A New Twist in Determining Eichleay Damages

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To claim against the government for extended home office overhead (i.e. delay costs) during a government mandated shut-down of indeterminate length, the courts have consistently applied the Eichleay formula. This formula requires that a contractor show: (1) proof of a delay or suspension of contract performance for an uncertain duration which disrupts the contractor’s stream of revenue needed to pay its fixed home office overhead costs; and (2) an inability to take on additional work which would provide a substitute stream of revenue to pay for those costs. Wickham Contracting Co. v. Fischer, 12 F. 3d 1574, 1577 (C.A. Fed. 1994).

The Federal Circuit Court of Appeals appeared to be relaxing the burden on contractors to prove the second prong of this formula (i.e. an inability to take on additional work during the standby period) in Mech-Con Corp v. West, 61 F.3d 883, 886 (Fed. Cir. 1995). There, the Court held that when the contractor is put on standby by the government, the contractor has a prima facie case of entitlement to Eichleay damages. Id. This holding is consistent with the Court's earlier dicta in Wickham, where it acknowledged that "when the period of delay is uncertain and the contractor is required by the government to remain ready to resume performance on short notice . . . the contractor is effectively prohibited from making reductions in home office staff or facilities or by taking on additional work." Wickham, 12 F. 3d at 1578. Thus, while the burden of proof ultimately stays with the contractor to prove inability to take on additional work by a preponderance of the evidence, the burden of production temporarily shifts to the government to prove that the contractor was able to take on additional work. If the government presents no evidence or fails to overcome it's burden of production, the contractor should be entitled to Eichleay damages.

On January 30, 1997, however, the decision in Satellite Elec. Co. v. Dalton, 105 F.3d 1418 (1997), was issued. In Satellite, the Court narrowed the application of Mech-Con for delays occurring near the end of a contract. Although the contractor in Satellite was able to prove delay and standby status, the Court found that the government successfully rebutted the presumption that the contractor was not able to take on additional work. The government presented evidence that the work suspension occurred when the project was 96.7% complete (less than $30,000 remaining on a $845,798 contract). The government also showed that during the standby periods, lasting a total of 228 days, Satellite submitted bids on 49 different contracts and was awarded two contracts. In addition, the president of Satellite admitted that they could have taken on more work if it had been available (before the BCA, the president attributed it's inability to win contracts on other contractors bidding at a loss. 95-2 BCA 27,884, 139,089). The Court thus upheld the BCA finding that;

[The evidence] does not show an inability to take on additional work for any reason attributable to the Government. . . . There must be an impairment of a contractor's ability to take on other work that is
attributable to the Government-caused delay to be reimbursed for the period of delay under the Eichleay formula.


While Satellite does not change the overall substantive law for determining Eichleay damages, it does lessen the government's burden of proof in establishing a contractor's ability to take on additional work when the suspension occurs near the end of the contract. In Mech-Con, the Court of Appeals stated that the government must "show that the contractor . . . was able . . . to take on other work during the delay." Typically, in a civil suit, the threshold to overcome a prima facie case would be a preponderance of the evidence. Satellite, however, in dicta, lowers this requirement by stating that the government need only "show" that the contractor was able to take on additional work and not "prove" that the contractor was able, or in fact did, take on other work. 105 F.3d at 1423. The burden that the government now has to overcome is something less than a preponderance of the evidence.

The Court explains its differentiation by opining that the Eichleay formula is premised on the contractor proving it could not take on additional work solely because of the government's actions. Thus, "if the government shows that the contractor was able to handle other work . . . it refutes the underlying fact on which Eichleay damages are based." 105 F.3d at 1423. Moreover, the thrust of the burden remains on the contractor to prove that the government, as opposed to the contractor or a third party, is liable for Eichleay damages.

Realistically, courts in the future will be looking at the same criteria they were looking at before Satellite to determine a contractor's "ability" to take on additional work. This may include whether the government contract at issue is precluding the contractor from obtaining additional bonds, how much work is required on the contract when the suspension occurs, and how large the contract was and whether this amount is reasonably likely to offset overhead costs. Satellite was 96% complete with the project and the remaining work represented only $30,000. Furthermore, although Satellite had a poor credit record with its bonding company that precluded it from being able to acquire other bonds, Satellite was actively bidding on numerous contracts. The Court thus surmised that the Government's suspension did not interfere with Satellite's ability to obtain work.

The major drawback to the contractor is what to do when a suspension occurs near the end of a contract. Presuming that the contractor is in good standing with it's bonding company (i.e. it's able to obtain bonds for any contracts awarded) should the contractor rigorously bid on new contracts? The Satellite Court seems to waffle on this issue. At one point the Court cites Altmayer v. Johnson, 79 F.3d 1129, 1135 (Fed. Cir. 1996), for the proposition that bidding on contracts at the end of the subject contract "does not establish that [the contractor] was able to reduce its overhead or take on other work during the delay." 105 F.3d at 1422. Yet, the Court seemed particularly concerned with the number of contracts Satellite was bidding on and used the information as a factor to deny Satellite entitlement to Eichleay damages.
The harsh reality of the Court's position is that it would seem more unreasonable for a contractor to not bid on new contracts when it's at 97% completion. Moreover, it would be considered sound business practice to have overlapping contracts. Thus, for the Court to consider it as a factor for denying Eichleay damages only punishes the contractor, stifles competition within government contracting by discouraging contractors to bid new contracts and places the entire burden of potential losses on the contractor for government suspensions. This line of reasoning, however, seems consistent with the Federal Circuit's current "pro-government approach" in awarding Eichleay damages.