IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2327

SAFECO INSURANCE COMPANY OF AMERICA,

Plaintiff-Counter Defendant,
Cross Defendant-Appellee,

versus

REHABILITATION SPECIALISTS, ET AL.,

Defendants,

REHABILITATION SPECIALISTS,

Defendant-Counter Plaintiff,
Cross Plaintiff-Cross Defendant,
Appellant,

versus

BAYTOWN CONSTRUCTION, INC., ET AL.,

Defendants-Cross Defendants,
Cross Plaintiffs-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-89-620)

(April 7, 1994)

Before KING, and WIENER, Circuit Judges, and DOHERTY, District Judge.*

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*District Judge of the Eastern District of Louisiana, sitting by designation.

WIENER, Circuit Judge:[**]

In this declaratory judgment action, Defendant/Counter Plaintiff-Appellant, Rehabilitation Specialists (Rehab), appeals the district court's take-nothing judgment in favor of Defendant/ Counter Defendant-Appellee, Baytown Construction, Inc. (Baytown), and the court's award of attorneys' fees in favor of Plaintiff/Counter Defendant-Appellee, Safeco Insurance Co. (Safeco). Safeco, as surety for Baytown, issued payment bonds in favor of Rehab on four of five City of Houston (COH) projects that Baytown subcontracted to Rehab. Rehab asserted claims against Safeco on the payment bonds for the four projects and claims against Baytown on all five projects. Baytown disputed Rehab's claims and asserted backcharges that if valid would more than offset Rehab's claims.

Unable to determine whether Rehab's claims were valid, Safeco filed suit and asked for a declaration of the relative rights of the parties. Rehab sought to recover on the payment bonds from both Baytown and Safeco, and further sought breach of contract damages from Baytown. After a bench trial, Rehab was awarded nothing because Baytown's asserted backcharges were found to set-off Rehab's claims fully. Safeco, the plaintiff for declaratory judgment purposes, was awarded attorney's fees of

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[**]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

$92,046.22. Rehab, which is currently in Chapter 11, appealed.

First, we reverse and render judgment in favor of Rehab for $157,042.62 on its breach of contract counterclaim against Baytown, which is the net amount of Rehab's claims against Baytown remaining after set-off of backcharges validly allowed by the district court. Second, we affirm the district court's take-nothing judgment in favor of Safeco and Baytown on Rehab's claims against the payment bonds: Rehab's perfected claims against Safeco and Baytown on the payment bonds were fully offset by valid backcharges. Third, we affirm the award of attorneys' fees to Safeco, but modify the judgment to reflect that Rehab and Baytown are jointly liable to Safeco for such fees. Finally, we affirm the district court's denial of Rehab's request for attorneys fees: As Rehab is not entitled to recover anything on the payment bonds, it is not permitted to recover attorney's fees under the McGregor Act.[1]

I

FACTS AND PROCEEDINGS

Rehab is a corporation which was involved in the rehabilitation of water and sewer lines for municipalities, and Clyde Rice was its president. Baytown and Mar-Len of Louisiana are corporations engaged in construction work, and Leonard Malinowsky is president of both companies. Safeco is an

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[1] TEX. REV. CIV. STAT. ANN. arts. 5160-5164 (Vernon 1987 & Supp. 1994), repealed in part by Acts 1993, 73rd Leg., ch. 268, § 46(1) (codified as amended at TEX. GOV'T CODE ANN. §2253 (Vernon Supp. 1994)).

insurance company which issues payment bonds to contractors.

Rehab acted as a subcontractor for Baytown on several projects, including the following[2]:

Project	Start Date	Form	Description
4038-1	1/84	Written	"Closed" project[3]
3981-1	1/85	Oral	Time and materials contract[4]
Bacliff MUD	1/86	Written	"Closed" project
4040-1	2/86	Written	"Closed" project
3783-2 ("-2")	9/86	Written	Payment bond by Safeco
3783-7 ("-7")	11/86	Written	Payment bond by Safeco
3783-8 ("-8")	12/86	Written	Payment bond by Safeco
3783-9 ("-9")	1/87	Written	Payment bond by Safeco
4020-1	10/87	Written	No payment bond

Rehab usually performed 100% of the work required by each general contract awarded to Baytown. Baytown's commission was 12% of the amount of the general contract with the owner. Stated another way, Rehab was to be paid 88% of the general contract amount ("the subcontract amount").

Generally, during the course of construction Baytown would cover Rehab's current expenses that it would otherwise have had to pay out of the subcontract amount, i.e., its 88% of the general contract amount. Baytown did this because Rehab lacked the financial capability to meet these expense payments as they came

[2]The parties' relationship began as early as 1983, but the record is devoid of evidence concerning projects subcontracted by Baytown to Rehab prior to 1984.

[3]A project was closed between the owner and the general contractor after the work was fully and satisfactorily completed and Baytown had received the full amount due under each general contract.

[4]On such a project, Rehab would be reimbursed for whatever it spent.

due during the course of a project. The expenses in question were the payroll for Rehab's employees, payroll burden (payroll taxes and contributions), equipment rental charges, and materials. Baytown also made working capital advances and partial payments to Rehab from time to time, depending on the amount of work completed to date on each project. For accounting purposes, these payments were deducted on a monthly basis from the 88% due to Rehab, an accounting practice that was reflected on separate "Subcontract Payment Estimates" issued monthly by Baytown to Rehab for each project.

To obtain such payments periodically for its work in progress, Rehab would prepare a partial completion estimate for each project and submit such estimates to the owners. The owners would verify Rehab's estimate, then prepare and submit to Baytown an owner's "Payment Estimate" for each project, setting forth the percentage of work that the owners believed had been completed. From the owners' Payment Estimates, Baytown would then prepare "Subcontract Payment Estimates" (estimate) for the projects. Based on such estimates, Rehab would receive payments from Baytown each month. The estimates stated the subcontract amount and calculated the payment due Rehab by deducting from the subcontract amount (1) previous payments made by Baytown to third parties for expenses incurred by Rehab (such as payroll), (2) previous partial completion payments to Rehab, and (3) advances to Rehab for working capital.

After the work on a project was complete and that project was

"closed" between Baytown and the owner, Baytown would furnish Rehab a "Final Subcontract Payment Estimate" (final estimate) setting forth the final subcontract amount,[5] deductions, and the amount due Rehab. On each closed project, the last Subcontract Payment Estimate issued by Baytown was denominated the "final" estimate. Rehab considered each of the written subcontracts to be an independent agreement, which came to closure when the work on that project was completed and "final payment" was made. As a result, Rehab believed that the accounting between it and Baytown for each "closed" project was at an end.

Baytown, on the other hand, maintains that the parties had only onesQin "large part" oralsQcontract, which Baytown asserts was formed by "a course of dealing" between Baytown and Rehab. As for the fact that all but one of the projects begun during or since 1984 were reduced to writing, Baytown explains that the written subcontracts, although pertaining to particular projects, were merely components of the single "course of dealing" contract encompassing all projects between Rehab and Baytown. Baytown insists that its relationship with Rehab was "a continuing open account," under which Baytown constantly propped up Rehab by making monthly advances and payments thus keeping Rehab in business while projects were ongoing.

Baytown asserts that in the aggregate its payments and advances to or on behalf of Rehab exceeded the amount that Rehab

[5]The initial subcontract amount, which appeared on the written subcontracts, was subject to change for additional work authorized by change orders.

was entitled to be paid, and that the parties always intended to "settle up" at some point in the future.[6] Baytown also asserts that it had never "closed out" a project with Rehab over the course of their five-year business relationship. It explains that "final" in its "Final Subcontract Payment Estimates" to Rehab meant finality vis-a-vis the owner; and Baytown represents to us that "final estimates" were only estimates of finality.[7]

During 1986 and 1987, Baytown entered five general contracts with COH (the COH projects) to wit: projects -2, -7, -8, -9, and 4020-1. All work on each of those projects was subcontracted to Rehab. Safeco furnished payment bonds to Baytown on four of the COH projects: -2, -7, -8, and -9 (the bonded projects). The payment bonds were issued pursuant to the McGregor Act. Baytown and others agreed to indemnify Safeco against losses it might suffer as a result of issuing the bonds.

Rehab characterizes the relationship between itself and Baytown before the start of the COH projects in September 1986 as "pleasant, excellent." That relationship deteriorated, however: A $12 million wrongful death action was filed against Baytown and Rehab after a trench accident occurred on project -2 that resulted in the deaths of Bud Simien, a subcontractor to Rehab, and his

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[6]According to Baytown's representations to the district court, Rehab had been overpaid more than $1.25 million over the course of the parties' relationship.

[7]The district court implicitly found for Baytown on this issue: it allowed offsets for overhead on 4038-1, 4040-1 and Bacliff MUD, projects that Rehab had asserted were already closed.

brother. Also, an OSHA citation was issued to Baytown. It asserts that the OSHA citation should have been issued to Rehab, and blames Rehab for the "wrongful" issuance of the citation. That citation, though later withdrawn after Baytown protested its issuance, apparently caused Baytown temporarily to lose its bonding capability late in 1986 or early in 1987. Then, late in 1987, Rehab successfully bid two COH projects (1783-29 and 1783-30) on its own, without Baytown's involvement. This spelled the death knell of Baytown's commissions on any projects performed by Rehab.

After Baytown refused to pay Rehab for the five COH projects, Rehab filed claims against Safeco on the bonded projects. Baytown, as principal on the bonds, disputed Rehab's bond claims and alleged backcharges that if valid would fully offset Rehab's bond claimssQand demonstrate that Baytown had overpaid Rehab. As surety on the bonds, Safeco was entitled to assert all offsets alleged by its principal, Baytown.[8] As noted, Safeco filed the instant suit[9] seeking a declaration of the relative rights of the parties and questioning whether Rehab's bond claims were valid. Rehab counterclaimed for payment of the bond claims. The parties stipulated that under the McGregor Act Rehab had perfected $158,620.04 of its claims against the payment bonds.

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[8]Aultman & Taylor Co. v. Hefner, 67 Tex. 54, 62, 2 S.W. 861, 864 (Tex. 1886); Robberson Steel, Inc. v. J. D. Abrams, Inc., 582 S.W.2d 558, 564-65 (Tex. Civ. App.))El Paso 1979, no writ).

[9]Baytown defended Rehab's claims against the payment bonds pursuant to its agreement to indemnify SafeCo.

Rehab also filed a cross-action against Baytown,[10] seeking $336,743.95 under the written subcontracts on the five COH projects and $75,000 under the oral subcontract (3981-1).[11] Baytown cross-claimed against Rehab to recover its "overpayments" on many projects (not just the six projects for which Rehab asserted claims), which overpayments, if proved in full, would not just have offset Rehab's claims but would have entitled Baytown to a positive recovery as well. Baytown asserted backcharges for projects that Rehab believed had been closed between itself and Baytown (4038-1, 4040-1, and Bacliff MUD) for all purposes))and especially for accounting purposes. Baytown also asserted backcharges for categories of payments that had never before been reflected on the estimates from Baytown to Rehab: overhead, claims costs,[12] and payments made on claims by second tier subcontractors (Rehab's subs).[13] The total backcharges asserted by Baytown exceeded $1.25 million. Rehab filed for bankruptcy protection under Chapter 11 and the bankruptcy court stayed the cross-action.

The bench trial ended with Rehab being awarded nothing.

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[10]Rehab also filed a cross-action against Mar-Len of Louisiana, but these claims were dismissed and are not relevant to this appeal.

[11]The $75,000 oral contract claim appears to have been abandoned.

[12]Baytown asserts that it is entitled to deduct its costs of defending claims brought against it for the death of the Simien brothers on project -2.

[13]At least three of Rehab's subcontractors apparently asserted that Rehab had not paid their claims. Baytown paid Rehab's subs and now asserts that the subcontracts require Rehab to reimburse Baytown for those payments.

Issues of credibility were resolved in favor of Baytown and thus against Rehab. The principal issues involved in this appeal turn on Finding 10, which lists "the payments, credits, offsets and/or backcharges that Baytown is entitled to assert against Rehab as a result of the course of dealing between them":

> 10. Defendant Baytown is entitled to assert the following payments, credits, offsets and/or backcharges against Defendant Rehab on the following projects as a result of the course of dealing which existed between Defendant Baytown and Defendant Rehab, and Defendant Rehab is not entitled to any affirmative recovery on same (except as to Project 3783-9 to the extent of $22,236.94).
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> | | |
> |---|---|
> | Project 3783-2 | $ 48,861.87 |
> | Project 3783-7 | 60,849.67 |
> | Project 3783-8 | 25,505.23 |
> | Project 4020-1 | 25,482.20 |
> | Project 4038-1 | 108,846.11 |
> | Project 4040-1 | 98,878.04 |
> | Bacliff MUD | 22,838.95 |
> | Project 3981-1 | 102,386.07 |
>
> Defendant Baytown is not entitled to assert any credits or offsets on Projects 1783-29, 1783-30, or on Maco [Rehab's subcontractor] against Defendant Rehab.

Rehab moved to amend the findings to clarify how Finding 10 was calculated. That motion was denied. Safeco, the plaintiff in the declaratory judgment action, was awarded attorney's fees of $92,046.22. Rehab appeals.

The en globo nature of Finding 10 does little to assist our analysis. Our examination of the record and our reconstruction of the district court's calculations reveal that the district court found that Baytown had in fact overpaid Rehab in the aggregate

amount of $471,411.20 for all of the subcontracts.[14] The district court arrived at that sum by making a series of calculations. First, the court determined the individual subcontract amounts and deducted therefrom undisputed charges and payments (advances, payroll, payroll taxes, materials, and equipment charges). Second, the court deducted the following disputed offsets: (1) $37,774.19 for Baytown's overpayment on a "closed project" (4038-1); and (2) $102,386.07 for Baytown's overpayment on project 3981-1, the incomplete time and materials contract (a total of $140,160.26). Third, the court deducted all backcharges requested by Baytown for (1) overhead, $476,469.76; (2) claims costs, $59,154.94; and (3) 98% of claims by Rehab's subs, $51,126.54.[15] As a result, the disputed offsets allowed by the court totalled $726,911.50. The court's calculations produced a bottom-line figure for each project

[14]Baytown and the district court believed that Finding 10 ($471,411.20) offset Rehab's claims ($336,743.95) andSQif the cross-action had not been stayedSQBaytown would have been entitled to an affirmative recovery of $134,667.25. But in fact, Finding 10 actually represents the amount that Baytown paid over and above the sum of all subcontract amounts ($471,411.20)SQhence Finding 10 would be Baytown's "claims" against Rehab. The claims asserted by Rehab are the $336,743.95 below the sum of all subcontract amounts that it was supposed to have been paidSQthe actual "offsets." In sum, Rehab argues that it was "underpaid" $336,743.95; Finding 10 reflects that the court (albeit possibly through inadvertence) found that Rehab was overpaid the full amount of $471,411.20 on eight subcontracts.

[15]Approximately 43% of offsets claimed by Baytown were not allowed by the courtSQa total of $541,055.71. That figure includes 2% of the backcharges claimed by Baytown for its "payments" to Sugarland, Manholes, and ADS ($1,073.39), and 100% of backcharges claimed by Baytown for its "payments" to Rehab's subs MACO ($533,271,84) and Simien ($6,710.48). The court disallowed these claimed offsets because they were never paid by Baytown. Baytown does not assert on appeal that disallowed offsets should have been allowed.

(Finding 10)SQall but one of which reflected an "overpayment" by Baytown to Rehab. The sum of these "overpayments"SQ$471,411.20SQis thus the amount that Rehab must defeat on appeal before it may begin to recover anything on its claims.

Rehab questions (1) whether proper interpretation of the subcontracts would permit Baytown to deduct overhead, claims costs, and claims by Rehab's subs; and (2) whether the amount of the offsets allowed for the two latter categories is accurate. Thus, of the $726,911.50 in disputed offsets that were allowed by the district court, Rehab on appeal challenges only $586,751.24 (the total amount of backcharges allowed as set-off for overhead, claims costs, and claims by Rehab's subs). Rehab apparently accepts the court's allowance of $140,160.26 of the offsets disputed at trial.[16] That conclusion reduces the maximum amount that Rehab may recover to $196,583.69 ($336,743.95 minus $140,160.26).

II

ANALYSIS[17]

A. Standard of Review

Fact findings may be set aside if they are clearly erroneous.[18] The offsets listed in Finding 10 are essentially contract damages that Baytown would be entitled to recover from Rehab if Rehab were not bankrupt and if Rehab could not prove its claims. "Damages

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[16]Except for overhead charges, Rehab does not challenge on appeal those offsets awarded to Baytown on 4038-1 ($37,774.19) and 3981-1 ($102,386.07).

[17]Texas substantive law governs this diversity case.

[18]FED. R. CIV. P. 52(a).

need not be proven with an exact degree of specificity, and we review the award under the clearly erroneous standard."[19] Questions of law,[20] or mixed questions of law and fact, are reviewed de novo.[21]

B. Discussion

1. Stipulations Ignored?

Finding 10 informs us that the net amount of Baytown's overpayment to Rehab is $471,411.20. Rehab contends that in calculating the offsets in Finding 10, the district court erroneously relied on the subcontract amounts listed in Exhibit 11,[22] a document that was never admitted into evidenceSQrather than those in Exhibits 2 (Rehab's summary sheet) and 3 (Baytown's summary sheet), which were stipulated to by the parties. The first issue, then, is whether the court erred in using subcontract amounts from Exhibit 11 to calculate Finding 10 rather than using figures stipulated to by the parties.

Rehab makes two basic arguments with respect to the "stipulations." First, it claims that the parties stipulated to the subcontract amounts due to Rehab on the COH projects before deduction of backcharges; and that these stipulations were binding

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[19]Albany Ins. Co. v. Bengal Marine, Inc., 857 F.2d 250, 253 (5th Cir. 1988).

[20]Seal v. Knorpp, 957 F.2d 1230, 1234 (5th Cir. 1992).

[21]United States for Use of Consol. Elec. Distr., Inc. v. Altech, Inc., 929 F.2d 1089, 1092 (5th Cir. 1991).

[22]Exhibit 11 was prepared by Baytown at the request of the trial court and was based primarily on the last payment estimates issued by Baytown to Rehab for each project.

onSQbut were ignored bySQthe court. Second, Rehab insists that even if the stipulations were not binding on the court, it erred in calculating Finding 10 when it used subcontract amounts from Exhibit 11. As Exhibit 11 was never formally admitted into evidenceSQand as the record does not support Exhibit 11's subcontract amountsSQthe amount of offsets in Finding 10 are erroneous, says Rehab, to the tune of $81,243.66 (the difference between the sum of the subcontract amounts on Exhibit 11 and the sum of those agreed upon by Baytown and Rehab).

Under Texas law, stipulations of fact may bind a court if the stipulations comply with Rule 11 of the Texas Rules of Civil Procedure relating to written agreements between attorneys or parties.[23] And federal courts sitting in diversity are required to apply this state rule.[24] The record clearly reflects that Baytown and Rehab stipulated in the presence of the court that the relevant subcontract amounts were those appearing on Exhibits 2 and 3. The agreement complies with the "made-in-open-court" exception to Rule 11's requirement of a writing[25] and is not contrary to any purported

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[23]Gulf Construction Co. v. Self, 676 S.W.2d 624, 630 (Tex. App.SQCorpus Christi 1984, writ ref'd n.r.e.).

[24]Anderegg v. High Standard, Inc., 825 F.2d 77, 80 (5th Cir. 1987) ("We have held that Rule 11, although to be found among the Texas Rules of Civil Procedure, is nonetheless also a rule of substance akin to the parol evidence rule and applicable for that reason to Texas diversity cases tried in our federal court system.") (citing Condit Chem. & Grain Co. v. Helena Chem. Corp., 789 F.2d 1101 (5th Cir. 1986)), cert. denied, 484 U.S. 1073, 108 S. Ct. 1046, 98 L. Ed. 2d 1009 (1988).

[25]Id., 825 F.2d at 81.

subcontract amounts disclosed by the record.[26] Although setting aside or modifying a stipulation is apparently within the discretion of the trial court,[27] it does not appear from the record that the district court attempted to modify or set aside the stipulation made between the parties. Instead, the district court appears to have inadvertently disregarded the stipulated subcontract amounts. The subject stipulations thus bind the court as well as the parties in this case.

Although Baytown concedes that it stipulated to the dollar amounts of certain subcontracts, it argues that any error is harmless, as offsets calculated with only Exhibit 3 figures still exceed Rehab's claims. We disagree. Such error is not harmless; it directly affects this appeal and its outcome.

The offsets allowed by the court in Finding 10 were artificially increased by $81,243.66 through the use of subcontract amounts from Exhibit 11. This in turn increased the amount of offsets that on appeal Rehab must demonstrate to be erroneous before it is entitled to recover any part of its $336,743.95 in claims. In other words, when Exhibit 11 subcontract amounts are used to calculate Finding 10, Rehab has to demonstrate $471,411.20 in erroneous offsets before it starts to recover anything, whereas when the stipulated subcontract amounts are used, Rehab need only demonstrate $390,167.54 in erroneous offsets.

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[26] Cf. Penick v. Penick, 750 S.W.2d 247, 249 (Tex. App.--Houston [14th Dist.] 1988), rev'd on other grounds, 783 S.W.2d 194 (Tex. 1988); Gulf Constr., 676 S.W.2d at 630.

[27] Cf. Penick, 750 S.W.2d at 249 (citations omitted).

Thus Finding 10 is clearly erroneous to the extent that the subcontract amounts used by the court differed from those stipulated by the partiesSQan error detrimental to Rehab in the amount of $81,243.66. At most, then, Rehab need only prove an additional $390,167.54 in erroneous offsetsSQnot $471,411.20SQ before it may begin to recover any portion of its claims.

2. Offsets for Overhead

a. Construction of Subcontracts

Rehab asserts that the court erroneously allowed the requested backcharge for overhead ($476,469.76) on eight projects (-2, -7, -8, -9, 4020-1, 4038-1, 4040-1, and Bacliff MUD). At trial, the only justification advanced by Baytown for the overhead backcharge was the subcontract term "etc." (et cetera). Thus whether offset for overhead was properly allowed depends on the interpretation of the written subcontractsSQa legal question that is subject to de novo review.

1. Projects -2, -8, and -9: Does "etc." include overhead?

In fact, only three of the written subcontracts, those for projects -2, -8, and -9, contain the word "etc." To determine what deductions are authorized by the subcontract term "etc.," we take the wording of the subcontracts, examine that wording in light of the circumstances, apply the pertinent rules of construction, and thereby find the meaning of the subcontracts.[28] Articles 3(A) of the subcontracts for projects -2, -8, and -9 (with only minor

[28]Aetna Life & Casualty Co. v. Gunn, 628 S.W.2d 758, 760 (Tex. 1982).

differences in project -2) provide that

> [t]he Contractor shall pay the Subcontractor in current funds for the performance of the work, subject to additions and deductions by Change Order, the total sum of __(specified amount)__. LESS payroll, taxes, etc. paid for by Baytown Construction Co., Inc.[29]

Clearly our attention must focus on the phrase, "LESS payroll, taxes, etc. paid for by Baytown." The historical circumstances reflect that the only deductions ever taken by Baytown on its monthly and final payment estimates were deductions for Rehab's payroll, payroll taxes, materials, and equipment rental. Baytown's own overhead was never mentioned.[30]

First, we consider the plain grammatical meaning of "etc."[31] Both its literal translation from the Latin et cetera and its universally accepted English usages and meanings are "and others," "and other things," and "others of like kind or character."[32] Thus etc. is not open-ended or unlimited in reach; it is limited by the specific examples in the list that it modifies. The phrase immediately following the word etc.SQ"paid for by Baytown"SQfurther restricts the class of items anticipated by the term etc.

Read in context of the full contractual provision, the experience of the parties, and the universally accepted meaning of

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[29]Emphasis added.

[30]Even Baytown concedes that the one time that it did attempt to deduct overhead, on project 3981-1, the deduction was admittedly improper (albeit not for the same reason that we conclude it was improper).

[31]Reilly v. Rangers Mgt., Inc., 727 S.W.2d 527, 529 (Tex. 1987).

[32]BLACK'S LAW DICTIONARY 553 (6th ed. 1990).

etc., the authorized deductions are: payroll, taxes, and other items of like kind or character paid for by Baytown. Thus there remains to be answered only the sub-question, "Which putative deductions are `others of like kind' and which are not?"

We answer that inquiry by applying the venerable maxim of ejusdem generis. "[E]jusdem generis applies when words of a specific and particular meaning are followed by general words and when an ambiguity exists."[33] A general word that follows a list of specific items is held to refer to the same class of items as the items that are specifically mentioned.[34] We thus construe general words that follow specific words to include only the class or category framed by the specific words.[35]

We observe first that Baytown's overhead is not "paid for" by Baytown in the same sense that Rehab's payroll, payroll taxes, materials, and equipment rental are "paid for" by Baytown. Those items are specific expenses incurred by the non-paying partySQhere, RehabsQbut disbursed as an accommodation by the paying partySQhere, Baytown. By contrast, the paying party's own overhead is directly incurred by it as one of its own costs of doing business. Overhead is not an expense of doing business of Rehab that is paid for, i.e., disbursed by, Baytown, in the sense that those of Rehab's

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[33]Corpus Christi v. Bayfront Assocs., Ltd., 814 S.W.2d 98, 104 (Tex. App.SQCorpus Christi 1991, writ denied).

[34]Haney v. Minnesota Mut. Life Ins. Co., 505 S.W.2d 325, 328 (Tex. Civ. App.SQHouston [14th Dist.] 1974, writ ref'd n.r.e.).

[35]Stanford v. Butler, 142 Tex. 692, 698, 181 S.W.2d 269, 272 (Tex. 1944).

anticipated costsSQexpressly listed in the subcontracts and preceding the word "etc."SQare disbursed by Baytown.

Next, we look to the way the parties to agreements, by their actions, have interpreted their agreements: Here, Baytown's historical failure ever to attempt to charge Rehab for Baytown's own overhead at any time during the entire course of the parties' long business relationship confirms the conclusion that Baytown's overhead is not the kind of cost paid for by Baytown that would be caught in the net of ejusdem generis. As Baytown's overhead is not part of the class or category of items that includes payroll or payroll taxes or materials or equipment rental paid for by Baytown, such overhead is not encompassed in the term etc.

Clearly, then, Baytown was not entitled to an offset of $153,702.70 for its overhead related to projects -2, -8, and -9.[36]

2. Projects -7 and 4020-1

The subcontract for project -7 does not contain the word etc., Baytown's sole asserted contractual justification for the deduction of overhead. Project -7's subcontract was executed within the same two-week period that the subcontracts for projects -2 and -8 were executed, and reads in pertinent part, "less payroll, taxes, paid for by [Baytown]." Construing the plain wording of this subcontract as written, we conclude that project -7 does not authorize Baytown's deduction of overhead for that project in the

[36]Baytown claimed overhead for those projects in the following amounts: project -2, $61,889.15; project -8, $31,197.93; and project -9, $60,615.62.

amount of $101,608.12. Absent etc. or any other words of generality, "payroll, taxes" constitutes an exclusive two-item list of deductions authorized under that contract.

Neither does project 4020-1 contain "etc." It reads "less payroll, payroll taxes, materials, and any unpaid bills produced by [Rehab] to perform this contract." Clearly the final item in the otherwise exclusive list of permitted deductions could not be stretched to include Baytown's overhead. This subcontract was the final COH subcontract executed between the parties, and further confirms our earlier conclusion that the parties never intended for overhead to be deducted under any of these subcontracts. This last subcontract appears to have clarified the term et ceteraSQand it still cannot be stretched to include overhead. Baytown's $28,370.03 in overhead on project 4020-1 simply cannot be "shoe-horned" into any of the specific categories listed as authorized deductions: "payroll, payroll taxes, materials, and any unpaid bills produced by [Rehab] to perform this contract."

As the subcontracts for neither project -7 nor project 4020-1 authorize Baytown to deduct its overhead, the district court was in error when it allowed overhead offsets for these two projects in the amount of $129,978.15.[37]

[37]The court had allowed an overhead offset for project -7 in the amount of $101,608.12 and for project 4020-1 in the amount of $28,370.03.

3. Projects 4038-1, 4040-1 and Bacliff MUD.

Rehab never claimed any amounts due for projects 4038-1, 4040-2, or Bacliff MUD, yet Baytown was allowed an offset of $230,563.10 for its "overpayments" to Rehab for these projects. The vast majority of those asserted overpayments ($192,788.91) comprise late-in-the-game "afterthought" assertions of backcharges for overhead. These subcontractsSQall writtenSQwere not even introduced into evidence. The only record support for the overhead numbers for these projects is Baytown's summary sheet, Exhibit 3.[38] We conclude that the district court erred in allowing overhead offset for these three projects in the amount of $192,788.91.[39]

In conclusion, we agree with Rehab that the district court erred as a matter of law when it allowed Baytown's total requested backcharge for overhead ($476,469.76) on all eight projects (-2, -7, -8, -9, 4020-1, 4038-1, 4040-1, and Bacliff MUD). Accordingly, at this interim junctureSQeven before we address the offsets for claims costs and claims of Rehab's subsSQRehab would be entitled to a judgment in its favor in the amount of $86,302.22.[40]

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[38]Although it introduced job costs reports for the COH projects to support the overhead figures on its summary sheets, Baytown did not introduce job cost reports for projects 4038-1, 4040-1, and Bacliff MUD.

[39]The court allowed Baytown overhead offsets for these projects in the following amounts: 4038-1, $71,071.92; 4040-1, $98,878.04; and Bacliff MUD, $22,838.95.

[40]Recall that after correction for the stipulated subcontract amounts, Finding 10's offsets (Baytown's affirmative "claims") totalled $390,167.54. As the subcontracts did not authorize any of the offsets for overhead that were allowed by the court ($476,469.76), Baytown's affirmative "claims" of $390,167.54 and an additional $86,302.22 in actual offsets

b. Course of Dealing

Baytown does not disagree with the rules of contract construction applied above. Instead it argues that those rules do not apply in this case because the district court found that the course of dealing between the parties, which Baytown argues was "the contract," reflects that the parties intended to deduct overhead.[41] We disagree.

First, Baytown's sole justification offered at trial for the deduction of overhead was the subcontract term, "etc." It did not rely on the course of dealing to demonstrate that overhead was to be deducted. Second, even if at trial Baytown had relied on the course of dealing to demonstrate that Rehab would pay Baytown's overhead, our analysis of that course of dealing compels us to reach exactly the opposite conclusion. As noted, the "course of dealing" includes Baytown's accounting and billing practices over several years, which reflects that Baytown never once claimed deductions for overhead.

Baytown's course of dealing arguments would turn the concept on its head. A course of dealing generally supplies terms for ambiguous, silent, or incomplete contracts; yet here, Baytown asserts that the course of dealing is the contract, supplanting the written agreements acknowledged by the parties. In reality Baytown

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against Rehab's claims evaporate.

[41]The court also allowed deductions for claims costs and claims of Rehab's subs under the "course of dealing," but Baytown does not pretend that deductions for those items turn on anything other than construction of the subcontracts.

would have us ignore the terms of the written subcontractsSQeight of nine of the subcontracts at issueSQin favor of some overarching, vaguely omnipresent course of dealing between the parties, a "course of dealing" which does not even support Baytown's argument that it is entitled to deduct overhead.

While it is at least conceivable that the parties may have intended to switch roles in responsibility for Baytown's overhead on these projectsSQif, for example, Baytown's commission were reduced from 20%, with Baytown paying its own overhead, to 12%, with Rehab paying that overheadSQsuch an implied agreement to "switch" is at most supported only by the self-serving testimony of Baytown's president, Mr. Malinowsky, and its controller, Mr. Boudreaux. In fact, even though one of those two witnesses stated that overhead was deducted from Baytown's 20% commission, he described the 20% as a "clear profit with only minor expenses deducted."[42] In an apparent contradiction of logic, Baytown's witnesses also describe the 12% as "clear profit" but assert that overhead was not to come out of that amount. None of the subcontracts describe Baytown's 12% fee as "clear profit." Mr. Rice, the president of Rehab, approached Malinowsky about reducing the commission to Baytown from 20% because it was a little steep under the circumstancesSQafter all, Rehab was performing 100% of the work! The record reflects that Malinowsky, not Rice, suggested the 12% figure. This does not portray an agreement between the parties to shift responsibility for Baytown's overhead to RehabSQit

[42]Emphasis added.

would be pointless for Rehab to ask Baytown to lower its commission if the net effect would be the same, leaving Rehab no better off despite Baytown's agreeing to lower its commission![43]

The best evidence of the parties' intent is the interpretation given by their actions (or inaction).[44] Although it knew the cost that it was incurring for overhead,[45] Baytown's conductsQits failure to assert overhead on its estimates, and its failure to assert the backcharge until litigation had been underway for over a yearsQindicates that the parties never agreed that Rehab would absorb Baytown's overhead.

3. "Claims Costs"

The district court also allowed Baytown to offset Rehab's claims with "claims costs" of $59,154.94. The "claims costs" asserted by Baytown as offsets relate not to claims made by Baytown against the owner or third parties on Rehab's behalf, but to the defense of claims brought against Baytown by third parties. Rehab contends that nothing contained in the subcontracts authorizes the deduction of claims costs of the type asserted by Baytown late in the day. Alternatively, Rehab argues that any amounts of offsets for claims costs in excess of $32,500 would be clearly erroneous:

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[43]Overhead for the COH projects, project 4038-1, project 4040-1, and project Bacliff MUD comprised approximately 7.2% of the general contract amounts for those projects.

[44]See Lone Star Gas Co. v. X-Ray Gas Co., 139 Tex. 546, 552, 164 S.W.2d 504, 508 (Tex. 1942).

[45]The record contains job cost reports dated July 1987 and June 1988 that detail Baytown's overhead costs for the COH projects.

offsets for claims costs over that amountSQthe sum actually expended by BaytownSQrepresent purely speculative, projected or future claims costs and should not have been allowed.

Rehab insists that Baytown is improperly attempting to deduct claims costs incurred in defending claims against Baytown, specifically, the OSHA citation on project -2. As deduction of claims costs also turns on construction of the written subcontracts, we review this issue de novo.

Article 10(E)(4) of each of the subcontracts with COH provides:

> Subcontractor is responsible for any and all costs incurred by Contractor of claim preparation and documentation for Subcontractor's portion of work and will reimburse Contractor for documentation, preparation, computation, negotiation, consulting and/or accounting and attorney fees costs of arbitration, mediation or litigation, prorated overhead and travel time.

The paragraph that immediately precedes Article 10(E)(4), Article 10(E)(3), which Baytown would like this court to ignore, reads

> Subcontractor shall make all claims to the Contractor in the manner provided in the Contract Documents for like claims by the Contractor upon the Owner, except that the time for making claims for extra costs shall be one (1) week.

Rehab insists that the parties intended to require Rehab to bear only those claims costs incurred by Baytown in asserting claims on Rehab's behalf against either the owner or a third party with respect to Rehab's work. Instead, all of the claims costs incurred by Baytown for which it seeks set-off relate to the defense of claims brought by third parties against Baytown. Witnesses for Baytown testified that no claims costs incurred by Baytown related

to either of the two types acknowledged by Rehab as proper under the subcontracts: (1) claims of Rehab against the owner, or (2) claims of Rehab against a third party. Thus, Rehab insists, Baytown has incurred no "claims costs" that may properly be deducted under the subcontracts.

Not surprisingly, Baytown argues that nothing in the subcontracts limits the type of claims costs that Baytown is allowed to deduct. When we read the agreements in context, however, we agree with Rehab as a matter of law.

In effect, Baytown is attempting to turn Article 10(E)(4) into an indemnification provision for attorney's fees. But when we read Article 10(E)(4) in pari materia with the preceding article, 10(E)(3), we are compelled to agree with Rehab's position that it is requiredSQunambiguouslySQto reimburse Baytown only for any costs it may incur in preparing claims on Rehab's behalf against the owner or third parties, but no others. Consequently, the offsets for claims costsSQa total of $59,154.94 on the five COH projectsSQshould not have been allowed.

Up to this point we have concluded that the district court erred in allowing offsets for overhead ($476,469.76) and claims costs ($59,154.94). At this juncture, then, Rehab would be entitled to a favorable judgment in the amount of $145,457.16. Still, one category of offsets allowed by the court remains to be addressed: claims against Rehab by its subs.

4. Claims by Rehab's Subcontractors

The district court concluded that Baytown was entitled to offset Rehab's claims by $51,126.54 for payments made by Baytown to Rehab's subs.[46] Rehab challenges the court's conclusion by arguing that (1) the subcontracts do not authorize Baytown to deduct its payments to Rehab's subs for their claims against Rehab unless those claims are first perfected against the payment bonds; and (2) even assuming that Baytown may charge Rehab for its payments to Rehab's subs without first requiring subcontractors to perfect bond claims, Baytown cannot be allowed an offset in excess of amounts actually paid to Rehab's subs.

a. Construction of the Subcontracts

Article 10(C) is the only provision of the subcontracts between Baytown and Rehab that relates to claims asserted by Rehab's subs, and states in pertinent part:

> C. Subcontractor agrees to turn said work over to Contractor in good condition and free and clear from all claims, encumbrances and liens for labor, services, or materials, and to protect and save harmless Contractor and Owner from all claims encumbrances and liens growing out of the performance of this work and all maintenance required under the Contract Documents, and should Subcontractor, during the progress of said work, or at any time thereafter, fail to pay for all labor, services and materials used, purchased for use in the prosecution of said work, Contractor may, at its option and without notice to Subcontractor, pay all such claims and charge the amounts thereof to Subcontractor.[47]

[46]Again, the district court allowed Baytown to charge Rehab for 98% of its claimed payments to ADS ($11,727.46), Manholes, Inc. ($3,412.75), and Sugarland ($35,976.33).

[47]Emphasis added.

Rehab urges that Baytown must prove[48] that (1) a claim was asserted against Baytown, Safeco, or COH, and (2) the claim was "valid." Rehab maintains that, as the projects were governed by the McGregor Act, the exclusive method by which Rehab's subcontractors could validly assert a claim against Baytown, Safeco, or the COH was by perfecting a claim against the payment bonds posted by Baytown. In effect, Rehab argues that the only "valid claim" in the setting of the McGregor Act is one properly perfected against a payment bond. To perfect a McGregor Act claim, the subcontractor would be required to send statutorily prescribed notices to the general contractor and its surety within the time periods specified in the statute. Without perfected payment bond claims for the unpaid bills of Rehab's subcontractors, insists Rehab, neither Baytown nor Safeco nor the COH could be exposed to any liability to the second tier subs.

Rehab also insists that the record is devoid of evidence of <u>any</u> sort of claim against Rehab by its subs, much less evidence of a validly asserted bond claim, so that any offset for sums paid on unperfected or invalid claims to Rehab's subcontractors was improper. We disagree with Rehab's characterization of the record: The checks made payable to Rehab's subs and the accompanying letters are "some" record evidence that claims were made. We do agree, however, that the record is devoid of evidence of any valid <u>bond</u> claim.

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[48]It is Baytown's burden to prove offsets to which it is entitled. <u>Atkins v. Williamson</u>, 320 S.W.2d 425, 427 (Tex. Civ. App.SQAustin 1959, writ dism'd).

But Baytown insists that the subcontracts do not require perfection of a bond claim by Rehab's subcontractors as a prerequisite to Baytown's right to recognize a "valid" claim and pay it. Baytown argues that it should not be required to wait for a claim against the bonds or for the filing of a lawsuit before it pays an otherwise "valid" claim.

The Texas Supreme Court[49] has recognized that even if payment bonds expressly limit recovery for suppliers' claims to those established in compliance with the McGregor Act, a subcontractor maysQby an indemnity agreement that does not require perfection of claimssQgive up its right to insist that claims be perfected against the payment bonds.[50] Article 10(C) of the subcontracts at issue here, which specifically addresses the claims of Rehab's subs, does not expressly limit Baytown's indemnity rights to claims perfected under the McGregor Act. We conclude that Article 10(C) of the subcontracts does not require perfection of claims against the bonds, and we are unwilling to infer any such requirement.[51] Therefore, Baytown is not precluded from being indemnified by Rehab through offset for the payments Baytown actually made to Rehab's

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[49]When confronted with a similar situation that presented the question of liability on a payment bond governed by the McGregor Act, that court avoided the question. See Miner-Dederick Constr. Corp. v. Mid-County Rental Svc., Inc., 603 S.W.2d 193, 199 (Tex. 1980), reversing 583 S.W.2d 428 (Tex. Civ. App.SQBeaumont 1979).

[50]Miner-Dederick, 603 S.W.2d at 199.

[51]See Fontenot v. Mesa Petroleum Co., 791 F.2d 1207, 1221 (5th Cir. 1986) (holding that notice requirement will not be inferred from an indemnity agreement that does not expressly require notice).

subcontractors.[52]

b. Amount of Offset Allowed: Clearly Erroneous

Although we thus conclude that Baytown is allowed to pay claims by Rehab's subs and recover the amount of such payments from Rehab by way of offset, we also conclude that Baytown should be able to charge Rehab only for the amounts actually paid by Baytown to Rehab's subs. Careful review of the record reveals that the district court, too, intended to allow offsets only for payments actually made by Baytown to Rehab's subs.[53]

The sole documentary evidence of the amounts paid by Baytown to second tier subcontractors is detailed below in tabular form. The table also illustrates the offsets allowed by the court.

Exhibit	Payee	Amount Paid	Offset Allowed
23	ADS	10,501.00	11,737.46
24	Manholes	2,083.44	3,412.75
25	Sugarland	26,956.64	35,976.33
		39,541.08	51,126.54

The district court, however, relied on Baytown's summary sheets, not the copies of checks in the record (Exhibits 23, 24, and 25), to reach its offset figures. The difference between the amount documented as paid to Rehab's subs ($39,541.08) and the offsets allowed by the court ($51,126.54), is $11,585.46. Baytown does not

[52]The Texas Supreme Court noted that "[t]o hold otherwise would allow a subcontractor to avoid the ultimate responsibility for debts owed to its suppliers on the basis of a statutory notice provision enacted for the general contractor's protection." Miner-Dederick, 603 S.W.2d at 200.

[53]As Baytown attempted to recover 100% of claims by Rehab's subs, and Baytown admittedly withheld, i.e., did not pay, at least 2% of claims of ADS, Manholes, and Sugarland and 100% of claims of MACO and Simien, the court disallowed the offsets that Baytown did not actually pay.

explain why there is a difference of $11,585.46 between "payments made" to Rehab's subs as reflected on Baytown's summary sheets (Exhibits 3 and 11), and the sums reflected on the only record documentation of payments made to Rehab's subs, Baytown's Exhibits 23, 24, and 25. Baytown had the burden of proving that it was entitled to such offsets.[54] As Mr. Boudreaux admitted that Exhibits 23, 24, and 25SQthree checks totalling $39,541.08SQ represent the only payments actually made to Rehab's subs, the district court's reliance on the figures on Baytown's summary sheets for "actual payments" made by Baytown was misplaced. Consequently, to the extent of the difference of $11,585.46, the court's allowance of the unsubstantiated and admittedly unpaid portion as an offset was clearly erroneous.

To recap: Based on the foregoing analysis of the subcontracts and of Baytown's asserted backcharges for overhead, claims costs, and claims by Rehab's subs paid by Baytown, Rehab has defeated backcharges of (1) $476,469.76 for overhead, (2) $59,154.94 for claims costs, and (3) $11,585.46 for claims of Rehab's subs. Rehab has also demonstrated that Finding 10 was $81,243.66 greater than it should have been as a result of the district court's reliance on the wrong subcontract amounts in its calculations. The set-off that Baytown was awarded was $628,453.82 greater than was warranted by the subcontracts and the evidence. Thus Finding 10, the initial

[54]Baytown asserts that if Rehab wanted to know why Baytown's claimed payments to Rehab's subs were greater than payments evidenced by checks, Rehab should have asked! Such a position by Baytown ignores its burden of proof.

$471,411.20 overpayment finding, becomes an underpayment finding of $157,042.62. We conclude then that Rehab is entitled to an affirmative recovery of $157,042.62 on the five COH projects. A question that remains to be addressed, though, is, "Which partySQSafeco or BaytownSQis responsible for paying that amount to Rehab?"

5. The Judgment

Safeco, as surety on the payment bonds, is not liable for any portion of Rehab's perfected claims against those bonds. The parties stipulated that, under the McGregor Act, Rehab had perfected only $158,620.04 of its $305,178.69 in claims against the payment bonds. Again, as surety on the bonds, Safeco was entitled to assert all offsets alleged by its principal, Baytown.[55] The district court properly allowed $179,701.34 of Baytown's asserted offsets. Those offsets ($179,701.34)SQwhich inure to Safeco's creditsSQclearly exceed Rehab's perfected claims against the payment bonds ($158,620.04). Thus Rehab may not recover any portion of its perfected bond claims.

As for Rehab's breach of contract counterclaim against Baytown on the five COH projects for $336,743.95, Baytown is entitled to apply the same offsets of $179,701.34 applied against the perfected claims on the bonded projects.[56] This time, Rehab's claims are only

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[55]Aultman & Taylor Co. v. Hefner, 67 Tex. 54, 62, 2 S.W. 861, 864 (Tex. 1886); Robberson Steel, Inc. v. J. D. Abrams, Inc., 582 S.W.2d 558, 564-65 (Tex. Civ. App.))El Paso 1979, no writ).

[56]Rehab's breach of contract claims of $336,743.95 relate to all COH projects, projects -2, -7, -8, -9, and 4020-1. Its

partially offset, leaving Rehab entitled to an affirmative recovery of $157,042.62 against Baytown on its breach of contract counterclaim. We turn finally to the sole remaining issues, those concerning the award of attorney's fees to Safeco and a possible award of such fees to Rehab.

6. Safeco's Attorney's Fees

Rehab's challenge to the district court's award of attorneys' fees of $92,046.22 to Safeco was limited and conditional: Rehab asserted that if it was entitled to recover on the payment bonds against Safeco, an award of attorney's fees to Safeco under Texas' Uniform Declaratory Judgments Act amounted to abuse of discretion.[57] Thus, as Rehab is not entitled to recover anything from Safeco on its payment bonds, we need not address whether the district court abused its discretion in awarding attorney's fees to Safeco under the Act. Nevertheless, as we are changing the disposition of this case on appeal, we must determine which party or parties will have to pay Safeco's attorney's fees.

Neither Baytown nor Rehab is clearly the losing party or the prevailing party. The district court, crediting Baytown's testimony, properly allowed Baytown to set-off almost $180,000 of Rehab's claims. But on appeal, we have reversed the district

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breach of contract claims relating to the bonded projects total $305,178.69. Rehab perfected only $158,620.04 of its $305,178.69 in claims against the payment bonds issued by SafeCo. Thus the $158,620.04 in perfected bond claims form part of Rehab's breach of contract claims of $336,743.95. Therefore, any offsets applied to the perfected bond claims are also applied to the breach of contract claims.

[57] TEX. CIV. PRAC. & REM. CODE ANN. §37.009 (Vernon 1986).

court's allowance of over $625,000 in offsets awarded to Baytown, as a result of which Rehab obtains an affirmative judgment against Baytown. The question of who should pay for Safeco's attorney's fees incurred as a result of the disputed claims and offsets between the parties to this litigation presents a proverbial Gordian knot. Like Alexander the Great, we choose not to struggle fruitlessly in trying to untie that knot, but elect instead to cut it, holding Rehab and Baytown jointlySQbut not severallySQliable. Each is thus responsible to Safeco for one-half of the award of attorney's fees.

7. Rehab Entitled to Attorney's Fees?

Rehab argues that all parties stipulated that the payment bonds furnished by Safeco for projects -2, -7, -8, and -9 were executed pursuant to and governed by the provisions of the McGregor Act. Article 5160(B) of the McGregor Act assures every claimant the right to sue the principal and the surety for the amount due plus reasonable attorneys' fees.[58] As Rehab is not entitled to recover from either Baytown or Safeco on the payment bonds, we need not consider whether Rehab would otherwise be entitled to attorneys' fees under the McGregor Act. For, to establish any right to attorney's fees under the McGregor Act, Rehab had to prevail, i.e., to recover on its bond claims under the Act.[59] Here Rehab clearly cannot recover such fees, as it simply was not a

[58]See TEX. REV. CIV. STAT. ANN. art. 5160(B) (Vernon 1987) (repealed 1993).

[59]J. M. Hollis Constr. Co. v. Paul Durham Co., 641 S.W.2d 354, 359 (Tex. Civ. App.SQCorpus Christi 1982, no writ).

successful McGregor Act bond claimant.

III

CONCLUSION

In light of the foregoing analysis and the determinations made therein, we (1) REVERSE and RENDER judgment in favor of Rehab for $157,042.62 against Baytown; (2) AFFIRM the district court's take-nothing judgment against Rehab and in favor of Safeco to the extent of Rehab's asserted claims against the payment bonds; (3) AFFIRM the award of attorneys' fees to Safeco in the amount of $92,046.22, but modify the judgment to reflect that Baytown and Rehab are jointlySQbut not severallySQliable to Safeco for such fees, one-half each; and (4) AFFIRM the district court's denial of Rehab's request for attorneys' fees.