

The Teton Update

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Eichleay Reinstated---The Continuing Saga

All State Boiler, Inc. V. United States F.3d (June 25, 1998)

A construction contractor has won a significant battle in the war to obtain Eichleay damages during a period of delay. This victory essentially reinstates Eichleay for most construction contractors.

The Eichleay formula is a method by which contractors obtain recovery for unabsorbed home office overhead costs during periods of delay when income from a delayed project is minimal but home office costs continue. The formula obtains its name from the firm that filed the case in 1960. Since that first decision the Eichleay formula has been one of the most heavily litigated aspects of Federal contract law!

The Spring 1994 issue of the "Teton Update" reported on the precedent setting Interstate case that finally established some seemingly unambiguous guidelines for the utilization of the formula. Case law had evolved to establish the following two-part test as a necessary prerequisite to obtain Eichleay damages:

First, that the contractor is on "standby". 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.

Second, that the contractor is unable to take on other work to replace the income lost from the delayed contract.

Subsequent Government litigation efforts have whittled away at the applicability of the formula. The Federal Government won a significant victory at the U.S. Court of Appeals for the Federal Circuit in the *Satellite Elec. Co. v. Dalton, 105 F3d 1418 (Fed. Cir. 1997)*. This case essentially "gutted" the applicability of the formula for almost all construction contractors when it required a contractor to prove that it could/did not bid on new work during the period of suspension. The reality of contracting is that contractors continually bid work if they are to stay in business. The Satellite case limited Eichleay recovery to those few contractors that were at their bonding limit or were essentially out of business.

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Since January 1997, the Government has seized on this precedent setting ruling in the Satellite case to deny contractors Eichleay recovery during periods of delay if they were able to bid on other work. Several of our clients were denied significant delay cost recovery as a result of Satellite. This case was obviously wrong when viewed from the perspective of the contracting community and even some board judges informally agreed while advising that their hands were tied by the precedent setting case.

Fortunately, in *All State Boiler, Inc. V United States F3d (June 25, 1998)*, the same court rejected the Government's interpretation that bidding other work during a period of delay negated Eichleay recovery. The court found such a position to be "counter to public policy and industry practice", in addition to being too literal an interpretation of Satellite. In another manner of speaking, common sense now prevails. All State Boiler is a precedent setting case that will govern this situation until the next anomaly in the Eichleay war surfaces.

All State Boiler 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.

Should you have any questions on delay damages or other matters related to Federal Contract issues, please contact Steve Forget for a free consultation.

About the Author

Mr. Forget founded Teton Construction Consultants in 1984 after 10 years in construction contracting for the Corps of Engineers as a military officer and civilian. His background is unique in that he has concentrated primarily on the early resolution of construction changes and claims based on his extensive knowledge of government procurement regulations and his creative use of alternative dispute resolution techniques. Steve is a nationally recognized speaker on the subject of Federal construction contract negotiations and is frequently called upon by the Corps of Engineers to present disputes resolution programs to its contract administrators.