

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Tulsa Mid-West Construction Co.) ASBCA No. 55173
)
Under Contract No. DACW03-95-C-0090)

APPEARANCE FOR THE APPELLANT: Mr. Randy C. Barrett
President

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
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Little Rock

OPINION BY ADMINISTRATIVE JUDGE JAMES
UNDER BOARD RULE 11

On 24 July 2000 Tulsa Mid-West Construction Co. (Tulsa or appellant) submitted a certified claim for 702 days of delay and \$498,167.16 for 10 sub-claims in repairing and renovating the gates and frames for the DeQueen Dam in Sevier County, Arkansas, whose partial denial by the contracting officer (CO) Tulsa appealed to the Board. Tulsa withdrew and deferred two claim items, and eight were tried on entitlement only, including the number of delay days. Our 14 May 2004 decision sustained that appeal in part and denied it in part, held that appellant was entitled to 299 calendar days of *Eichleay* unabsorbed home office overhead, and remanded the appeal to the parties for resolution of quantum. *Tulsa Mid-West Construction Co.*, ASBCA No. 53594, 04-2 BCA ¶ 32,634 at 161,470, 161,479-81 (*Tulsa I*).

After the parties failed to resolve quantum, we reinstated the appeal, designated ASBCA No. 55173. The Board has continuing jurisdiction of the appeal under the Contract Disputes Act of 1978 (CDA). Pursuant to the Board's order, in the nature of pleadings, Tulsa filed a "Statement of Costs" (SOC) and respondent replied thereto (GSOC). Pursuant to Board Rule 11, the parties elected to submit the appeal on the record (AR), including the hearing transcript, Tulsa's claim attachments and Rule 4 file in *Tulsa I*, a December 1998 Audit Report and legal briefs. AR pages are numbered 1 to 774, except that the *Tulsa I* transcript skipped from page 118 to page 120 (AR at 119-20). In May 2007 respondent provided transcript page 119, which the Board designated AR page 119A. On 18 June 2007 the Board added pages from the Corps of

Engineers Schedule EP 1110-1-8, Region III, September 1997 Edition (Board Ex. 1). On 2 July 2007 respondent provided Modification Nos. P00006, P00013 and lists of payments made to Tulsa under the contract (respectively, Board Exs. 2-A, 2-B and 2-C). We assume familiarity with our decision in *Tulsa I*.

FINDINGS OF FACT

1. At the time of award, 12 September 1995, the amount of the contract was \$198,870 (AR at 193). During the course of performance, which ended on 28 December 1997, the parties attempted to resolve the various issues which were the subject of *Tulsa I*. The following modifications issued during that period increased the contract price as indicated:

Unilateral Mod. 4, 23 April 1996, \$5,456, related to the butterfly valve; paid to Tulsa (AR at 378-79; Bd. ex. 2-C)

Unilateral Mod. 6, 27 June 1996, NTE \$15,553.35, related to seal bars; paid to Tulsa (Bd. exs. 2-A, 2-C)

Unilateral Mod. 7, 6 December 1996, NTE \$20,965.00 for piston/cylinder corrosion; not paid to Tulsa (AR at 394-95)

Bilateral Mod. 8, 10 March 1997, \$1,435.06 for return of cylinder to jobsite; paid to Tulsa (AR at 431-32; Bd. ex. 2-C)

As a result of these modifications, the contract price was adjusted to not to exceed \$242,279.41.

2. On 22 July 1998, following unsuccessful negotiations with the contracting officer (CO), Tulsa submitted a request for equitable adjustment (REA) in the amount of \$293,088.45 (AR at 434).

3. DCAA audited the REA. In its report dated 15 December 1998, DCAA questioned costs of \$161,754 and found unsupported costs of \$62,113 (AR at 453, 456), resulting in a balance of \$69,221.45.

4. On 12 March 1999, the CO sent Tulsa proposed Mod. 11 offering to settle the REA seal bar and cap screw, butterfly valve, H₂S and piston/cylinder issues for \$61,614 (AR at 435-37). Proposed Mod. 11 cancelled Mod. 7, whose \$20,965 had not been definitized or paid to Tulsa. Tulsa rejected proposed Mod. 11, and the CO issued it as a unilateral modification on 1 April 1999, increasing the contract price to \$282,928.41

(\$242,279.41 – 20,965 + 61,614). (AR at 438-39) On 25 October 1999 Tulsa was paid \$24,918.86, apparently under Mod. 11 (Bd. ex. 2-C).

5. On 23 September 1999, the CO issued unilateral Mod. 12, definitizing Mod. 6's NTE \$15,553.35 change adjustment at \$4,632.21, and, as a result, reducing the contract price by \$10,921.14 to \$272,007.27 (\$282,928.41 – 10,921.14) (AR at 445-57).

6. Tulsa's 24 July 2000 certified claim, which the CO received on 26 July 2000 (AR at 164), included 10 "issues" (sub-claims):

... 1 – Seal Bar and Cap Screw specifications, including delay and associated direct costs.	\$ 29,576.97
... 2 – Butterfly Valve in wrong position.	\$ 23,209.07
... 3 – Hydrogen Sulfide (H2S) problem. 37,260.15	\$
... 4 – Piston/Cylinder corrosion problem, including delay.	\$186,770.38
... 5 – Equipment destroyed by H2S.	\$ 17,179.00
... 6 – Additional mileage.	\$ 2,986.20
... 7 – Miscellaneous.	\$ 23,970.62
... 8 – Consultant expenses.	\$ 8,209.25
... 9 – Other extra costs.	\$166,426.70
... 10 – Extra Porta Potty expenses.	\$ 2,578.82
Total	\$498,167.16

(AR at 164) DCAA did not audit the certified claim. The only audit report in the record is on the REA.

7. The CO's 1 October 2001 final decision denied Tulsa's 24 July 2000 claim, except \$3,066.55 for sub-claims 3 (\$1,132.87) and 7 (\$1,933.68) (AR at 162, 189). Unilateral Mod. 13, on 10 January 2002, increased the contract price by \$3,066.55 to \$275,073.82 (\$272,007.27 + 3,066.55). This amount was paid to Tulsa. (Bd. ex. 2-B)

8. In *Tulsa I* appellant withdrew its appeal from the CO's final decision as to sub-claim 7 and deferred sub-claim 8 to its EAJA application. We summarized the other sub-claims as follows (04-2 BCA at 161,470-71):

Of the remaining 8 sub-claims, appellant contends that the replacement seal bar and cap screws were unavailable (sub-claim 1), and that their installation and site conditions for that installation differed from that indicated in the contract (sub-claim 9); that the butterfly valve interfered with the removal of the gates to be renovated (sub-item 2); that hydrogen sulfide gas delayed the work by creating hazardous conditions for workers (sub-claim 3), caused appellant's tools to corrode (sub-claim 5), and corroded a piston/cylinder used to lift the dam gates (sub-claim 4); and that these problems delayed the work causing frequent trips from the job site to its home base (sub-claim 6), extra Porta Potty rental expenses (sub-claim 10), and unabsorbed overhead expenses.

Tulsa I regrouped its findings and holdings as follows: (i) sub-claims 1 and 9, (ii) sub-claim 2, (iii) sub-claims 3, 5 and 6 and (iv) sub-claims 4 and 10.

9. With respect to sub-claims 1 and 9, *Tulsa I* stated (04-2 BCA at 161,479):

[W]e hold that appellant bears the risk of the problems with regard to the availability of the [ASTM B36 brass] cap screws and bars seals and deny any compensable delay damages on this basis.

....

... [M]any of the cap screws had to be custom fitted due to the deteriorated condition of the seal bars, gates, and frames The Government has admitted that appellant is entitled to an equitable adjustment for this work but claims that appellant has been fully paid for it in unilateral modifications. . . .

Appellant is also entitled to an equitable adjustment for dealing with the problems of the seal bars being in two six foot lengths rather than one twelve foot length as shown in the contract drawings as well as the irregular pattern of holes

rather than the straight line depicted in the drawings We are unable to grant (1) any time extensions beyond those granted in unilateral Modifications No. P00011; or (2) any days of compensable delay for lack of proof.

10. With respect to sub-claim 2, *Tulsa I* held that (04-2 BCA at 161,480):

[Tulsa was entitled to recover] the actual costs to relocate the valve as well as the costs of moving appellant's employees from the job site to the home base and back . . . home office overhead . . . under *Eichleay* for 19 days of standby . . . [and] an additional 9 days of time extension (6 more than allowed by the contracting officer) for the relocation of the valve. . . .

11. With respect to sub-claims 3, 5 and 6, *Tulsa I* stated (04-1 BCA at 161,481):

We hold that appellant is entitled to an equitable adjustment for its actual costs to monitor the hydrogen sulfide as well as to work under the hazardous conditions of hydrogen sulfide with fresh air equipment, the amount of its *Eichleay* costs for 26 days of standby, 26 days of standby costs for its equipment at the jobsite as well as the cost of moving appellant's forces from the job site to its home base and back, the cost to replace appellant's tools corroded by the hydrogen sulfide, and the cost of the hydrogen sulfide permit as well as the cost of training appellant's employees to work in areas contaminated with hydrogen sulfide.

12. With respect to sub-claims 4 and 10, *Tulsa I* held (04-2 BCA at 161,481):

[A]ppellant is entitled to 254 calendar days of standby during the period of resolution of the rusted lift gate cylinder/piston problem. It is entitled to equipment costs for this standby period including Porta Potty rental expenses. It is also entitled to its costs to hone the cylinder, transport the cylinder from the job site to Tulsa for repairs, demobilizing and mobilizing its forces at the job site, and its unabsorbed home office overhead in accordance with *Eichleay*.

13. Tulsa's SOC included the following amounts and *Eichleay* calendar days:

<u>Sub-Claim</u>	<u>Amount</u>	<u>Cal. Days</u>
1. Seal Bars & Cap Screws 0	\$ 2,342.93	
2. Butterfly Valve	8,645.10	19
3. H ₂ S Problem	11,353.42	26
4. Piston/Cylinder Corrosion	58,814.10	254
5. Equipment Destroyed by H ₂ S	17,179.00	0
9. Equipment Standby Costs	120,015.24	0
Totals:	<u>\$218,349.79</u>	<u>299</u>

The SOC did not expressly include sub-items 6 and 10, but rather included sub-item 6 costs under sub-claims 2 and 3, and sub-item 10 costs under sub-claim 4. (SOC at 1-2; findings 16(a), 17(a), 18(a), *infra*) Sub-claims 2-4 included *Eichleay* unabsorbed home office overhead costs at \$180.73 per day for the above-listed calendar days. The back-up data for sub-claim 3 show that it should be \$18,788.18 rather than \$11,353.42, resulting in a SOC total of \$225,784.55. (SOC, tab 1 at 5, 9, 12) Appellant's SOC calculations do not reflect any adjustment for amounts received as a result of unilateral modifications.

14. Respondent's GSOC estimated the amount due, rounding the total, as follows:

<u>Claim Item</u>	<u>Dollars</u>
1. Seal Bars & Caps Screws	\$ 0
2. Butterfly Valve	2,290
3. Hydrogen Sulfide H ₂ S Problem	7,515
4. Piston/Cylinder Corrosion	40,129
5. Equip't Destroyed by H ₂ S	0
9. Other Extra Costs due to delays, DSC & equipment costs	0
Total:	<u>\$49,935</u>

The GSOC included no sub-claims 6 and 10, but mentioned Porta Potty rental (GSOC at 12). Respondent calculated the *Eichleay* rate at \$74.11 per day. (GSOC at 1-2) On 2 March 2006, respondent issued unilateral Mod. 14 which increased the contract price of \$275,073.82 (finding 7) by \$49,935 to \$325,008.82. Tulsa was paid \$49,935 on 26 May 2006, for a cumulative total of \$299,234.82. (Bd. ex. 2-C) Respondent asserts

that Mods. 4, 6, 7, 8, 11, 13 and 14 already compensated Tulsa for all that it is entitled to under its claim.

15. Sub-claim 1, Seal Bars & Cap Screws. (a) Appellant's SOC listed five employees who allegedly countersunk seal bars from 16 through 19 October 1996, the time period found in *Tulsa I*, finding 22 (AR at 621), their straight and overtime hours, rates and per diem amounts, for a direct labor subtotal of \$1,341.13, and added 33% labor burden, 15% overhead, 10% profit and 1.9% bond cost, for a total of "\$2,342.93" (*sic*, actually \$2,299.26) (SOC, tab 1 at 1-2). Tulsa's fiscal year ends 30 June (AR at 470).

(b) Although DCAA questioned Tulsa's 57% overhead rate used in its \$293,088 equitable adjustment request of 22 July 1998 (AR at 454, 463-65), Tulsa's 24 July 2000 \$498,167 certified claim did not use that 57% overhead rate to price any of its sub-claims. Respondent applied the DCAA-audited overhead rates of Barrett Electric, Tulsa's parent company, for fiscal years 1997 and 1998 (though sub-claim 1 seal bar and cap screw work was all performed in its fiscal year 1997) to the audited direct labor costs (AR at 458), and did not question Tulsa's profit and bond rates (AR at 465-66). Respondent contends that "nothing more is owed since the Appellant was . . . paid in earlier modification(s)" (GSOC at 1), *viz.*, \$15,553.35 by Mod. 6 and \$9,450 by Mod. 11 (gov't br. at 7).

(c) Our review of Tulsa's weekly payroll reports submitted to the Labor Department for the week ending 20 October 1996 disclosed several discrepancies between straight and overtime hours claimed and those reported. Accordingly, the adjusted direct labor cost is \$780.38 (SOC, tab 1). When Tulsa's 33% labor burden, 15% overhead, 10% profit and 1.9% bond rates are applied to its direct labor cost, the result is \$1,337.90 ($\$780.38 \times 1.33 \times 1.15 \times 1.1 \times 1.019$). Our treatment of payments Tulsa allegedly received for sub-claim 1 under Modification Nos. 6 and 11 is in findings 1, 4, 5 and 22.

16. Sub-claim 2, Butterfly Valve Relocation. (a) Appellant's SOC listed eight employees who allegedly dealt with the butterfly valve problem on 4, 5, 24, 25, 26, 29 April and 2 May 1996 (AR at 612), their straight and overtime hours, rates and per diem amounts, for a direct labor subtotal of \$2,732.13; added 33% labor burden, 15% overhead, 10% profit and 1.9% bond cost mark-ups thereto, for a subtotal of \$4,684.00; and added \$527.25 in mileage costs and \$3,433.85 for 19 days of *Eichleay* damages at \$180.73 per day, for a total of \$8,645.10 (SOC, tab 1 at 3-5).

(b) From Tulsa's 24 July 2000 sub-claim 2 amount of \$23,209 respondent deducts \$5,456 and \$3,490 for payments allegedly made under modification Nos. 4 and 11, respectively, and acknowledges \$1,408 for 19 days of *Eichleay* damages at DCAA's

\$74.11 daily rate and \$882 for 9 days (at \$98/day) of time extensions, totaling \$2,290 as “Payments Due” (GSOC at 1, 9, 10).

(c) Our review of Tulsa’s weekly payroll reports disclosed some discrepancies between the hours and corresponding amounts claimed and audited. Thus, the adjusted direct labor cost is \$2,216.38. When Tulsa’s 33% labor burden, 15% overhead, 10% profit and 1.9% bond cost rates are added, the labor cost is \$3,799.80. To the foregoing labor amount of \$3,799.80, we add \$527.25 in mileage costs, for a total of \$4,327.05 for sub-claim 2. Our treatment of *Eichleay* damages and payments Tulsa received under Modification Nos. 4 and 11 for sub-claim 2 is in findings 1, 4, 21 and 22.

17. Sub-claim 3, Hydrogen Sulfide (H₂S). (a) Appellant’s SOC listed six employees allegedly affected by H₂S, two on 18 September and days thereafter through 28 September, and six for 14 or 15 through 29 October 1996 (AR at 619-21), their straight and overtime hours, rates and per diem amounts, for a direct labor subtotal of \$3,819.25, added 33% labor burden, 15% overhead, 10% profit and 1.9% bond cost mark-ups thereto, for a subtotal of \$6,547.79, and added \$959.85 in mileage costs (sub-claim 6), \$6,581.56 for “Equipment listed in Atch 3,” including five items of H₂S monitoring equipment (\$3,376.46); H₂S schooling (\$500.00); H₂S permit (\$160.00) and six items of equipment (½" torque wrenches, drill motors, grinders, hand wrenches, wench cables and ½" drill motor) destroyed by H₂S (\$2,545.10) (AR at 513), and \$4,698.98 for 26 days of *Eichleay* damages at \$180.73 per day, totaling \$18,788.18 (SOC, tab 1 at 6-9; finding 13).

(b) Respondent contends that on sub-claim 3 it has already paid \$19,421 as follows: (1) \$3,367 (of \$3,376.45 claimed, without explanation of the \$9.45 difference), for H₂S monitoring equipment and \$500 for H₂S schooling costs among the \$61,614 under Mod. 11; (2) \$160 H₂S permit cost and \$2,545 cost of equipment destroyed by H₂S among the \$49,935 under Mod. 14; (3) \$4,196 in H₂S labor costs under Mod. 11; (4) \$597 for H₂S “Medical Cost to employees” under Mod. 14; (5) \$3,584 for equipment standby costs due to H₂S, plus \$259 profit, under Mod. 11 and \$2,286 under Mod. 14 (we address equipment standby costs in finding 20); and (6) 26 days of *Eichleay* damages, \$1,927 under Mod. 14 at \$74.11 per day (GSOC at 11; gov’t br. at 9-13).

(c) Our review of Tulsa’s weekly payroll reports disclosed some discrepancies between the hours, rates and corresponding amounts claimed and audited. Thus, the adjusted direct labor cost is \$2,211.75. When Tulsa’s SOC labor burden, overhead (except for 24 September 1996, which we do not include to avoid duplication

of *Eichleay* damages¹), profit and bond cost rates are applied to its adjusted direct labor cost, the labor cost is \$3,667.97. Tulsa's mileage charges for sub-claim 3 were \$959.85. The sum of burdened labor (\$3,667.97), mileage (\$959.85) and "Equipment listed in Atch 3" (\$6,581.56, which respondent does not dispute), is \$11,209.38. Our treatment of standby equipment costs, *Eichleay* damages and payments Tulsa allegedly received under Modification Nos. 11 and 14 for sub-claim 3, respectively, is in findings 20, 21 and 22.

18. Sub-claim 4, Piston/Cylinder Corrosion. (a) Appellant's SOC listed six employees who allegedly dealt with the piston/cylinder corrosion problem on 30-31 October and 10-11 December 1996, 4-6 September and 13-17 October 1997 (AR at 568), their straight and overtime hours, rates and per diem amounts, for a direct labor subtotal of \$5,536.71 (*sic*; arithmetically \$5,536.72); added 33% labor burden, 15% overhead, 10% profit and 1.9% bond cost mark-ups for a subtotal of \$9,492.23; and added \$1,527.51 for cylinder honing, \$1,888.95 for Porta Potties (rental plus overhead and profit) and \$45,905.42 for 254 calendar days of *Eichleay* damages at \$180.73 per day, totaling \$58,814.10 (*sic*; arithmetically \$58,814.11) (SOC, tab 1 at 10-12).

(b) Respondent asserts that it has paid Tulsa \$13,465 by Mod. 7, \$1,435 by Mod. 8, and \$29,412 by Mod. 11, and \$40,129 (*sic*, total is \$40,130) by Mod. 14, including \$20,281 for additional equipment standby costs (948 hours at \$21.39/hour, which we address in finding 20 below), \$1,025 for Porta Potty rental expenses, and \$18,824 for 254 days of *Eichleay* damages at \$74.11 per day (GSOC at 2, 11-12). Respondent cited no record evidence to support its computations of the costs of cylinder honing, additional equipment standby and Porta Potty rental.

(c) Our review of the record disclosed discrepancies between the days and hourly amounts claimed and audited and those for which *Tulsa I* found entitlement. Tulsa performed work on the piston/cylinder problem on 30 October 1996, 10-11 December 1996 and 20-21 February 1997 (*Tulsa I*, findings 50, 55, 59; AR at 431-32, 568). The direct labor cost for the foregoing five days is \$944.00. When Tulsa's labor burden, overhead, profit and bond cost rates are applied to \$944.00, the burdened labor cost is \$1,618.41. To that \$1,618.41, we add \$1,527.51 for cylinder honing, composed of Accurate Machine & Maintenance, Inc.'s 27 December 1996 invoice for \$1,185.00 (AR at 584), plus 15% overhead, 10% profit and 1.9% bond markups, and \$1,717.23 for Porta Potty rental, composed of Johnson's Services, Inc. invoices for \$1,493.24 (AR at 761-74) plus 15% overhead, for a total of \$4,863.15 for sub-claim 4. We allow no profit on Porta Potty rental, which was incurred during the work suspension, and

¹ See *Luria Brothers & Co. v. United States*, 369 F.2d 701, 711 (Ct. Cl. 1966) (to avoid duplication, the amount the contractor already received for (*Eichleay*) home office overhead by change orders must be deducted from the "full overhead").

hence is excluded by the contract's FAR 52.212-12 SUSPENSION OF WORK (APR 1984) clause (AR at 214). Our treatment of *Eichleay* damages and payments Tulsa received under Modification Nos. 7, 8, 11 and 14 for sub-claim 4, is in findings 1, 4, 14, 21 and 22.

19. Sub-claim 5, Equipment Destroyed by H₂S. (a) Appellant's SOC claims \$17,179.00 for 33 items of equipment destroyed, in whole or in part, by H₂S, itemized in "ATTACHMENT 5" to Tulsa's 24 July 2000 certified claim (AR at 448, 450). None of those 33 equipment items duplicates any of the 6 equipment items claimed under sub-claim 3 for \$2,545.10 (finding 17(a)).

(b) Respondent contends that sub-claim 5 was combined with sub-claim 3, "any remaining costs were paid" under Mod. 14, and its audit report found half of Tulsa's equipment costs to be unsupported (gov't br. at 16, citing AR at 459-61). The equipment costs questioned in December 1998 by DCAA were among those for which Tulsa claimed "standby" time (AR at 460) under sub-claim 9 (*see* finding 20(b) below). The audit report stated (AR at 461):

The contractor also claimed costs for equipment items destroyed as a result of the H₂S problem [under sub-claim 5]. These equipment costs were based on replacement costs, which were estimated by the contractor. Per your request, we did not perform a review of the proposed equipment replacement costs.

(c) The SOC listed equipment prices obtained from Tulsa's January 2006 internet search to support its estimated value of 21 of the 32 items of equipment damaged or destroyed in 1996. Where those internet data listed more than one model, size, type or capacity of equipment, and Tulsa did not identify which such model, size, type or capacity it owned, the Board used the least cost item listed. (SOC, tab 2) We find that Tulsa supported its estimates for the 21 items in the amount of \$7,584.73.

20. Sub-claim 9, Equipment Standby Costs. (a) The contract contains clause No. 94, "EQUIPMENT OWNERSHIP AND OPERATING EXPENSE SCHEDULE (MAR 1995) (EFARS 52.231-5000)," which provided in pertinent part (AR at 310):

(b) Allowable cost for construction . . . equipment in sound workable conditions owned or controlled and furnished by a contractor or subcontractor at any tier shall be based on actual cost data for each piece of equipment or groups of similar serial and series for which the Government can determine both ownership and operating costs from the

contractor's accounting records. When both ownership and operating cost cannot be determined for any piece of equipment or groups of similar serial or series equipment from the contractor's accounting records, costs for that equipment shall be based upon the applicable provisions of EP 1110-1-8, Construction Equipment Ownership and Operating Expense Schedule, Region III. Working conditions shall be considered to be average for determining equipment rates using the schedule unless specified otherwise by the contracting officer. For equipment not included in the schedule, rates for comparable pieces of equipment may be used or a rate may be developed using the formula provided in the schedule. . . . For retroactive pricing, the schedule in effect at the time the work was performed shall apply.

(b) Tulsa listed stand-by equipment by types and dates taken from its daily reports, and stand-by rates taken from the EP 1110-1-8 "Construction Equipment Ownership and Operating Expense Schedule, Region III." Sub-claim 2 included equipment items and stand-by rates from 4 April to 2 May 1996. Sub-claim 3 included such items and rates from 18 September to 15 October 1996. Sub-claim 4 included such items and rates from 30 October 1996 to 11 August 1997. (AR at 488-89, 517-22, 569-72) The SOC, Tab 3, summarized the foregoing standby equipment standby costs, stating:

Total of Claim Atch 2, Butterfly Valve . . .	\$ 6,951.28
Total of Claim Atch 3, H2S Problems	\$ 8,892.31
Total of Claim Atch 4, Piston/Cylinder Problem	\$ 77,261.13
[Subtotal:]	\$ 93,104.72
Plus O/H @ 15%	\$107,070.43
Plus Profit @ 10%	\$117,777.47
Plus Bond @ 1.9%	\$120,015.24
Total	\$120,015.24

Standby rates are from COE "Construction Equipment Ownership and Operating Expense Schedule" Sept 1997, pages 2-20, 2-21, 2-57, 2-120, 2-126, 2-156, 2-160, 2-161, 2-162, 2-164, 2-1878, and 3-5.

(c) Respondent acknowledges liability for \$20,281, but asserts that it has paid for equipment stand-by costs under various modifications (gov't br. at 17). It argues that the audit report found half of Tulsa's standby equipment costs to be unsupported (gov't br. at 16, citing AR at 459-61).

(d) Tulsa’s SOC for sub-claim 9, \$120,015.24 (finding 13), included direct labor hours and costs, equipment operational usage hourly rates for work added by contract modifications, equipment standby hourly rates for idled equipment, and overhead, profit and bond cost markups (AR at 641-91). We exclude from consideration for recovery: (1) all labor and equipment *operating* costs (as distinguished from standby costs) listed in SOC, Tab 3, and its referenced Attachments 2-4 and (2) costs not supported by EP 1110-1-8 or by the DCAA audit (AR at 459-61). We find that Tulsa supported equipment standby costs for sub-claims 2-4 in the amount of \$75,188 (AR at 488, 517-18, 520, 569-72). To \$75,188 we add 15% overhead (\$11,278) and 1.9% bond costs (\$1,643), for a total of \$88,109 for sub-claim 9. We allow no profit on standby costs, which are excluded by the contract’s Suspension of Work clause (AR at 214).

21. Eichleay Unabsorbed Home Office Expenses. (a) The 299 calendar days of compensable delay found in *Tulsa I* were sequential, not concurrent (*Tulsa I*, findings 31, 42, 59, 04-2 BCA at 161,475-76, -78). The *Eichleay* formula is as follows:

$$1. \frac{\text{Contract billings}}{\text{Total billings for contract period}} \times \frac{\text{Total overhead for contract period}}{\text{contract period}} =$$

Overhead allocable to the contract.

$$2. \frac{\text{Allocable overhead}}{\text{Days of performance}} = \text{Daily contract overhead}$$

$$3. \text{Daily contract overhead} \times \text{No. days delay} = \text{Amount claimed.}$$

Eichleay Corp., ASBCA No. 5183, 60-2 BCA ¶ 2688 at 13,568.

(b) The parties both used the *Eichleay* formula to calculate the daily rate for unabsorbed home office overhead costs, but their computations differ in two major respects. First, both parties end the “contract period” on 28 December 1997. DCAA calculated 721 “days of performance” beginning on 8 January 1996, when Tulsa allegedly “began to load trucks” for site work, since prior work was performed only by Tulsa’s administrative personnel (AR at 467-68; finding 11(a)). Tulsa calculated 822 “days of performance” beginning on 28 September 1995, when it acknowledged receipt of notice to proceed (AR at 340). From 28 September 1995 to 8 January 1996 Tulsa ordered materials, processed submittals, obtained special tools and obtained a commitment for brass machining work (AR at 358-63, 365, 602-07). Second, DCAA “combined” the “total billings for contract period” and “allocable overhead” of Tulsa and

its parent company, Barrett Electric, asserting that “there was not a proper segregation of costs between the two companies,” yet DCAA segregated Tulsa’s \$1,015,811 “total billings” and \$454,216 “allowable overhead” (AR at 467-68). We find that contract performance began on 28 September 1995. We are not persuaded that the amounts for Tulsa and Barrett Electric should be combined.

(c) To determine *Eichleay* damages, we use: (i) the adjusted \$319,669.95 contract price, less *Eichleay* damages, derived in finding 22, *infra*, as “contract billings” in *Eichleay*’s first numerator; (ii) the adjusted total of \$1,411,195.30 of “total billings for contract period” in *Eichleay*’s first denominator, composed of Tulsa’s \$1,226,693.40 of DeQueen dam billings in “TMW BILLING 9/28/95 THRU 7/15/97” (SOC, tab 4 at 5, 9) plus \$184,501.90 in the under-reported contract amount (\$319,669.95 - \$135,168.05 in SOC, tab 4 at 5); (iii) \$502,146 in *Eichleay*’s second numerator, by adding to DCAA’s \$454,216 “allowable overhead” an estimated amount of \$47,930 (1/2 of \$95,860 for “6 months ended 6-30-96”) (AR at 467) for the final three months of 1995 that DCAA omitted; and (iv) 822 days of performance (finding 21(b)) in *Eichleay*’s second denominator. Thus, Tulsa’s daily home office overhead is \$138.38 ($\$319,669.95 \div \$1,411,195.30 \times \$502,146 \div 822$), which, multiplied by 299 days, produces \$41,375.57 in *Eichleay* damages.

22. Quantum Summary. None of the contract modifications that provided time or monetary adjustments contained a release signed by Tulsa (AR at 376-79, 394-95, 438-39, 445-47; Bd. exs. 2-A, 2-B, 2-C), except Mod. 8 (AR at 432-32). We derive the following amount recoverable on Tulsa’s claim:

<u>Pricing Action</u>	<u>Amount</u>	<u>Finding</u>
Original contract price	\$198,870.00	1
Mod. 8 adjustment on sub-claim 4	1,435.06	1
CO's final decision on sub-claim 7 (undisputed)	1,933.68	7 8
Sub-total	<u>\$202,238.74</u>	
Sub-claim 1 amount \$ 1,337.90		15(c)
Sub-claim 2 amount 4,327.05		16(c)
Sub-claim 3 amount 11,209.38		17(c)
Sub-claim 4 amount 4,863.15		18(c)
Sub-claim 5 amount 7,584.73		19(c)
Sub-claim 9 amount <u>88,109.00</u>		20(d)
\$117,431.21	<u>117,431.21</u>	
Subtotal:	319,669.95	
Plus: <i>Eichleay</i> damages	<u>41,375.57</u>	21
Adjusted contract price	361,045.52	
Less: Amount paid to Tulsa	<u>(299,234.82)</u>	14
Claim balance due:	<u>\$ 61,810.70</u>	

DECISION

Appellant has the burden to prove the amount of damages on its 24 July 2000 claim, including the reasonableness of claimed costs and their causal connection to the changed work. *See Lecher Construction Co.*, ASBCA No. 35543, 88-2 BCA ¶ 20,695 at 104,588. Appellant has established satisfactorily the damages it sustained, with the exceptions noted in findings 15(c), 16(c), 17(c), 18(c), 19(c) and 20(d).

Respondent has the burden of proving its affirmative defense of payment. *See* FED. R. CIV. P. 8(c); *S.A.S. Bianchi Ugo fu Gabbriello*, ASBCA No. 53800, 05-2 BCA ¶ 33,089 at 164,024-25. Respondent has documented satisfactorily the payments it made under the contract, and we have taken into consideration the amounts respondent has paid to Tulsa (finding 22).

We hold that appellant is entitled to recover \$61,810.70 (finding 22). Tulsa is entitled to CDA interest on \$61,810.70 from 26 July 2000, when the CO received Tulsa's certified claim (finding 6), to the time when such principal amount is paid. To the extent set forth above, we sustain the appeal, and deny the balance thereof.

Dated: 02 August 2007

DAVID W. JAMES, 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. 55173, Appeal of Tulsa Mid-West Construction Co., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals