BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of RICE CORPORATION	)	
	)	Docket No. MSBCA 1301
Under DNR Contract No. SEC 8-85	)	

December 2, 1987

Interest - Predecision interest was not recoverable as part of the contractor's equitable adjustment in view of a specific contract prohibition respecting its award. Section 17-201(d), Division II, State Finance and Procurement Article, now codified as Section 11-137(j), which authorizes award of predecision interest in the Board's discretion notwithstanding a contrary contractual provision was not intended to be applied retroactively.

Proposed Decision under COMAR 21.10.06.28 - The purpose of exceptions in the context of findings of fact in a proposed decision under COMAR 21.10.06.28 is to set forth the proposed finding of fact(s) being excepted to and those portions of the record which are contrary to the proposed finding specified. The Board's proposed decision was based on the record before it. The Respondent filed exceptions based on documents not previously brought to the Board's attention. The appropriate method of bringing these extra record documents before the Board, which cast doubt on one aspect of the proposed decision dealing with equipment costs, would have been by motion. However, the Board in its discretion received the documents in evidence based on the concession by the Appellant's counsel that the documents reflected the actual state of events regarding the equipment costs.

Patent Ambiguity - Duty to Inquire - Any ambiguity in specifications regarding size of rock and manner of its placement in a shoreline protection project was patent or obvious such as to require Appellant to make prebid inquiry concerning the State's interpretation of the specifications.

Delay - Burden of Proof - Appellant met its burden of proof to show (1) that it reasonably could have completed the project by the contract completion date and (2) its entitlement to a time extension and equitable adjustment for costs involved in the period of delay in completion.

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DECISION BY CHAIRMAN HARRISON

Appellant timely appeals the Department of Natural Resources (DNR) procurement officer's denial of its claim for an equitable adjustment and time extension. In addition to contesting the merits of the claim, DNR asserts affirmative defenses of (1) alleged lack of timely notice of claim and (2) waiver based on Appellant's failure to seek clarification of an alleged patent ambiguity.

Findings of Fact

1. On August 30, 1984 DNR, under the auspices of the Shore Erosion Control Program, allocated funds for the design and construction of a shoreline protection project for

property owned by Dr. and Mrs. William Bell located on the Choptank River, at Ferry Neck, Ashford Farm, Talbot County, Maryland. The work consisted of the construction of 444 linear feet of stone revetment with appropriate ties to nearby work, debris removal, grading, topsoiling and seeding.

2. On February 15, 1985, the project was advertised in the Maryland Register, Blue Reports and the Dodge Reports. Additionally, copies of the Invitation for Bids (IFB) were sent to 120 marine contractors.

3. A prebid conference was held at the project site on March 12, 1985 which was attended by Appellant's President, Mr. Robert D. Rice.

4. Bids were opened on March 19, 1985. Bids were as follows:

Bidders	Base Bid
Appellant	$ 75,500
Kenster Tri-State & Co.	91,400
Marine Structural Applications, Inc.	96,200
J. Marion Bryan & Sons, Inc.	96,800
Coastal Design & Construction, Inc.	107,900
Teal Construction, Inc.	130,633
Allied Contractors, Inc.	135,740

The Engineer's estimate for this project, as submitted on March 6, 1985 by Jack S. Feick and Associates, Inc., who provided architectural and engineering services for the project, was $80,727.00.

5. On April 3, 1985, a Notice of Award was mailed to Appellant together with the construction contract and other required documents for execution and submission.

6. On April 19, 1985, Mr. W. Eugene Holsinger, who prepared Appellant's bid, Appellant's President, and Mr. Donald G. Maloney, Appellant's superintendent on the project, accompanied by Shore Erosion Control Program personnel visited three previously completed stone revetment projects for the purpose of providing Appellant with examples of the construction of this type of project.

7. On April 22, 1985, the procurement officer sent a Notice to Proceed to Appellant together with an executed copy of the contract dated April 19, 1985 in the amount of $75,500 with a 120 day performance period commencing on April 22, 1985 and ending on August 19, 1985. However, according to counsel for DNR, Appellant's 120 day performance period actually commenced on May 22, 1985, requiring completion by September 19, 1985. See Respondent's Post Hearing Brief at p. 31. We accept these latter dates (May 22 - September 19) as reflecting the actual 120 day contract performance period.

8. Material to the appeal are the following provisions of the specifications:

Section 5-2 B. General:

1. All stone for the protection work shall be durable quarried stone as approved by the Maryland Department of Natural Resources. The stone shall be hard and angular, free from laminations, weak cleavages, and undesirable weathering, and of such character that it will not disintegrate from the action of air, salt water, and in handling and placing. Sedimentary stone will generally be unacceptable. The stones shall be approximately rectangular in cross section and free from thin slabby pieces having a maximum dimension more than three and one-half times the least dimension.

C. Stone Size: Stone sizes for armor stone, chinking stone and bedding stone shall meet the following requirements:

1. Armor stone sizes shall be such that a minimum of 90% of the individual stones shall weigh from 400 lbs. to 1200 lbs. Not more than 10% of the individual stones shall weigh more than 1200 lbs., nor individual stones be less than 400 lbs.

2. Bedding stone shall be approximately 3" up to 8" in size. Stones smaller than 3" shall not be allowed.

3. Chinking stones shall weigh not less than 100 lbs. nor more than 200 lbs. each.

D. Field Sample: The contractor shall supply samples of stone to be displayed at the site with appropriate individual weights marked as follows: 400 lbs., 600 lbs., 800 lbs., 1000 lbs., and 1200 lbs. These samples of stone shall be from the same quarry and of the same type of stone as that to be supplied for the job and shall be delivered to the site in advance of the time when placing the stone protection is expected to begin. Final approval of stone for the protection work will be based upon these samples. The Contractor will not be granted an extension of time or extra compensation due to delay caused by sampling, testing, approval or disapproval of stone protection material under the requirements of these specifications.

E. Certification: The Contractor shall obtain from the quarry and submit to the Maryland Department of Natural Resources a certificate indicating the following:

1. Stone Classification

2. Weight per cubic foot

3. That sizes stipulated in the specifications are being supplied to the site.

Section 5-3 CONSTRUCTION METHOD:

A. Alignment and Grading: The filter cloth, bedding stone, armor stone and chinking stone shall be placed within the limits and to the lines and grades shown on the Drawings or otherwise required by the Engineer. The Alignment of the revetment shall in general follow the existing bankline and shall extend no further outboard than is necessary to construct the revetment to the lines and grades shown. When necessary, the revetment shall be constructed on compacted select fill as approved by the Engineer. The surface, as graded, shall be free from any projections or abrupt changes in slope which may cause damage to or bulging of the filter cloth.

B. Filter Cloth: The strips of plastic filter cloth shall be spread parallel to the major axis of the structure on the prepared foundation as shown on the drawings. The cloth shall be loosely laid (not stretched) with no more than one overlap parallel to the major axis of the structure. Overlaps perpendicular to the major axis of the structure shall be staggered a minimum of 5 feet. Rolls of as great length as it is economical for the Contractor to handle shall be used whenever possible in order to minimize the number of overlaps perpendicular to the major axis of the structure. All overlaps shall be a minimum of 18". The cloth shall be securely fastened in place to prevent slippage during construction with securing pins placed 30 inches apart each way.

Alternate anchoring methods may be used subject to approval by the Engineer. Adequate precaution shall be taken to prevent damage of the plastic cloth from placement of overlaying materials. Stone weighing more than 100 pounds should not be dropped from a height greater than 5 feet onto the plastic cloth. Stones weighing more than 500 pounds should not be dropped from a height greater than 2 feet. Any plastic filter cloth damaged or displaced before or during placement of overlaying layers shall be replaced or repaired to the satisfaction of the Engineer at the Contractor's expense.

C. Bedding Stone: Bedding Stone shall be placed on the filter cloth in a uniform layer as shown on the typical details. Bedding stone may not be dropped from height greater than 5 feet above the cloth.

D. Armor Stone: Armor stone shall be placed in such a manner as to produce a reasonably well graded mass of rock with a minimum practical percentage of voids and shall be constructed to the specific lines and grades. Stones shall be placed so there is a well graded distribution of the various sizes throughout the revetment. Any oversize stones shall be placed at the toe of the revetment. The finished revetment shall be free from pockets of small stones and clusters of larger stones. Rearranging of individual stones by mechanical equipment or by hand will be required to the extent necessary to obtain a reasonably well graded distribution of stone size. Spaces between stones which are large enough to receive chinking stones shall be filled. The Contractor shall maintain the revetment until accepted and any material displaced by any cause shall be replaced at his expense to the lines and grades shown on the drawings. (Underscoring in original).

E. The Contractor shall schedule his operations so that the length of time newly graded areas are left exposed to wave action is minimized. Immediately prior to placement of plastic filter cloth, the revetment backfill slopes shall be fine graded to a tolerance of plus or minus three tenth (0.3) foot from a smooth surface as measured by an approved template.

The Contractor shall not prepare more slope than can be covered with revetment stone by the end of each working day. Temporary protection for the exposed end of the slope shall be provided at the end of each working day.

(Rule 4, Tab 2).

9. On May 2, 1985, a pre-construction meeting was held at the project site conducted by Mr. Daniel G. Mullen, who was named in the Notice to Proceed as the State inspector assigned to the project. The meeting was attended by two of Appellant's employees, Mr. Donald G. Maloney, the project superintendent, and his son, Mr. Donald G. Maloney, Jr.

10. On May 22, 1985, Appellant moved onto the project site and started site access operations. At this time Mr. Bernard F. Wentker had been assigned the duties of State inspector for the project replacing Mr. Mullen who had departed State service.[1]

11. On May 24, 1985, DNR received a materials certification for stone supplied by D.M. Stoltzfus & Sons, Inc as required by Section 5-2E of the specifications, supra.

12. During an inspection on May 28, 1985 by Mr. James R. McKnight, construction manager for the Shore Erosion Control Program, Appellant was advised that some of the bedding stone was too large. Stone size problems were resolved, appropriate sample piles established, and construction of the revetment commenced on or about May 31, 1985. (March 25 Tr. 494; Appellant's Rule 4 Supplement, Tab 3). Appellant intended to construct the entire stone revetment from one end to the other without stopping. This approach to construction of the revetment was based on Appellant's belief that the specifications permitted 10% of the armor stone to weigh less than 400 lbs. and that armor stones need only be in contact with one another at one point. (March 23 Tr. 147-154). Appellant testified that it expected to finish the project by early July 1985 based on a projected rate of progress of approximately 40 feet of revetment per day. (March 23 Tr. 76-78, 136-140; March 24 Tr. 239-242).

13. Mr. Wentker inspected the first 20 feet of revetment[2] on June 4, 1985 and advised Appellant of certain major problems with the job, and a need to establish a "sample section." (March 26 Tr. 757-766).

14. On July 1, 1985, Appellant's President, Mr. Rice, personally complained to Mr. Leonard Larese-Casanova, Director of the Shore Erosion Control Program,[3] and Mr. Wentker's superior, that Mr. Wentker was requiring work to be performed that was not in accordance

[1]On June 7, 1985, Appellant was formally advised by letter of a change in State inspectors, naming Mr. Wentker as responsible for this task.
[2]Appellant had constructed some 85 feet of revetment by this time. (March 23 Tr. 78).
[3]Mr. Larese-Casanova also is the procurement officer for the instant procurement from whose decision Appellant has appealed.

with the plans and specifications. (March 25, Tr. 654-655). This oral complaint was followed up by a written complaint dated July 10, 1985. (Rule 4 File, Tab 9).

Appellant's complaint specifically related to instructions from Mr. Wentker (1) to remove stone placed as armor stone that weighed less than 400 lbs. and replace it with stone that weighed more than 400 lbs; (2) to reposition stone to achieve a contact condition which minimized the space between the armor stones; and (3) to approach the work on a section by section basis in order that Mr. Wentker could approve the work on one section before Appellant proceeded to work on the next section.

15. By letters dated August 30 and September 9, 1985, and at a personal meeting on September 3, 1985 with Mr. McKnight, Appellant asserted that as of August 30, 1985 the work was complete except for site restoration and requested that a punch list be issued. (Rule 4 File, Tabs 11, 12). The punch list was issued on September 17, 1985 at a field inspection. Appellant worked on punch list items and other work as directed by Mr. Wentker during the period September 17 to November 15, 1985. Mr. Wentker was transferred to another job site and site restoration was finally accomplished during the last two weeks of November. (March 25 Tr. 506-508). Appellant last performed work on the project on November 30, 1985.

16. Appellant had indicated a not-to-exceed 120 calendar day completion period in its bid and the contract required satisfactory completion in a 120 calendar day period (measured from May 22, 1985 - September 19, 1985). While Mr. Wentker was of the opinion that the project was not even substantially complete as of mid-November 1985 when he last visited the site (March 26 Tr. 860-883), Mr. Larese-Casanova testified that Appellant substantially completed the project by August 30, 1985. (March 25 Tr. 727-737). Mr. Larese-Casanova also was of the opinion that Appellant could have completed the project including all punch list items and site restoration not later than September 12, 1985. (March 25 Tr. 731-732). We accept the testimony of Mr. Larese-Casanova regarding project completion which is generally supported by the testimony of Mr. McKnight whom Mr. Larese-Casanova testified had equal oversight authority with Mr. Wentker over the work. (March 25 Tr. 604-610).

17. The Board finds that Appellant misinterpreted the specifications relating to size of armor stone and the manner of its placement. This misinterpretation required certain reworking of the revetment and associated delays (i.e. difficulty in achieving a 2 to 1 slope) such that it would not have completed the project prior to September 12, 1985. However, the Board finds that as a result of actions by Mr. Wentker, during the period September 13, 1985 to November 30, 1985, project completion was improperly delayed until the latter date. In the main, these actions consisted of requiring Appellant to undertake significant reworking of stone not actually required by the specifications, including certain repositioning of armor stone in a revetment already deemed structurally sound by his superiors and cosmetic changes to the alignment and grade not required by the specifications. (March 23 Tr. 182-183).

18. The work was not finally accepted by DNR until March 26, 1986,[4] although the contractor had completed restoration and seeding of the project by the last week in November 1985. (March 25, Tr. 688).

19. Appellant timely filed a claim (Rule 4 File, Tab 17) with DNR on January 3, 1986 in accordance with the disputes clause of the contract (Section 6.15 of the contract general conditions) seeking an equitable adjustment in the amount of $113,205.00[5] together with an extension of the contract performance time through November 30, 1985. The claim was detailed both as to matters of entitlement and quantum and included data and correspondence pertinent to the claim. According to Mr. Larese-Casanova, the filing of the claim caused certain delay in acceptance of the work and led to a field inspection by him on February 26, 1986. (March 25 Tr. 689-690).

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[4]According to Mr. Larese-Casanova this was the date the property owners (Dr. and Mrs. Bell) formally accepted the project. (March 25 Tr. 688). Compare Finding of Fact No. 21. Under the Shore Erosion Control Program, the property owner actually pays for a certain amount of the construction and is involved in approving plans and specifications and ultimately the work. (March 25 Tr. 673-675, 684-688).

[5]Appellant's claim, which was reduced at the hearing to $104,265.00, is based on a total cost approach, seeking the difference between the bid and all costs incurred on the project plus amounts withheld or retained and an amount for profit.

20. By letter dated March 7, 1986, DNR purported to effect final payment under the contract and withheld $2,321.50 for certain work allegedly not performed and certain alleged corrective work revealed by the February 26 field inspection.[6] Also withheld was a retainage of $1,132.50 (1 1/2% of the total value of the contract).

21. As noted in Finding of Fact No. 18 and footnote 4, supra, the property owners did not officially accept the project until March 26, 1986. However, acceptance had been informally obtained from Dr. Bell over the telephone on December 12, 1985, when Dr. Bell indicated that he was completely satisfied with the work. (March 25, Tr. 688).

22. Appellant's claim was denied by final decision of the procurement officer dated June 24, 1986.

23. Mr. Holsinger, who prepared the Appellant's bid estimate, Mr. Rice, Mr. Donald Maloney, Sr., and Mr. John E. Clark, Appellant's expert in heavy construction, all testified that given the right mix of men and equipment (backhoe Caterpillar 225, 953 loader) a rate of progress of 40 to 50 feet per day of placement of stone revetment was realistic and achievable. (March 23 Tr. 38, 44-46, 63, 140-146, March 24 Tr. 335-371). Mr. Clark further testified that the specifications permitted use of stone that weighed less than 400 lbs. as armor stone, expressing the opinion that Section 5-2C.1 set forth above permitted a bell curve distribution with a 10% plus or minus deviation from the 400-1200 lb. standard. Mr. Clark also suggested that minimum (one point) contact of armor stone was all that the specifications required. (March 24 Tr. 348-356).

Testimony from Mr. Donald E. Andrews, DNR's expert in the construction of marine projects such as the instant one, indicated that an optimum rate of 20 feet per day[7] was all that could be expected for this type of project with proper equipment and an experienced and motivated crew. (March 26 Tr. 955-1033; Respondent's Exhibits, Volume II, Tab 5). Mr. Andrews also testified that the specifications precluded use of stone weighing less than 400 lbs. as armor stone and required the armor stone to be placed in such a way as to maximize surface contact of the stones with one another.

24. Mr. Larese-Casanova testified that he was satisfied with the work as of late November 1985 when restoration and seeding had been accomplished. (March 25 Tr. 688). He also testified, as noted above, that Appellant substantially completed the project by August 30, 1985 and should have completely finished the project by September 12, 1985. The Board finds on the basis of Mr. Larese-Casanova's testimony that the mere assertion

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[6]The work in question was stated to be as follows:

> For the record, based on my (Mr. Larese-Casanova) site visit of February 26, 1986, it appears that certain work items were not totally accomplished by your firm. These items include:
>
> 1. The back edge of the apron needs additional straightening and chinking.
>
> 2. A substantial amount of undersized stone remains in clusters within the lines and grades for armor stone.
>
> 3. The apron from the baseline to back edge, from Sta. 0+00 to Sta. 0+83, is out of level and needs adjustment.
>
> 4. Required topsoil was not added to the area behind the revetment as shown in the drawings. A low backfill area exists at Sta. 0+83.
>
> Of greatest concern are two areas in the vicinity of Stations 1+07 and 1+29 where filter cloth is exposed within the toe dimension due to the lack of stone. These two defective areas, which were not apparent before, in my opinion threaten the structural integrity of the revetment and, therefore, must be corrected.

(Rule 4 File, Tab 21).

[7]As noted above, the project was deemed substantially complete by August 30, 1985. Appellant's daily reports reflect that it required some 55 working days from May 22, 1985, when construction started, until August 30, 1985 to construct the 441 linear feet of stone revetment. (Appellant's Rule 4 Supplement, Tab 3). This translates out to an actual construction rate of approximately 8 feet per working day.

contained in the March 7, 1986 letter from Mr. Larese-Casanova to Appellant concerning alleged incomplete or defective work fails to establish that the alleged backcharge of $2,321.50 is appropriate in the absence of other credible evidence supporting these allegations and Appellant's strenuous denial thereof. The Board also finds that whether Appellant established its claim or not, it is entitled to the amount ($1,132.50) withheld as retainage.

25. On September 4, 1987, Chairman Harrison issued a proposed decision pursuant to COMAR 21.10.06.28[8] (hereinafter Rule 28). The decision was received by the parties on September 8, 1987. On October 6, 1987, DNR filed exceptions to the proposed decision, purportedly pursuant to Rule 28, which challenged the Board's award of $18,228.82 in equipment rental costs. DNR's exceptions are based on documents in the possession of DNR's attorneys which they obtained during discovery but did not introduce in evidence at the hearing nor otherwise previously bring to the Board's attention. DNR asserted that these extra record documents reflect that the appropriate award for equipment rental costs should be only $7,526.13.[9]

26. On October 19, 1987, the Board received an envelope postmarked October 15, 1987 which contained Appellant's exceptions to the proposed decision and a response to DNR's exceptions. Appellant's exceptions, which in effect reiterated its position as expressed in its post hearing brief concerning entitlement and quantum, were not timely filed pursuant to Rule 28 and will not be considered. Appellant's response to DNR's exceptions, however, was timely filed. The response challenged the Board's receipt of new evidence (i.e. the documents contained in DNR's exceptions). Neither party requested oral argument regarding DNR's exceptions pursuant to Rule 28.

27. By letter dated November 10, 1987, received by the Board on November 12, 1987, Appellant conceded that the "accounting information contained in Respondent's Exceptions to Proposed Decision appear [sic] to be correct." The Board finds on the basis of this concession that Appellant's actual equipment costs for the period September 13, 1985 to November 30, 1985 was $7,526.13.[10]

Decision

We first address DNR's affirmative defenses as set forth in its Answer to Appellant's complaint. DNR initially asserts (for the first time on appeal to this Board[11]) that Appellant's claim must be denied for failure to comply with the notice requirements of subsection (E) of Section 3.06 of the contract general conditions (i.e. the changes clause) in that:

> Section 3.06E of the contract, noted above, provides for early, contemporaneous notification of costs due to delay or alleged additional work. Although in its letter to the Procurement Officer dated July 10, Appellant stated that a breakdown of the delay and cost of the alleged additional work would be provided, it was not until Appellant forwarded its claim for an equitable adjustment on December 31, 1985, some 5 1/2 months later, that the Procurement Officer was provided with a statement of the monetary extent of the claim.

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[8]DNR declined to waive the provisions of Section 10-212, State Government Article, Maryland Annotated Code and COMAR 21.10.06.28 requiring a proposed decision where less than a majority of the Board have heard the evidence adduced.

[9]DNR, while agreeing that the stipulated total equipment costs for the job of $69,000.00 is correct, contends that only $7,526.13 of these costs in fact relate to the period of delay (September 13, 1985 to November 30, 1985) rather than $18,228.82 as set forth in the proposed decision.

[10]The appropriate method of bringing the documents respecting the equipment costs to the Board's attention would have been by motion. The purpose of exceptions in the context of proposed findings of fact in a proposed decision issued under Rule 28 is to set forth the proposed finding of fact(s) being excepted to and to identify those portions of the record which are contrary to the proposed finding specified. See Section 10-212, State Government Article, Annotated Code of Maryland. Here the documents in question were not part of the record before the Board when it issued the proposed decision. However, in view of the concession by Appellant's counsel contained in his November 10, 1987 letter, the Board, pursuant to Rule 28 and limited to the particular facts described herein, re-opened the record in its inherent discretion and received in evidence the documents contained in DNR's exceptions.

[11]The procurement officer did not challenge Appellant's claim on this basis.

(Answer, p. 4).

Subsection (E) of Section 3.06 provides in relevant part:

> If the contractor intends to assert a claim for an equitable adjustment under this clause, he shall, within 30 days after receipt of a written change order . . . or the furnishing of written notice . . ., submit to the Procurement Officer a written statement setting forth the general nature and monetary extent of such claim, unless this period is extended by the State. . . .

Thus, DNR apparently complains that the Appellant failed to document the costs involved in its claim for delay and additional work within 30 days of its July 10, 1985 letter.[12] The Board, however, finds that Appellant's explanation of its costs as filed on January 3, 1986 was appropriately filed in timely fashion and in compliance with the contract's requirements. It would not have been possible for Appellant to fully assess the extent of its claim until it stopped work in late November 1985. Appellant filed its assessment of its costs (based on a total cost approach) within a few weeks thereafter. This filing complied in all respects with the statutory requirements respecting claims in construction contracts as then set forth in §17-201(c) of Division II of the State Finance and Procurement Article. We thus reject DGS' affirmative defense predicated on failure to follow the notice provisions of the changes clause.

Our finding that DNR is not responsible for claimed delay and costs for alleged additional work prior to September 13, 1985 (Finding of Fact No. 17) requires only limited discussion of DNR's other affirmative defense. DNR asserts that Appellant's claim for an equitable adjustment is barred by its failure to seek clarification of an alleged patent ambiguity in the specifications respecting placement and size of armor stone. We agree with DNR that directives to Appellant through August 1985 regarding placement and size of armor stone (to include direction concerning reworking of sections, sample sections and section by section approach) were necessitated by Appellant's failure to use, as required by the specifications, armor stone that weighed at least 400 lbs. and Appellant's failure to achieve "minimum practical percentage of voids" in terms of rock placement. While we believe the meaning of the specifications respecting weight of rock and its placement is clear and unambiguous, based on a plain reading of the words used therein, any ambiguity would be patent requiring Appellant to make a pre-bid inquiry or be bound by the government's contrary interpretation. See Dr. Adolph Baer, P.D. and Apothecaries, Inc., MSBCA 1285 at pp. 9-10, 2 MICPEL ¶146 (1987).

The alleged ambiguity regarding weight of rock concerns the following language of the specifications regarding stone size:

> Armor stone sizes shall be such that a minimum of 90% of the individual stones shall weigh from 400 lbs. to 1200 lbs. Not more than 10% of the individual stones shall weigh more than 1200 lbs., nor individual stones be less than 400 lbs.

Appellant contended that this language permitted use of rock as armor stone weighing less than 400 lbs. DNR contended it did not and required Appellant to rework sections of the revetment where stones less than 400 lbs. had been used as armor stone. We, as noted, think the language of the specification clearly limits the 10% deviation to stones weighing more than 1200 lbs. However, any ambiguity created by the anomaly of the 10% deviation being limited to stones over 1200 lbs. as opposed to applying both to stones over 1200 lbs. and under 400 lbs. is apparent, obvious, i.e., patent.[13] See Hanks Contracting, Inc., MSBCA 1212, 1 MICPEL ¶110 (1985); American Building Contractors, Inc., MSBCA 1125, 1 MICPEL ¶104 (1985).

Any ambiguity regarding the meaning of the language concerning placement of armor stone so as to produce a reasonably well graded mass of rock with "a minimum practical percentage of voids" is also patent, i.e., obvious, in raising the question of how the rock was to be placed to achieve a minimum practical percentage of voids. Appellant chose to

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[12]In response to Appellant's letter of July 10, 1985, the procurement officer wrote Appellant on July 23, 1985 denying its claim out-of-hand and refusing to recognize any "cost of additional work." (Rule 4 File, Tab 10).

[13]The specification has been revised by DNR and now provides, in relevant part: "Not more than 10% of the individual stones shall weigh more than 1200 lbs. No armor stones shall be less than 400 lbs."

interpret this language as only requiring the stones to be in contact with one another at one point. DNR required reworking or repositioning of certain of the stones so that not only were the stones touching one another, but the contact was at a point or points that left the smallest openings between the stones. This interpretation by DNR of what was meant by a minimum practical percentage of voids we believe to be correct. In any event, Appellant is not able to rely on its contrary interpretation due to its failure to seek pre-bid clarification concerning the intent of the specification. See American Building Contractors, Inc., supra.

Thus, Appellant's failure to seek clarification of the specifications respecting placement and size of armor stone bars its claim for delay and costs for alleged additional work prior to September 12, 1985 when the record reflects it would have actually finished the work in accordance with DNR's interpretation of the specifications.

We turn now to the merits of Appellant's claim for an equitable adjustment of $104,265.00 together with an extension of the contract performance time through November 30, 1985. Specifically, Appellant asserts that it should have achieved a rate of progress of 40 feet of stone revetment placement per day and completed the work by early July, well before the contract completion date of September 19, 1985. It alleges that it did not achieve its anticipated rate of progress because of DNR's improper interpretation of the specifications and seeks on the basis of a total cost concept the difference between its bid and all costs actually attributable to the project. On the other hand, DNR contends that Appellant is responsible for all delay and additional costs occasioned in completion of the project, and is further liable for damages for the cost of allegedly incomplete work.

We conclude that Appellant has met its burden to show that it reasonably could have completed the project by the contract completion date of September 19, 1985. We find that Appellant completed the work except for punch list items and site restoration by August 30, 1985, and should in fact have completed the entire project by September 12, 1985 but for the actions of Mr. Wentker in requiring work not called for by the specifications.

Appellant has failed to demonstrate, however, that it would have completed the project earlier than September 12, 1985. It's claimed achievable rate of progress of 40 feet of stone revetment placement per day was not met. The 8 feet per day rate of progress that Appellant actually achieved during the period May 22, 1985 to August 30, 1985 resulted from its failure to appreciate the true intent of the specifications regarding size of armor stone and its placement and the need to re-work stone to comply with the specifications. Thus its claim for an equitable adjustment based on the total cost concept of the difference between its bid and all costs actually attributable to the project must fail.

The expert opinion evidence of record concerning what the specifications require respecting stone size and placement differs. However, the record as a whole supports the finding that while Mr. Wentker's directives requiring replacement and re-arrangement of stone during the period May 22, 1985 to August 30, 1985 were appropriate, his directives issued during the period September 13, 1985 to November 15, 1985[14] respecting repetitious and cosmetic reworking of stone clearly required more than the specifications called for. We note in passing that to conclude otherwise would cast doubt on the testimony of Mr. Larese-Casanova (the procurement officer whose final decision at the agency level is being appealed) that the project was complete save for punch list items and site restoration by August 30, 1985 and should have been entirely finished by September 12, 1985. (Finding of Fact No. 16).

We thus find Appellant entitled to a time extension as requested through November 30, 1985 and an equitable adjustment for all reasonable costs incurred as a result of delay and extra work it was required to perform during the period September 13, 1985 to November 30, 1985. To this amount should be added the backcharge of $2,321.50 which we have found to be unsupportable and retainage of $1,132.50. See Findings of Fact Nos. 20 and 24).

Quantum

Appellant's claim calculated in the total cost mode is as follows:

[14]Mr. Wentker's actions regarding stone placement during the period September 13, 1985 to November 15, 1985 precluded Appellant from undertaking site restoration until the latter half of November. Appellant completed site restoration by November 30, 1985 in a timely fashion.

COMPUTATION OF EQUITABLE ADJUSTMENT

	BID[15]	ACTUAL	EQUITABLE ADJUSTMENT
Labor	$ 4,915.00	$ 22,340.00	$ 17,425.00
Equipment	13,630.00	69,000.00	55,370.00
Materials, Subcontractors, and other Direct Costs	43,020.00	45,645.00	2,625.00
SUBTOTAL	$61,565.00	$136,985.00	$ 75,420.00
G&A	7,075.00	26,438.00	19,363.00
SUETOTAL	$68,640.00	$163,423.00	$ 94,783.00
10% Profit	6,860.00	16,342.00	9,482.00
TOTAL	$75,500.00	$179,765.00	$104,265.00

(Rule 4 File Tab 17, p. 23A, Appellant's Rule 4 Supplement, Tab 5).

The parties have stipulated that of the costs set forth above, Appellant's total actual cost of "Equipment" was $69,000 and that its actual cost of "Materials, Subcontractors, and other Direct Costs" was $45,645. While the parties have not stipulated as to labor costs, Appellant's payroll/cost ledgers reflect that total labor costs (after deduction of a clerical error of $475.00)[16] amounted to $22,340.00. (Appellant's Rule 4 Supplement, Tabs 5 and 6; March 24 Tr. 250-253; March 26 Tr. 744; Rule 4 File, Tab 17 p. 23A). Appellant submitted uncontroverted data showing a total general and administrative (G&A) overhead expense for 1985 in the amount of $200,522.08 as compared with direct job costs of $1,036,737.56 yielding a 19.3 (G&A) percentage rate.[17] (March 23 Tr. 192-204; Rule 4 File, Tab 17, p. 23A, Appellant's Rule 4 Supplement, Tab 6; March 24 Tr. 263-267).

Appellant seeks an equitable adjustment in the amount of the difference between its total costs and its bid. Appellant also seeks interest thereon from the date of submission of its claim. The Board has found, however, that Appellant is only entitled to reasonable costs arising out of the delay and additional work caused by DNR during the period September 13, 1985 to November 30, 1985. The Board will calculate the equitable adjustment, therefore, on the basis of the portion of the costs set forth above that the record reflects Appellant actually incurred as a result of DNR's actions during the period September 13, 1985 to November 30, 1985.

A review of Appellant's direct labor costs[18] for persons who worked on the job during this period reflects gross salaries of $1,633.34 for Mr. Randy Madsen[19]; $1,012.50 for Mr. Donald Maloney; $1,400.00 for Mr. Donald Maloney, Jr.; and $754.00 for Mr. Alfred Proctor for a total gross salary cost of $4,799.84. Indirect labor costs[20] for gross salaries total

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[15]Copies of Appellant's bid work sheets appear at Tab 1 of Appellant's Rule 4 Supplement.
[16]DNR apparently declined to stipulate as to labor costs as a result of this clerical error which was explained by Appellant during the hearing.
[17]While Appellant's projected G&A rate in its bid was only 11.5% we note that the bid was prepared early in 1985 and find that the 19.3% derived by dividing the total of Appellant's 1985 direct job costs by the total of its 1985 G&A costs is reasonable; though some miniscule components of the total G&A amount might be questionable in terms of allowability (i.e. entertainment and litigation expenses). See March 24 Tr. pp. 264-267.
[18]Labor costs are derived from Appellant's payroll/cost ledgers, Appellant's daily reports, and Appellant's labor and overhead recapitulation. See Appellant's Rule 4 Supplement, Tabs 3-6.
[19]Mr. Madsen replaced Mr. Maloney as job superintendent.
[20]Indirect labor costs include employer FICA, small tools, insurance (workman's compensation, health, etc.) and gasoline and oil.

$1,444.75 based on an indirect labor percentage factor of 30.1%. (Appellant's Rule 4 Supplement, Tabs 3, 5 and 6). The total labor cost component of Appellant's equitable adjustment amounts, therefore, to $6,244.59.

As initially set forth in the proposed decision of September 4, 1987, an analysis of the record then before the Board for equipment costs (rental) for equipment used on the project during the period September 13, 1985 to November 30, 1985 as gleaned from Appellant's payroll/cost ledgers reflect payment of $5,000.00 to the Driggs Corporation on November 14, 1985, and payments of $5,000 and $6,397.60 to the Driggs Corporation on December 4, 1985; payment of $151.72 to Rental Tools & Equipment Co. on October 9, 1985; and payment of $1,679.50 to Norris E. Taylor Contractors, Inc. on December 4, 1985. These equipment costs total $18,228.82. (Appellant's Rule 4 Supplement, Tab 6). However, as noted in Findings of Fact Nos. 25 to 27, documents submitted to the Board by DNR after issuance of the proposed decision reflect that actual equipment costs for equipment rental during the period September 13, 1985 to November 30, 1985 should only total $7,526.13, reflecting payments of $6,397.50 to Driggs Corporation and $1,128.63 to Norris E. Taylor Contractors, Inc.

"Materials, Subcontractors and other Direct Costs" for the period September 13, 1985 to November 30, 1985 as derived from Appellant's payroll/cost ledgers total $1,890.00 ($917.56 materials, $613.00 subcontractors, $359.44 other direct costs). (Appellant's Rule 4 Supplement, Tab 6).

Appellant's total costs for labor, equipment, and "Materials, Subcontractors and other Direct Costs" for the period September 13, 1985 to November 30, 1985 thus amount to $15,660.72. Applying a G&A rate of 19.3% to this amount yields $3,022.51 ($15,660.72 x 19.3 = $3,022.51). Appellant's costs including G&A total $18,683.23. Applying a 10% profit factor to this amount results in Appellant's entitlement to an equitable adjustment of $20,551.55 for the additional costs attributable to delay and extra work during the period September 13, 1985 to November 30, 1985. To this amount must be added the amount of $2,321.50 improperly backcharged and withheld from Appellant and the amount of $1,132.50 withheld as retainage, yielding a total amount due Appellant of $24,005.55.

In summary, we find Appellant entitled to a time extension through November 30, 1985 and total additional compensation as follows:

Labor	$ 6,244.59
Equipment	7,526.13
"Materials, Subcontractors and other Direct Costs"	1,890.00
SUBTOTAL	$15,660.72
G&A (19.3%)	3,022.51
SUBTOTAL	$18,683.23
10% Profit	1,868.32
TOTAL	$20,551.55
Backcharge	2,321.50
Retainage	1,132.50
TOTAL	$ 3,454.00
GRAND TOTAL	$24,005.55

Interest

Appellant seeks predecision interest from the date of submission of its claim.

The Board may award predecision interest in its discretion. See Md. Port Adm. v. C.J. Langenfelder & S., 50 Md. App. 525, 537-545 (1982); M&M Hunting Preserve, MSBCA 1279 at pp. 13-15, 2 MICPEL 145(1987). However, the contract under consideration herein provides that "[t]he contractor and the State agree that no prejudgment or post judgment interest on any claims asserted by either party will be allowed." Section 6.16 E Claims of the contract general conditions. (Rule 4 File, Tab 2). Effective July 1, 1986, the procurement law specifically provides that "[n]otwithstanding any contract provision to the contrary, the Board of Contract Appeals, in its discretion, may award interest on amounts found due the contractor on a claim . . . beginning on a date prior to the decision of the Board, determined by the Board to be fair and reasonable after hearing all of the facts of the claim, until the date of the decision, but interest may not accrue from a date that is before the receipt of a claim by the procurement officer." Section 17-201(d), Division II, State Finance and Procurement Article.[21] (Underscoring added). Here, the contract was entered into on April 19, 1985 prior to the July 1, 1986 effective date of Section 17-201(d), supra. We do not believe that the underlined portion of Section 17-201(d) whereby contract provisions that preclude award of predecision interest are rendered of no effect was intended to operate retroactively.[22] In any event, in the absence of any challenge by Appellant to this contract general condition forbidding award of predecision interest we decline to award it as part of Appellant's requested equitable adjustment.

Appellant also seeks post decision interest. Effective, July 1, 1986, the Legislature provided that amounts due a party under a decision of the Board shall accrue interest at the rate specified in §11-107(a) of the Courts and Judicial Proceedings Article. Section 17-203(c), Division II, State Finance and Procurement Article.[23]

Based on the above, we sustain Appellant's appeal, in part, in the amount of $24,005.55 and remand the matter to DNR for appropriate action.

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[21]Now codified as Section 11-137(j), Division II, State Finance and Procurement Article.
[22]Such a provision overriding contrary contractual agreement we perceive to be substantive and not merely remedial. Thus, to apply it retroactively would involve impairment of the obligation of contract. See James Julian, Inc., MSBCA 1222, 1 MICPEL ¶100 (1985).
[23]Now codified as Section 11-139(c), Division II, State Finance and Procurement Article.