ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Applied Companies, Inc.	)	ASBCA No. 54506
	)	
Under Contract No. SPO450-94-D-0108	)	

APPEARANCE FOR THE APPELLANT: Peter B. Jones, Esq.
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APPEARANCE FOR THE GOVERNMENT: Donald S. Tracy, Esq.
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OPINION BY ADMINISTRATIVE JUDGE DICUS

This appeal presents appellant's claim for damages resulting from entitlement decisions of the Board and the United States Court of Appeals for the Federal Circuit. The underlying contract is a requirements contract for two types of metal cylinders for refrigerants. In *Applied Companies, Inc.*, ASBCA Nos. 50749, 50896, 51662, 01-1 BCA ¶ 31,325 (*Applied I*), the Board granted appellant's motions for summary judgment in ASBCA Nos. 50749 and 51662 and sustained those appeals. The Board also granted the government's motion for summary judgment in ASBCA No. 50896 and denied that appeal. The Board thereafter denied the government's motion for reconsideration. *Applied Companies, Inc.*, ASBCA Nos. 50749, 51662, 01-2 BCA ¶ 31,430 (*Applied II*). The Federal Circuit affirmed the Board's decisions, while providing instructions on damages in *Rumsfeld v. Applied Companies, Inc.*, 325 F.3d 1328 (Fed. Cir.), *cert. denied*, 540 U.S. 981 (2003) (*Applied III*). Specifically, the instructions on damages eliminated lost profits as an available form of recovery. Familiarity with those opinions is presumed.

By letter of 12 February 2004 appellant sought initiation of quantum proceedings in ASBCA Nos. 50749 and 51662. The resulting quantum appeal was docketed as ASBCA No. 54506. Thereafter, the government filed motions to dismiss ASBCA Nos. 50749 and 54506, which we denied. *Applied Companies, Inc.*, ASBCA Nos. 50749, 54506, 04-2 BCA ¶ 32,705 (*Applied IV*). Familiarity with that opinion is also presumed.
We deny ASBCA No. 54506.

Background

A brief synopsis of prior proceedings is provided. In *Applied I*, the Board found that the government had been negligent in preparation of estimates for an RFP for the purchase of government requirements for metal cylinders for refrigerants R-12 (Line Item 0001) and R-114 (Line Item 0004). The government estimates were 62,945 units for Line Item 0001 and 56,550 units for Line Item 0004, plus or minus 3 percent. The period of performance was one year, with a one year option. *Applied I*, 01-1 BCA at 154,730. However, in March 1994 the government learned that its requirements would be substantially lower for fiscal year (FY) 1994 – 2,555 for Line Item 0001 and 1,037 for Line Item 0004. The contract for Line Items 0001 and 0004 was awarded in June 1994 without adjustment in estimated quantities. In August 1994, 2 weeks after issuing an order for delivery of 5,411 and 4,933 units by 15 November 1994,[1] the government informed appellant that estimated annual quantities were reduced to 5,952 for Line Item 0001 and 5,426 for Line Item 0004, and asked for comments. *Id.* at 154,731. In September 1994 appellant submitted revised pricing, to which the parties were unable to agree. When delivery was not made on 15 December 1994 the government issued a 21 December 1994 show cause order. Ultimately, appellant's failure to deliver resulted in a 6 February 1995 termination for convenience. *Id.* at 154,731-32.

Appellant submitted a 23 February 1995 termination settlement proposal in the amount of $1,654,495, of which $1,115,509 was unabsorbed overhead. The contracting officer issued a 26 February 1997 unilateral determination in the amount of $295,253 which denied unabsorbed overhead. *Id.* at 154,732-33. An appeal was taken and docketed as ASBCA No. 50749. Thereafter, a claim was filed for lost profits for the option year. That claim was denied, appealed and docketed as ASBCA No. 50896. A subsequent claim for breach of contract and lost profits in the base year was filed,[2] denied and appealed. That appeal was docketed as ASBCA No. 51662. The parties filed cross motions for summary judgment. *Id.* at 154,729, 154,733. As noted above, the Board granted appellant's motions in ASBCA Nos. 50749 and 51662. We found that the government had breached the contract by issuance of negligent estimates and sustained those appeals. We granted the government's motion in ASBCA No. 50896. We found that exercise of an option was a unilateral government right and denied that appeal. *Applied I, II.* In the course of deciding the motions, which dealt only with entitlement,

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[1] Appellant never delivered any cylinders (*Applied III*, 325 F.3d at 1330; finding 2, *infra*).

[2] The government had moved to dismiss, alleging that appellant had raised breach and lost profits in the base year for the first time in its complaint in ASBCA No. 50749. A claim expressly raising those issues was filed after a Board suggestion in a telephone conference (11 March 1998 memo. of tele. conf.).

the Board observed that breach damages may include anticipatory profits. *Id.*, 01-1 BCA at 154,734, 01-2 BCA at 155,220.

The government appealed the Board's decision and the Federal Circuit affirmed the Board on entitlement. *Applied III.* However, because we had indicated that lost profits might be recoverable, the Court considered it prudent to provide instructions to the Board regarding damages. The Court instructed the Board that the government's negligence in preparing estimates of its requirements did not entitle appellant to recover anticipatory profits. *Id.*, 325 F.3d at 1336. It further instructed the Board that, "[i]f, as appears to be the case, no cylinders were delivered, Applied is limited to recourse under the Termination for Convenience of the Government Clause of the contract." *Id.* at 1342.

After appellant sought initiation of quantum proceedings on 12 February 2004, the government filed motions to dismiss ASBCA Nos. 50749[3] and 54506 on 12 May 2004. The Board denied the government's motions in a 16 July 2004 decision. *Applied IV*. We pointed out, among other things, that appellant's termination settlement proposal presented recovery of unabsorbed overhead to the contracting officer, albeit in a different amount, the contracting officer expressly denied recovery of unabsorbed overhead, and thus the quantum appeal for unabsorbed overhead was properly before the Board. *Id.*, 04-2 BCA at 161,720-21.

FINDINGS OF FACT

1. Delivery Order No. 0001 (DO 0001) was issued to appellant on 16 August 1994, calling for 5,411 units of Line Item 0001 for a total price of $284,618.60, and 4,933 units of Line Item 0002 for a total price of $259,475.80. Delivery was to be made by 15 November 1994. (Ex. G-37) Appellant was informed of the error in the government's estimates of its annual requirements in a letter dated 29 August 1994. That letter reduced the relevant estimates from 62,945 to 5,952 for Line Item 0001, and from 56,550 to 5,426 for Line Item 0004. (R4, tab 13) DO 0001 was amended as follows on 20 September 1994: delete 5,411 units of Line Item 0001 and insert 6,295 units of Line Item 0001 at a total price of $331,117.00, delete Line Item 0002 entirely and insert 5,655 units of Line Item 0004 at a total price of $297,453.00 (ex. G-48).

2. Appellant argued before the Federal Circuit that it never delivered any of the cylinders ordered by the government. *Applied III*, 325 F.3d at 1330. The government issued a 21 December 1994 show cause letter due to appellant's failure to make deliveries, to which appellant responded in a 27 December 1994 letter stating it would

[3] ASBCA No. 50749 was reinstated to the Board's active docket for the purpose of resolving the government's motion and will be dismissed administratively upon issuance of this decision.

make delivery by 27 January 1995. *Applied I*, 01-1 BCA at 154,732. However, appellant's supplier, Manchester Tank & Equipment Co. (Manchester), had informed appellant on 29 November 1994 that it would commence deliveries on 20 February 1995 (ex. G-82, tenth page). The contract was terminated on 6 February 1995. *Applied I*, 01-1 BCA at 154,732. Moreover, the record is devoid of evidence that any deliveries were ever made. We find, therefore, that appellant never made deliveries under the contract.

3. Appellant's claim does not involve government-caused delay (app. br. at 17).

4. Appellant sought unabsorbed overhead of $1,115,509 in its 23 February 1995 termination settlement proposal. That proposal included amounts for work performed. (R4, tab 21 at 3) The contracting officer's 26 February 1997 unilateral determination on appellant's termination settlement proposal and revisions thereof denied appellant's claim for unabsorbed overhead ("the Government does not recognize unabsorbed overhead or loss of business under these circumstances"), but allowed $211,458 for work-in-process. We find appellant had begun performance. The contracting officer allowed costs pursuant to FAR 52.249(f)(2), (3) as follows:

Work-in-process	$211,458
Profit	31,718
Subtotal	$243,176
Settlement expense	3,000
Settlements with subcontractors	49,077
Total	$295,253

The contracting officer's unilateral determination informed appellant of its appeal rights. (Ex. G-90) The contracting officer's pre-negotiation memorandum has a spreadsheet attached that includes $133,348 for G&A in the total payment of $295,253 (R4, tab 75, last page). We find, therefore, that appellant was paid for G&A. A timely appeal was taken, dated 14 May 1997, and docketed as ASBCA No. 50749 (Bd. corr. file, ASBCA No. 50749; *Applied I*, 01-1 BCA at 154,733).

5. Appellant filed a claim dated 12 March 1998, asserting breach of contract and seeking lost profits in the amount of $1,025,812.80 (ex. G-95). The claim was denied in a 29 June 1998 contracting officer's decision. An appeal notice dated 27 July 1998 was filed. (Exs. G-96, -97) The appeal was docketed as ASBCA No. 51662 (Bd. corr. file, ASBCA No. 51662). *Applied I, II,* and *III* ensued (*see, supra*). By letter of 12 February 2004 appellant sought to proceed with quantum in ASBCA Nos. 50749 and 51662, which were combined under and superseded by ASBCA No. 54506 (Bd. corr. file, ASBCA No. 54506).

6. In support of its position on quantum appellant has filed the 28 January 2005 declaration of its Chief Financial Officer (CFO), Kent L. Fortin (hereinafter "Fortin decl."). Mr. Fortin asserts that appellant can only absorb fixed costs through the delivery of units or other contractual actions under contract orders, invoicing and payment. In formulating the bid price for the contract at issue, appellant relied on the government's estimates. Appellant's 1 July 1994 Active Contracts Report included the units set forth in the government's estimates. That report is used by appellant for forecasting, including forecasting of burden rates. (Fortin decl., ¶¶ 4, 7, 8, 9)

7. In FY 95 (7/1/94-6/30/95) appellant calculated its overhead as $2,972,518 (overhead less fringe benefits of $901,843 plus G&A of $2,070,675). Sales for FY 95 totaled $10,576,140. Appellant's G&A costs were the same for FY 94 and FY 95. (Fortin decl., ¶¶ 10, 11, attachs. 2, 3)

8. Appellant did not realize the income stream it anticipated under the contract at issue. It did continue to incur certain fixed costs. (Fortin decl., ¶ 12)

9. It typically takes appellant more than one year to obtain new business, *i.e.*, from bid to start of deliveries. Mr. Fortin believes it would have been impracticable for appellant to secure new business to replace the anticipated business under the contract at issue. (Fortin decl., ¶ 13)

10. Mr. Fortin calculated damages in the form of "Unabsorbed Fixed Burden" totaling $1,116,916, which he believes appellant suffered as a result of the negligent estimates. He used the following formula and numbers:

Unrealized Contract Billings Total Realized and Unrealized Orders for Contract Period	x	Fixed Burden for Contract Period	=	Unabsorbed Fixed Burden
$5,656,867 $16,861,577	x	$2,972,518	=	$997,246
		Profit @ 12%		=
$119,670				
		Total		$1,116,916

Mr. Fortin asserts that 12 percent approximates appellant's historical earned rate of profit. He states that his "calculation applies the principles of the 'Eichleay formula' to calculate the amount of Applied's fixed burden costs that were not defrayed by the revenues (or 'billings') expected for Contract -0108 based on the requirements estimates included in the RFP and the contract." He used FY 1995 fixed burden and sales because the period

approximated the base contract year. (Fortin decl., ¶¶ 14, 16, attachs. 2, 4) We find Mr. Fortin's calculation does not include days of delay. We further find that Mr. Fortin's calculation and the amount and form of damages claimed is also set forth in Appellant's Statement of Damages Due, submitted pursuant to the Board's Order on Proof of Costs. The only damages sought are unabsorbed overhead. The government's 20 August 2004 response to appellant's statement asserts the contracting officer's unilateral determination has not been overturned and the denial of unabsorbed overhead therein should be upheld (Bd. corr. file).

DECISION

Appellant argues that the law of the case is that the government committed a material breach and is liable for damages, that the breach was a breach of warranty, and that the Board has the power and duty to render a jury verdict. It also contends, in effect, that failure to meet a specific requisite of the Eichleay formula is not fatal, that application of termination for convenience principles is inappropriate, and that it will not receive a windfall if it recovers its unabsorbed burden as claimed.

The government argues that without proof of a delay, unabsorbed overhead cannot be recovered. It also contends that we are limited to application of termination for convenience principles, and that post-termination overhead is not recoverable. Finally, the government asserts that appellant's reliance on *Hi-Shear Technology Corp. v. United States,* 356 F.3d 1372 (Fed. Cir. 2004), is misplaced.

Our instructions from the Federal Circuit removed lost profits from consideration. *Applied III.* However, appellant's letter seeking commencement of quantum proceedings listed ASBCA No. 51662, which arose from a claim seeking only lost profits. Appellant has not argued for lost profits. Accordingly, we do not consider any elements of ASBCA No. 51662 to be before us in deciding ASBCA No. 54506 and we hold that, in any event, *Applied III* bars any recovery of lost profits whether under some vestige of ASBCA No. 51662 or otherwise.

The Federal Circuit held in *Applied III* that, if appellant made no deliveries, it was "limited to recourse under the Termination for Convenience of the Government Clause of the contract." *Applied III*, 325 F.3d at 1342. We have found that no deliveries were made (finding 2). Appellant argues, and we agree, that the Court has held that recovery of unabsorbed overhead under the termination for convenience clause may be allowable. *Nicon, Inc. v. United States*, 331 F.3d 878, 887 (Fed. Cir. 2003). In that case, on which appellant relies, the Court noted that the burden of proof is on the contractor, while limiting the application of its holding and establishing certain conditions:

> However, a contractor seeking unabsorbed overhead damages as part of its termination for convenience settlement must still meet certain requirements in order to be entitled to recover any of its unabsorbed overhead. The contractor must show that, before the government terminated the contract, there was a period of government-caused delay of uncertain duration. . . .
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> . . . .
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> Our holding here is narrow. We reaffirm that the *Eichleay* formula as it is set forth in our precedent is the exclusive formula for the calculation of damages for unabsorbed overhead due to a period of government-caused delay in situations in which contract performance has begun. The *Eichleay* formula was created and intended for a factual situation in which a contractor's performance has begun and then been delayed or suspended for an uncertain duration because of government fault, thereby extending the time period of performance. The formula must be strictly applied and may not be modified to make it apply to situations in which there is no performance on the contract.
>
> However, in situations in which contract performance has not yet begun, but the government terminates the contract for convenience after a period of delay, the contractor is not left without a remedy. The contractor may recover unabsorbed overhead costs as part of its termination for convenience settlement if a reasonable method of allocation can be determined on the facts of the case and the contractor can otherwise satisfy the strict prerequisites for recovery of unabsorbed overhead costs.

Id. at 887-88.

Appellant argues that it is entitled to recover unabsorbed overhead pursuant to *Nicon* through application of an adapted version of the Eichleay formula (app. br. at 16-18). We disagree. We understand the Court to hold that the Eichleay formula may not be modified in the manner used by appellant (finding 10) where, as here, appellant had begun performance (finding 4). The requirement for a government-caused delay still obtains, there was no such delay, and appellant's calculation does not incorporate days of delay (findings 3, 10). It cannot meet the "strict prerequisites for recovery of unabsorbed

overhead costs." *Nicon, supra*, 331 F.3d at 888. We find appellant's reliance on *Nicon* is misplaced.

Appellant urges that we look to and apply a means of damages calculation set forth by the Court in *Applied III* for situations in which there was no termination. There, the Court, after holding that anticipatory profits could not be recovered for breach founded on negligent estimates in a requirements contract, set forth what it considered the proper methodology for determining recovery in such cases. The Court at 1340-41 specifically discussed *Everett Plywood and Door Corp. v. United States*, 419 F.2d 425 (Ct. Cl. 1969). In that case, faulty estimates resulted in a per unit increase in the contractor's costs of cutting and purchasing timber. *Id.* at 429-31. The *Everett* Court calculated the average rate the contractor would have been paid if the contract volume had been realized and determined the difference between that rate and the contract rate:

> As to each type of timber involved herein, plaintiff's damages for loss of stumpage are computed by first arriving at the average rate which plaintiff would have paid for each type of timber had the contract volume for that type been realized. For each type, this involves applying the contract rate to the competitive bid volume, applying the redetermined rate to the balance of the contract volume, adding the two products thus computed, and dividing such total by the contract volume, to arrive at the average rate per M board feet, which would have been paid on the contract volume. This average rate was then deducted from the contract rate actually paid, and the difference applied to the volume actually cut, to arrive at the excess payment on that type of timber, resulting from plaintiff's failure to realize the lower average rate contemplated.

Id. at 433. However, the Court in *Applied III* went on to hold that, if no deliveries had been made prior to termination, "Applied is limited to recourse under the Termination for Convenience of the Government Clause of the contract." *Applied III*, 325 F.3d at 1342. As we have found no deliveries were made (finding 2), we interpret this last instruction from the Court to mean that an equitable adjustment under the *Everett Plywood* model is foreclosed to appellant. We therefore find no merit in appellant's argument that the *Everett Plywood* methodology is the appropriate means of calculating the equitable adjustment to which the appellant alleges it is due (app. br. at 10-12). Even without the Court's instruction limiting appellant to recovery under the termination for convenience clause, we see no way on the facts presented in this appeal to apply the *Everett* methodology.

Appellant has not challenged any of the elements of the contracting officer's unilateral determination except for unabsorbed overhead. The government seeks to have the determination upheld. (Finding 10) We, therefore, reasonably infer that other elements of the contracting officer's unilateral determination, which included an amount for G&A (finding 4), are not at issue. As noted above, the Court has instructed us that, if no deliveries were made, recovery is limited to that which would be available in a termination for convenience. We have found that no deliveries were made and concluded, under our interpretation of the Court's precedents, that no amount is allowable for unabsorbed overhead in a termination for convenience on the facts presented. However, even if we had found there were deliveries, appellant could not recover. In the Federal Circuit an appellant may generally recover unabsorbed overhead only through application of the Eichleay formula, and application of the Eichleay formula requires proof of certain specific elements. *Wickham Contracting Co. v. Fischer*, 12 F.3d 1574, 1580-81 (Fed. Cir. 1994) ("we hold that the *Eichleay* formula is the exclusive means for compensating a contractor for unabsorbed overhead when it otherwise meets the *Eichleay* prerequisites." (italics in original)). One of the "prerequisites" is delay:

> Before using the *Eichleay* formula to quantify an amount of damages, the contractor must meet certain strict prerequisites for the application of the formula. First there must have been a government-caused delay of uncertain duration.

Nicon, Inc. v. United States, 331 F.3d at 883. Here, there was no government-caused delay (finding 3).

Appellant does not argue there was such a delay. Instead, it argues that there was a breach of warranty arising from the negligent estimates that reduced appellant's income "even more directly than a delay" (app. br. at 18). Appellant does not cite, and we are unaware, of any precedent supporting that approach to recovery of unabsorbed overhead where, as here, performance had begun and there was no delay. Given the Federal Circuit's statements in *Wickham*, *Nicon*, and other cases, of what must be proved before Eichleay will apply, appellant's argument does not prevail. We hold that appellant's claim for unabsorbed overhead may only be recovered through application of the Eichleay formula, there must be a government-caused delay before the Eichleay formula can be used, and that appellant has not proved a government-caused delay.

Appellant next argues that "The Board Has The Power and Even The Duty" to render a jury verdict on damages (app. br. at 12). Appellant looks to *Hi-Shear Technology Corp., supra,* 356 F.3d 1372 (*Hi-Shear II)*, to support its position. The government argues that *Hi-Shear II* does not support appellant. In *Hi-Shear II* the Court reiterated its holding in *Applied III* while affirming the decision of the Court of Federal

Claims in which it awarded jury verdict damages to Hi-Shear. *Hi-Shear Technology Corp. v. United States*, 53 Fed. Cl. 420 (2002) (*Hi-Shear I*).

Appellant argues that in *Hi-Shear II* the Court found that *Hi-Shear I* did not run counter to *Applied III* and that, as a result, the Court of Federal Claims and the boards of contract appeals have flexibility in exercising discretion in their determination of damages in negligent estimate cases arising from requirements contracts. While we do not take exception to appellant's argument as a general principle, it overlooks the specific, overriding direction given to the Board in *Applied III* – because there were no deliveries, we may only look to the termination for convenience clause in resolving appellant's claim for damages. *Applied III*, 325 F.3d at 1342; *Hi-Shear II*, 356 F.3d at 1380.

Appellant has challenged only the denial of unabsorbed overhead in appealing the contracting officer's unilateral determination under that clause (finding 10). As we have stated elsewhere herein, unabsorbed overhead may be recovered only under the Eichleay formula, and a strict prerequisite for application of the Eichleay formula is government-caused delay. As a government-caused delay is not even contended by appellant, its claim for unabsorbed overhead must fail. Accordingly, we deny the appeal.

Dated: 12 April 2006

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

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman

Armed Services Board
of Contract Appeals

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. 54506, Appeal of Applied Companies, Inc., rendered in conformance with the Board's Charter.

Dated:

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