documents and statements made to the Board of Public Works makes it clear that MTA did not consider Change Order No. 70 as compensating Appellant for any of its direct delay costs. In proof of this allegation, Appellant points to the content of MTA's Finding of Fact and Summary of Negotiations. This document contains no language which would suggest that the change order intended to compensate Appellant for any of its delay costs.

MTA also prepared an Action Agenda which was sent to the Board of Public Works. The Action Agenda summarizes the $400,000 lump sum payment as follows:

> Change Order No. 070, in the negotiated amount of $400,000, provides a final settlement for all claims associated with the following:
>
> I. Differing site condition - Future North-South Line
>
> * * *
>
> II. Resteel Change
>
> * * *
>
> III. Acceleration of Milestone b
>
> * * *

MTA's Mr. Robert Murray, Project Manager, also testified before the Board of Public Works on this Change Order and gave no indication that the lump sum payment was compensating Appellant for delay costs. But Mr. Murray did advise the Board of Public Works that the reserved "equitable adjustment for extended overhead" would cost the State slightly more than $500,000. (Finding of Fact 20). However, the Finding of Fact and Summary of Negotiations and the Action Agenda have been discredited by the MTA as being faulty and incomplete due to the haste in which they were prepared. (Tr. 409-411). Thus, an examination of these papers is not conclusive of the full understanding of Change Order 70.

The question that remains to be answered, then, is whether Appellant reasonably could have thought that it was going to be paid for all of its delay costs and whether the MTA intended to pay these costs <u>until</u> it saw the "monstrous claim." This can only be ascertained by an examination of the negotiations and circumstances leading up to the execution of Change Order 70.

Where contract language is susceptible of more than one interpretation, a court or board will look to the circumstances surrounding the execution of the contract document, including the negotiations leading up to the contract, in order to determine its meaning and the intent of the parties. Macke Co. v. United States, 199 Ct.Cl. 552, 467 F.2d 1323, 1325 (1972); Mascara v. Shelling & Shelling of Baltimore, Inc., 250 Md. 215, 243 A.2d 1, cert. denied, 393 U.S. 981 (1968); Deyworth v. Industrial Sales Co., 241 Md. 453, 217 A.2d 253, 256 (1966).

Appellant submits that when the following points are considered, the result should be the conclusion that Change Order No. 70 did not include any of Appellant's delay costs, and that Appellant is entitled to recover all of its costs from the 167 days of compensable time:

1. During the negotiations, there was no discussion of, or quantification of, Appellant's delay costs. (Tr. 42, 45, 50, 73, 156).

2. There was no discussion of the meaning of the term "extended overhead." (Tr. 305, 309, 342, 369-371, 400-401).

3. No one from the MTA informed Appellant that the MTA viewed C.O. No. 70 as being a limitation on Appellant's recovery. (Tr. 710, 166, 305, 309, 342, 369-371, 400-401, 416).

These are not enough, in and of themselves, though, to conclude that the entire tone of the negotiations was as Appellant contends. The facts stated above are actually points that never were negotiated, and probably should have been, but silence on these issues is not conclusive of anything.

MTA's view of the negotiations places emphasis on several other facets of the controversy. MTA notes that Appellant was far behind schedule and suffering from a severe cash flow, thus exposing Appellant to the possibility of expensive liquidated damages. (Finding of Fact No. 13). In order to avoid liquidated damages and to obtain much needed cash, the parties opened up the negotiations to include both time and money. (Finding of Fact Nos. 12 and 13). What was then drafted was an agreement similar to Change Order No. 29 which resolved both time extensions and delay costs for an earlier time period. The draft reserved only extended overhead because the MTA's audit of Appellant's books was not yet complete. MTA believes that it gave Appellant what it considered to be undeserved relief from liquidated damages. Coupled with the $400,000 payment MTA felt that the delay costs were taken care of.

Appellant has argued that it never would have accepted just $400,000 for its direct costs attributable to delay. However, when the total picture is taken into account, it seems that MTA did give up a lot. Every day that Appellant was granted a time extension it meant money for Appellant because of the threat of liquidated damages. (Tr. p. 276).

With this in mind, Appellant submits that if one assumes arguendo that the MTA contemporaneously interpreted Change Order No. 70 as resolving the bulk of Appellant's delay costs, there was no "meeting of the minds" to this

effect, and if there was no "meeting of the minds," there was no contract. See: Consumers Ice Co. v. United States, 201 Ct.Cl. 116, 475 F.2d 1161 (1973); Canaras v. Lift Trust Services, Inc., 272 Md. 337, 322 A.2d 866 (1974).

The facts that Appellant uses to support this contention are that there was no discussion of the term "extended overhead" and that MTA never informed Appellant that it considered Change Order No. 70 as resolving all delay costs except extended overhead. Appellant further contends that this appeal represents a fact pattern which is particularly susceptible to rescission. If the contract were rescinded, both parties would have to begin negotiations again. However, that will not be necessary as the Board finds that there was a meeting of the minds. While some important issues and terms were never discussed, there were several events which have led the Board to believe that there was mutual assent to a common understanding.

The key revolves around Appellant's draft revision to the paragraph (b) of the Change Order, MTA's rejection of these revisions at the August 19, 1981 meeting, the execution of the final draft of the Change Order by Appellant without its revisions, and Appellant's forwarding letter of August 20, 1981. (Findings of Fact 15, 16, 17 & 18). By means of these documents, Appellant expressed one possible understanding of the negotiations which the MTA promptly rejected. Appellant knew of this rejection, and signed the change order as it read originally. This fact leads the Board to believe that Appellant knew what the MTA intended by the change order, thus a valid contract was formed; a contract which compensated Appellant for all of its delay costs except extended overhead costs which were reserved until the audit was finished.

The Appellant has argued that MTA should be bound by the interpretation set forth in Appellant's letter of August 20, 1981 which forwarded Change Order No. 70 to MTA. The meaning given to a contract provision by one party will prevail over a conflicting interpretation asserted by the second party where the second party entered the agreement knowing or having reason to know the meaning given to the provision by the first party. See: Cresswell v. United States, 146 Ct.Cl. 119, 173 F. Supp. 805 (1959); Duplex Envelope Co. v. Baltimore Post Co., 163 Md. 596, 168 A. 688 (1933); Appeal of Bank of America, ASBCA No. 18811, 78-2 BCA ¶13,365 (1978).

Appellant contends that as a matter of law, the MTA cannot insist upon an interpretation inconsistent with Appellant's letter of August 20, 1981, which clearly alerted the MTA to Appellant's position.

> 2. On page 6, sub-paragraph (B), the MTA has agreed (a) that Intercounty is entitled to 167 calendar days of compensible time and (b) that negotiations for an equitable adjustment for associated costs for the 167 calendar days of compensible time will commence on or before September 30, 1981.
>
> We believe the above points represent the understanding of both Intercounty and the MTA.

While the above language indicates Appellant's understanding that it was to be fully compensated for the 167 calendar days of compensable time, and it appears that MTA was aware of Appellant's interpretation of the change order

because its top officials acknowledged during the trial that they had read and discussed the letter before signing the change order (Tr. 254-255, 350-351), this is not enough to satisfy the requirement that "a party willingly and without protest enter into a contract with knowledge of the other party's interpretation. . . ." Perry and Wallis, Inc. v. United States, 192 Ct.Cl. 310, 427 F.2nd 722, 725 (1970).

When the negotiations had progressed to a certain point, both sides felt it would be helpful to crystallize the discussions by setting them to paper. MTA accordingly prepared a draft of what later became Change Order No. 70. This draft contained the language granting Appellant a lump sum of $400,000 and the agreement to negotiate an equitable adjustment for extended overhead for 167 calendar days of delay. Appellant revised this language to read as follows:

> (b) commence no later than September 30, 1981, negotiations to determine the amount of equitable adjustment to compensate for 167 calendar days compensable delay.

Appellant's representatives testified that these changes were made because they felt this language clearly stated what the agreement was. (Tr. 62). However, MTA rejected the proposed change because it felt this was not reflective of the negotiations. This action by MTA refutes the idea that it "willingly and without protest entered into a contract with knowledge of the other party's interpretation. . . ." The rejection of Appellant's draft revisions to Change Order No. 70 does constitute a protest. In fact, representatives of Appellant signed the draft immediately after MTA rejected their revisions.

These actions were all prior to the time that Change Order No. 70 was actually signed, which was when the above letter was composed. The fact that MTA received and read the letter is not enough to characterize the MTA as acquiescing to Appellant's position. While the MTA never discussed the letter with Appellant, it also did not change the language of the change order to accommodate Appellant's interpretation. In fact, Appellant signed the change order as it had been originally written. Thus, it can actually be stated that Appellant acquiesced to the MTA's interpretation of the change order.

Having determined that a valid agreement was formed, it is necessary to determine whose interpretation of the term "extended overhead" is correct. Appellant feels that it is entitled to recover all of its time-related costs resulting from the 167 days of compensable delay; while MTA feels that the term "extended overhead" limits the amount that Appellant can recover.

MTA has asserted throughout that the term "extended overhead" has a precise, definite, and well-understood meaning in the construction industry: the normal overhead costs that a construction contractor incurs during a period of delay. Thus, it consists of the indirect costs that cannot be traced to or associated with a particular job or project. MTA thus considers many of the costs that Appellant has included in its claim to be direct costs assigned to a particular project.

MTA has cited many treatises, articles, and cases that have discussed this term. All of them state that "overhead" is the sum of a contractor's indirect costs. For example, in the Construction Briefing Papers series,

overhead is defined in the "Definitions" section as "generally, the aggregate of [the contractor's] indirect costs." Kent and Walters, "Recovering Indirect Costs." Construction Briefing No. 80-6 (November 1980). In the same briefing paper, "indirect cost" is defined as any cost which is not directly identifiable with a single construction contract, but which is identified with two or more such contracts, or [the contractor's] business in general." [Id, at 1].

MTA also claims that its position is supported by other authorities that have defined the types of costs included in the term "overhead." The briefing paper on "Calculating and Proving Construction Damages" states that job site and home office overhead consist of such costs as supervision, engineering, rent, utilities, maintenance, clerical work, supplies, and security. Tieder, Hoffar and Cox, "Calculating and Proving Construction Damages," Construction Briefing No. 82-3 (May 1982).[2]

MTA also cites the decisions of courts and boards of contract appeals which support its position. The holdings in these decisions have been that overhead includes only the indirect costs incident to a contract, and not such direct costs as equipment, escalation, and subcontractor costs. For example, in Ben C. Gerwick, Inc. v. United States, 152 Ct.Cl. 69, 130 (1961), the Court of Claims granted the contractor's claim for home office and job site overhead. The Court found that job site overhead consisted of only the following cost elements:

> Such field office expenses, exclusive of salaries, included the cost of blueprints, office equipment and supplies, transportation and automobile expenses, maintenance and repair of office equipment, hauling and express for the field office, telephone, telegraph, safety engineer and first aid, light and power, and miscellaneous expenses necessary for the operation of the field office. Such field office overhead expenses were regularly continuing expenses incurred for the operation of the field office, without regard to the amount of work performed or the time used in performance.

The Court in Gerwick allowed as delay damages, but not as overhead costs, the costs of equipment and labor escalation attributable to the delay, thus making the same distinction between direct and indirect costs that MTA is making. In Peter Kiewit & Sons Co., Inc. v. United States, 138 Ct.Cl. 668, 722-724 (1957), the Court of Claims granted recovery of extended overhead. As separate elements of damages, the Court awarded the cost of equipment and wage escalation caused by the Government's delay. These additional damages were separately broken out as not being associated with overhead. [Id., at 724].

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[2]See also: H. Wright and J. Bedingfield, Government Contract Accounting, at 393 (1979) (quoting DAR 15-402.4); P. Treuger, Accounting Guide for Government Contracts, at 768 (7th Ed. 1982); Coombs and Palmer, Construction Accounting and Financial Management at 287 (1977).

The decisions of the boards of contract appeals have also uniformly treated overhead as those indirect costs which are incident to the performance of the contract work. In Martin Associates, Inc., GSBCA No. 5663, 82-1 BCA ¶15,739, the contractor's claim for delay damages was broken down into direct costs, unabsorbed overhead, and subcontractor costs.[3]

Appellant, on the other hand, asserts that there is no commonly understood meaning for the term "extended overhead" in the construction industry. Appellant presented expert testimony by an employee of Touche, Ross and Company who is an expert in construction industry accounting; he testified that, in his opinion, there is no common meaning for "extended overhead." (Tr. 477-478, 506-509, 522-523). This testimony, presented in rebuttal, was not refuted by MTA which presented no testimony as to the common understanding of the term. Despite this lack of testimony, the wealth of citations included in MTA's brief on this point does corroborate its position that there is a precise definition. The testimony of one expert witness is not enough to controvert the numerous treatises and cases which the MTA has brought to the attention of this Board. Therefore, the Board finds that the accepted meaning, in the construction industry, of the term "extended overhead" does not include such Appellant direct costs as equipment, subcontracting, and escalation.

For the above reasons, this appeal is denied.

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[3]See also: J.R. Pope, Inc., DOTCAB No. 78-55, 80-2 BCA ¶14,562; Constructors-Pamco, ENGBCA No. 3648, 76-2 BCA ¶11,950; Foster Construction Co., DOTCAB No. 71-16, 73-1 BCA ¶9,869; J.D. Shotwell Co., ASBCA No. 9,861, 65-2 BCA ¶5,243; B.J. Lucdrelli & Co., ASBCA No. 8768, 65-1 BCA ¶4,655.