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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY, Plaintiff, Cross-defendant and Appellant, v. PARSONS-DILLINGHAM METRO RAIL CONSTRUCTION MANAGER JOINT VENTURE, Defendant, Cross-complainant and Appellant.	B255450 (Los Angeles County Super. Ct. Nos. BC150298, BC179027)

APPEALS of the judgment of the Superior Court of Los Angeles County, Warren Ettinger and John Shepard Wiley Jr., Judges. The judgment in favor of Los Angeles County

Metropolitan Transportation Authority is reversed and remanded with instructions.

Kupferstein Manuel & Quinto, Phyllis Kupferstein; Gibson Dunn & Crutcher, Theodore J. Boutrous, Jr., Theane Evangelis, Andrew G. Pappas, Brandon J. Stoker and Theodore M. Kider for Parsons-Dillingham Metro Rail Construction Manager Joint Venture.

Mary Wickham, Interim County Counsel, Charles Safer, Assistant County Counsel; Nossaman, Thomas D. Long, Stephen P. Wiman and Jennifer L. Meeker, for Los Angeles County Metropolitan Transportation Authority.

The Los Angeles County Metropolitan Transportation Authority (MTA), through a predecessor agency,[1] entered into a cost-reimbursement contract in 1984 with three entities, which then formed the Parsons-Dillingham Metro Rail Construction Manager Joint Venture (Parsons),[2] to manage construction of the Metro Red Line. The original or base contract was amended a number of times over the years, including in 1991 (amendment 13/14) and 1993 (amendment 17). By 2000 the Red Line was operational. Work on the project was fully completed and final

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[1] MTA was formed in 1993 from the merger of the Southern California Rapid Transit District and the Los Angeles County Transportation Commission.

[2] The joint venturers were Parsons Infrastructure & Technology Group, Inc. (formerly The Ralph M. Parsons Company), Parsons Transportation Group, Inc. (formerly De Leuw Cather & Company and Parsons De Leuw, Inc.) and Dillingham Construction, N.A., Inc.

invoices were issued in 2004. MTA paid Parsons approximately $365 million for its work and that of its subcontractors on the Red Line project.

In 1996 and 1997 MTA sued Parsons for overbilling. Parsons filed a cross-complaint to recover certain unpaid overhead costs. Ultimately, judgment was entered in favor of MTA in 2014 for more than $93 million—approximately $30 million for improperly billed general and administrative costs (G&A) and overhead charges, $25 million for unauthorized subcontractor overhead charges and $38 million in prejudgment interest.

On appeal Parsons contends the court erred in ruling it had improperly billed MTA for G&A and overhead charges based on a theory first asserted after trial and that, in any event, is inconsistent with the plain meaning of the parties' contract; awarding prejudgment interest on MTA's overhead claim when the amount at issue was uncertain; and denying its claim for unpaid overhead costs. In its cross-appeal MTA contends the court erred in denying its claim for an additional $61 million in improperly documented subcontractor costs and declining to award prejudgment interest on its recovery for unauthorized subcontractor overhead charges.

We agree with Parsons that the contract as amended, which we review de novo in the absence of conflicting extrinsic evidence, authorized the recovery of G&A and overhead charges and reverse the judgment in favor of MTA. We affirm the trial court's rulings with respect to MTA's claim for recovery of additional subcontractor costs and Parsons's cross-complaint.

FACTUAL AND PROCEDURAL BACKGROUND

The issues on appeal in this breach of contract action concern the propriety of Parsons's billings and its entitlement to payments under the parties' contract as amended in 1991 and 1993. As the court stated in its 2013 ruling on a motion for judgment, "No party says the Red Line is anything but safe and reliable. The only controversy is whether Parsons overbilled MTA in the 1990s."

1. *The Amended Contract—Relevant Provisions*

The original contract between MTA and Parsons for the Red Line (Contract 3369) was in effect, with amendments, from 1984 through April 30, 1991. This base contract was superseded in 1991 by amendment 13/14, which added segment two to the Red Line project,[3] and in 1993 by amendment 17, which added segment three to the project.[4] Payments to Parsons following the 1991 amendments, the subject of this appeal, were governed by

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[3] The Red Line project was divided into segments, designated minimum operable segments (MOS), that could be built in distinct phases. MOS-1 consisted of five stations from Union Station to Westlake/MacArthur Park. MOS-2 added three stations from Westlake/MacArthur Park to Wilshire/Western (now part of the Purple Line) and five stations from Wilshire/Vermont to Hollywood/Vine. Amendment 13 superseded the base contract as to MOS-1; contemporaneous amendment 14 addressed MOS-2.

[4] MOS-3 extended the Red Line from Hollywood/Vine to North Hollywood, where it now ends. The pertinent provisions in Amendments 13/14 and 17 are substantially identical.

the compensation and payment provisions in Part D of the amended contract.[5]

Pursuant to Article CP-3.A. of the amended contract Parsons was entitled to its "Recoverable Costs," defined as, "(i) allowable direct labor costs ('Direct Labor,' as defined below), (ii) associated allowable Indirect Costs (also referred to herein as 'Overhead' or 'Overhead Costs') in an amount stated as a percentage (the 'Overage Rate') of the appropriate component of Direct Labor, (iii) costs of subcontracts, and (iv) other direct charges ('ODCs') necessarily and reasonably required in the performance of this Contract. . . ."

The provision defining Recoverable Costs continues, "[N]o costs or expenses incurred by [Parsons] as a result of [Parsons's] failure to comply with terms and conditions of this Contract shall constitute Recoverable Costs." It also states, "All Recoverable Costs must be reasonably incurred by [Parsons] exclusively in connection with the performance of the Services subsequent to the date of this Contract.[6] Except where explicitly stated to the contrary in this Contract, Chapter 1, Subpart 31.2 of the FARs [(Federal Acquisition Regulations)] shall be used to determine whether a given cost item is an element of Recoverable Cost."

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[5] Part A of the amended contract set forth the scope of services to be provided by Parsons; Part B contained "General conditions"; Part C, "Special provisions."

[6] "Services" was defined by amendment 13/14 as "All technical and professional services to be performed by and responsibilities of [Parsons] under this Contract for the MOS-1 Program and MOS-2 Program as specified, stated, or indicated in this Contract . . . ."

In the two-page section discussing "Labor Costs" (Article CP-3.B.) the amended contract provides, "For persons who provide Services under this Contract and who also devote time to other matters, their time must be properly allocated between all of their activities, and only those hours spent in performing Services under this Contract shall be considered Direct Labor. It shall be the responsibility of [Parsons] to maintain records necessary to determine this required allocation." The same section outlining the proper computation of Labor Costs stated, "The provisions of this Article CP-3.B shall apply to all [Parsons] Subcontractors performing work on the Project."

In a multi-page "Overhead" section (Article CP-3.C.), the amended contract provided that MTA will pay Parsons "an Overhead allowance for Indirect Costs ('Actual Overhead Rate') of the Home Offices, Field Offices and Project Office for each Joint Venturer. Until determination of the Actual Overhead Rates for each Joint Venturer, [Parsons] shall receive a provisional allowance for Indirect Costs ('Provisional Overhead Rates') incurred by each Joint Venturer, stated as a percentage of the Direct Labor provided by each Joint Venturer at its respective offices, as follows . . . ." A separate paragraph identified the Provisional Overhead Rates for subcontractors. The Overhead section also provides, "For items of expense which are provided to [Parsons's] Project Office or Field Office operations at no cost, those costs shall not be included in the indirect expense of [Parsons's] Project Office or Field Office operations and, therefore, shall not be included in the calculation of any Project Office or Field Overhead Cost or Rate under this Contract."

2. *MTA's Complaints and Parsons's Cross-complaint*

On May 20, 1996 J. Martin Gerlinger as a qui tam plaintiff filed a complaint in superior court against Parsons asserting claims under the federal and state False Claims Acts, alleging it had fraudulently overbilled direct and indirect costs for construction management services on the Red Line.[7] MTA intervened in the False Claims Act suit in October 1996[8] and filed a separate complaint against Parsons the following year for breach of contract, fraud and an accounting. The trial court granted summary adjudication on the fraud claim, ruling it was barred by the statute of limitations, a decision we upheld in a nonpublished decision denying MTA's petition for a writ of mandate. (*Los Angeles Metropolitan Transportation Authority v. Superior Court* (May 24, 2000, B134038).)

MTA's original complaint for breach of contract alleged Parsons had charged MTA for certain items outside the definition of Recoverable Costs or in excess of stated limitations in the parties' amended contract. Specifically, MTA alleged Parsons had overbilled it by failing to adjust provisional overhead rates to actual overhead rates, not properly crediting MTA for refunded sums, improperly including reimbursed charges in overhead, billing in excess of the maximum allowable contract price, charging legal fees not allowed under the contract, improperly

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[7] Gerlinger had previously filed a federal False Claims Act case in United States District Court. That case, which was never served, was dismissed in October 1996.

[8] An appeal by Gerlinger and MTA from the judgment in favor of Parsons in the False Claims Act litigation is before this court in case No. B265863.

including the Los Angeles City business tax as a direct expense and improperly allocating certain costs, including subcontractor costs. MTA's first amended complaint, filed in March 1998, repeated the same allegations concerning overbilling.

In 1998 Parsons filed a cross-complaint, and thereafter an amended cross-complaint, for breach of contract and declaratory relief alleging MTA had, in violation of the contract, unilaterally adjusted the contract's provisional overhead rates to an arbitrary overhead rate of 68 percent and, as a result, had underpaid Parsons. The amended cross-complaint also alleged MTA had engaged in tortious interference with Parsons's business relationships.

In 2000 a referee appointed pursuant to Code of Civil Procedure sections 638 and 639, subdivision (e), by stipulation of the parties and court order, granted Parsons's motion for summary adjudication on its declaratory relief claim, ruling the contract imposed a duty on MTA not to unilaterally adjust the provisional overhead rates used to calculate payment of invoices.[9]

3. *Trial of Phase 1*

On February 16, 2001 the court entered an order dividing the trial into three phases: (1) a bench trial limited to Parsons's liability for breach of contract for alleged overbilling and its breach of contract claim against MTA, including issues of contract interpretation and equitable defenses; (2) a jury trial to determine the existence and/or amount of damages; and (3) trial

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[9] Although the referee found MTA was not entitled to unilaterally adjust the provisional overhead rates, he also ruled material issues of fact remained as to whether MTA had breached that duty and whether MTA could avail itself of defenses to any breach.

of Parsons's tort claim. After MTA and Parsons settled a number of ancillary issues, trial began on May 7, 2001. Trial proceeded regularly from May through November 2001 and then sporadically over the next several years due to the trial court's schedule.

On September 20, 2001, at the court's request following completion of MTA's case-in-chief, MTA filed a list of Parsons's seven alleged contract breaches: (1) Parsons failed to annually submit its "interim determinations of actual overhead rates." (2) Parsons interfered with MTA's contractual right to inspect, audit or review Parsons's books and records. (3) Parsons failed to adjust its provisional indirect rate billings downward to its interim determination of actual rates upon its determination of those rates. (4) One of the joint venturers inflated its indirect rates using a methodology that departed from its normal practice. (This was essentially the allegation asserted in MTA's fraud claim barred by the statute of limitations.) (5) Parsons failed to reduce indirect rates to account for MTA's furnishing of insurance coverage at no cost. (6) Parsons used accrual billing rather than actual cost billing. (7) Parsons billed for indirect costs of subcontractors at rates in excess of the contractual caps governing subcontractor indirect rates.

In a statement of decision filed October 1, 2004, before the conclusion of the Phase 1 trial, the court ruled in favor of MTA on Parsons's first amended cross-complaint, concluding Parsons was not entitled to recover damages for any short payments due to MTA's use of the adjusted overhead rate of 68 percent (calculated as more than $9 million) because Parsons had materially breached the contract by failing to provide MTA with the required form of invoices. Specifically, the court ruled Parsons

had provided only billing data, not payroll data as required, failed to show hours worked by individual day, failed to provide labor categories for direct labor personnel and failed to provide proper invoice certifications.

In March 2005 MTA moved to amend and supplement its operative complaint. MTA argued its motion "represents a simple mechanism to update the pleadings and conform the MTA's breach of contract complaint against defendants to the proof already received into the Phase 1 record (and a small amount of additional evidence to be presented in the MTA's Phase 1 rebuttal case). All of this evidence directly bears on the question of whether the MTA can recover defendants' costs which were overbilled to the MTA under Contract 3369." The proposed amended pleading included the allegation Parsons had billed for G&A costs "which were not incurred exclusively in connection with the performance of Services under the Contract."

The court denied MTA's motion with prejudice in January 2006. MTA and Parsons quote different comments made by the court and attribute very different rationales for the court's order. According to Parsons, the court ruled MTA had unduly delayed in asserting its new claims and, because Parsons would be entitled to discovery and motion practice, addition of those claims would further delay resolution of the case. However, as Parsons notes, the court suggested MTA could assert its new claims in a separate lawsuit. MTA, on the other hand, insists the court denied the motion as "superfluous" because all of Parsons's costs under the contract, including G&A, were already at issue.

4. *The June 3, 2009 Statement of Decision*

After both sides finally rested and following extensive briefing, the court on June 3, 2009 issued a 67-page statement of

decision on Phase 1 issues. Most significantly, the court found that G&A costs were not recoverable except for certain specified payments to "Principals"—a term defined in the contract as "partners, principals, or principal executive officers"—for performance of administrative duties. According to the ruling, recovery of G&A was prohibited by the provision in the amended contract that "All Recoverable Costs must be reasonably incurred by [Parsons] *exclusively* in connection with the performance of the Services subsequent to the date of this Contract." That is, Parsons could charge only for costs incurred solely in connection with the amended contract and could not allocate to the Red Line project a proportionate share of general expenses necessary for the operation of the business. (The court added its own emphasis to the word "exclusively" in discussing this provision.)

The court also ruled payroll burden costs (for example, payroll taxes and the costs of employee insurance and other benefits) were not recoverable because those costs were not expressly identified in amendment 13/14. The court directed a previously appointed accounting referee to calculate Parson's recoverable costs following the rulings in the statement of decision. However, after Parsons moved for clarification of the rulings with respect to G&A costs and payroll burden, the court directed the accounting referee to calculate costs both with and without G&A and payroll burden, "and then we will be able to figure out if that's appropriate."

The accounting referee issued a report on a single invoice more than two years after the June 2009 statement of decision. The referee was excused in July 2012; the court observed, "[a]t this rate, analyzing all invoices would take centuries—literally."

5. *The 2013 and 2014 Motions for Judgment*

The litigation had been assigned to a number of different judges since its inception, but the Phase 1 trial beginning in 2001 was conducted entirely by Judge Warren Ettinger, who issued the June 2009 statement of decision. The case was reassigned twice more, the second time in October 2011 to Judge John Shepard Wiley Jr. After Judge Wiley discharged the accounting referee and suggested judgment could be entered without additional detailed review of Parsons's invoices, MTA moved for judgment seeking nearly $160 million for four categories of nonrecoverable costs including payroll burden, overhead and subcontractors.

In August 2013 the court granted MTA's motion, awarding it $29,954,835.03 in damages for improperly charged overhead, including G&A,[10] adhering to the prior ruling that Parsons could charge only for costs incurred exclusively in connection with the contract, not items that needed to be apportioned or allocated. Although Parsons had argued the ruling on the "exclusivity clause" in the 2009 statement of decision had been tentative only and had incorrectly interpreted the parties' amended contract,

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[10] In its August 2013 ruling on MTA's motion for judgment, the court defined "overhead" by reference to Judge Ettinger's June 2009 statement of decision as "a cost that benefits both the contract and other work but that can be proportioned between the two according to the benefits received," and a "general and administrative cost" as "a cost necessary to the overall operation of the business but for which a direct relationship to a particular cost objective cannot be shown." Although Parsons vigorously contested the court's interpretation of the contract language, it agreed $29,954,835.03 was the proper sum for these billing errors, "assuming for analysis they are errors."

the court stated it would "stand by the 2009 Statement of Decision": "Years of litigation should produce forward motion. . . . On a case that has outlasted many a trial judge, the parties should not be able to start anew with every judicial reassignment."

The court, however, rejected MTA's claim for $86 million for allegedly unsupported subcontractor costs, ruling that MTA had failed to carry its burden of proving Parsons's breach of contract on this issue. The court found Parsons had provided the records of subcontractors' payrolls by day and employee, as specified by the parties' contract, and determined the contract did not require Parsons to maintain records at the level of individualized detail demanded by MTA more than three years after project completion, a deadline that had expired in 2007. Before 2007, the court continued, "MTA never demanded Parsons obtain from other entities the individualized records MTA now wants. MTA's demands are tardy—formulated long after the work was done, the money was paid, and the trial was over." In it analysis on this point the court distinguished between the requirements under Article CP-3 of the amended contract, defining Recoverable Costs—the basis for the 2004 denial of Parsons's cross-complaint because of inadequate documentation—and those of Article CP-6, Audit and Record Keeping, which imposed recordkeeping requirements on Parsons.

Finally, the court ruled equitable estoppel barred MTA from recovering $35 million in payroll burden costs. MTA agreed payroll burden was a recoverable cost under the 1984 base contract and had never contended prior to 2009 that amendment 13/14 in 1991 modified the appropriate treatment of that cost item. Nevertheless, in what Judge Wiley accepted as "a

surprise to all concerned," the court in its 2009 statement of decision ruled those amendments "must be read as disallowing payroll burden." Although "fully accept[ing] this ruling by the 2009 trial judge," Judge Wiley ruled MTA "cannot now exploit this startling 2009 development. The reason is estoppel."

A month after this decision MTA filed a new motion for judgment or, alternatively, for a new trial, on subcontractor overhead. MTA argued, like Parsons's overhead, subcontractor overhead violated the exclusivity provision in the amended contract. MTA also sought recovery of prejudgment interest on both Parsons's and subcontractors' overhead from May 23, 2001, the date on which the parties had stipulated to the amounts Parsons had billed MTA and the amounts MTA paid Parsons.

In February 2014 the court granted MTA's motion in part and denied it in part. The court agreed the 2009 interpretation of the "exclusivity clause," which barred recovery of Parsons's overhead and G&A costs, also precluded recovery of subcontractors' overhead charges. Accordingly, MTA was entitled to an additional recovery of $25,141,057.94. (That sum was a portion of the $86 million claim for allegedly improper subcontractor costs previously rejected by the court.) The court awarded prejudgment interest of $38,120,605.08 on the damages awarded for overpayment of Parsons's overhead and G&A costs under Civil Code section 3287, subdivision (a), finding that $29,954,835.03 was a sum capable of being made certain by calculation once the issue of liability was resolved. It denied prejudgment interest on the new award for subcontractor overhead costs, however, which had been estimated by application of average figures for payroll burden published by the Department of Labor.

Prior to entry of a final judgment Parsons moved for a new trial, arguing, in part, that MTA's claim G&A was not a recoverable cost based on the amended contract's "exclusivity clause" had not been timely presented and the court's decision on that issue without permitting discovery and motion practice by Parsons deprived it of due process. The court denied the motion.

CONTENTIONS

Parsons contends it was reversible error for the court to permit MTA to significantly alter its G&A and overhead claims after trial, thereby depriving Parsons of its due process right to conduct discovery and engage in pretrial motion practice; G&A and overhead are recoverable under the plain meaning of the parties' amended contract; the court erred in awarding prejudgment interest on MTA's recovery based on Parsons's billings of overhead and G&A costs; and the court also erred in denying its cross-claim for unpaid costs based on its finding Parsons had materially breached the contract.

In its cross-appeal MTA contends it was entitled to recover the full $86 million it sought for improperly documented and billed subcontractor costs, not just the $25-plus million for subcontractor overhead, and the court erred in denying it prejudgment interest on damages related to its overpayment of subcontractor costs.

DISCUSSION

1. *Standards of Contract Interpretation*

The fundamental goal of contract interpretation is to give effect to the mutual intention of the parties as it existed at the time they entered into the contract. (*Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 288; *Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264; see Civ. Code,

§ 1636.) That intent is interpreted according to objective, rather than subjective, criteria. (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1126 (*Wolf*).) When the contract is clear and explicit, the parties' intent is determined solely by reference to the language of the agreement. (See Civ. Code, §§ 1638 ["language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity"]; 1639 ["[w]hen a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible"].) The words are to be understood "in their ordinary and popular sense" (Civ. Code, § 1644), and the "whole of [the] contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.)

Although parol evidence is inadmissible to vary or contradict the clear and unambiguous terms of a written, integrated contract (Code Civ. Proc., § 1856, subd. (a); *Wolf, supra,* 162 Cal.App.4th at p. 1126), extrinsic evidence is admissible to interpret the agreement when a material term is ambiguous. (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395; see Code Civ. Proc., § 1856, subd. (g) [extrinsic evidence admissible to interpret terms of ambiguous agreement]; *Pacific Gas & Electric Co. v. G.W. Thomas Drayage & Rigging Co.* (1968) 69 Cal.2d 33, 39-40 [if extrinsic evidence reveals that apparently clear language in the contract is susceptible to more than one reasonable interpretation, it may be used to determine contracting parties' intent].) Whether an ambiguity exists is a question of law, subject to independent review on appeal. (*Wolf v. Superior Court*

(2004) 114 Cal.App.4th 1343, 1351; *Winet v. Price* (1992) 4 Cal.App.4th 1159, 1165.)

As we explained in *Wolf, supra,* 162 Cal.App.4th 1107, when the meaning of words used in a contract is disputed, the trial court engages in a three-step process: "First, it provisionally receives any proffered extrinsic evidence that is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. [Citations.] If, in light of the extrinsic evidence, the language is reasonably susceptible to the interpretation urged, the extrinsic evidence is then admitted to aid the court in its role in interpreting the contract. [Citations.] When there is no material conflict in the extrinsic evidence, the trial court interprets the contract as a matter of law. [Citations.] This is true even when conflicting inferences may be drawn from the undisputed extrinsic evidence [citations] or [when] extrinsic evidence renders the contract terms susceptible to more than one reasonable interpretation. [Citations.] If, however, there is a conflict in the extrinsic evidence, the factual conflict is to be resolved by the jury." (*Wolf,* at pp. 1126-1127, fn. omitted; see *Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 439 ["[i]t is solely a judicial function to interpret a written contract unless the interpretation turns upon the credibility of extrinsic evidence, even when conflicting inferences may be drawn from uncontroverted evidence"]; see also *Hess v. Ford Motor Co.* (2002) 27 Cal.4th 516, 527 [same].)

2. *Overhead and G&A Are Recoverable Costs Under the Parties' Amended Contract*

Amendment 13/14 expanded the Red Line project, adding the second segment (MOS-2) with eight new stations, extending the subway line to the north and west. As discussed, the

amended contract defined the term "Recoverable Costs" to include four general categories of costs—direct labor, "associated Indirect Costs (also referred to herein as 'Overhead' or "Overhead Costs')," costs of subcontracts, and other direct charges. Immediately following that definition the amended contract provided, "All Recoverable Costs must be reasonably incurred by [Parsons] exclusively in connection with the performance of the Services subsequent to the date of this Contract. Except where explicitly stated to the contrary in this Contract, Chapter 1, Subpart 31.2 of the FARs [Federal Acquisition Regulations] shall be used to determine whether a given costs item is an element of Recoverable Cost." The same language appears in amendment 17, which added the third segment (MOS-3) to the project.

Based solely on "an examination of the contract excerpts submitted by the parties"—that is, without any reference to extrinsic evidence—Judge Ettinger in his June 3, 2009 statement of decision interpreted the language quoted in the preceding paragraph, referred to by the court as the "exclusivity clause," as disallowing with one exception the recovery of any G&A expenses because G&A, by definition, was not incurred exclusively in connection with the performance of a single contract.[11]

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[11] In defining "Direct Labor" amendment 13/14 provided "Direct Labor shall not include salaries or other payments made to partners, principals, or principal executive officers ('Principals') of [Parsons], unless otherwise specifically provided in this contract. . . . Payment to Principals for the performance of their administrative duties for [Parsons] shall not be an allowable component of Direct Labor, although these payments for those administrative duties will be allowed as Indirect Costs." The trial court recognized these payments as allowable G&A.

Thereafter, declining to reexamine Judge Ettinger's 2009 ruling, Judge Wiley extended that interpretation of the amended contract in his August 2013 and February 2014 orders to bar recovery by Parsons of most overhead charges for its own and its subcontractors' activities. In reaching these conclusions, the trial court misunderstood the plain meaning of the parties' agreement.[12]

a. *Allocation and allowability under the FAR*

As defined in FAR 2.101 (48 C.F.R. § 2.101 (2012))[13] and quoted by the trial court, "*General and administrative* (*G&A*) *expense* means any management, financial, and other expense which is incurred by or allocated to a business unit and which is for the general management and administration of the business

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[12] Because we conclude the trial court erred in its construction of the parties' amended contact and improperly disallowed Parsons's billings for both its own and its subcontractors' overhead and G&A, we need not address Parsons's contention the trial court committed prejudicial error in allowing MTA to advance those claims without proper notice or court approval. Similarly, because we hold MTA is not entitled to recover any damages related to overhead and G&A, we need not consider Parsons's argument the court erred in awarding prejudgment interest on the sum relating to Parsons's overhead and G&A or MTA's argument the court erred in denying prejudgment interest on damages for its purported overpayment of subcontractor costs.

[13] The Federal Acquisition Regulations (FAR) are issued as Chapter 1 of Title 48 of the Code of Federal Regulations. (See 48 C.F.R. § 1.105-1(a)(2), (b) (2012).) Because the FAR number and the section number in title 48, CFR, are identical, only the FAR number will be used in the balance of this opinion.

unit as a whole. G&A expense does not include those management expenses whose beneficial or causal relationship to cost objectives can be more directly measured by a base other than a cost input base representing the total activity of a business unit during a cost accounting period." An "indirect cost" more generally is "any cost not directly identified with a single final cost objective, but identified with two or more final cost objectives or with at least one intermediate cost objective." (*Ibid.*)[14] As MTA explains in its respondent's brief, indirect costs typically include expenses such as office space incurred in carrying out a specific contract or series of contracts and may also include payroll burden such as vacation and sick days and employer contributions to FICA. G&A, therefore, is but one form of indirect cost.

G&A, as well as indirect costs more generally, are allowable expenses under federal acquisition regulations, subject to allocability principles established by the federal government's cost accounting standards (CAS). FAR 31.201-1(a) provides, "The total cost . . . of a contract is the sum of the direct and indirect costs allocable to the contract . . . ." FAR 31.201-4, in turn, provides, "[a] cost is allocable if it is assignable or chargeable to one or more cost objectives on the basis of relative benefits received or other equitable relationship. Subject to the foregoing, a cost is allocable to a Government contract if it— [¶] (a) Is incurred specifically for the contract; [¶] (b) Benefits both the contract and other work, and can be distributed to them in

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[14] A "cost objective" is "a function, organizational subdivision, contract, or other work unit for which cost data are desired and for which provision is made to accumulate and measure the cost of processes." (FAR 31.001.)

reasonable proportion to the benefits received; or [¶] (c) Is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown." Subdivision (a), in effect, defines "direct cost"; subdivision (b), "overhead"; and subdivision (c) plainly encompasses G&A expenses. (See also FAR 31.203(d) [items in the allocation base "shall bear their pro rata share of G&A costs"].)

Of course, as the trial court explained in its 2009 statement of decision, FAR 31.202-2(a) on determining "allowability" permits the parties to agree to exclude from recoverable costs expenses otherwise authorized by the FAR and CAS: "A cost is allowable only when the cost complies with all of the following requirements: [¶] (1) Reasonableness. [¶] (2) Allocability. [¶] (3) Standards promulgated by the CAS Board, if applicable, otherwise, generally accepted accounting principles and practices appropriate to the circumstances. [¶] (4) *Terms of the contract.* [¶] (5) Any limitations set forth in this subpart." (Italics added.) MTA and Parsons's agreement echoed this provision, adopting FAR 31.2 to determine whether a given cost item is an element of Recoverable Cost "[e]xcept where explicitly stated to the contrary in this Contract." Article CP-3.C.5., for example, implemented this limitation, expressly prohibiting recovery of facilities cost of capital as either a direct or indirect cost, even though recovery of the cost of money is allowable under specified circumstances by FAR 31.205-10(b).[15]

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[15] The amended contract states, "Facilities cost of capital shall not be allowed as a reimbursable direct cost and shall not be included in the computation of an indirect rate, provisional or actual."

b. *The plain language of the amended contract*

Although Parsons and MTA agreed amendment 13/14 could carve out express exceptions to the FAR provisions for allowable costs, the trial court erred in concluding the "exclusivity clause" precluded recovery of most indirect costs, including G&A, properly allocated under the FAR to the Red Line project, because those expense items in toto had not been incurred solely for the benefit of that project.[16] The key language of the so-called exclusivity provision—"reasonably incurred . . . exclusively in connection with the performance of the Services subsequent to the date of this Contract"—properly (and literally) read, is not a disallowance of reasonably allocated indirect costs, including G&A, incurred in performing the amended contract, but a temporal limitation, requiring Parsons to charge direct costs and allocate indirect costs incurred before the May 1, 1991 effective date of the amended contract to the base contract in effect since 1984. That is, only those expenses for work done after April 30, 1991 on MOS-1 and MOS-2—direct labor, associated allowable indirect costs, subcontract costs and other direct charges—were recoverable under the terms and conditions of the new amended contract. No indirect cost pool to be allocated to the amended

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[16] As discussed, in its June 2009 statement of decision the trial court ruled amendment 13/14 "must be read as disallowing payroll burden," and MTA thereafter unsuccessfully sought to recover $35 million in allocated payroll burden. Although MTA now acknowledges payroll burden associated with direct labor was an indirect cost recoverable under the amended contract, it does not attempt to reconcile that concession with its position regarding the meaning of the "exclusivity clause."

contract could include elements, including G&A, that predated May 1, 1991.

The trial court's interpretation of this language as precluding recovery of costs that were not incurred for the exclusive benefit of the Red Line project (most overhead and G&A), rather than costs, whether direct or allocated, that were not incurred exclusively after April 30, 1991, ignores the final seven words of the sentence—"subsequent to the date of this Contract." The trial court thus violated a fundamental principle of contract interpretation that requires, whenever possible, meaning be given to every word of a contract. (See, e.g., *Wind Dancer Production Group v. Walt Disney Pictures* (2017) 10 Cal.App.5th 56, 70; *Advanced Network, Inc. v. Peerless Ins. Co.* (2010) 190 Cal.App.4th 1054, 1063-1064.) This failure to attribute any significance to the limiting temporal language is all the more striking because the second page of the amended agreement provides, "Contract No. 3369, including Amendments 1 through 12, is superseded by this Amendment which shall constitute a conformed contract for services performed subsequent to April 30, 1991." Given this general statement at the outset of the amended contract, the parties' coupling of the word "exclusively" with their repetition of "subsequent to the date of this Contract" in defining "Recoverable Costs" must have been intended to impose an additional constraint relating to when direct or indirect costs were incurred and how they were to be allocated, not the nature of the costs, as the trial court ruled.[17]

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[17] MTA notes this language on the second page of the amended contract. However, rather than attempt to give meaning to both uses of this somewhat similar language in the

This commonsense interpretation of the language used by the parties is reinforced by viewing the agreement as a whole. (See Civ. Code, § 1641 ["[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other"]; *County of San Joaquin v. Workers' Comp. Appeals Bd.* (2004) 117 Cal.App.4th 1180, 1185.) First, although G&A is recognized as a recoverable cost under the FAR and was billed by Parsons and paid by MTA under the base contract without dispute, nothing in the amended contract explicitly disallowed continued recovery of this major cost item as the amended contract required if FAR subpart 31.2 was not to be followed to determine recoverable costs and as the parties did, for example, for facilities costs, a far less significant item. Whatever else may be said about the "exclusivity clause," it does not explicitly prohibit the recovery of G&A.

In addition, as the trial court recognized, the amended contract expressly provided for recovery of certain G&A expenses: payments to partners or principals for performing administrative duties.[18] And throughout the amended contract the parties

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parties agreement, as instructed by the rules of contract interpretation, MTA paradoxically argues that attributing any meaning at all to "subsequent to the date of this Contract" in the "exclusivity clause" would violate the presumption against surplusage.

[18] MTA contends this provision would be unnecessary if all administrative (G&A) time was recoverable as an indirect cost, invoking the venerable principle *inclusio unius est exclusio alterius*. MTA's argument disregards the placement of this provision in Article CP-3.B. of the agreement defining "Direct

authorized payment of expenses, labeled overhead, that were not incurred "exclusively" for, or attributable exclusively to, the performance of the Red Line project. Indeed, significant claims in this litigation concerned the proper use of provisional overhead rates and the calculation of actual overhead rates—matters that would not be at issue if only costs exclusively attributable to the Red Line project were recoverable by Parsons. Yet none of those many provisions was identified as an exception to a general exclusion of payments for indirect costs not exclusively incurred in performing services for the amended contract, as surely they would have been if the trial court's interpretation of the single sentence "exclusivity clause" were correct.[19]

c. *Extrinsic evidence*

The trial court based its ruling on what it understood to be the plain language of the "exclusivity clause" and the relevant FAR and neither found the clause ambiguous nor referred to any extrinsic evidence in interpreting it. Nonetheless, MTA responds to Parsons's argument that the amended contract unambiguously

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Labor," not in Article CP-3.C., the portion of the agreement defining allowable overhead. Nothing in the language providing that payments to principals for performance of administrative duties were recoverable as indirect costs, but not as a component of direct labor, suggests that payments to others for performing administrative duties were not also recoverable as indirect costs. The contrary inference, in fact, is far more reasonable.

[19] The amended contract also provided, if MTA supplied an item at no expense to Parsons, Parsons could not thereafter seek reimbursement for it as part of an indirect cost pool. This "no cost clause" precluding Parsons from recovering for costs it did not incur was not a factor in the trial court's rulings regarding recovery of G&A and overhead.

authorized the recovery of G&A and overhead charges—an interpretation of the contract language with which we agree—principally by arguing the trial court's interpretation was "reasonable and supported by substantial evidence." According to MTA, therefore, even if Parsons's interpretation is also reasonable, "the judgment in the MTA's favor must not be reversed because the trial court's interpretation was not erroneous." For this proposition MTA cites only *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 866, in which the Supreme Court explained, although "an appellate court must determine the trial court's interpretation is erroneous before it may properly reverse a judgment," the cases so holding "do not mean that the appellate court is absolved of its duty to interpret the instrument." (*Ibid.*) Rather, as summarized in section 1, if a contract term is ambiguous, but "there is no conflict in the extrinsic evidence," the appellate court "must make an independent determination of the meaning of the contract." (*Ibid.*; accord, *City of Hope National Medical Center v. Genentech, Inc.*, *supra,* 43 Cal.4th at p. 395; *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391.)

For the reasons discussed, we do not believe the parties' amended contract is reasonably susceptible to the construction urged by MTA and adopted by the trial court; extrinsic evidence was unnecessary to properly interpret the "exclusivity clause." (See *Wolf*, *supra*, 162 Cal.App.4th at pp. 1126-1127.) To be sure, some extrinsic evidence was admitted at trial without being identified as such, and the parties argued about the import of that evidence. Nonetheless, there was no conflict in the evidence itself that would divest this court of its responsibility to independently interpret the contract. And even if that evidence

were considered, it supports Parsons's entitlement to recover G&A and overhead charges, rather than MTA's more restricted view of recoverable costs.

For example, MTA points to a 1984 cost proposal in which Parsons offered to remove G&A as a component of recoverable costs as a contribution to the community. There is no dispute that such a proposal was made (and never accepted). But MTA's assertion, based on the proposal, that "[i]t is reasonable to infer that the parties did not intend for G&A to be recoverable from the beginning" is belied by Parsons's actual inclusion of G&A as an element of cost under the base contract and MTA's payment of those costs without dispute. (See *City of Hope National Medical Center v. Genentech, Inc.*, *supra,* 43 Cal.4th at p. 393 [party's conduct between execution of contract and dispute about meaning of contract's terms may reveal what parties understood and intended terms to mean]; *Wolf*, *supra*, 162 Cal.App.4th at pp. 1133-1134 [same].)

Similarly, there is no dispute MTA proposed a further amendment to Contract 3369 after amendment 17 added MOS-3 to the scope of Parsons's services—what eventually became amendment 23 (effective as of January 1, 1996). That proposal specifically identified G&A as part of the indirect rate cap, but, as finally accepted, the amendment simply referred to a single maximum overhead rate (which was increased from 110 percent to 115 percent). Both MTA's proposal and the final version of the amendment provided that the "exclusivity clause" would remain part of the parties' contract. This extrinsic evidence is undisputed; the documents say what they say. MTA's suggested inference from this evidence, however, is not reasonable.

MTA contends the decision not to specifically identify G&A as part of the proposed cap rate while continuing to include the exclusivity clause in the final form of the amendment necessarily means Parsons and MTA "intended to continue to disallow G&A costs." To the contrary, if the "exclusivity clause" disallowed G&A, as MTA argues, a proposal that introduced G&A as a new item of recoverable costs would have set aside, or declared an exception to, that provision as well. That the proposal both identified G&A as a separate item, rather than simply as part of indirect costs or overhead, and maintained the so-called exclusivity clause is strong evidence that G&A was always a recoverable cost when limited to expenses incurred exclusively after April 30, 1991. In any event, contrary to MTA's assertion, the presence of this uncontradicted extrinsic evidence in no way requires that we defer to the trial court's flawed interpretation of the amended contract.

In sum, the trial court erred in ruling in 2009 that the "exclusivity clause" in the amended contract precluded recovery of G&A. Application more generally of that erroneous contract interpretation to Parsons's overhead and that of its subcontractors in the court's 2013 and 2014 rulings, although perfectly logical based on the faulty premise, was equally erroneous. The award of $93 million to MTA must be reversed.

3. *Parsons's Claim for Unpaid Costs Was Properly Denied*

Article CP-5 of the amended contract, governing billings and progress payments, required Parsons to "submit, on a monthly basis, separate invoices covering those Recoverable Costs incurred by [Parsons] for MOS-1 and MOS-2 in the previous month . . . ." Article CP-5.B. specified backup to be submitted with the invoices: "Copies of payroll data shall

accompany the monthly Invoices. [Parsons] shall provide the name, classification, and hours worked (by date) of all Direct Labor personnel who were directly employed in providing Services during the period covered by the Invoice."

Finding that Parsons had failed to provide the requisite information with its invoices and, as a result, had materially breached its obligations under the amended contract, the trial court ruled in favor of MTA on Parsons's cross-complaint for underpayments due to MTA's unauthorized reduction of the amended contract's provisional overhead rates to an arbitrary rate of 68 percent. On appeal Parsons argues it provided the payroll data required and, in any event, was entitled to recover the unpaid costs because it had substantially complied with the provisions of the amended contract governing the format of invoices and there were never any complaints about the quality of its work.

The issue is, once again, one of contract interpretation, rather than factual dispute. Parsons contends "payroll data" as used in the first sentence of Article CP-5.B. meant only "the name, classification, and hours worked (by date) of all Direct Labor personnel," as required in the second sentence of Article CP-5.B. It contends it provided this specific information, at least tacitly conceding the trial court was factually correct in concluding the material it had submitted constituted billing records, not payroll data as that term is generally understood. (See, e.g., Lab. Code, § 1776, subds. (a), (b) [defining "payroll records" in connection with public works projects].) Parsons's proposed interpretation of this provision violates the presumption against surplusage: If all that was required by the first sentence was expressed in the second, there would be no reason to include

the first. (See *Wind Dancer Production Group v. Walt Disney Pictures*, *supra*, 10 Cal.App.5th at p. 70; Civ. Code, § 1641.)

In addition, we cannot agree with Parsons's contention it supplied the required "hours worked (by date)" for all direct labor personnel when it provided billing data calculated on a weekly basis. The common understanding of the language used, "by date," required reporting hours each day; and that is also the technical requirement, for example, for public works contractors under the Labor Code. (See Lab. Code, § 1776, subd. (a).) Finally, we agree with the trial court that the requirement that Parsons identify direct labor personnel by "classification" with its invoices was intended to refer to the four categories listed in Article CP-3.B. (project management; engineers and other professionals; technical and drafters; and administrative and clerical), not simply overtime classifications (exempt or nonexempt) as included on Parsons's invoices. As MTA argues, Article CP-5.B. required that the monthly invoices be prepared in a manner that allowed correlation to the contract provisions for allowable costs. Because each of the four Article CP-3.B. categories had a different maximum hourly wage rate (for example $31.32 for engineers and other professionals, but $28.18 for administrative and clerical workers), that correlation was possible only if the relevant category for each worker was identified.

Whether these failures by Parsons were material breaches sufficient to excuse performance by MTA was a question of fact. (See *Schellinger Brothers v. Cotter* (2016) 2 Cal.App.5th 984, 1002 ["[w]hether a breach is material is usually left to the trier of fact 'to determine from all the facts and circumstances shown in evidence'"]; *Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277

["[n]ormally the question of whether a breach of an obligation is a material breach, so as to excuse performance by the other party, is a question of fact"].) The trial court found Parsons's breaches of its invoicing obligations were both "substantial" and "material," noting, for example, with respect to an exemplar invoice, the failure to specify labor categories, which prevented MTA from ascertaining whether labor billed exceeded the contractual wage caps, "could amount to as much as $3,084 out of the $8,533" billed for one week's work of 237 hours. Indulging all reasonable inferences in support of the trial court's finding, as we must (see, e.g., *Western State Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133), Parsons points to nothing in the record that would justify overturning the trial court's finding on this point.

Finally, Parsons fails to provide any legal authority to support its alternate argument that, even if it breached its contractual invoicing obligations, it is nonetheless entitled to recover unpaid overhead costs because MTA was satisfied with the quality of its construction management services. (Cf. *Kaufman v. Goldman* (2011) 195 Cal.App.4th 734, 743 [appellate court may treat as forfeited any argument not "supported by both coherent argument and pertinent legal authority"]; *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 ["[w]hen an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citation to authority, we treat the point as waived"].) In any event, as MTA explains, under the amended contract Parsons was ultimately entitled to be paid only for its recoverable actual overhead costs. Billings for indirect costs at provisional rates—the issue in the cross-complaint—were subject to later adjustment to Parsons's

"actual rates." Yet in ruling in favor of MTA on the cross-complaint, the trial court found Parsons "did not submit proof from information contained either in or outside the invoices that costs billed in the invoices consisted solely of 'Recoverable Costs' as required by the Contract." Thus, while payments based on provisional rates may have been $9 million too low, absent adequate evidence of the determined actual rates, there was no basis to find Parsons was, in fact, underpaid for its satisfactory completion of the contract.

4. *MTA's Claim To Recover Payments for Subcontractor Costs Was Properly Denied*

In its cross-appeal MTA contends the trial court erred in denying its claim for $86 million in improperly documented and billed subcontractor costs (a figure that includes the $25-plus million in subcontractor overhead that we hold was properly included by Parsons as a recoverable cost notwithstanding the "exclusivity clause"). MTA's theory was that Parsons was obligated under the amended contract to maintain and submit to MTA actual payroll records to support the labor component of "costs of subcontracts" that comprised one element of Parsons's "Recoverable Costs" and, based on statements by Judge Ettinger at an April 2001 hearing on motions in limine, once MTA made out a prima facie case of breach,[20] it was Parsons's burden at trial

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[20] In the discussion between the trial court and counsel cited by MTA, the reference to MTA's prima facie case contemplated evidence that Parsons's had used improper billing rates—that the rates billed were different from the rates that should have been billed—even if the total amount of resulting damages was not yet determined. In its briefing in this court, however, MTA suggests it met its prima facie burden simply by showing the total amount

to prove its billings were correct through use of those records. Because Parsons effectively admitted it had no actual payroll records or other evidence of what subcontractors' workers were paid to support its billings, MTA continues, it should have been awarded the full $86 million it demanded.

In 2013, however, Judge Wiley ruled MTA as plaintiff bore the burden of proving Parsons's billings were incorrect, which it failed to carry. And Judge Wiley further ruled Parsons had no responsibility to maintain actual payroll records of its subcontractors beyond 2007, three years after completion of the contract.[21] MTA contends both rulings are wrong.

a. *Burden of proof*

Ordinarily, "a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting" (Evid. Code, § 500), but this rule does not apply "as otherwise provided by law." (*Ibid.*) In *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, a case involving an entertainment industry profit participation

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it had paid Parsons's for subcontractor costs and demonstrating that the documentation supporting Parsons's invoices failed to satisfy all contractual requirements. While MTA arguably proved the latter point, it failed to establish the former.

[21] As discussed, Judge Wiley also ruled MTA's subcontract costs claim was "tardy—formulated long after the work was done, the money was paid, and the trial was over. [¶] The general rule here is that you cannot get $86 million on a theory you never specified at trial." Parsons urges us to affirm Judge Wiley's ruling on this ground. Because we affirm the court's order denying MTA's claim on the merits, we need to address the issue of the claim's timeliness.

agreement, we gave an example of one such exception to the general rule, quoting the Supreme Court's decision in *Sanchez v. Unemployment Ins. Appeals Bd.* (1977) 20 Cal.3d 55, 71, ""Where the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim."" Pursuant to that principle we suggested, "In cases where the financial records essential to proving the contingent compensation are in the exclusive control of the defendant, fundamental fairness, the 'lodestar' for analysis under Evidence Code section 500 [citation], requires shifting the burden of proof to the defendant." (*Wolf*, at p. 36.)

Relying primarily on our decision *Wolf v. Superior Court*, *supra*, 107 Cal.App.4th 25, and briefly quoting several decisions from other courts of appeal that also shifted the burden of proof in circumstances similar to those in *Wolf*, MTA argues the trial court erred in ruling it was MTA's burden to prove what billed subcontractor costs were improper. But as our colleagues in Division Five of this court observed in *Sander/Moses Productions, Inc. v. NBC Studios, Inc.* (2006) 142 Cal.App.4th 1086, in his complaint the plaintiff in *Wolf* alleged the Disney studios had refused to turn over necessary information in response to repeated audit requests, an important factor in our discussion of burden shifting. In *Sanders/Moses*, in contrast, "there [was] no evidence that the information necessary to calculate the amount of continent compensation to which Sander/Moses was entitled under the agreement was unavailable." (*Id.* at p. 1096.) Because the plaintiff had the ability to prove the amount of compensation to which it claimed it

was entitled, the court concluded, "there was no need to shift the burden of proof." (*Id.* at pp. 1096-1097.)

In the case at bar, evidence at trial showed that MTA exercised its audit rights as to Parsons's and its subcontractors' books and records from the outset of the Red Line project in 1984 and it continued those audits until they were voluntarily suspended in 1997. Moreover, the information MTA needed to verify the subcontractor costs billed by Parsons was available to MTA from the subcontractors themselves; it was not within the exclusive control of Parsons. For both of these reasons, the narrow exception to the general rule of Evidence Code section 500 recognized in *Wolf v. Superior Court*, *supra*, 107 Cal.App.4th 25 is inapplicable here.[22]

b. *Recordkeeping and document retention requirements*

Although protesting the refusal of the trial court to shift the burden of proof on its cross-complaint, MTA insists it carried

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[22] FAR 31.201-3(a) provides, "A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business. . . . No presumption of reasonableness shall be attached to the incurrence of costs by a contractor. If an initial review of the facts results in a challenge of a specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable." As the trial court explained, this regulation governs certain rights and obligations of the parties under the terms of their contract. (Additional rights and obligations are contained, for example, in Article CP-6, Audits and Recordkeeping, discussed in the next section.) It does not address the issue of burden of proof at a trial for breach of contract.

that burden by showing that Parsons had improperly documented and billed subcontractor costs. The trial court properly rejected this argument based on the express provisions of Article CP-6 of the amended contract.

Article CP-6 provides, "[Parsons] shall permit authorized representatives of [MTA], and any other agency as directed by [MTA], in its sole discretion and at its sole cost, to inspect and audit all of [Parsons's] records relating to its performance under this Contract and its Subcontractors' performance under this Contract from the date of this Contract through and until expiration of three years after acceptance of the Services by [MTA] under this Contract. . . . Contracts with all Subcontractors shall include similar provisions for such audits, as applicable. . . . Final billings for this Contract shall be based on final audited Actual Overhead Rates. [¶] In the event that any audit shows that the amount billed to [MTA] in any progress payment bill is in excess of the correct amount, [Parsons] shall immediately remit the difference to [MTA]. [¶] [Parsons] agrees to keep and maintain records showing actual time devoted to this Contract and all costs incurred in the performance of the Services required under this Contract for a period of three years from the date of completion of a Subcontract or the date of final acceptance of the Services performed under this Contract, whichever is later."

By its plain language, Article CP-6 required Parsons and its subcontractors to permit MTA audits; to remit sums an audit indicated were in excess of the correct amounts; and to maintain records for a period of three years after completion of the project showing the actual time devoted to, and all costs incurred in, performing the amended contract. MTA failed to prove Parsons

had not complied with those requirements, as the trial court found. Whether or not Parsons maintained or supplied all of the individualized subcontractor records required by Articles CP-3 and CP-5 of the amended contract at the time it invoiced MTA for subcontractor costs,[23] MTA did not establish the costs charged violated the terms of the amended contract. Parsons's failure to retain those records after 2007 was not a breach of contract and did not entitle MTA to recover the $86 million it had previously paid and as to which it had full audit rights under the amended contract.

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[23] As discussed in section 3, Articles CP-3, "Recoverable Costs," and CP-5, "Billings and Progress Payments," required Parsons to use and submit actual payroll records to support its calculation of Direct Labor costs. Parsons's failure to provide that documentation resulted in the rejection of its affirmative claim for unpaid costs due to MTA's unauthorized reduction of the amended contract's provisional overhead rates, as explained by the trial court in its October 1, 2004 statement of decision. Neither of those portions of the amended contract imposing invoicing obligations on Parsons vitiated Article CP-6's express three-year limitation on Parsons's obligation to retain subcontractor records.

DISPOSITION

The judgment in favor of MTA is reversed. The cause is remanded to the trial court with instructions to enter a new judgment providing MTA take nothing by way of its first amended complaint and Parsons take nothing by way of its first amended cross-complaint. The parties are to bear their own costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.