

Construction Claims and Pitfalls

Including General Claims/
Requests for Equitable
Adjustment (REAs)

OVERVIEW

- What Went Wrong?
- REAs vs. Claims
- Measuring Delay Damages
- Differing Site Conditions
- Who Has Authority to Bind the Government
- When the Government Is Bound
- Questions

WHAT WENT WRONG?

When a Contractor Is Entitled to an Equitable Adjustment

- A contractor is entitled to his actual costs, plus reasonable profit (except for suspensions), overhead, and bond
- Contract clauses that allow for an equitable adjustment to the contract if the Government is responsible for additional costs or time:
 - Variation in Estimated Quantity (FAR 52.211-18)
 - Differing Site Conditions (FAR 52.236-2)
 - Suspension of Work (FAR 52.242-14)
 - Changes-Fixed Price (FAR 52.243-1)
 - Termination for Convenience (FAR 52.249-2)
 - Stop Work Order (FAR 52.212-13)

REAs vs. Claims

- **Request for Equitable Adjustment:**
 - Request for compensation (time, money, or both) that falls short of a claim in terms of procedural requirements
 - Allows a contractor to recover costs associated with any suspensions of work or terminations for convenience or other constructive changes by the owner of the project
- **Contract Disputes Act:**
 - A claim is a written demand or assertion by one of the contracting parties seeking, as a matter of right, the payment of money in sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract

REAs vs. Claims (cont'd)

- **Interpretation:**
 - REAs categorized as contract administration
 - Claims categorized as a formal dispute which may lead to litigation
- **Cost:**
 - REA preparation fees are recoverable
 - Claim preparation fees are NOT recoverable

When to File a REA vs. a Claim

- File a REA when a contractor has a good working relationship with the Agency and the Government has indicated a willingness to reach an amicable resolution
- File a Claim if there is animosity, or a clear indication in prior discussions and correspondence, that the Government does not believe the contractor is entitled to an equitable adjustment

Measuring Delay Damages

- Appeal of Eichleay Corporation, ASBCA No. 5183, 60-2 BCA ¶ 2688 (1960)
 - Appeal of contracting officer determining the amount of equitable adjustments due to the contractor under the Suspension of Work provisions of the contract
 - Seeks to equitably determine the allocation of unabsorbed overhead to allow fair compensation of a contractor for Government delay

Elements of the *Eichleay* Formula

- Elements needed for the *Eichleay* formula:
 - 1) Occurrence of a Government-imposed delay;
 - 2) A requirement, by the Government, that the contractor “standby” during the delay; and
 - 3) While on “standby,” the contractor was unable to take on additional work
- Once elements 1 and 2 are proven, the burden shifts to the Government to show either:
 - 1) It was not impractical for the contractor to obtain replacement work during the delay or
 - 2) The contractor’s inability to obtain or perform replacement work was not caused by the Government’s suspension

Elements of the *Eichleay* Formula (cont'd)

- Home-Office overhead:

- Costs that are expended for the benefit of the whole business, which by their nature cannot be attributed or charged to any particular contract (i.e., administrative staff, rent, utilities, advertising, accounting)
- Resources would have been available but for the delay, and would have been used in connection with other projects
- Only fixed components of overhead are considered, not variable components
 - Direct costs are not included in the *Eichleay* analysis

Elements of the *Eichleay* Formula (cont'd)

- **Standby mode:**
 - Contractor must show that the suspension period was for an indefinite duration and that the Government could resume performance on short notice
 - Indefinite duration is the element that distinguishes a period during which resources can be allocated elsewhere versus one in which the uncertainty of resumption creates a risk of breach if a contractor does not stand at the ready
- **Bonding:**
 - Excess bonding capacity or bidding on other work does not bar recovery under *Eichleay*

Eichleay Formula

- *Eichleay Formula Three-Step Process:*
 - 1) Total Project Billings \div Total Company Billings x Total Home-Office Overhead During Actual Contract Period = **Overhead Allocated to Project**
 - 2) **Overhead Allocated to Project** \div Actual Days of Project Performance (including delay) = **Rate of Overhead Allocated to Project Per Day**
 - 3) **Rate of Overhead Allocated to Project Per Day** x Number of Days Delayed = **Amount of Home-Office Overhead Allocated to Project**

Government Defenses to *Eichleay*

- The delay/suspension did not cause any extension in the actual time of performance beyond the original or previously-revised contract performance date
- The contractor was or was not able to begin work on the next new contract in the extension period because of the continuing work on the delayed/suspended contract
- The contractor did or did not secure a replacement contract(s) or other substituted work between the start of the delay/suspension period and the end of the period of extension beyond the original or previously-revised contract performance date

Government Defenses to *Eichleay* (cont'd)

- Evidence that the contractor was aware of differing site conditions or other causes of the asserted Government-caused delay prior to the original bid submission
- Evidence that the contractor was unable to obtain replacement work because its bonding capacity was limited due to circumstances unrelated to the Government-caused delay/suspension

Recent Application of *Eichleay*

- The Redland Co., Inc. v. US, 97 Fed. Cl. 736 (2011)
 - Contractor not entitled to *Eichleay* damages for four-year suspension because it had not started performance at the time the suspension order was issued
 - Issuance of the notice to proceed did not trigger start of performance
 - The Redland Co., Inc. did not have equipment or personnel at the location

Recent Application of *Eichleay* (cont'd)

- **The Redland Co., Inc. v. US, 97 Fed. Cl. 736 (2011)**
 - The Redland Co., Inc. failed to demonstrate that the Government required that it be on standby
 - Without express language in the suspension order, the contractor bears the burden of proving standby by demonstrating that it was required to resume work at full speed, as well as immediately or on short notice
 - In order to be on standby, a contractor must be required to keep at least some of its workers and necessary equipment at the site, even if idle, ready to resume work on the contract
 - A contractor is not on standby if it is given a reasonable amount of time to gather together its equipment and personnel after a suspension is lifted
 - A contractor is not on standby if the Government requires immediate resumption of the work, but only with a reduced work force that allows the contractor to gradually increase its work force

Differing Site Conditions

- Unanticipated jobsite conditions encountered during a contract
- Must be an actual physical condition of the job site
- Must be a condition that existed at the time the contract was executed
- Condition must not have been discoverable during site inspection

Types of Differing Site Conditions

- Two (2) types of differing site conditions:
 - 1) Materially differs from the conditions indicated in the information about the job provided to bidders
 - 2) Unknown and unusual condition that differs materially from what is ordinarily encountered on the particular type of work in the particular locality

Types of Differing Site Conditions (cont'd)

- **Type 1 Differing Site Condition**

- Must be materially different from the conditions indicated in the information about the job provided to bidders

- Examples:

- Differences in the quality of the substances encountered;
- Differences in the quantity of work required as a result of the condition; or
- Changes in the construction techniques required in order to deal with the conditions

- **Type 2 Differing Site Condition**

- Must be an unusual condition for the locality

- Must be unknown to the contractor at the time bid was submitted

Differing Site Conditions: Requirements to file a REA

- Upon discovery, written notice must be given to the contracting officer identifying the type of differing site condition
 - Do not disturb the condition prior to written notice being given
- The Contracting Officer shall investigate the conditions after receiving notice
- A REA may only be submitted if written notice was given

The Government's Duty to Cooperate

- The Government has an implied obligation to carry out its duties under a contract in good faith
- The duty not to hinder and the duty to cooperate are aspects of the implied duty of good faith and fair dealing
- The duty of good faith and fair dealing is limited by the original contract
 - Prevents a party's acts or omissions that are inconsistent with the contract's purpose and deprive the other party of the contemplated value
- Bad faith is not an essential element of a breach of the implied duty of good faith and fair dealing claim

Differing Site Conditions: Recent Decision

- Metcalf Construction Company, Inc. v. US, 742 F.3d 984 (Fed. Cir. 2014)
- Broad disclaimer language in a request for proposal and contract negated a contractor's reliance on a Government soils report and caused the contractor to bear all risk for any errors in the report
- Clarifies that claims for breach of implied duty of good faith and fair dealing do not require contractors to prove the Government specifically targeted their contracts to reappropriate the benefits they expected to receive

Who to Reply Upon Who Has Authority to Bind the Government

- Contracting Officer
- Formally Designated Representative
 - COR
 - COTR
 - GTS
 - GTE
- Representative Assigned Without Formal Designation

Methods of Appointing Authority

- No FAR guidance
- Guidance offered in Agency regulations
- Appointment made in writing to each contractor affected by:
 - Separate letter or
 - Designation in the contract (FAR 52.246-12)

When the Government Is Bound

- COR/COTR is found to have acted within the scope of his/her authority
- The Government is not bound by apparent authority
- When implied actual authority is found
 - Court must find that the Agency intended to grant authority but failed to do so
- When an unauthorized action is ratified by an authorized representative

Questions?

Thank you for joining us today.