ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Packard Construction Corporation	)	ASBCA No. 55383
	)	
Under Contract No. DACA21-02-C-0012	)	

APPEARANCE FOR THE APPELLANT: Mr. Richard C. Forrester, III
Vice President, Operations

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Susan K. Weston, Esq.
Engineer Trial Attorney
U.S. Army Engineer District,
Savannah

OPINION BY ADMINISTRATIVE JUDGE DELMAN

Packard Construction Corporation (Packard or appellant) has asserted a claim, revised at trial, seeking 88 days of compensable delay, unabsorbed overhead and additional direct costs incident to performing work on the water main and water distribution system under a contract to build the SOF Imagery and Analysis Facility at Fort Bragg, NC. The government contends that appellant has failed to prove any recovery in excess of that already provided under unilateral contract modification and the decision of the contracting officer (CO). A hearing was held and briefs were filed. We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-13.

FINDINGS OF FACT

1. On 28 March 2002, the U.S. Army Corps of Engineers (government) awarded appellant Contract No. DACA21-02-C-0012 for the construction of the SOF Imagery and Analysis Facility at Fort Bragg, NC. The contract was in the amount of $3,181,476 and required completion within 450 days after notice to proceed. The contract included the FAR 52.236-2 DIFFERING SITE CONDITIONS (APR 1984) clause, and the FAR 52.243-4 CHANGES (AUG 1987) clause. (R4, tab 3 at 1-2, 65, 73)

2. As awarded, the contract price included Item No. 0001, the construction of the facility, in the amount of $2,753,438.00, Item No. 0002, site preparation and development including utilities, in the amount of $401,321.00, and Item No. 0003, Option No. 1, asphalt paving and stripping of parking area in the amount of $26,717.00 (R4, tab 3 at 3). Item No. 0002, also known as "Phase 1," included, *inter alia*, the

relocation of overhead electrical lines and installation and tie-in of lines for water (supply and fire/sprinkler), sanitation sewer, gas and communications duct bank.

3. During the course of performance in Phase I, appellant was unable to locate the underground 10" water main where depicted on the contract drawings. By letter to the government dated 25 June 2002, Packard advised that "after several days of trying to locate the existing waterline [sic] with the Government" Packard located the water line today in a "different location" and "much deeper" than shown on the contract drawings. Packard stated it would file a proposal for additional costs and reserved the right to file a claim for project delay. (Supp. R4, tab 39)

4. By letter to the government dated 26 June 2002, Packard issued a correction to the foregoing letter as follows:

> Pursuant to the subject matter and the referenced contract, be advised that Packard Construction has found the water main today, which is located approximately 18 feet below the surface.
>
> In our letter yesterday regarding location of the water line, the information I gave you was incorrect. The line we found yesterday was an existing 4" branch line, which elbowed down deeper, not the 10" water main.
>
> Although Packard found the 10" water main today, we have discovered another situation that requires action from the Government. It appears that the existing 10" main is an asbestos fiber cement pipe, which most companies will not attempt to tap due to the frailty of the pipe and the environmental issues.
>
> As requested by the COR [the government project engineer], Mr. Daryle Meddings, Packard is reviewing the matter for possible solutions. However, since this is an unforeseen condition that will require a change in the scope of work, Packard requests that the Government provide further direction. Until this situation is resolved, Packard will not be able to continue with the underground waterline [sic] work. Packard reserves its right to make a claim for any possible delays and associated costs after the situation has been resolved. In the meantime, please let us know if you have any questions.

(Supp. R4, tab 39)

5. Appellant's project manager, Mr. Jae S. Kang, emailed Mr. Meddings on 17 July 2002 reiterating the need for direction. Mr. Kang also advised: "It appears that at the location where the sewer line is to cross the waterline there will be about 2 feet of clearance under the water line. So the clearance will not be an issue." (Ex. A-7) Mr. Kang worked out of the office in Newington, VA. He visited the site "about once a week" (tr. 1/193), or about "once every two weeks" (tr. 2/122).

6. The government provided some direction to appellant on or about 25 July 2002, but failed to provide specific direction regarding how to handle the asbestos-reinforced water main. Appellant again sought direction by email dated 25 July 2002 (ex. A-9) and by email dated 6 August 2002 (ex. A-10).

7. By email dated 15 August 2002, the government provided direction regarding the tap into the asbestos water main (ex. A-12), which was confirmed by appellant on 19 August 2002 (ex. A-13). The tap on the line was installed on 23 August 2002 (ex. A-26, Report No. 080). While awaiting government direction, appellant's pipe layers performed work on the gas line and sewer line prior to being sent to other jobs (tr. 2/102).

8. The government also issued revisions to the routing of the water distribution system. By RFI No. 10, dated 26 August 2002, appellant sought revised drawings in view of these changes (ex. A-14). The government provided a new layout on 29 August 2002, and appellant installed the lines in accordance with this new layout (tr. 2/58). The testing of the water distribution lines was completed on 16 September 2002 (tr. 2/59).

9. Appellant excavated for the fire/sprinkler line on 27 September 2002 (supp. R4, tab 30 at 000369). On 30 September 2002, appellant discovered water seepage around areas in which it had worked (ex. A-26, Report No. 153). This raised the question as to the source of the seepage, *i.e.*, whether it was a leak from the piping in the water distribution system or was groundwater. Mr. Meddings was timely advised of this problem (tr. 4/39). Appellant performed re-excavation to check its work, but no leaks in the water lines were found (tr. 2/62).

10. The seeping water was then tested by base personnel and the results were discussed on site with the government's quality assurance representative (QAR), Mr. Leroy Fedd. Per appellant's "Contractor's Daily Report" (CDR) dated 2 October 2002, the water test indicated "no florides [sic] found in water" (ex. A-26, Report No. 155). This supported the conclusion that the water was not coming from any leak in the supply-water piping, that is, appellant's work, but rather was groundwater. Mr.

Meddings confirmed that the water was determined to be groundwater (tr. 4/40), and we so find.

11. Appellant performed additional excavation work to investigate the source of the groundwater, and this excavation required additional backfill and compaction (tr. 2/62-66). Appellant's pay application narrative to the government dated 31 October 2002 stated that this groundwater was an unforeseen site condition and appellant would file a claim (supp. R4, tab 40 at C-15, C-16). The government has not offered any evidence disputing the unforeseen nature of this physical site condition, and we find that a differing site condition under the contract has been shown.

12. During the time this groundwater related work was performed, appellant was performing other contract work. Appellant installed -- and then had to replace -- a post-indicator valve (PIV) in the fire line that was defective, which also required additional excavation and compaction (tr. 2/59-60; 67-9). Appellant finished work on the fire line by 10 October 2002 (supp. R4, tab 30, Report No. 163).

Unilateral Modification P00006

13. By letter to appellant dated 22 May 2003, the government issued a request for proposal (RFP), seeking appellant's price proposal for certain government-caused changes. Insofar as pertinent, the RFP sought appellant's price proposal for the revisions to the water main and the re-routing of the water lines. It did not mention the groundwater issue. (Supp. R4, tab 39)

14. Appellant did not provide a price proposal in response to the RFP. Mr. Kang explained that as project manager in a small office he did not have the time to provide a proposal at this time, and he also believed that delay impacts were continuing (tr. 2/75, 91). Government representatives called Mr. Kang on 11 July 2003 to discuss additional time and costs. Mr. Kang indicated that Packard wanted around 91 days, but he indicated that some adjustment would be required for weather and Packard inefficiencies. Mr. Kang was unable to offer any figures for direct costs and extended field overhead. (Supp. R4, tab 32 at 000010) He did not mention entitlement to unabsorbed overhead or Eichleay damages (*id*., tr. 3/229-30, 4/28). By email Mr. Kang sent the government a list of monthly equipment rates (*id*., at 00008; tr. 2/93-4; 4/25).

15. Having failed to receive a proposal from appellant, the government decided to issue a unilateral contract modification. The government issued P00006 on or about 6 August 2003 (supp. R4, tab 32). P00006 addressed a number of the delays caused by the changes during Phase I and their impact on the delivery schedule, but it did not separate the delay days allotted for each delay because many of the delayed work items were performed concurrently with other work and with each other (tr. 3/221).

16. Based upon an analysis of the total delays reflected in appellant's schedule updates that were furnished by appellant under the contract through November, 2002, the government determined that appellant was entitled to a compensable time extension in the amount of 66 calendar days for the changes in Phase I (tr. 3/221-2). The government did not consider any Packard inefficiencies or delays in making this determination (tr. 3/223). P00006 did not allow for any unabsorbed overhead. However it granted appellant extended field overhead for 66 calendar days in the amount of $26,169. This reflected an estimated daily field overhead rate of $308.89, plus markups. The actual daily field overhead rate, as subsequently audited by DCAA, was $786.00. (Tr. 3/262-3; supp. R4, tab 37 at 5)

17. Insofar as pertinent, the government also allowed appellant additional direct costs of $9,111 for the mis-location and the asbestos-nature of the water main[1], including subcontractor and contractor markups for overhead, profit and bond, and $4,618 to re-route the water lines, including subcontractor and contractor markups for overhead, profit and bond, for a total of $13,729 (supp. R4, tab 32 at 000014, 000015). P00006 allowed no direct costs related to the groundwater issue.

18. The government had earlier issued bilateral Modification No. P00002, granting Packard a total of 19 calendar days of excusable delay due to adverse weather from May 2002 through March 2003. Insofar as pertinent, two weather days were granted for August, 2002 and nine weather days were granted for October, 2002. (Supp. R4, tab 38 at 000003)

REA and Claim

19. On 8 September 2004, Packard filed a request for equitable adjustment (REA), identifying a number of issues impacting project delay and cost. Insofar as pertinent, appellant contended that the inaccurate depiction of the water main on the contract drawings caused project delay in the amount of 5 days and additional direct cost of $11,455, and that the unforeseen asbestos-reinforced water main line caused delay to tapping and the re-routing of water lines in the amount of 59 days, with additional direct cost of $21,865. Appellant also asserted delays due to other unmarked and mis-located utility lines and to unanticipated groundwater interference (finding 10), but contended that these were concurrent delays to the other delay elements in the claim. (Supp. R4, tab 31A)

[1] This cost was predicated, in part, upon excavation, backfill and compaction to a depth of roughly 12 feet to 14 feet (tr. 3/235-6), which was consistent with Mr. Fedd's measurements on site as referenced in his daily log (tr. 3/74), and which we find persuasive.

20. The government did not respond to this REA. By letter dated 29 December 2004, appellant sought a CO's decision, seeking a total of 64 days of compensable delay and additional direct costs of $33,320 (supp. R4, tab 31B).

21. The government requested additional supporting information (R4, tab 23). In response, appellant filed an updated claim dated 13 April 2005. Appellant now claimed compensable delay in the amount of 75 days, extended field overhead and additional direct costs of $34,278, including the groundwater claim. Appellant now also sought unabsorbed overhead for the claimed delay period, which brought the total claim to $145,340. (Supp. R4, tab 31C)

22. Appellant did not certify this claim at this time, but it appears that the CO nonetheless issued a decision on this claim and on other contractor claims not pertinent here. The CO denied this claim for the most part and an appeal was taken to the Board. The Board returned this claim to appellant for proper certification and submission to the CO.

23. After appellant properly certified the claim, the CO on 23 December 2005 issued another decision. The CO granted appellant some additional direct cost for labor and rental equipment, field overhead, office overhead, profit and bond (in an amount left uncalculated), but otherwise denied the claim (R4, tab 2). Appellant's appeal was docketed as ASBCA No. 55383.

The Experts and Project Delay

24. Appellant employed an expert to provide an expert report (ex. A-28) and an as-built schedule (exs. A-29, 30) to demonstrate appellant's claimed delay. Using the originally approved schedule as a starting point, the expert used contemporaneous project records to provide a computer-generated schedule showing the as-built critical path. He rejected the use of appellant's periodic schedule updates that were furnished during contract performance because they did not include the impacts of delays and any changes to the planned work sequence, and hence were not an accurate tool to show actual project delay. (Tr. 1/24) Based upon his analysis, he was of the opinion that appellant was entitled to recover 88 days of compensable delay (adjusted from 86 days) as a result of the water-related delays in Phase I (tr. 1/59). He gave no opinion as to whether appellant was entitled to any unabsorbed overhead.

25. We find a number of discrepancies in appellant's expert report and analysis. In Section E, Delay Analysis, ¶ 5 of the report the expert itemized a number of "necessary construction activities," that appellant performed during the delay period that were not chargeable as delay days, including original contract work on the sanitary sewer during nine days in July and August 2002. However at the hearing he conceded that he failed to include in this category, without persuasive explanation, sanitary sewer work

performed by appellant on other days during this period, including August 6, 7, 8, 12, 13, 14, 15, and 16 (tr. 1/110-115). In this section of the report, the expert also indicated that appellant located the sanitary sewer on 22 July 2002. However, appellant's CDR dated 22 July 2002 does not state that the sanitary sewer was located on that date (ex. A-26, Report No. 056). Rather, appellant's CDR dated 27 June 2002 states the sanitary sewer was located on 27 June 2002 ("found sanitary sewer 15' 6" down") (*id*., Report No. 039).

26. With respect to the claimed period of gross delay, appellant's expert concluded that absent government delay to the water line-related work, these work activities should have been completed on 20 June 2002. They were actually completed on 10 October 2002, a period of 112 calendar days of gross delay. This calculation was predicated on his opinion that appellant began digging to locate the water main on 12 June 2002. (Tr. 1/136) The expert stated that this opinion was based upon a review of appellant's daily construction reports (tr. 1/96).

27. However, appellant provided no daily records or testimony from any witness with personal knowledge that persuasively showed that appellant began digging to locate the water main on 12 June 2002. The government's QAR, who was on the job "pretty much each day" (tr. 3/53), testified that Packard was *not* looking for the water main on 12 June 2002 (tr. 3/50). Appellant's Construction Quality Control (CQC) Report dated 12 June 2002 does not mention the water main (supp. R4, tab 30, Report No. 43). Appellant's CDR dated 12 June 2002 also does not mention the water main. Rather, it refers to excavation to "remove railway track in site area" that was "below excavation of soil in site pad area" (ex. A-26, Report No. 028; tr. 1/187). This area was not in the area of the water main, but was below the building pad (tr. 3/55). Moreover, appellant's 25 June 2002 letter to the government advised that as of 25 June, appellant had been searching for the water main for just "several days" (finding 3).

28. In view of the foregoing, we find that appellant did not begin digging to locate the water main on 12 June 2002. We find that the expert's opinion in this regard was unsupported by the weight of the evidence and was not credible.

29. Nor are we persuaded by the expert's opinion that the claimed government-caused gross delay should extend to 10 October 2002. Appellant's CDRs for October 8 through October 10 reflect that appellant was required to remove and replace a defective PIV from the fire line during this period (ex. A-26, Report Nos. 161-163). This work was Packard's responsibility (tr. 2/107), but this matter was not addressed by appellant's expert.

30. Appellant's expert did not find any significant delay for which appellant was responsible during the claimed delay period. He defined "significant" delay as encompassing 2 days of work (tr. 1/141-2). However, Packard's daily CQC reports indicate that appellant had to reset sanitary sewer manhole no. 2, for which it was

responsible, over a 2-day period on 31 July 2002 and 1 August 2002 (supp. R4, tab 30, Report Nos. 92, 93), but the expert failed to identify this item in his analysis. (These 2 days were credited to the government for other reasons, see Section E, ¶ 5 of expert report.) Packard's daily CQC reports (*id*., Report Nos. 120, 121) also reflect water line repairs performed by appellant over a 2-day period -- on 28 August 2002 ("backfilling trench to repair 2" water line") and on 29 August 2002 ("water line repair"; "operator hit and broke main water line") -- but appellant's expert also failed to account for this item in his analysis. Appellant's expert also found no significant weather delays that needed to be taken into account during the delay period (tr. 1/125-6), but he failed to recognize and include a 2-day calendar time extension in August 2002 for weather that was agreed to by the parties under P00002 (supp. R4, tab 38; tr. 1/127-8). Appellant's project manager recognized, during conversations with government personnel in July 2003, that any calculation of project delay had to take into account the time granted for weather and Packard's own inefficiencies (finding 14), but appellant's expert made no such subtractions.

31. Based upon the foregoing, and our overall assessment of this expert's credibility, we are not persuaded by the opinion of appellant's expert that appellant was entitled to 88 days of compensable delay resulting from the water-related issues on Phase I of the project.

32. The government's expert, a civil engineer for the U.S. Army Corps of Engineers, used appellant's baseline schedule, as periodically updated pursuant to the contract, to track delays during the claimed delay period. The government's expert report concluded that as a "worst case scenario," the contract was 46 calendar days late as of 7 October 2002 without considering any Packard delay (supp. R4, tab 40, at C-18).

Claim for Unabsorbed Overhead

33. P00006 granted appellant a compensable time extension in the amount of 66 calendar days but did not allow any unabsorbed overhead. The DCAA report, dated 17 September 2007, calculated a daily contract fixed home office overhead rate of $607.00 (supp. R4, tab 37 at 5).

34. Appellant contends that during the claimed delay period there were 71 work days in which Packard's work force was, for all intents and purposes, suspended and unable to efficiently perform other contract work due to the water line discrepancies (tr. 3/26). According to Ms. Christine Pak, appellant's president, Packard lost money on each of these days since it earned less than 100% of its direct site costs on these days (tr., 3/26-7; br. at 15). For these purposes, Ms. Pak calculated daily earnings by taking the number of hours of work performed each day on a given work activity as compared to the monthly hourly total for that work activity, and multiplied this fraction by the contract dollar value for that work element for the month or pay period involved. According to

Ms. Pak, such daily losses were akin to appellant being on "standby" and justified a recovery of unabsorbed overhead. (Tr. 2/181-2).[2]

35. With respect to the value of the contract work performed during the delay period, the record reflects that through progress payment No. 5 ending 10/31/02, appellant was paid $451,183 (supp. R4, tab 35). Subtracting out amounts paid for work performed before the delay occurred and after the delay occurred, roughly $256,621 (tr. 2/155-6),
there remained a total of $194,562 paid for work performed in the delay period. Appellant's bid price for site development and utilities was $401,321 (finding 2). Based upon these figures, appellant was paid roughly 48% of the bid contract value during the claimed delay period ($194,562/$401,321). Much of this work was necessary and critical, as defined and recognized by appellant's own expert, including work on the sanitary sewer, overhead electrical relocation and the communications duct bank (ex. A-28, Section E, ¶¶ 5, 6).

36. We find that appellant performed significant and substantial work during the claimed delay period, with the following exception. Appellant's CDRs show that appellant performed little, if any, contract work while awaiting government direction on water line discrepancies on the following days: July 2, 3, 5, 8, 10, 12, 14, 16, 25, and 26, 2002 (ex. A-26, Report Nos. 042-060).

Claim of Additional Direct Cost

37. Appellant's claim, as revised, sought $52,662.91 for direct costs incurred to perform additional work resulting from the water line discrepancies. A number of the claim invoices involved equipment rentals for backhoe, excavator (trackhoe), plate tamper, roller and compactor. Mr. Kang testified, and we find that when appellant encountered the water related delays on the job, it used this equipment on other contract work activities, such as sanitary sewer excavation and debris removal (tr. 2/95). A number of the claimed invoices involved charges for testing services from an entity named "S&ME". However, many of these charges related to testing services for the sanitary sewer work and not for the water work (tr. 2/229-246). Appellant also previously contended that a number of the claimed invoices related to costs incurred for the debris-removal claim (tr. 2/268-9).

[2] Prior to trial, appellant prepared a written report that tracked Packard's earnings and total site costs for each day of the claimed delay period, but appellant failed to provide this potential exhibit to the government by 18 March 2008 as required by the Board's Pretrial Order. Based upon the government's objection at trial, the report was excluded as an exhibit (tr. 2/166-173). However, Ms. Pak did testify in some detail in support of appellant's entitlement to recovery of unabsorbed overhead, without government objection, and our findings reflect that testimony.

38. In addition, appellant failed to show by persuasive testimony or otherwise that the claimed invoices reflected amounts that related solely to the revised work as opposed to the base contract work (tr. 2/220-9). This was also the case with the invoices from subcontractor C.K. Andrews (CKA), who was hired to tap into the asbestos pipe and then continued to install the other water lines as part of the base contract (tr. 2/107-9). No witness from CKA testified to segregate out the claim costs from those incurred to perform the base contract work.

39. With respect to appellant's claim for additional direct labor related to water conditions, appellant claimed the hours of certain laborers and equipment operators from weekly certified payroll reports (supp. R4, tab 31C; ex. A-25). However, appellant's CDRs reflect that some of this labor cost was incurred for work activities unrelated to the water claim (see, e.g., ex. A-26, Report Nos. 036, 037, 040, 061, 063, 064, 067, 068). As for those labor costs that did involve the water work, appellant did not show by persuasive testimony or otherwise that this labor was expended solely to perform work beyond that required in the base contract.

40. Based upon the foregoing, we find that the appellant's proffered invoices do not accurately reflect the amounts incurred to perform additional work due to water site conditions during Phase I.

DECISION

Appellant has the burden to prove its claim. It must prove liability, causation and resultant injury. *Wilner Construction Co. v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994).

Based upon our findings, we are unable to accept the conclusions of appellant's expert that appellant is entitled to 88 calendar days of compensable delay due to project water site conditions. As for the government's expert, we need not assess the accuracy of his opinion that under a "worst case scenario" the contract was only 46 calendar days late as of 7 October 2002 without consideration of any Packard delay. The government under P00006 has already granted appellant a compensable time extension in the amount of 66 calendar days for Phase I, and the government does not seek to take away any of that time based upon its expert's report. Rather, appellant has the burden to shown entitlement to its claim, or at the very least show entitlement to more compensable time than that granted by the government by contract modification. Appellant has not shown entitlement to any recovery of compensable delay beyond that granted by the government.

However, the record does support entitlement to additional extended field overhead cost. Under P00006, the government allowed 66 calendar days of extended

field overhead at an estimated daily rate of $308.89. Appellant's actual daily contract field overhead rate, as audited by DCAA, was $786.00. (Finding 16) We conclude that appellant is entitled to recover extended field overhead for 66 calendar days at the daily rate of $786.00, less amounts already paid for extended field overhead under P00006 and the CO's decision dated 23 December 2005 (finding 23).

With respect to appellant's claim for additional direct cost, appellant has not shown entitlement to recovery of any direct cost beyond that granted by the government, with the exception stated below. The record reflects that appellant gave authorized government representatives timely notice of an unforeseen groundwater condition that required appellant to perform additional excavation, backfill and compaction in early October, 2002. Appellant advised the government in writing that it would file a claim for these additional costs and subsequently included the matter in its REA and claim (Findings 9, 10, 11, 19, 21). However, neither P00006 nor the CO's decision addressed the matter. We conclude that appellant is entitled to recover its reasonable costs to perform this additional work, and we remand the claim to the CO for purposes of determining quantum.

The final matter to be addressed is whether appellant is entitled to recover any unabsorbed overhead for project delay pursuant to the "Eichleay formula".[3] P00006 did not allow for any Eichleay recovery, nor did the CO's decision.

The test for Eichleay recovery is familiar. As we stated in *B.V. Construction, Inc.*, ASBCA Nos. 47766, 49337, 50553, 04-1 BCA ¶ 32,604 at 161,359:

> To be entitled to Eichleay damages, a contractor must first show that there was a government-caused delay to its planned contract performance "that was not concurrent with a delay caused by the contractor or some other reason." *P.J. Dick, Inc.*, 324 F.3d at 1370; *Sauer, Inc. v. Danzig*, 224 F.3d 1340, 1347-48 (Fed. Cir. 2000). The contractor must also show its original contract performance time was thus extended or, alternately, that it completed its performance on time or early but incurred additional, unabsorbed overhead cost because it had planned to finish even earlier. *P.J. Dick, Inc.*, 324 F.3d at 1370; *Interstate Gen.*, 12 F.3d at 1058-59. Finally, after proving the above elements, the contractor must show that it was required to remain on "standby" during the delay. *P.J.*

[3] The "Eichleay formula" was used in *Eichleay Corp.*, ASBCA No. 5183, 60-2 BCA ¶ 2688 to compensate a contractor for office overhead that was not absorbed or allocated to the direct costs of the contract work due to the government's suspension or delay of the work for an indefinite period.

> *Dick, Inc.*, 324 F.3d at 1370. Where a contractor proves these elements, "it has made a prima facie case of entitlement" and the burden of production shifts to the government "to show that it was not impractical for the contractor to take on replacement work and thereby mitigate its damages." *Id*.; *Melka Marine*, 187 F.3d at 1376; *All State Boiler*, 146 F.3d at 1373-82. If the government satisfies this burden of production, the contractor then bears the burden of persuasion that it was impractical for the contractor to obtain sufficient replacement work. *P.J. Dick, Inc.*, 324 F.3d at 1370; *Melka Marine*, 187 F.3d at 1376.

While the record shows government-caused work delay that extended performance of the contract, appellant has failed to show it was on "stand-by" throughout the claimed delay period. To establish "stand-by," appellant must show it was precluded from performing much, if not all, contract work. *B.V. Construction*, 04-1 BCA at 161,360 (citing cases). The record shows that appellant was performing significant and substantial amounts of contract work during most of the claimed delay period (finding 35). Accordingly, appellant has not shown that it was on "stand-by" throughout the delay period.

On the other hand, we reject the government's position that no Eichleay entitlement has been shown. Based upon a review of appellant's CDRs, it is clear that during early July 2002, appellant performed little, if any, contract work while awaiting government direction on water line discrepancies. Appellant has shown that it was effectively on "stand-by" on the following days: July 2, 3, 5, 8, 10, 12, 14, 16, 25, and 26 (finding 36). Appellant has made out a *prima facie* case of recovery of unabsorbed overhead for these days, and the government has not shown that appellant was able to take on additional work to mitigate its damages. We conclude that appellant is entitled to recover its unabsorbed overhead for these 10 days at the daily home office overhead rate of $607.00 (finding 33).

CONCLUSION

We remand the appeal to the CO to determine the amounts owed to appellant consistent with this opinion, with interest under the CDA to run from the date the CO received the certified claim to the date of payment.

The appeal is sustained in part as stated herein, and is otherwise denied.

Dated: 10 August 2009

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

MONROE E. FREEMAN, JR.
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. 55383, Appeal of Packard Construction Corporation, rendered in conformance with the Board's Charter.

Dated:

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