ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Rex Systems, Inc.	)	ASBCA No. 54444
	)	
Under Contract No. SPO900-01-D-9720	)	

APPEARANCES FOR THE APPELLANT: Michael I. Goulding, Esq.
James S. Phillips, Esq.
The Centre Law Group LLC
McLean, VA

APPEARANCE FOR THE GOVERNMENT: Vasso K. Monta, Esq.
Trial Attorney
Defense Supply Center,
Columbus (DLA)

OPINION BY ADMINISTRATIVE JUDGE DELMAN

In this appeal Rex Systems, Inc. (appellant) seeks an equitable adjustment arising out of the issuance of a government stop-work order. The government has stipulated to entitlement but contends that appellant has failed to prove quantum. The parties waived hearing and submitted the appeal on the record under Board Rule 11. We have jurisdiction under the Contract Disputes Act, 41 U.S.C. § 601 *et seq*.

FINDINGS OF FACT

1. On or about 26 September 2001, the Defense Supply Center, Columbus (government) awarded appellant Contract No. SPO900-01-D-9720. The contract was an indefinite quantity contract for certain prescribed parts and supplies, with orders to be issued by the government pursuant to delivery orders. The government had the option to extend the terms of the contract for 4 periods of 12 months each. (R4, tab 1)

2. On 6 September 2002, appellant received Delivery Order No. 23 (DO 23) under the contract (decl. Waldusky, ¶ 27). Under DO 23, the government ordered a quantity of 100 NSN 5998-01-212-7219 circuit card assemblies (CCAs) at a unit price of $2,001.00 each and specified that delivery was to be furnished 240 days ARO ("after receipt of order"), or on 3 May 2003 (R4, tab 2). Block No. 19 of DO 23 provided as follows (*id*.):

> Accelerated Delivery is Acceptable and Desired at No Cost to the Government.

3. It appears that the government detected a wiring problem with CCAs that were manufactured under a previous contract, based upon a design package previously furnished by appellant (Cook aff. at ¶ 4). This design package was also furnished to appellant for the manufacture of the CCAs under DO 23.

4. On 16 December 2002, the government unilaterally issued Modification No. 002301 to DO 23 – a stop-work order – pursuant to FAR 52.242-15, STOP-WORK ORDER (AUG 1989),[1] pending the redesign of the CCA due to the wiring problem (R4, tab 8). Insofar as pertinent, this clause provided as follows:

> (a) The Contracting Officer may, at any time, by written order to the Contractor, require the Contractor to stop all, or any part, of the work called for by this contract for a period of 90 days after the order is delivered to the Contractor, and for any further period to which the parties may agree. The order shall be specifically identified as a stop-work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Within a period of 90 days after a stop-work order is delivered to the Contractor, or within any extension of that period to which the parties shall have agreed, the Contracting Officer shall either--
>
> (1) Cancel the stop-work order; or
>
> (2) Terminate the work covered by the order as provided in the Default, or the Termination for Convenience of the Government, clause of this contract.
>
> (b) If a stop-work order issued under this clause is canceled or the period of the order or any extension thereof expires, the Contractor shall resume work. The Contracting Officer shall make an equitable adjustment in the delivery schedule or contract price, or both, and the contract shall be modified, in writing, accordingly, if--

[1] Block 14 of Modification No. 002301 provides that the Stop-Work Order clause is incorporated by reference in the contract, but does not specify the date of the clause. The August 1989 version herein would be the relevant clause as of the award date of this contract. Appellant does not dispute the government's right to invoke this Stop-Work Order clause to stop the work under DO 23.

> (1) The stop-work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract; and
>
> (2) The Contractor asserts its right to the adjustment within 30 days after the end of the period of work stoppage; *provided*, that, if the Contracting Officer decides the facts justify the action, the Contracting Officer may receive and act upon a proposal submitted at any time before final payment under this contract.

5. By e-mail dated 16 December 2002, appellant advised the government as follows (R4, tab 11):

> We acknowledge receipt of the STOP WORK contract modification. As I discussed perviously [sic], the circuit card assembly Relay & Patch Board 527334G1 is approximately 90% plus complete. The circuit boards have been wave soldered and only have conformal coating left. We are in a standby position. [Emphasis in original]

6. In or around January 2003, the government provided appellant with certain proposed design changes due to the wiring problem, which necessitated the rework of the units. Appellant accepted the new design, and notified the government by e-mail dated 31 January 2003, that appellant would seek an equitable adjustment for its additional costs and for delay (R4, tab 15).

7. Appellant's business is dependent upon federal contracts, and it was unable to take on new or replacement work on short notice in the midst of the delay due to the vagaries of federal advertised procurement (decl. Waldusky, ¶ 8). The government's stop-work order was of uncertain duration, and appellant did not lay off any of its personnel or reduce overhead costs during the work stoppage.

8. On 28 February 2003, the government unilaterally issued Modification No. 002302 to DO 23 pursuant to the Changes clause in the contract, FAR 52.243-1. This order lifted the stop-work order, directed performance in accordance with the design changes provided, increased the price of the DO in the amount of $10,900 ($109 per unit), and extended contract performance to 18 July 2003. (R4, tab 22)

9. The above price increase tracked appellant's proposal dated 6 February 2003. Insofar as pertinent, exhibit 1 of appellant's proposal showed additional unit production costs of $65.20 (100 units = $6,520), G&A of $33.90 (100 units = $3,390), and profit of

10%, for a total of $10,901. (R4, tab 16) Appellant's average profit rate for 2002 and 2003 was 11.2% (decl. Waldusky, ¶ 15).

10. It took appellant 28 days to perform the rework on all units as directed by Modification No. 002302 (supp. decl. Waldusky, ¶ 23). Appellant shipped one new sample unit for government testing on 27 March 2003 (R4, tab 28, block 3). On 29 April 2003, appellant was notified that the sample unit passed this test (R4, tab 32).

11. On 30 April 2003, appellant delivered to the government the remaining 99 units under DO 23 (R4, tab 34). This delivery was roughly 2-1/2 months prior to the extended delivery date of 18 July 2003.

12. By letter to the contracting officer dated 1 May 2003, appellant submitted a request for equitable adjustment arising out of the stop-work order of 16 December 2002. Appellant contended that this government-imposed delay caused it to incur unabsorbed overhead, and it used the Eichleay formula to calculate its increased unabsorbed overhead costs, in the amount of $25,784.84. Appellant also sought 15% profit as part of its equitable adjustment, for a total of $29,652.57. Appellant requested a contracting officer's decision. (R4, tab 35)

13. By letter to appellant dated 29 May 2003, the contracting officer denied the claim. The letter was not identified as a contracting officer's decision (R4, tab 36). On 3 December 2003, appellant appealed to this Board based upon the contracting officer's failure to issue a contracting officer's decision.

14. We find that appellant's fixed, daily G&A allocable to this contract was $256.66. This figure is based upon the following figures and calculations, using the Eichleay formula (supp. decl. Waldusky, ex. F):

Contract Billings	$211,000
Sales During Period of Performance	$2,490,938
Fixed G&A During Period of Performance	$718,095
Days of Performance (6 September 2002 through 30 April 2003 inclusive)	237 Days

$$\frac{211{,}000}{2{,}490{,}938} \times \frac{718{,}095}{237} = 256.66$$

15. The government does not dispute any of these figures, nor does it dispute that it was responsible for suspending the work pursuant to the stop-work order. Rather, it contends that appellant was not materially delayed by the government's stop-work order, and did not incur any unabsorbed overhead.

16. Generally, appellant seeks to make deliveries to its government customers in advance of the delivery schedule to enhance cash flow and maintain customer satisfaction (supp. decl. Waldusky, ¶ 5). DO 23 states that the government desired accelerated deliveries (finding 2).

17. Generally, the critical element in determining delivery of CCAs is material availability. Appellant made arrangements to receive all required material for the CCAs under DO 23 by 19 November 2002, and received much of this material prior to this date (supp. decl. Waldusky, ¶¶ 6, 14, 16). Appellant planned to perform the assembly, testing and delivery of the 100 units under DO 23 after receipt of this material, in conjunction with the production of 50 identical units called for under an earlier DO. Appellant's "Monthly Forecast/Actual Shipment EOM December 2002" indicated that appellant planned to deliver the 100 units under DO 23 on 20 December 2002 (*id*. at ¶ 15; ex. D).

18. The government's stop-work order was issued on 16 December 2002. Appellant was approximately 90% complete with the production of these units as of 16 December 2002. We find that but for the stop-work order appellant could have, and would have delivered the CCAs by 20 December 2002. (Supp. decl. Waldusky, ¶ 22)

19. Appellant delivered the CCAs on 30 April 2003, which was 131 days after its planned delivery date. We find that this delay was generally attributable to the government stop-work order. We find that the delay specifically attributable to the government stop-work order was 103 days, representing the difference between appellant's planned and actual delivery dates, 131 days, less the 28 days needed to perform the additional rework ordered by the government after the stop-work order was lifted. (Supp. decl. Waldusky, ¶ 23)[2]

DECISION

Appellant contends that the government's stop-work order delayed its planned early completion of the work and caused it to incur unabsorbed overhead, and seeks an equitable adjustment in contract price resulting from the government-imposed delay based upon application of the Eichleay formula. As stated by the Court in *P.J. Dick, Inc. v. Principi*, 324 F.3d 1364, 1370 (Fed. Cir. 2003):

> The Eichleay formula is used to calculate the amount of unabsorbed home office overhead a contractor can recover when the government suspends or delays work on a contract for

[2] We are mindful that appellant originally requested 74 delay days, representing the duration of the stop-work order. We believe, in accordance with Mr. Waldusky's supplemental declaration, that the correct measurement of the delay must take into account the difference between appellant's planned and actual completion dates.

> an indefinite period. *Melka Marine, Inc. v. United States*, 187 F.3d 1370, 1375 (Fed. Cir. 1999) (citing *Eichleay Corp.*, ASBCA No. 5183, 60-2 B.C.A. (CCH) ¶ 2688 (ASCBA 1960)).

The government contends that appellant is not entitled to use the Eichleay formula since appellant performed most of the original contract work at the time the government issued its stop-work order, and hence it was not materially delayed and did not incur any unabsorbed overhead. We do not agree with this contention. We believe that the percentage of contract completion, standing alone, should not determine the availability of the Eichleay remedy. Rather, the proper focus should be on the nature and magnitude of the government imposed delay on the remaining work, and the extent to which the delay placed the contractor on standby and precluded the contractor from obtaining additional work to absorb any overhead that could not be absorbed because of the delay. We have approved the use of the Eichleay formula to calculate delay damages when the work was roughly 95% complete. *Shirley Contracting Corp.*, ASBCA No. 29848, 85-1 BCA ¶ 17,858 at 89,399, *aff'd on reconsid*, 85-2 BCA ¶ 18,019. *See R.G. Beer Corp.*, ENG BCA No. 4885, 86-3 BCA ¶ 19,012 at 96,026 (Eichleay applied where 11%-18% of work remained to be completed at time of suspension).

In view of the foregoing, we conclude that the stage of completion of this contract at the time of the government-imposed delay was not a bar to the use of the Eichleay formula.

In order for a contractor to recover unabsorbed overhead under the Eichleay formula, it must show that the government was responsible for a delay to contract performance as planned; that the original contract performance period was extended as a result or that a planned, early completion was delayed as a result even if the contractor finished on time; and that the contractor was required to remain on standby during the delay period. The government then has the burden to produce evidence that it was not impractical for the contractor to obtain replacement work to mitigate its damages, and if it does so, the contractor bears the burden of persuasion that it was, in fact, impractical to obtain such work. *P.J. Dick, Inc.*, *supra*, at 1370.

We believe that the record establishes appellant's entitlement to Eichleay damages. The government encouraged, and the appellant planned the early completion of the contract work. Appellant had the capability to deliver the work early and would have done so, but for the government's issuance of the stop-work order on 16 December 2002. The government's stop-work order was of uncertain duration, and appellant was unable to lay off personnel or otherwise reduce overhead costs to mitigate the effects of the suspension. Appellant was on standby during the duration of the work stoppage. It was also unable to take on replacement work on short notice in the midst of the delay.

We conclude that appellant is entitled to a recovery of its unabsorbed overhead under the Eichleay formula, as adjusted below.

Appellant's Eichleay computation properly considered contract billings, sales and fixed G&A over the entire period of performance of this contract (finding 14). However, within this period of performance – and specifically within the delay period for which appellant seeks compensation – the government also directed appellant to perform additional work, during which time appellant's unabsorbed overhead could be applied. Appellant was also paid $3,390 as compensation for its fixed, time-related G&A expenses associated with this additional work (finding 9). Under the circumstances, we believe it fair and consistent with notions of damage mitigation that appellant's Eichleay recovery be reduced to reflect this additional G&A payment. *See Savoy Construction Company, Inc.*, ASBCA Nos. 21218, *et al.*, 85-2 BCA ¶ 18,073 at 90,723-24. *R.G. Beer Corporation*, *supra*, at 96,031 ("Where the contractor is paid a percentage home office overhead markup with respect to direct costs incurred during the same period over which the Eichleay award has been computed, the fixed expense portion of that mark-up must be subtracted from the amount computed pursuant to Eichleay.").

Profit

The government contends that appellant is not entitled to any profit as part of its equitable adjustment because the contract was not profitable. We do not agree. We have held that the lack of profitability of the original contract work should have no bearing on a contractor's right to a reasonable profit on its increased costs as part of an equitable adjustment. *Stewart & Stevenson Services, Inc.*, ASBCA No. 43631, 97-2 BCA ¶ 29,252, *reconsid. denied*, 98-1 BCA ¶ 29,653.

It is true we have held that a contractor is not entitled to profit in an equitable adjustment when a compensable delay arises out of a contract clause – such as the Suspension of Work clause – which expressly excludes profit. *C.E.R., Inc.*, ASBCA Nos. 41767, 44788, 96-1 BCA ¶ 28,029 at 139,934. In this case the government suspended work under the Stop-Work Order clause, which provides for the payment of an equitable adjustment and does not exclude profit. Generally, profit is part of an equitable adjustment unless the contract provides otherwise. We conclude that appellant is entitled to a reasonable profit as part of its equitable adjustment here.

As for the amount of profit claimed, we believe appellant's request for 15% profit has not been reasonably substantiated. Appellant sought 10% profit on the rework associated with DO 23 (finding 9). Appellant's average profit for 2002 and 2003 was 11.2% (*id.*). We believe 10% profit is reasonable under the circumstances.

We have fully considered all of the government's other contentions, and believe that they do not warrant the denial of appellant's claim.

In conclusion, we compute appellant's equitable adjustment as follows:

Daily G&A Allocable to the Contract (finding 14)	$256.66
Days of Delay Attributable to Stop-Work Order (finding 19)	103
Subtotal: Unabsorbed Overhead	$26,435.98
Less: Time-Related G&A paid under DO 23, Modification 002302 (finding 9)	$3,390.00
Total Recovery for Unabsorbed G&A	$23,045.98
Profit at 10%	$2,304.60
TOTAL EQUITABLE ADJUSTMENT	$25,350.58

The appeal is sustained.

Dated: 7 September 2004

JACK DELMAN
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

RICHARD SHACKLEFORD
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. 54444, Appeal of Rex Systems, Inc., rendered in conformance with the Board's Charter.

Dated:

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