



COURT CONFIRMS LIMITS ON EICHLEY: PROJECT MUST HAVE BEGUN BEFORE DAMAGES FOR DELAY ACCRUE

Contractors use the Eichley formula to calculate so-called “unabsorbed” overhead when project work is stopped. These damages are not direct costs but the cost of home office overhead such as the costs of being unable to reassign supervision and manpower that the contractor has lost part of its ability to absorb because of the suspended project. The delays that generate an Eichley claim must be suspension of work delays. But what happens when the suspension happens before work even begins? In that case, the U.S. Court of Federal Claims recently confirmed, Eichley does not apply.

The contractor in *The Redland Co. v. United States*, 2011 Ct. Fed. Cl. No. 08-606C (Apr. 7, 2011) claimed it was entitled to compensation for a four-year suspension of work on a U.S. Department of the Air Force project to pave an aircraft parking area. The contractor sought compensation for the work suspension based on “unabsorbed home office overhead” despite the fact that the suspension preceded the project start.

Home office overhead is an indirect cost, one “expended for the benefit of the whole business,” and cannot be attributed to a particular contract. To recover such an indirect cost, a contractor must therefore allocate a share of the cost to each of its contracts based on the amount of direct costs incurred under each contract. This is the Eichley formula.

The hitch here is that a contractor doesn’t incur direct costs under a suspended contract. The home office overhead becomes “unabsorbed” in circumstances where a contractor is required to be on standby.

Eichley damages are only available when the government required the contractor to remain on standby during the suspension and when the government caused delay occurred after performance has begun. There are very few exceptions to this rule.

In *Redland* the Court dismissed the contractor’s argument that the issuance of the notice to proceed established the start of performance. The plain language of the contract made clear that the issuance of the notice to proceed and the start of



performance were two distinct events, noting that the contractor was obligated to “begin performance within 14 calendar days ... after receiving ... notice to proceed.” Thus, the suspension preceded the start of performance.

This case, although an American case, is a good example of when a contractor can begin claiming delay damages against an owner who delays the start of a job.

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