

# The Teton Update

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## Eichleay Clarified Again

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*Interstate General Government Contractors, Inc. v. United States 12 F. 3d 1053 (Dec. 6, 1993)*

A construction contractor has won the battle but lost the war on yet another Eichleay case. Fortunately, lessons to be learned from this precedent setting case can help other contractors position themselves to obtain full recovery in delay situations.

The United States Court of Appeals for the Federal Circuit recently rendered a decision against Interstate General Government Contractors, Inc. which provides some common sense guidance on the application of the Eichleay Formula. Specifically, it clarifies the Court's previous CBC ruling by defining the "standby" test and noting that a limited bonding capacity is not the only means by which to demonstrate an inability to take on other work.

Interstate was delayed from starting work as a result of a bid protest. Its work force was shifted to other work or let go while it awaited the outcome of the protest. During this delay, Interstate was not able to bid other work because it was at its bonding capacity. The Contracting Officer and the Armed Services Board of Contract Appeals denied Interstate's Eichleay costs because its "work force was gainfully working at other jobs and not standing by awaiting the NTP,"

The Court of Appeals found that the Contracting Officer and the Board had applied an incorrect legal test concerning "standing by." The court noted that the "standby" test focuses not on the idleness of the contractor's work force which is a direct cost, but on suspension of work on the contract and its impact on indirect home office costs. The court found that application of the Eichleay formula does not require that the contractor's work force be idle. It simply requires that overhead be unabsorbed because performance has been suspended and that additional contracts are unavailable during the delay when payment for the suspended contract would have supported overhead.

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The court also noted that a contractor is not required to have exhausted its bonding capacity to demonstrate that it was unable to take on other contract work and thereby meet the second litmus test for Eichleay. Rather, the “uncertainty in duration of delays or suspension can also adversely affect the contractor’s ability to absorb the overhead by taking on additional work during the delay periods, because at any given moment the contractor could be required to shift his resources to resume work on the stalled project.” This finding is a most effective rebuttal to a typical basis upon which the Government denies Eichleay.

The court precisely and clearly summarized its findings as follows:

The proper standby test focuses on the delay or suspension of contract performance for an uncertain duration, during which a contractor is required to remain ready to perform. Standby combined with the inability to take on additional work are the two prerequisites for application of the Eichleay formula, because taken together they prevent the contractor from mitigating unabsorbed overhead when it is incurred.”

Interstate did not sustain its Eichleay position because it could not prove that it incurred compensable unabsorbed overhead costs when despite the delayed Notice To Proceed, it still finished the project prior to the original contract completion date. Nonetheless, the court has provided overall guidance on key aspects of the application of Eichleay that should result in less confusion, less litigation and easier recovery under a defined set of circumstances.

Interstate also demonstrates that it is more important than ever for the contractor to exercise forethought when “papering” the file and while making business or financial decisions so as to enhance opportunities to obtain full recovery under the guidelines of this precedent setting Eichleay case. ~

### **About the Author**

Mr. Forget founded Teton Construction Consultants in 1984. He specializes in the prevention of claims and resolution of disputes on Federal construction projects throughout the U.S.

Prior to 1984 Steve worked ten years with the Corps of Engineers as a military officer and civilian, negotiating changes and claims on construction contracts.