ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Caddell Construction Co., Inc.	)	ASBCA No. 49333
	)	
Under Contract No. DACA-41-92-C-0016	)	

APPEARANCE FOR THE APPELLANT: Thomas J. Kelleher, Jr., Esq.
Smith Currie & Hancock LLP
Atlanta, GA

APPEARANCES FOR THE GOVERNMENT: Frank Carr, Esq.
Engineer Chief Trial Attorney
Richard A. Say, Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Kansas City

OPINION BY ADMINISTRATIVE JUDGE DICUS
ON APPELLANT'S MOTION FOR RECONSIDERATION
AND REQUEST FOR REFERRAL TO THE SENIOR DECIDING GROUP

Appellant has moved for reconsideration of the Board's decision, *Caddell Construction Co., Inc.*, ASBCA No. 49333 (20 December 1999) (*"Caddell")*, and requests that the motion be referred to the Senior Deciding Group for decision. The Chairman has decided not to refer the matter to the Senior Deciding Group. Our decision in *Caddell* relied upon *M.A. Mortenson Co.*, ASBCA Nos. 40750, 40751, 40752, 98-1 BCA ¶ 29,658, (Senior Deciding Group) *aff'g on recon.* 97-1 BCA ¶ 28,623 (*"Mortenson"*), the most recent decision by the Board's Senior Deciding Group. Accordingly, the Chairman has determined not to revisit the issues addressed in *Mortenson*.

In our initial decision, we granted respondent's summary judgment motion. The essential, undisputed facts are that during contract performance appellant used a per diem rate to recover field overhead costs (*Caddell*, findings 6, 9; Appellant's Response to Respondent's Motion for Summary Judgment at 5). Appellant reserved the right to claim field overhead on a percentage basis and filed the claim at issue seeking recovery of additional field overhead costs on a percentage basis (*Caddell*, finding 10). We held that the use of more than one method to recover field overhead was precluded by *Mortenson* and granted summary judgment for respondent (*Caddell* at 7). We are not persuaded by the arguments raised by appellant in its motion to modify that holding. Appellant has

presented no new evidence or precedent and does not contend that its claim could be granted without resulting in its recovery of field overhead on both a per diem and percentage basis. We have fully considered the contentions in appellant's motion and, while appellant strongly disagrees with us, we conclude that no genuine issue has been raised that would alter our holding.

However, we address an argument raised by appellant in its reply. Appellant asserts that the United States Court of Appeals for the Federal Circuit has "clearly approved two different methods for the allocation and recovery of [home office] overhead expenses in a federal construction contract." In support of this argument, appellant cites *C.B.C. Enterprises v. United States,* 978 F.2d 669 (Fed. Cir. 1992); *Community Heating & Plumbing Co. v. Kelso,* 987 F.2d 1575 (Fed. Cir. 1993); and *Altmayer v. Johnson,* 79 F.3d 1129 (Fed. Cir. 1996). The cited decisions, all of which involve application of the Eichleay formula, have sustained claims for recovery of home office overhead on a per diem basis notwithstanding the contractor's recovery of home office overhead on a percentage basis during contract performance. FAR 31.203, the provision relied on by the Board in both *Mortenson* and *Caddell*, does not distinguish between types of overhead. Thus, the decisions cited by appellant are at least facially at odds with *Mortenson* and *Caddell*. None of the Court's decisions addresses FAR 31.203 directly in determining whether to grant recovery of home office overhead based on application of the Eichleay formula.

The Court has treated recovery of home office overhead through application of the Eichleay formula as an essential part of the claims process in Federal contracting which should not be altered except by statute:

> As far as this panel is concerned, we do not believe these precedents should be overruled. They are of such long standing and have been followed in so many decisions of the various board of contract appeals that such action should more properly be taken by Congress.

Capital Electric Co. v. United States, 729 F.2d 743, 746-47 (Fed. Cir. 1984). By concluding that the proper way to overturn the Eichleay decisions is by Congressional action, the Court appears to hold that a regulation would be inadequate to overrule this long-standing doctrine. Thus, while it does not address FAR 31.203 directly, the Court by implication seems to single out the Eichleay formula for special treatment, and considers it inappropriate for the underlying precedents applying the formula to be nullified by regulation. The Court has also established elements necessary for Eichleay recovery that are not applicable to recovery of other types of overhead: (1) a Government-caused delay; (2) the requirement that the contractor be on "standby" during the delay; and (3) the contractor's inability to take on other work. *Interstate General Government*

Contractors, Inc. v. West, 12 F.3d 1053, 1056 (Fed. Cir. 1993). Unlike claims for recovery of home office overhead, claims for job site overhead are not subjected to those conditions, and we are unaware of any basis to treat job site overhead as immune from regulatory constraints.

We are not persuaded by appellant's arguments to reexamine the basis for our decisions in *Mortenson* and *Caddell*. The FAR provision at issue is not contrary to any statute that we have identified and we cannot ignore it. Moreover, the Court has rejected the principle enunciated in *Eichleay Corp.*, ASBCA No. 5183, 60-2 BCA ¶ 2688, *aff'd on recon.*, 61-1 BCA ¶ 2894, that the method for recovery of home office overhead should be decided on the facts of each case, and held that the Eichleay formula is the "exclusive means" for recovery of home office overhead. *See Wickham Contracting Co. v. Fischer*, 12 F.3d 1574, 1580-81 (Fed. Cir. 1994). The Court has also noted the peculiar nature of home office overhead expenses, which "by their nature cannot be charged or attributed to any particular contract." *Altmayer*, 79 F.3d at 1132. Indeed, recovery of home office overhead as an element of delay damages does not present a question of increased home office expenses so much as equitable reallocation of those expenses among all of an appellant's contracts. The Court has, therefore, recognized ways in which home office expenses differ from other forms of overhead and accorded a singular status to recovery of home office overhead. We are unwilling to disregard FAR 31.203 based on the Court's actions in the Eichleay cases.

Finally, to ensure there is no misunderstanding of the Board's decision, we address appellant's argument that it is error for the Board not to consider evidence of accounting practices in conjunction with FAR 31.201-2(c), which provides:

> When contractor accounting practices are inconsistent with Subpart 31.2, costs resulting from such inconsistent practices shall not be allowed in excess of the amount that would have resulted from using practices consistent with this subpart.

If appellant raises this point to argue that, notwithstanding *Mortenson*, it was entitled under the FAR to recoup the total amount it would have billed through exclusive use of a percentage rate, the claim before us does not seek a sum certain based on that proposition.

We do not, therefore, have jurisdiction to consider whether exclusive application of a percentage rate would have entitled appellant to additional recovery of field overhead. The Board's decision is affirmed.

Dated: 29 March 2000

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

I concur

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

I concur

MICHAEL T. PAUL
Administrative Judge
Acting 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. 49333, Appeal of Caddell Construction Co., Inc., rendered in conformance with the Board's Charter.

Dated:

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