

ALL STATE BOILER WORK, INC.**CONTRACT NO. V631C-657****VABCA-4537****VA MEDICAL CENTER
NORTHAMPTON, MASSACHUSETTS**

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**OPINION BY ADMINISTRATIVE JUDGE KREMPASKY
(RULE 12.3 ACCELERATED PROCEDURE)**

This is a timely appeal of the Respondent, Department of Veterans Affairs' ("VA or Government") denial of Appellant, All State Boiler Work, Inc.'s ("ASBW") claim for unabsorbed home office overhead based on the VA's 58 day suspension of work under Contract No. V631C-657 ("Contract") between the VA and ASBW for the boiler plant upgrade at the VA Medical Center in Northhampton, Massachusetts ("VAMC Northhampton").

The record before the Board consists of: the pleadings in this appeal; the 49 Exhibit Appeal File (cited as "R4, tab ___"); 6 exhibits placed in evidence by ASBW at the hearing (cited as "Exh. A-___"); 16 exhibits placed in evidence at the hearing by the VA (cited as "Exh. G-___"); 1 Joint Exhibit (cited as "Exh. J-1, ¶ ___") consisting of the 13 uncontroverted paragraphs of the 25 paragraph Joint Comprehensive Statement of Facts filed by the parties prior to the hearing; the transcript of the hearing in these appeals (cited as "Tr. ___"); and, the parties' briefs.

A one day hearing was held in Hartford, Connecticut. Both entitlement and quantum are before the Board.

In its August 30, 1994 claim to the Contracting Officer, ASBW claimed \$39,962 in unabsorbed home office overhead and other delay costs. However, in its Notice of Appeal, ASBW stated that its claim was \$55,739.74. On January 10, 1995, ASBW elected to proceed under the Board's Accelerated Procedure pursuant to Rule 12.3. Consequently, by Order, the Board limited ASBW's recovery in this appeal, if any, to a maximum of \$50,000. As further refined in the proceedings in this appeal and restated in its Posthearing Brief, ASBW now claims \$41,644 (\$718 per day x 58 days) in unabsorbed home office overhead resulting from the VA's suspension of work. The parties have stipulated that ASBW is entitled to \$9,628 in direct and field office overhead costs as a result of the suspension of work giving rise to this appeal. Thus, the Board's task in this appeal is limited to determining whether ASBW is entitled to recover unabsorbed home office overhead costs, and the amount of such costs, if any, as a result of the suspension of work.

FINDINGS OF FACT

The VA awarded the Contract to ASBW on December 10, 1993; the Contract price was \$1,354,285. ASBW received the Notice to Proceed on January 13, 1994. The Contract performance period was 360 days from the date of ASBW's receipt of the Notice to Proceed. Thus, the Contract completion date was January 8, 1995. The completion date was subsequently extended 30 days by modification, for reasons unrelated to the suspension of work, to February 7, 1995. The Contract was substantially complete on March 1, 1995, 22 days after the adjusted scheduled completion date. (Exh. J-1, ¶¶ 1-3, R4, tabs 1-2; Tr. 20, 31)

The Contract (R4, tab 31) includes the standard Federal Acquisition Regulation ("FAR"), 48 C.F.R. Chapter 1, and Department of Veterans Affairs Acquisition Regulation ("VAAR"), 48 C.F.R. Chapter 8, clauses usually found in VA construction contracts, including the following clauses relevant to this appeal:

SUSPENSION OF WORK, FAR 52.212-12 (APR 1984)
 DISPUTES (ALTERNATE I), FAR 52.233-1 (DEC 1991)
 DIFFERING SITE CONDITIONS, FAR 52.236-2 (APR 1984)
 SCHEDULES FOR CONSTRUCTION CONTRACTS, FAR 52.236-15 (APR 1984)
 CHANGES, FAR 52.243-4 (AUG 1987)
 SCHEDULE OF WORK PROGRESS, VAAR 852.236-84 (NOV 1984)
 CONTRACT CHANGES, VAAR 852.236-88 (JUN 1987)

The Contract, in Specification Section 01010-1.5.G., required ASBW to submit a schedule providing for prosecution of the work in eight phases on dates mutually agreeable to the "Medical Center Director, the COTR [Contracting Officer's Technical Representative] and the Contractor." Phases I and II are described in the Specification as follows:

Phase I: Contractor, within 60 days from the date of award of contract shall submit all major equipment, material, and subcontractor selections for approval.

Phase II: Contractor shall finalize all major equipment, material, and subcontractor purchases. Establish schedule for delivery of major equipment including burner parts, burner controls, deaerator, pumps, instrument and controls; schedule demolition in coordination with deliveries such that installation of major equipment will start without delay following demolition.

Subparagraphs A and C of Paragraph 1.6 of the Contract Specification Section 15051, *Basic Requirements and Methods (Boiler Plant)* state in pertinent part:

A. Work consists of phased replacement of existing equipment in existing boiler plant while the plant remains in service.

* * * * *

C. Where work involves demolition and construction in an existing operating boiler plant, work must be scheduled to permit operation of the boiler plant and to maintain service with one spare boiler available (In addition to those required for serving the load) at all times.

ASBW submitted its initial construction schedule on February 2, 1994. This schedule shows an early completion date of September 30, 1994 and provides for ASBW's Contract submittals being provided to the VA between January 31 and April 25, 1994, and the VA's submittal review and approval taking place between January 31 and May 31. Thus, ASBW's schedule proposes that all submittals would be in the VA's hands within 108 days of the Notice to Proceed, not the 60 days called for in the Specifications. The completion date, 90 days earlier than the Contract completion date shown in ASBW's schedule, was based on ASBW's intention to use temporary boilers. Use of temporary boilers would permit ASBW to work simultaneously on all three boilers "off-line." Working on the boilers "off line" would allow ASBW to complete the work much faster than if it had to insure that two boilers remained operational at all times, as provided for in the Contract. The VA rejected this schedule because it did not provide for all submittals within 60 days of the Notice to Proceed and because of ASBW's proposed use of a temporary boiler or boilers. ASBW resubmitted its construction schedule for approval seven additional times; the VA never approved a construction schedule for this project (Exh, A-1; Tr. 19, 33-34, 58-59, 94-106)

ASBW originally intended to use a single temporary boiler. When the VA objected that this did not meet the requirements of Section 15051, ASBW proposed to provide two temporary boilers, a large one and a small one. However, ASBW conditioned this suggestion on the VA being responsible for the rental cost of one of these boilers. The VA rejected this proposal and ASBW did not use temporary boilers during construction. ASBW's Project Manager, Mr. Ververis, variously testified that, if the VA had permitted use of temporary boilers, work could have been completed earlier than 270 days and that the VA's refusal to permit use of temporary boilers had no impact on ASBW's ability to complete the Contract in 270 days. The record contains no evidence that ASBW ever submitted a schedule showing early completion that did not include use of the temporary boiler(s). (Tr. 33-36, 94-97, 106)

On February 23, 1994 ASBW wrote to the VA COTR, Mr. Miller, about its concern with the VA's slowness in responding to its submittal and Request for Information ("RFI"). The Contracting Officer ("CO"), Ms. Hamelin, referencing ASBW's letter, expressed her concern that RFIs and submittals be dealt with promptly. On February 24 and 25, the CO forwarded VA's responses to submittals and RFIs; in each of these letters, the CO apologized for the VA's delay in responding. (R4, tabs 3-5)

On March 23, 1994, 69 days after award, the CO, by letter to Project Manager Ververis, expressed concern with ASBW's failure to provide all of its submittals within 60 days and directed ASBW to provide its submittal schedule by March 31, 1994. ASBW, on March 24, 1994, provided VA with a revised schedule. The schedule continued to show equipment submittals taking place through mid-April, with submittal review concluded at the beginning of May 1994. ASBW subsequently revised the date by which it would have its submittals to the VA to May 13, 1994. (R4, tabs 7-8, 14)

After a series of meetings and conversations in the March 23-28 time frame, the VA permitted ASBW to begin work prior to submission and approval of the Contract submittals and gave ASBW an additional 30 days to complete its submittals. (Tr. 101-102)

ASBW mobilized on site March 28, 1994, 74-days after the Notice to Proceed and approximately 3 weeks after the mobilization date on the construction schedule submitted by ASBW to the VA. The next day, on March 29, 1994, ASBW discovered suspected asbestos in the casing of Boiler #3. After the VA verified the presence of asbestos in the boiler casing, the VA issued a suspension order under the Contract SUSPENSION OF WORK clause on March 30, 1994. In the suspension order, the CO stated that the suspension would be for a minimum of two weeks. (Exh. J-1, ¶¶ 4-5; R4, Tabs 10-11)

After some discussion with ASBW, in which ASBW indicated its willingness to subcontract the asbestos abatement work under the Contract, the VA determined that it was necessary to competitively acquire asbestos abatement services. The asbestos abatement was separately contracted. Because it felt it could not bid competitively, ASBW requested that it not be sent a bid package for the asbestos abatement project. (Exh. J-1, ¶6; Tr. 38, 54, 90-91)

On March 30, 1994, the date of the suspension of work, out of a total of 172 required Contract submittals, 9 of ASBW's Contract submittals had been approved and 45 other submittals had been forwarded to the VA; an additional 93 submittals were forwarded to the VA between March 30 and May 26, 1994. (Exh. A-2)

During the entire term of the suspension, ASBW was not permitted to perform any construction work at the site. ASBW could have performed other work on site, albeit out of sequence, based on the submittals that had been approved. Because of concern for potential exposure of ASBW personnel to asbestos and the fact that any work that would have been performed would have been out of sequence, the VA did not permit any work to be performed. The VA vacated the suspension of work order, after 58 days, on May 26, 1994. (R4, tab 18; Tr. 48-50, 54-55)

During the suspension of work, ASBW had approximately \$5 million of additional bonding capacity and continued to actively bid for new work. ASBW, as a matter of its deliberate business practice, maintained its work-on-hand volume at approximately half of its bonding capacity. Although ASBW bid several jobs smaller than those for which it would typically compete during the suspension period in an effort to generate revenue, it was impractical for ASBW to bid, obtain contracts, and begin work on new projects in the 58 day period of the suspension. In general, however, ASBW was not prevented from bidding on new projects by reason of the suspension of work. (Exh. J-1, ¶¶ 22-23; Tr. 68-70, 72, 76)

In a March 30, 1994 letter, in response to the VA's Suspension of Work Order, ASBW informed the VA that it would be seeking an equitable adjustment for the suspension. Responding to the VA's request for the information, ASBW informed the VA that its daily home office overhead rate, calculated in accordance with the "Eichleay" formula was \$722.33. ASBW reiterated this home office overhead rate in three subsequent submissions to the VA in May and June of 1994. The last of these, dated June 2, 1994,

was its claim of \$55,739.74 for a modification equitably adjusting the Contract for the costs associated with the suspension of work. (R4, tabs 12, 15, 16, 17, 19)

The VA obtained the services of the Defense Contract Audit Agency ("DCAA") to audit ASBW's claim. In its report, dated July 29, 1994, the DCAA questioned the entirety of ASBW's daily home office overhead rate claim of \$722.33 stating:

The contractor calculated its claim for recouping overhead cost using a variation of the Eichleay formula based on a representative period (1 January 1994 to 30 April 1994), which we concur with. In making its calculation the contractor did not exclude all unallowable cost from the expense pool. During our audit we determined that the contractor had reassigned its personnel to other projects during the contract suspension. In addition, the contractor was unable to show that it suffered financial damage as a result of the delay. Therefore, we have questioned this cost in its entirety.

(R4, tabs 21-23)

Since the claim was in excess of \$50,000, the CO, on August 10, 1994, informed ASBW that it had to certify the claim in accordance with FAR 33.207 before it could be considered. On August 30, 1994, ASBW submitted a revised certified claim totaling \$39,962. This revised claim, received by the CO on September 1, 1994, included a home office overhead claim at a daily rate of \$523. (R4, tabs 24-25)

The CO obtained a DCAA audit of the revised claim. In its audit report of November 2, 1994 the DCAA, with regard to home office overhead stated:

The Contractor proposed a revised home office overhead daily rate of \$523 per day. The contractor did not provide any rationale as to how this rate was calculated. We calculated a daily rate of \$738 based on the dollar amounts included in the contractor's submission. In making its calculation, the contractor did not exclude all unallowable cost from the expense pool. We have adjusted for the unallowable costs, have recomputed a daily overhead rate of \$718, which is still \$195 higher than the proposed home office overhead rate of \$523.

Since the contractor has not yet provided any additional data to support the claim for home office overhead, our audit position in Audit Report Number 2251-94A17200001, dated 29 July 1994, has not changed. We have questioned this cost in its entirety.

ASBW does not dispute the DCAA's adjusted daily home office overhead rate. (R4, tab 27; Tr. 61-61)

ASBW's fiscal year ("FY") runs from May 1 to April 30; thus, the Contract term (January 8, 1994 - February 7, 1995) encompassed parts of ASBW's FYs 94 and 95); the site performance and suspension of work (March 28, 1994 - March 1, 1995) took place primarily in ASBW's FY 95. (Tr. 78-79)

ASBW generally maintains a \$3 - 4 million volume of "work on hand" (awarded contract amounts less amounts billed against those contracts) from year to year. However, due to business conditions in the Northeast United States, this volume was substantially less in August - November 1994. ASBW's home office overhead expenses generally average 20-25% of sales (billings); FY 95 home office overhead expenses were approximately 25% of sales. (Exhs. A-3, 4, 5; Tr. 77-78)

By a final decision issued on November 17, 1994, the CO allowed \$522 of ASBW's claim, the costs of operational rentals during the suspension, and denied the rest of the claim. In regard to the costs of home office overhead, the basis for the denial was that ASBW personnel were assigned to other projects during the suspension and ASBW had not demonstrated any "financial damage" resulting from the suspension. (R4, tab 29)

DISCUSSION

ASBW seeks recovery under the Contract SUSPENSION OF WORK clause for 58 days of home office overhead costs resulting from the VA's suspension of work. That the VA suspended ASBW's work at the site for 58 days is not in dispute. ASBW's claimed entitlement rests on Paragraph (b) of the SUSPENSION OF WORK clause which states:

If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the Contracting Officer in the administration of this contract . . . an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the contract modified in writing accordingly.

In determining whether ASBW is entitled to the recovery under the SUSPENSION OF WORK clause, ASBW must show: 1) that the Contract work was suspended for an unreasonable period; 2) the number of days the suspension delayed completion of the work; and, 3) the increased cost of performance, if any, caused by the suspension.

The VA concedes that it suspended performance of the contract and has stipulated the amount of direct and field overhead costs ASBW is entitled to recover for the suspension. We turn to the second and third tests in order to determine whether ASBW is entitled to recover additional home office overhead costs. In order to determine whether ASBW has met its burden with regard to the second and third tests, we must first determine the Contract completion date.

ASBW asserts that it planned to complete the Contract in 270 days on September 30, 1994, or 90 days earlier than the date set forth in the Contract documents. ASBW supports its assertion that it could have completed the Contract early with its construction schedule, submitted to the VA but never approved, showing the 270 day completion of

the work and the broad testimony of its project manager that he always planned early completion of a project. This early completion schedule is dependent on the use of temporary boilers. The use of the temporary boilers is the most significant reason the VA refused to approve ASBW's schedule. There is no question that the VA had the right, under the terms of the Contract, to disapprove the use of the temporary boilers. ASBW also asserts that it could have completed the work in 270 days regardless of whether it was permitted to use temporary boilers. This assertion, however, is supported only by the conclusory testimony of ASBW's project manager that use of the temporary boilers had no effect on ASBW's planned early completion.

In order to sustain the early completion schedule, ASBW must establish that, from the beginning of the Contract it: "1) intended to complete the contract early; and, 2) had the capability to do so; and 3) actually would have completed early but for the Government's actions." *Interstate General Government Contractors v. West*, 12 F. 3d 1053, 1059 (Fed. Cir. 1993). On this record, although ASBW may have had an original intent to finish early, it has failed to prove that it had the capability of doing so without the use of temporary boilers. ASBW's "proof" of its capability to finish early consists only of broad, general assertions. Such generalities, in the absence of corroborative objective, specific data or testimony, is insufficient to prove the early completion schedule. *Dawson Construction Company, Inc.*, VABCA Nos. 3306-3310, 93-3 BCA ¶ 26,177, at 130,314. In addition, ASBW's failure to mobilize at the site until 3 weeks after the date indicated in its schedule and its tardiness in submittal submissions calls into question both its intention and capability of finishing early and belies a conclusion that it would have completed the work in 270 days but for the suspension. We also note that ASBW apparently made little or no effort to adhere to the early completion schedule it now asserts.

Thus, we must look at the Contract's bargained for completion date as the benchmark date to be used in our measurement of the extent of the delay in completion of the work occasioned by the suspension. The original Contract completion date of January 8, 1995 was extended until February 7 (30 days) by modification. The Contract was substantially complete on March 1, 1995, 22 days after the extended completion date. In light of the parties' stipulation to ASBW's entitlement for direct and field overhead delay costs resulting from the suspension, we are satisfied that the suspension as discussed above, was unreasonable and delayed completion of the work by 22 days.

Inasmuch as the parties do not dispute the daily overhead rate as adjusted by the DCAA, having now established the exact period of the Government caused delay for which ASBW is entitled to recover, the task before the Board would ordinarily not be a difficult one. But the Government, in its brief, implicitly asks us to thoroughly reexamine the rationale behind the *Eichleay* formula. In light of the Federal Circuit's continuing acceptance of that approach we decline the invitation. Of greater consequence, however, is the Government's understanding of the legal preconditions to recovery which have been articulated by the Court. The Government argues that:

The prevailing rule as stated by the Federal Circuit requires an "inability" to take on work during the "contract period" even had such work been available. The *Eichleay* prerequisite refers to the *capability* of the contractor to take on work during

the contract period, and not to the logistical difficulties of obtaining "substitute" work during the period of a particular suspension

* * * * *

The Board should reject All State's Eichleay claim because All State's bidding and ability to take on other work were completely unaffected during the suspension and during the remainder of the contract period.

(Gov't Br. at 19)

The Government attacks the Contractor's "narrow focus" on the inability to "substitute a cash flow during a narrow window of time, i.e., whether the contractor can obtain work to perform during the precise period of the suspension." It argues that:

Because it will always be impossible to precisely substitute a partially displaced stream of earning the approach makes recovery virtually automatic. By focusing on the attempted replacement of a displaced cash flow, moreover, the "uncertainty" of duration is emphasized, and the contractor by definition, will always be able to show lower receipts and a reciprocally higher rate of overhead, absent an anticipated stream of earning, to establish a hypothetical "disruption" between revenue and overhead.

(Gov't Br. at 30)

We begin our analysis by observing that, by definition, home office overhead costs are the indirect, general costs of a contractor's facilities and business operation for the performance of all its contracts. *See* FAR 31.203-205. Such costs are allocated to the direct costs of performing a contract on some fair, prorated basis. Usually this is done by establishing a percentage mark-up rate that is applied to the direct costs of performing the contract. Thus, in a "pure" change that simply adds work (and/or additional performance time) to a contract, the mark-up on the direct costs of the additional work "absorbs" a contractor's home office overhead costs. However, where, because of a Government caused delay or suspension of work, a contractor is prevented from performing contract work for which it could bill, there are no direct costs against which the continuing home office overhead expenses may be allocated. These home office overhead costs may then be termed as "unabsorbed" or "extended" home office overhead. In Federal construction contracts, the amount of such unabsorbed home office overhead resulting from a compensable suspension of work is computed by use of a formula first used in *Eichleay Corp.*, ASBCA No. 5183, 60-2 BCA ¶ 2688, *affd. on reconsideration*, 61-1 BCA ¶ 2894. The *Eichleay* formula is an arithmetic computation by which a daily home office overhead rate is computed; the amount of recoverable unabsorbed overhead is determined by multiplying the daily rate by the number of days of compensable delay. *Wickham Contracting Company, Inc. v. Fischer*, 12 F. 3d 1574 (Fed. Cir. 1994); *C.B.C. Enterprises, Inc. v. United States*, 978 F. 2d 669 (Fed. Cir. 1992).

Since 1984, the Federal Circuit has made it absolutely clear that, when a compensable delay resulting from suspension of work occurs, the *Eichleay* formula is the "exclusive means available for calculating unabsorbed overhead to the delayed contract." *Wickham*, 12 F. 3d at 1580-81 citing *Capital Electric Co. v. United States*, 729 F. 2d 743 (Fed. Cir. 1984).

However, before the *Eichleay* formula may be used to compute unabsorbed overhead costs, a contractor must satisfy *two prerequisites* that show that the suspension or delay disrupted the allocation of home office overhead costs by reducing the direct costs against which the home office overhead costs are allocated. These prerequisites are: 1) a showing that the contractor was required reasonably to "standby" during the delay period; and, 2) it was impractical for the contractor to take on additional jobs during the delay period. *Interstate General*, 12 F. 3d at 1057; *C.B.C.*, 978 F. 2d at 675. In this case, it is the second prerequisite that is a