

BEFORE THE  
MARYLAND STATE BOARD OF CONTRACT APPEALS

In the Appeal of )  
WHITING-TURNER CONTRACTING )  
COMPANY ) MSBCA Docket No. 1975  
)  
Under MTA Contract No. )  
MTA-3-48-1 )

May 12, 1997

Contract Interpretation: Appellant (for its subcontractor) was not entitled to separate payment of fringe benefits when the plain and ordinary meaning of the words used in the special provisions, SGP-4.03.1(A) specifically excludes such fringe benefits from separate payment and SGP-4.03.1(C) specifically includes such fringe benefits as overhead. In order to ascertain the meaning of a contract, the words used in the document should be given their ordinary everyday meaning.

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OPINION BY BOARD MEMBER STEEL

This appeal regards the proper application of contract provision SGP-4.03.1 to labor rates for design services performed under a Mass Transit Administration (MTA) contract.

Findings of Fact

1. On or about March 1, 1994, the MTA issued an invitation for bids for the Central Light Rail Line, Phase II Design/Build Contract, No. MTA-3-48-1, for the design and construction of certain portions of Baltimore's Light Rail.
2. The procurement was conducted under COMAR 21.05.02.17, using a two-step advertised procedure. Under the first step, proposals were submitted for MTA's evaluation of qualifications and bidder understanding of the scope of the proposed contract. Step two invited acceptable Step One bidders to submit sealed price bids.

3. On March 24, 1995, Whiting-Turner Contracting Company (Whiting-Turner) and Whitney, Bailey, Cox & Magnani (WBCM) entered into an agreement under which WBCM would provide Whiting-Turner with design services.
4. On December 16, 1994 MTA awarded the Contract to Whiting-Turner.
5. Pursuant to the Contract, Whiting-Turner undertook to perform its responsibilities under the Contract, including original and additional design services performed by WBCM.
1. The method of compensating Whiting-Turner and its subcontractors, including WBCM, for design changes or additions is set forth in Contract Provision SGP 4.03.1, which provides:

SGP-4.03.1 Negotiated Payment Provision - Professional and Technical Services

- When the contractor is entitled to an equitable adjustment for professional and/or technical services provided pursuant to design changes or additions to the Contract, and only as directed by the Administration, the compensation will be based on the following as documented and justified by the Contractor:

- (A) Labor - The cost of all professional and/or technical labor computed on the basis of the hourly wage rate of the individual(s) involved directly in the performance of the changed or added work (excluding fringe benefits, taxes, insurance, etc.)
  - (B) Travel and Related Expenses - The cost of travel expenses of the Contractor or sub-contractor personnel in travel status required for performance of changed or added work, as provided for in the then current Standard Travel Regulations of the State of Maryland.
  - (C) Contractor Fixed Fee - The Procurement Officer and the Contractor shall negotiate a fixed fee for work performed pursuant to this provision by his forces and/or by his subcontractors, as compensation for supervision, overhead, administrative expenses and profit. The Contractor's fixed fee shall not exceed 130% of Item A above.
  - (D) Subcontractors:
    1. The Contractor shall receive an adjustment for work performed by a subcontractor computed as in Items A through C above.
    2. The Contractor may receive additional markup allowance not to exceed 5% of the adjustment computed in D.1 above.
    3. Notwithstanding actual charges to the Contractor for super-vision, overhead, expenses or profit on work performed by others, no such markups in excess of those specified will be recognized or considered.
  - (E) No additional allowances shall be made for any costs not specifically reimbursed in Items A through D above.
  - (F) As provided by SGP-7.05, the Contractor's records shall be made available if required to substantiate any submitted items of cost.
7. In a memorandum dated February 2, 1996 to MTA, Whiting-Turner requested that a lump sum be negotiated as the basis for fees for additional professional and technical services provided pursuant to design changes or additions to the Contract. Attached to this memo was a letter dated February 1, 1996 from WBCM's managing partner to Whiting-Turner that explained the basis for Whiting-Turner's request.

8. At a meeting on February 6, 1996, WBCM informed the Project Director for MTA that, absent any agreement for lump sum billing, WBCM intended to bill its direct labor and add an appropriate labor burden. To this, WBCM would add a fee specified in Item C of SGP-4.03.1 not to exceed 130% of the labor costs.
9. By letter dated February 15, 1996, MTA denied Whiting Turner's request for a negotiated lump sum settlement of fees for additional design services, citing SGP-4.03.1 as the provision applicable to the calculation of labor design costs for approved change order work, and noted that that provision prescribes the factor to be used as the mark-up for direct professional and/or technical labor.
10. By letter of March 18, 1996, Whiting-Turner gave timely notice to the MTA of its intent to file a claim for an equitable adjustment for professional and/or technical services under SGP-4.03.1, and the methodology which it claimed was proper for calculating the amount payable for such services.
11. Whiting-Turner thereafter submitted a claim to the Procurement officer claiming that it was entitled to compensation for fringe benefit costs by applying a factor for labor burden to the "direct wages" which it bills under SGP 4.03.1(A), and arguing that the fixed fee for "compensation for supervision, overhead, administrative expenses and profit" set forth in SGP-4.03.1(C) does not include fringe benefit costs.
12. Service companies like WCBM Turner typically account for and report their fringe benefit costs as overhead.
13. Finding that the labor costs of SGP-4.03.1(A) do not include fringe benefits which are properly recovered as part of the contractor's fixed fee under SGP-4.03.1(C), on August 30, 1996 the Procurement Officer denied Whiting Turner's methodology claim.
14. This appeal by Whiting-Turner on behalf of its subcontractor WCBM timely followed.

### Decision

Whiting-Turner has brought this appeal on behalf of its subcontractor, WCBM, who performed additional design work ordered by MTA during the course of the performance of the contract. This appeal involves a determination of the definition of labor costs under Contract provision SGP-4.03.1(A) and (C), and under which section compensation for fringe benefits such as pension benefits, holiday pay, sick leave, and unemployment insurance should be paid. SGP-4.03.1 comes into play when the contractor or subcontractor is entitled to an equitable adjustment for professional and/or technical services provided as a result of design changes or additions to the Contract.

Under Maryland law, we must utilize the objective theory of contract interpretation, i.e., that the "written language . . . will govern the rights and liabilities of the parties . . . unless the written language is not susceptible of a clear and definite understanding." Ray v. Eurice Bros., 201 Md.115 (1952). Thus, the Board must, where possible, read contract terms by their plain, ordinary meaning. Further, we must evaluate the contract as an harmonic whole so as to give effect to all of its provisions, such that no provision is disregarded. Dr. Adolph Baer, P.D. and Apothecaries, Inc., MSBCA 1285, 2 MSBCA ¶146 (1987).

The parties agree that Appellant's subcontractor (WCBM) performed extra design work as a result of additions or changes to the underlying contract. They disagree, however, on how sections (A) and (C) of SGP-4.03.1 should be applied, and therefore, how much the subcontractor should be compensated for the extra work. Applying Appellant's theory of compensation would result in additional payment to the subcontractor, and 5% of such payment to Appellant.

Whiting-Turner argues that it should be compensated for its labor burden as an actual cost of doing business, and therefore it should be permitted to include its labor burden as a "cost" under Item (A), citing in support COMAR 21.09.01.16A. Compensation for Personal Services:

- A. Compensation for personal services includes, but is not limited to salaries, wages . . . fringe benefits, contributions to pension, . . . paid or accrued in any form (Emphasis added).

as well as the provisions of the contract dealing with force account work. Appellant's argument, however, ignores the fact that the instant contract's provision SGP-4.03.1(A), specifically covering the extra design work performed here, outright excludes indirect payroll costs:

- A. Labor - The cost of all professional and/or technical labor computed on the basis of the hourly wage rate of the individual(s) involved directly in the performance of the changed or added work (excluding fringe benefits, taxes, insurance, etc.) (emphasis supplied).

In his written decision, the Procurement Officer denied Whiting-Turner's claim, concluding that fringe benefits are not included under 4.03.1(A) and must be recovered as part of the contractor's fixed fee under SGP-4.03.1(C). He further found that SGP-4.03.1 applies to changes or additions to the contract as directed by the MTA, controls the negotiation of costs for design changes, limits WCBM to a fee not to exceed 130 percent of labor costs under (A) as compensation for supervision, overhead, administrative expenses and profit, and that Whiting-Turner is entitled to a fee not to exceed 5% on the cost of work performed by its subcontractors.

We agree with the Procurement Officer. The language of SGP-4.03.1 is clear and unambiguous. Under SGP-4.03.1(A), the contractor is entitled to compensation for labor costs "computed on the basis of the hourly wage rate of the individual(s) involved directly in the performance of the changed or added work." The provision unequivocally continues, "excluding fringe benefits, taxes, insurance, etc.," from direct labor costs. Inclusion of fringe benefits as indirect cost in overhead is typical practice in this industry, as stated by WCBM's own managing partner at the hearing in this matter<sup>1</sup>. These costs are to be included in overhead under SGP-4.03.1(C) which permits recovery of "supervision, overhead, administrative expenses and profit." Therefore, under the terms of the contract at issue, fringe benefits for professional and technical

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<sup>1</sup> We may consider trade usage to assist us in explaining or defining a contract term even in the absence of an ambiguity. Hensel Phelps Construction Co., MSBCA 1016, 1 MSBCA ¶44 (1983).

services performed pursuant to design changes or additions as directed by the Administration must be paid under SGP-4.03.1(C), with its limitation of 130%, rather than under SGP-4.03.1(A).

For the reasons stated above, the appeal of Whiting-Turner is this 12th day of May, 1997 hereby denied.

Date: May 12, 1997

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Candida S. Steel  
Board Member

I concur:

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Robert B. Harrison, III  
Chairman

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Randolph B. Rosencrantz  
Board Member

Certification

COMAR 21.10.01.02 **Judicial Review.**

A decision of the Appeals Board is subject to judicial review in accordance with the provisions of the Administrative Procedure Act governing cases.

Annotated Code of MD Rule 7-203 **Time for Filing Action.**

**(a) Generally.** - Except as otherwise provided in this Rule or by statute, a petition for judicial review shall be filed within 30 days after the latest of:

- (1) the date of the order or action of which review is sought;
- (2) the date the administrative agency sent notice of the order or action to the petitioner, if notice was required by law to be sent to the petitioner; or
- (3) the date the petitioner received notice of the agency's order or action, if notice was required by law to be received by the petitioner.

**(b) Petition by Other Party.** - If one party files a timely petition, any other person may file a petition within 10 days after the date the agency mailed notice of the filing of the first petition, or within the period set forth in section (a), whichever is later.

\* \* \*

I certify that the foregoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1975, appeal of Whiting-Turner Contracting Company under MTA Contract No. MTA-3-48-1.

Dated: May 13, 1997

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Mary F. Priscilla  
Recorder