BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of MACKE BUILDING SERVICES, INC. Under State Aviation Administration Contract No. SAA-SV-81-003	))) Docket No. MSBCA 1128)))

February 1, 1985

Pleadings - Relevant Issues - The State's failure to plead an affirmative defense did not preclude it from arguing the defense in its brief where Appellant was not prejudiced thereby and it appeared to the Board that justice would not be served without a consideration of the matter raised. COMAR 21.10.06.07 permits the amendment of pleadings at the discretion of the Board under circumstances such as those present here.

Patent Ambiguity/Duty To Inquire - Appellant's interpretation of the contract payment provisions did not give rise to a patent ambiguity since it did not result in an internal contradiction or otherwise read an essential provision out of the contract.

Contract Interpretation - Appellant's interpretation of the contract payment provisions was deemed to be reasonable under an objective test. The interpretation proferred gave meaning to all of the contract language while assuring that the State would receive exactly what it bargained for at a price not to exceed that which was determined to be the low bid.

Contract Interpretation - Where a contractor relies on an interpretation of the contract in preparing its bid, it cannot proffer a different interpretation after award and seek to obtain an equitable adjustment based thereon. Here, however, it was not shown that Appellant relied on a different interpretation in preparing its bid.

Waiver - Although Appellant accepted payments over a nine month period pursuant to the State's interpretation of the contract payment formula, such conduct was not sufficient to imply a waiver of the contract payment requirements or otherwise demonstrate an agreed modification to the original terms of the contract.

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OPINION BY CHAIRMAN BAKER

This appeal is taken from a final decision issued by a Maryland Department of Transportation State Aviation Administration (SAA) procurement officer denying Appellant's claim for additional payments under the captioned contract. The dispute involves the proper interpretation of the contract payment formula. Appellant has been paid to date only in accordance with the SAA's interpretation of this formula. Under its interpretation of the payment formula, however, Appellant would be entitled to higher weekly payments. Entitlement is all that is at issue at this time. (Stipulation 9).

Findings of Fact

1. In March 1981, the SAA issued an invitation for bids (IFB) from contractors interested in performing cleaning services at Baltimore-Washington International Airport (BWI). Generally, the contractor selected pursuant to this IFB was to furnish trained custodians, supervision, management and the necessary equipment and materials to perform those routine and special cleaning projects described in the contract specifications. See Contract SP-1.01.

2. On a daily and/or weekly basis, as set forth in the contract specifications, routine cleaning and policing of the BWI property was required. Routine cleaning was defined as "[t]he complete, detailed cleaning of an area." Policing was defined as ". . . a cursory type of cleaning to help maintain a uniformly high level of cleanliness and appearance between routine cleanings." See Contract SP-6. The contract Special Provisions detailed the precise manner in which policing and routine cleaning were to be performed.

3. Cleaning services were to be provided seven days a week, 24 hours per day. Contract Special Provision SP-6 addressed the general work assignments of contractor personnel on a daily basis, as paraphrased below:

a. One Job Manager responsible to the SAA for the daily performance of work.

b. One day shift (7:00 a.m. to 3:00 p.m.) supervisor whose crew would be responsible for the policing of all public areas, North and South terminals, A, B, C, D and E piers, and routine cleaning of Service Building II.

c. Thirteen day shift custodians working under the day shift supervisor. These custodians each were to have an upright custodial cart, specified equipment and were to be responsible for a contractually specified area of the terminal and service building.

d. Two evening shift (3:00 p.m. to 11:00 p.m.) supervisors responsible for the routine cleaning of the outer buildings and tenant areas in North and South terminals and A, B, C, D and E piers; and policing of public areas.

e. Twenty-two evening custodians working under the two evening supervisors. These custodians each were to have an upright custodial cart, specified equipment and be responsible for a specified area of the terminal.

f. One night (11:00 p.m. to 7:00 a.m.) supervisor responsible for the routine cleaning of all public areas.

g. Seventeen night custodians working under the night supervisor. These custodians likewise each were to have an upright custodial cart and be equipped as specified in the contract. Public areas to be cleaned by each custodian were described in detail in the specifications.

4. The equipment to be furnished by Appellant for use by its custodians was described in the contract under a brand name or equal specification. Minimum numbers of each piece of equipment were specified so as to assure that custodians did not have to share equipment during any single shift.

5. Routine cleaning and policing were to be bid as follows:

CONTRACTOR'S BID SHEET FOR ROUTINE WORK

For Performance of Routine (Not Projects) Work Only

	Weekly Charge	Bid Item#
One full-time on-site Job Manager 7 days/week - 56 hours/week	$________	R1
Day Shift:		
Supervisor for 56 manhours /week	$________	R2
Custodians for 705.25 manhours/week	$________	R3
Evening Shift:		
Supervisor for 112 manhours/week	$________	R4
Custodians for 1193.5 manhours/week	$________	R5
Night Shift:		
Supervisors for 56 manhours/week	$________	R6
Custodians for 922.25 manhours/week	$________	R7
Payroll taxes and insurance	$________	R8

Cleaning materials and supplies (for routine cleaning work only). Includes cost of dust mops, chemicals, etc. (Does not include materials for projects work.)	$__________	R
Cleaning equipment cost (including cleaning equipment for routine cleaning). Includes equipment maintenance cost, parts, repairs, amortization, and all other equipment costs.	$__________	R10
Contractor's overhead and profit (including all miscellaneous costs such as bonds, book-keeping, liability insurance, recruiting of personnel, cost of paging and answering service, fringe benefits).	$__________	R11
Uniform costs for custodians and supervisors, including cost of laundering.	$__________	R12
TOTAL MAXIMUM Weekly Charge for Routine Cleaning work.	$__________	R13

Bid sheets for routine work were to be completed for each of the three years covered by the terms of the prospective contract. These sheets respectively were numbered P-2A, P-3A, P-4A in the IFB.

6. In addition to routine cleaning and policing, the IFB described certain special cleaning projects to be performed periodically during the year as ordered by the SAA. Eight such projects were described and an estimated yearly frequency was provided. Contractors were asked to quote a lump sum unit price for each of these projects. Additionally, contractors were to furnish an hourly unit price for miscellaneous labor, estimated at 1,000 manhours per year, for any additional cleaning services required by the SAA. See Contract Special Provision SP-1.17. These special project prices were to be firm for all three years of the contract term.

7. The contract was to be awarded to the responsive and responsible bidder submitting the lowest bid for the routine cleaning, policing and special project services required during the three year contract term. See Contract General Provision GP-3.02.

8. Thirteen bids were received under the captioned IFB. Although Abacus Corporation submitted the lowest total bid at $2,725,596, it was not determined to be a responsible bidder. This responsibility determination never was appealed to the Board and is not at issue. Appellant, the second low bidder, thereafter was determined to be a responsive and responsible bidder and received award of the contract on June 10, 1981.

9. Contract Special Provision SP-1.12 is entitled "Invoices" and provides that:

> On a weekly basis, Contractor shall submit to the Contract Officer a payroll record for employees working under the Contract, along with a list of completed projects.

The Contractor shall also submit on a weekly basis to the Contract Officer, for approval, the actual sign-in sheets along with the corresponding time cards.

On a monthly basis, an invoice shall be submitted by Contractor showing charges for routine work and each project separately for each week in the past month. A total charge for the work performed during the past month is to be shown also.

* * *

10. Contract Special Provision SP-1.13 is entitled "Payment Schedule" and provides that:

Payment to the Contractor for routine cleaning work will be determined by the "Formula For Computing Weekly Routine Cleaning Charge", shown on page T-1.

Addendum No. 1 to the IFB deleted page T-1 and substituted page T-1A as follows:

[Weekly Charge (not to exceed Item R13)] = [Actual Total Wages & Salaries Paid (as shown in Items R1 through R7)] + [Actual Total Wages & Salaries Paid (as shown in Items R1 through R7) / Total Wages & Salaries Bid (Items R1 through R7)] x [Payroll Taxes & Insurance Bid (Item R8) + Cleaning Materials Bid (Item R10) + Cleaning Equipment Cost Bid (Item R10) + Overhead and Profit Bid (Item R11) + Uniform Cost Bid (Item R12)]

Notes: The daily maximum custodial man-hours shall not exceed 403 hours in any one day for routine work.

Item numbers R1 through R13 are as bid by Contractor on page P2A, P3A, and P4A of this contract.

11. Appellant's initial invoice was submitted to the SAA on or about August 31, 1981. (Appeal File, Tabs IV (12, 2)). Actual salaries and wages paid by Appellant to employees performing routine cleaning and policing were listed in an attachment to the invoice as follows:

Week Ending	Amount
8/7/81	$12,634.05
8/14/81	$11,859.36
8/21/81	$11,195.34
8/28/81	$12,195.74

Using the payment formula, Appellant determined that the total wages and salaries as bid (items R1 through R7) equaled $12,979 per week for year one of the contract. Payroll taxes and insurance (item R8), cleaning materials (item R9), cleaning equipment cost (item R10), overhead and profit (item R11)

and uniform cost (item R12) totalled $5,390 per week for year one of the contract. There is no dispute as to the accuracy of these figures. Appellant then utilized the actual wages paid by it during each week of August 1981, as set forth above, and computed the weekly charges to the SAA.[1] Actual wages were determined by Appellant based on time sheets and the wage rates paid to each custodian. Appellant's weekly charge to SAA, in each instance, was less than the maximum weekly charge of $18,369 as bid by Appellant for year one of the contract. (Appeal File, Tab III (1)).

12. The SAA refused to pay the invoice as submitted. In its view, the contract required Appellant to compute actual salaries and wages by taking the average salary and wage rates, as computed from Appellant's bid sheets, and applying these rates to the actual number of manhours worked. The SAA recomputed the amount due Appellant pursuant to its interpretation of the contract payment formula and tendered payment.

13. By letter dated November 2, 1981, Appellant's Vice President and General Manager, Mr. George E. McNeil, requested that the SAA advise him of its precise interpretation of the payment formula. While he noted that Appellant was depositing the first payment received from the SAA, Mr. McNeil expressly stated that there still was a question as to the proper method for payment. (Appeal File, Tab IV (4)).

14. The SAA, through Mr. Walter O. Wesley, its Chief of Facilities Maintenance, responded to Mr. McNeil on November 13, 1981 as follows:

> Payment for routine contract work is made on the basis of hours actually worked as evidenced by Macke [Appellant] sign-in sheets. Page P-2A of contract SAA-SV-81-013 provides the foundation for computing the invoice. The actual custodian hours worked multiplied by the rate bid for each shift is added to the manager's and supervisor's salaries. A percentile is developed by this figure divided by the figure representing the total of all wages and salaries bid if the minimum number of hours required by contract on Page P-2A items R-1 through R-7 were provided. Overhead costs, equipment, supplies and taxes are multiplied by this percentage and these sums added to wages and salaries worked for the subtotal. . . . Project work charges which are submitted with your invoice are verified and added to the subtotal for a grand total.

(Appeal File, Tab IV (5)).

15. All invoices submitted by Appellant for the months of October 1981 through June 1982 (received by the SAA on July 29, 1982) were calculated pursuant to the SAA's interpretation of the payment formula. (Stipulation No. 8).

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[1] Appellant developed a short hand approach to the computation by multiplying the actual weekly salaries and wages paid by the factor 1.4153 (i.e., 1 + (5,390/12,979)).

16. By letter dated September 16, 1982, Appellant's counsel apprised SAA officials of a discrepancy in the method of contract payment through the June 1982 payment. Counsel reasserted Appellant's initial interpretation and asked for back compensation correcting the perceived interpretation error.

17. Pursuant to advise of counsel, Appellant submitted its September 9, 1982 invoice in a manner consistent with its attorney's interpretation of the payment formula. This invoice was returned without payment by the SAA for correction by Appellant.

18. Appellant resubmitted its invoice without change by letter dated September 20, 1982. The SAA, however, authorized payment for July, August and September 1982 only in accordance with its interpretation. (Appeal File, Tab IV (9)).

19. By agreement, invoices submitted by Appellant since October 1982 have reflected the SAA's interpretation of the payment formula pending resolution of the dispute. (Stipulation 8).

20. A meeting was conducted on October 25, 1982 to discuss the payment dispute. Appellant's President attended as did Mr. Theodore E. Mathison, the SAA Director of Airports. Thereafter, by final decision dated November 19, 1982, Mr. Mathison denied Appellant's claim for additional payments pursuant to its interpretation of the contract.

21. A timely appeal was taken on December 21, 1982. The parties thereafter agreed to submit this matter for decision without a hearing pursuant to COMAR 21.10.06.11.

Decision

I. Contract Interpretation

The SAA initially contends that Appellant's interpretation of the contract payment formula creates a patent ambiguity in the contract which Appellant should have recognized and inquired about prior to bid. Failure to inquire further is said to be fatal to Appellant's claim. Appellant not only denies the existence of a patent ambiguity, but objects to our consideration of this issue since the matter was not raised by the SAA in its pleadings.

COMAR 21.10.06.07 states that the Board ". . . may permit either party to amend its pleadings under conditions just to both." The regulation further makes clear that the Board has discretion to permit issues raised for the first time at hearing to be considered. In the instant appeal, the SAA initially presented the defense of patent ambiguity in its brief.[2] Appellant objected to the issue as untimely in its reply brief but thereafter responded fully to it. Appellant did not contend that it was denied the opportunity to present relevant evidence concerning this issue or that it otherwise was prejudiced. Further, the issue raised by the SAA is legal in nature and is

[2]This was a Rule 11 (COMAR 21.10.06.11) proceeding and hence a hearing was not conducted.

capable of being resolved fully based upon a consideration of the contract documents alone. For these latter reasons, we will proceed to consider and resolve the issue as raised.[3]

Turning to the SAA's affirmative defense, we initially note the importance of the patent ambiguity doctrine as summarized by the former U.S. Court of Claims:

> . . . If a patent ambiguity is found in a contract, the contractor has a duty to inquire of the contracting [procurement] officer the true meaning of the contract before submitting a bid. [citations omitted]. This prevents contractors from taking advantage of the Government; it protects other bidders by ensuring that all bidders bid on the same specifications; and it materially aids the administration of Government by requiring that ambiguities be raised before the contract is bid on, thus avoiding costly litigation after the fact.

George E. Newsom v. The United States, 230 Ct.Cl. 301, 303 (1982). "What constitutes a patent ambiguity and glaring omission cannot . . . be defined generally, but only on an ad hoc basis by looking to what a reasonable man would find to be patent and glaring." Rosenman Corp. v. United States, 182 Ct.Cl. 586, 590, 390 F.2d 711, 713 (1968). Generally, it is helpful to ask whether the contractor's interpretation does away with the contract's ambiguity or internal contradiction. George E. Newsom v. The United States, supra; The Brezina Construction Co., Inc. v. United States, 196 Ct.Cl. 29, 34-35, 449 F.2d 372 (1971); see also Dominion Contractors, Inc., MSBCA 1041, February 9, 1984, conc. op., p. 32.

Here the SAA contends that Appellant's interpretation of the contract conflicts with General Provision GP-8.01 which reads as follows:

> Payment to the Contractor will be made for the actual quantities of Contract items performed in accordance with the requirements of this Contract. In the event actual quantities increase or decrease from the quantities given in the proposal, the unit prices will prevail.

This provision, we are told, means that where the number of hours of custodial help is less than the estimated weekly total, the unit price for custodial wages per hour will prevail. Although a unit price for custodial wages admittedly was not set forth expressly on the bid form, the hourly wage was determinable from the bidding documents and thus is said by the SAA to represent the unit price under the contract. Appellant's interpretation, therefore, is inconsistent with this requirement in that the actual wage rates incurred necessarily would not be the same as the unit price allegedly bid.

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[3]Compare Maryland Rule of Civil Procedure 2-341(b) and Federal Rule of Civil Procedure 15(b) which liberally allow amendments of pleadings to serve the ends of justice. Here justice would not be served if Appellant were permitted to recover despite any failure by it to inquire in the face of a patent ambiguity.

Appellant contends that the bid form for routine work did not require a unit price to be quoted for custodial help on an hourly basis and that none was provided. Instead a weekly charge for custodial help per shift was quoted, as required, and then used to compute the maximum weekly charge under the contract. This maximum weekly charge, in turn, was utilized by SAA both to ascertain the low bidder and to act as a ceiling for the actual weekly wages which Appellant could pay to its employees and seek recovery for under the contract. Accordingly, Appellant saw no internal inconsistency with GP-8.01 and thus made no inquiry to the SAA prior to bid.

Notwithstanding the foregoing, the SAA submits that a reasonable person could not have resolved the apparent ambiguity as Appellant did since to do so requires that GP-8.01 be read out of the contract. However, the contract did mandate the performance of project work in addition to the routine work previously discussed. It is uncontroverted that this project work was bid on a unit price basis. Appellant understood GP-8.01 to apply to project work and thus did not dismiss this provision as meaningless.

On the basis of the foregoing, we conclude that Appellant was not aware of any ambiguity nor should it have been given its interpretation of the contract. No prebid duty of inquiry thus arose.

We now address the reasonableness of Appellant's interpretation.[4] In this regard, we note that the daily maximum number of custodial hours for which Appellant could invoice the SAA and receive payment was 403 hours. To reach this daily figure, Appellant would have had to employ all 13 day custodians, 22 evening custodians and 17 night custodians suggested by the SAA under contract Special Provisions SP-7, 8 and 9. Further, had the

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[4]In George E. Newsom v. United States, supra, at p. 304 the Court stated as follows:

> The analytical framework for cases like the instant one was set out authoritatively in Mountain Home Contractors v. United States. It mandated a two-step analysis. First, the court must ask whether the ambiguity was patent. This is not a simple yes-no proposition but involves placing the contractual language at a point along a spectrum: Is it so glaring as to raise a duty to inquire? Only if the court decides that the ambiguity was not patent does it reach the question whether a plaintiff's interpretation was reasonable. The existence of a patent ambiguity in itself raises the duty of inquiry, regardless of the reasonableness vel non of the contractor's interpretation. It is crucial to bear in mind this analytical framework. The court may not consider the reasonableness of the contractor's interpretation, if at all, until it has determined that a patent ambiguity did not exist.

This same approach is followed here. See also Dominion Contractors, Inc., MSBCA 1041, February 9, 1984, Conc. Op., pp. 31-32; Concrete General, Inc., MSBCA 1062, November 7, 1984, pp. 11-12.

contract required Appellant to assign this exact number of custodians to the respective shifts, there would have been no need for a payment formula since the required manhours per week always would have equaled the estimated manhours per week appearing in the bid schedules. The payment formula was necessary and important only when Appellant staffed the BWI job with less than the maximum number of custodians permitted under the contract. We conclude from this that the contract contemplated that Appellant would have the management flexibility to determine the custodial staffing required to meet the express requirements for routine cleaning at BWI on a daily and weekly basis and that the estimate of custodial manhours per week appearing in the bid schedules was not to constitute a mandatory requirement but rather a maximum figure for labor usage.

Appellant's custodial help did not earn a standard pay rate. Custodial wage rates varied depending upon what shift was being worked, an individual's experience, and his length of service with the company. Generally, the more experienced the custodian, the higher his pay. Further, the use of more experienced custodians apparently enabled Appellant to perform routine cleaning to the satisfaction of the SAA while requiring fewer custodial employees and, hence, fewer manhours per week. The net result was an average custodial hourly wage that was higher than if Appellant had expended the maximum number of custodial hours and employed less experienced help.[5]

In construing the contract payment formula, Appellant understood the term "Actual Total Wages & Salaries Paid (as shown in Items R1 through R7)"[6] to mean the actual hours worked by each custodian multiplied by his or her respective wage rate. This was the amount actually paid by Appellant to its help. Appellant further understood that it could not invoice or receive payment for actual wages and salaries on a weekly basis in excess of what appeared under Items R1 through R7 of its bid sheet. However, as long as Appellant met its obligations under the contract at a price not to exceed the maximum weekly charge bid, Appellant understood that it would be paid based upon the wages actually earned by its custodial employees.

The SAA maintains that the foregoing interpretation is unreasonable because it renders contract General Provision GP-8.01 meaningless. See Dominion Contractors, Inc., MSBCA 1040, May 20, 1982, p. 10; Chew v. DeVries, 240 Md. 216, 213 A.2d 742 (1965). For reasons previously stated, however, we have concluded that GP-8.01 had no application to the determination of contract payments for routine cleaning services and was not rendered meaningless since it still governed payment for special project work performed under the contract.

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[5] Appellant premised its bid upon the assumption that 40% of the custodians in year one of the contract would earn $4.25 per hour, 20% would earn $4.00, 20% would earn $3.75 and the remaining 20% would earn $3.50. These figures were adjusted slightly prior to submitting the bid. The average wage, as bid, based upon the maximum 2,821 hours of custodial work per week would have been $4.10/hour for year one of the contract. This figure, according to SAA, represents the unit price for custodial help.

[6] There is no dispute as to the salaries paid to the job manager and supervisors and billed to the SAA on an hourly basis.

In further opposition to the reasonableness of Appellant's interpretation, the SAA has offered the affidavits[7] of the drafter of the contract, Mr. Bristow, and several competitors for the instant contract. (Exhs. R-1 through R-3). Each affiant has testified that the contract was intended to require a minimum number of manhours of custodial work,[8] as set forth on the bid sheets, with hourly wages to be determined by the bid submitted for these hours. With regard to Mr. Bristow's testimony, it is well settled that ". . . where there has been an integration of an agreement, those who executed it will not be allowed to place their own interpretation on what it means or was intended to mean. The test in such cases is objective and not subjective." Ray v. Eurice, 201 Md. 115, 127 (1952). Similarly, the interpretation given the contract by Appellant's competitors is of little significance where a reasonably intelligent bidder could have and did ascribe a different meaning to the same contract language.

We conclude that Appellant's interpretation is reasonable. The term actual when given its ordinary meaning refers to something real or factual. See "Webster's New World Dictionary", Second College Ed., 1978. The actual total wages paid by Appellant to its custodians are as demonstrated in its books of account. An average wage rate per shift multiplied by the total actual hours worked by custodians on the corresponding shift does not equal necessarily the real wages paid by Appellant.

Aside from the foregoing semantic considerations, Appellant's interpretation does not conflict with any other contract provision, permit Appellant to avoid full contract performance, or otherwise require the SAA to pay an amount in excess of that bid by Appellant. In this regard, it is clear that Appellant was required by the contract to perform routine cleaning in conformance with detailed specifications as to frequency and procedure. Manpower was to be provided to achieve these ends.[9] Further, under no circumstances was the SAA responsible for wages and salaries in excess of that bid by Appellant on a weekly basis for all custodial work since the payment formula limited weekly invoices and payments to the maximum weekly payment bid. In other words, the SAA was to receive exactly what it bargained for in return for weekly payments to Appellant that never were to exceed a sum deemed to be the lowest amount bid for the work involved.

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[7] These affidavits were received with Appellant's consent in an effort to avoid the need for a costly hearing.

[8] Although we need not assess the credibility of these affidavits, we note that the contract clearly stated a maximum rather than a minimum number of custodial hours for which the successful contractor could be paid on a weekly basis.

[9] Appellant's manpower here was sufficient not only to comport with contract requirements but to earn SAA praise.

The SAA next contends that even if Appellant's interpretation was reasonable, it did not rely on that interpretation when preparing its bid and, thus, is not entitled to be paid in accordance therewith. Compare WPC Enterprises, Inc. v. United States, 163 Ct.Cl. 1, 6 (1963); Astro-Space Laboratories, Inc. v. United States, 200 Ct.Cl. 282, 295, 470 F.2d 1003 (1972). In this regard, the SAA submits that Appellant prepared its bid by calculating an average hourly rate for custodial help and multiplying this rate by the estimated manhours set forth on the bid sheets for this class of employee. (See Exhs. R-5, R-6, R-7). Accordingly, it is argued that there was no understanding that less than the maximum number of custodial manhours would prove necessary or that actual custodial wage rates incurred in the performance of the contract would be utilized to compute weekly payments.

In considering this argument, we note that Appellant was required by the terms of the IFB to submit its bid in accordance with the bid sheets prepared by the SAA. These bid sheets, among other things, solicited Appellant's weekly charges for routine cleaning over each of three contract years. The maximum number of hours per week of labor for which Appellant could be paid for its routine cleaning services was provided on the bid sheets and was to be used in computing the weekly charge for custodial labor by shift. Appellant, therefore, was to compute a maximum price, on a weekly basis, for the performance of all routine services.

In preparing its bid, Appellant recognized that wage rates for its custodians would vary by as much as $0.75 an hour. (Exh. R-5). It thus sought to estimate an hourly charge for custodial services that would take into account this disparity over the maximum 2,821 manhours which it was required to assume might be necessary to perform the contract work. Appellant's intent in preparing its bid, therefore, was to ascertain the average labor cost that it was likely to incur if it was required to expend the maximum number of custodial hours permissible under the contract. Appellant's prebid worksheets, therefore, do not demonstrate Appellant's interpretation as to how the contract pay formula should be applied since its bid necessarily assumed that the maximum number of custodial hours would be required. Clearly what would be an average wage rate over the maximum 2,821 custodial hours permissible under the contract on a weekly basis necessarily would not be the same where fewer manhours were necessary. Thus, we cannot say that Appellant's intent in preparing its bid was contrary to the interpretation of the payment formula proferred by it here. Based on the evidence adduced, it appears that Appellant neither considered nor had cause to consider the proper interpretation of the payment formula until it prepared its first invoice.

II. Waiver

We have concluded that Appellant had a right to be paid under the contract pursuant to its interpretation of the payment formula. When the SAA declined to pay Appellant in accordance with this interpretation, it

breached[10] the captioned contract. Notwithstanding this conclusion, the SAA alleges that its nonperformance was excused for all invoices submitted prior to October 1982 (i.e., for performance through June 1982) as a result of Appellant's waiver of the breach. This waiver allegedly was manifested by Appellant's acceptance of all payments made prior to October 1982 without complaint. Put another way, the SAA contends that it is not liable for the full consideration payable under the contract through October 1982 since Appellant didn't insist upon it.

A waiver is ". . . the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such a right, and may result from an express agreement or be inferred from the circumstances." Gould v. Transamerican Associates, 224 Md. 285, 294 (1961). As further stated by the Maryland Court of Appeals:

> "A waiver may be either verbal or in writing; and it is not necessary that the waiver should be direct and positive. It may result from implication and usage, or from any understanding between the parties which is of a character to satisfy the mind that a waiver is intended. The assent must, however, be clearly established and will not be inferred from doubtful or equivocal acts or language." 5 S. Williston. Law of Contracts § 678 (3rd ed. 1961).

Canaras v. Lift Truck Services, Inc., 272 Md. 337, 360-61 (1974).

The issue here concerns whether Appellant's actions demonstrated an intent on its part to relinquish its right to be paid in accordance with the terms of the payment formula, i.e., did the tender of reduced payments and the acceptance thereof for a nine month period manifest an intent to modify the clear terms of the contract. In Walker v. Associated Dry Goods Corp., 231 Md. 168 (1963), the Court of Appeals was faced with a similar issue involving the interpretation of a shopping center lease. In particular, the dispute involved the manner in which additional rent based upon a scale of percentages of net sales above a minimum figure was to be computed under the lease. The lessor received rents from the lessee over a four year period without objection to the method of computation. Only after a new principal joined the lessor's organization was the question concerning lease payments raised. The Court held that the contract was unambiguous and that the lessor's interpretation controlled. Further, "[t]he mere acceptance by Walker [lessor] for several years of payments in less amounts than they were entitled to under the lease does not evidence an intention on their part to modify the terms of the lease". Id, at pp. 179-180; cf., Food Fair Stores, Inc. v. Blumberg, 234 Md. 521 (1964).

In the instant appeal, we similarly conclude that Appellant did not unequivocably waive its right to payment under the contract by invoicing and accepting payment under the SAA's interpretation of the payment formula for

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[10] Pursuant to contract General Provision GP-5.08, Appellant obligated itself to present breach claims in accordance with a prescribed administrative procedure and ". . . to proceed diligently with the performance of the contract . . ." pending a final decision.

a nine month period. Appellant did submit its first invoice pursuant to its own interpretation of the formula. It thereafter was told that its invoices would be paid only if submitted in the manner directed by the SAA. While Appellant could have pursued its administrative remedy more aggressively, its delay neither can be viewed as a relinquishment of its right to payment under the terms of the contract as originally entered into, or concomitantly as evidence of an agreed modification to the contract.

For all of the foregoing reasons, therefore, Appellant's appeal is sustained and remanded to the SAA Administrator for negotiation of an equitable adjustment.