

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Charles G. Williams Construction, Inc.) ASBCA No. 49775
)
Under Contract No. DADA03-92-C-0043)

APPEARANCE FOR THE APPELLANT: Judith Ward Maddox, Esq.
Colorado Springs, CO

APPEARANCES FOR THE GOVERNMENT: COL Michael R. Neds, JA
Chief Trial Attorney
MAJ Robert W. Clark, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

This opinion reconsiders our previous Finding 24 in this appeal, that the *Eichleay* claim of Charles G. Williams Construction, Inc. (CGW) was not proven. *See* 00-2 BCA ¶ 31,047 at 153,321. In *Charles G. Williams Construction, Inc. v. White*, 271 F.3d 1055 (Fed. Cir. 2001), the Court vacated that finding on the ground that we did not adequately explain it. The Court did not require rehearing or reopening the record. The existing record is sufficient for compliance with the mandate.

ADDITIONAL FINDINGS ON CGW'S EICHLLEY CLAIM

1. CGW's initial *Eichleay* claim was submitted in October 1994 in the amount of \$84,433 for an alleged 161 days of delay in completion of the work. A Defense Contract Audit Agency (DCAA) audit report dated 2 December 1994 questioned the entire amount on the grounds that (i) CGW's daily logs did not indicate a work stoppage during any part of the contract performance period; and (ii) the G&A expense was "fully absorbed by the charges on this contract, and other contracts the contractor was working on, during contract performance." (R4, tab 55 at 2, 14-15)

2. In response to the audit report, CGW submitted a revised *Eichleay* claim in a letter dated 9 October 1995 enclosed with a price adjustment proposal dated 24 October 1995. The revised *Eichleay* claim was in the amount of \$98,642 for an alleged 330 days of delay in completion of the work (1 June 1993-26 April 1994). (Supp. R4, Vol. B at 72, 76-77) Finding 11 of our previous decision stated that the last 127 days of the extended contract performance period, from 21 December 1993 through 26 April 1994, were due to concurrent Government and contractor-responsible causes. *See Charles G. Williams*

Construction, Inc., ASBCA No. 49775, 00-2 BCA ¶ 31,047 at 153,318. That finding was not reversed or vacated by the Court. Therefore, in reconsidering CGW's revised *Eichleay* claim we are concerned only with the period of contract performance through and including 20 December 1993.

3. CGW's revised *Eichleay* claim did not allege that there had been a complete suspension of work at any time during performance of the contract. It did allege that its "anticipated cash flow for direct costs was significantly reduced." (Supp. R4, Vol. B at 72) The claim letter and its attached exhibits, however, provided no data from CGW's books and records showing a significant reduction in the direct costs incurred on the job at any time from the start of work through 20 December 1993. (Supp. R4, Vol. B at 72 *et seq.*)

4. At hearing, appellant called Mr. C. Williams the CEO of CGW; Mr. J. Williams, the President of CGW; and Mr. Scherling, a consultant. Mr. C. Williams provided no testimony on the alleged reduction in direct costs during the performance of the contract. The only testimony of Mr. J. Williams on that issue was a general statement that he would have had to obtain \$2 million of new business to absorb the overhead that was allegedly unabsorbed on Contract 0043 (tr. 1/178-79). That testimony is inconsistent with the data submitted by CGW for its termination settlement claim, and is not credible. *See* Finding 9 below.

5. Mr. Scherling testified that proof of Government-caused delay was sufficient by itself for application of the *Eichleay* formula. When asked if there were any prerequisites to application of the formula, he answered: "There's prerequisites: you've got to have government-caused delay – I think that's one of the primary things; and then I think you can run the calculation and determined [sic] what the costs should have been during that extended time period" (tr. 2/238). The calculations for the revised *Eichleay* claim were made by a Mr. Streala (tr. 2/195). Mr. Streala did not testify.

6. The DCAA audit report dated 15 December 1995 on the revised *Eichleay* claim referred to the prior audit (*see* Finding 1 above) and stated:

Our prior audit evaluation indicated that CGW did not have unabsorbed overhead and the use of the *Eichleay* formula was not warranted. . . . Our prior audit review indicated that CGW had not provided us with any evidence indicating that it had a reduction in its direct costs during the contract period. The data reviewed in our prior audit indicated that CGW had continued to charge the Fitzsimons project during the period of performance, and CGW was compensated for the additional overhead that was absorbed by the contract due to the inefficiencies as part of contract

Modification No. 15. . . . CGW did not provide us with any additional data which would change our prior opinion that all of the overhead for the actual period of the contract performance was fully absorbed by the basic contract, contract modifications, and other projects.

(Supp. R4, Book 11, tab 2 at 003795-96)

7. The DCAA auditor, Mr. Smith, affirmed under oath the statements in his audit report on the revised *Eichleay* claim. He credibly testified as follows:

Q. With regard to Eichleay, can you discuss what your review of Eichleay was in your audit report?

. . . .

A. Basically what I did was, since we had questioned it in the prior audit, in their updated [claim] they had provided statements saying that they had documentation to show that they had a reduction in their flow of direct costs which was one of the basis of why [sic] we had questioned Eichleay in the past on this audit. And basically the process in this audit was just to go through to find out if they had any documentation or anything that would change our prior opinion, and we did not obtain or receive any documentation that changed our original opinion.

Q. Well . . . who did you speak to, who was the representative for the Appellant in those discussions?

A. Most of the questions associated with Eichleay were through Doug Scherling. During the audit I had some coordination with Jack Williams, but I don't recall specifically discussing Eichleay or anything; most of that was through Doug.

Q. . . . [W]ell, you asked them whether they could show whether they had a reduction in the flow of the direct costs. Right?

A. Right.

Q. What was their response to that?

A. I actually asked Doug, I think, a couple of times during the process of the audit, and when we were getting near the end, his final comment was: We don't have anything.

....

Q. Which scenario do you think Appellant is in in this situation – in this appeal?

A. Based on the data that we have evaluated, the contractor continued to work on this project during the time of the contract, it did not have any reduction in their flow of direct costs; therefore, this contract continued to absorb its equitable share of general and administrative expenses; they didn't have to go out and replace work because the work was being replaced by this additional effort on this contract

(Tr. 2/270-71, 293-94)

8. Following Mr. Smith's testimony, Mr. Scherling testified on rebuttal on a number of issues in the appeal, but not on the *Eichleay* claim. Mr. Scherling did not contradict or otherwise rebut Mr. Smith's testimony that when requested to provide documentation showing a reduction in direct costs, he had replied "[w]e don't have anything." (Tr. 3/179-202)

9. The audit report and auditor's testimony are corroborated by CGW's daily reports which show that the site was manned without significant interruption by CGW and its subcontractors (who performed 89 percent of the work) throughout the contract performance period (supp. R4, Books 2-5, supp. R4, Vol. A, tab 1 at 5-8). The audit report and auditor's testimony are also corroborated by the data which CGW submitted in support of its termination settlement claim. That data showed that, during the original 12-month contract performance period from October 1992 to October 1993 (the only period for which the relevant data are shown), CGW's actual direct cost inputs to the job (\$1,071,702) were greater than they would have been (\$1,043,602) if there had been no Government-responsible changes, differing site conditions, and occupancy of the work site. (Supp. R4, Vol. A, tab 1 at 8, 26-65)

10. The audit report and auditor's testimony are further corroborated by the contract modifications and our findings on CGW's price adjustment claims in our prior decision. Those modifications and our prior decision compensated CGW for an aggregate \$469,480

in direct cost inputs for changes, differing site conditions, and Government occupancy of the work site. (Supp. R4, Book 11, tab 1 at 003775; *Charles G. Williams Construction, Inc.*, ASBCA No. 49775, 00-2 BCA ¶ 31,047, Finding 25 at 153,321) These additional direct cost inputs amounted to a 45 percent increase in the direct cost inputs required for the original contract work, * and absorbed their allocable share of the fixed overhead in the contract performance period in which they were incurred.

11. We find, based on the auditor's report and testimony, the daily reports, and other data referred to above, that appellant has not proved that performance of the work was suspended or significantly interrupted during the period through and including 20 December 1993.

DECISION

The first prerequisite for an *Eichleay* recovery is that the contractor be on "standby" for an uncertain duration. *Charles G. Williams Construction, Inc. v. White*, 271 F.3d 1055, 1058 (Fed. Cir. 2001). "Standby" for purposes of *Eichleay* "requires that overhead be unabsorbed because performance of the contract has been suspended or significantly interrupted." *Interstate General Government Contractors, Inc. v. West*, 12 F.3d 1053, 1057 (Fed. Cir. 1993). CGW has the burden of proving standby. *See Melka Marine, Inc. v. United States*, 187 F.3d 1370, 1375 (Fed. Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000). With the additional findings above, we reaffirm our original Finding 24 that CGW has failed to carry that burden. The auditor's report and testimony were credible, corroborated by the daily reports, the scope of the contract modifications, and the data in CGW's termination settlement claim, and were un rebutted by any credible evidence by CGW.

Since CGW has failed to prove the "standby" element of its claim, we do not reach the issues of whether it was impracticable for it to take on replacement work (the second prerequisite for an *Eichleay* recovery), or whether the variable items in the overhead pool in CGW's *Eichleay* calculation can be identified and removed.

On remand, the appeal is again denied as to the *Eichleay* claim.

Dated: 28 March 2002

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board

* \$469,480/\$1,043,602 (Supp. R4, Vol. A, tab 1 at 8)

of Contract Appeals

I concur

I concur

MICHAEL T. PAUL
Administrative Judge
Armed Services Board
of Contract Appeals

CARROLL C. DICUS, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 49775, Appeal of Charles G. Williams Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals