

FOURTH DISTRICT REAFFIRMS EICBLEAY RULE FOR HOME OFFICE OVERHEAD CLAIMS

By: Douglas Roberts, Esq.

In Martin County v. Polivka Paving, Inc., 2010 WL 1881089 (Fla. 4th DCA 2010) the court reviewed the issue of whether a contractor on a government project could be awarded damages for home office overhead when a contract was delayed, but not entirely suspended by the government.

Martin County ("County") and Polivka Paving, Inc. ("Contractor") entered into a contract for the construction of soccer fields at a County park ("Project"). After unforeseen site conditions delayed construction, adding several months to the contract's completion date, the County and the Contractor agreed on change orders for some work which increased the price and extended the time of the contract. However, when the contractor finished the Project, the County failed to pay for the change orders and delay costs, among others.

Contractor sued the County for breach of contract for the County's failure to make payment. The Contractor sought to recover delay damages, including "field office" overhead and "home office" overhead which were extended relative to the Project because of its delayed completion. The County contended that no home office overhead could be due to Contractor because there was not a complete suspension of the work by the government, only an alleged delay of work. Therefore, the elements to satisfy the standard for entitlement to home office overhead damages could not be met because no suspension had occurred.

At trial, Contractor's expert agreed that no suspension of work had occurred. Therefore, the *Eichleay* formula¹, which is used to calculate home office overhead as a component of delay damages, was not applicable. However, Contractor's expert asserted that because a delay had nonetheless occurred, Contractor should be entitled to its extended home office overhead.

The trial Court denied the County's motion for a directed verdict on Contractor's home office overhead claim, which would have precluded the claim from going to the jury, and the jury found Contractor was entitled to an award of its lost home office overhead, among other damages.

The Court held that "[e]ntitlement to [home office overhead] damages depends on proof of three elements: (1) a government-imposed delay (2) that the government required the contractor to "standby" during the delay; and (3) while "standing by," the contractor was unable to take on additional work.

The Appellate Court found that that "[h]ome office overhead costs are those [costs] that are expended for the benefit of the whole business, which by their nature cannot be attributed or charged to any particular contract. They are fixed costs that are allocated on a pro-rata basis among various contracts." Because there had been no complete government suspension of the work, the Court found that Contractor was not seeking home office overhead, but additional costs directly attributable to the contract. Therefore, the Court reversed the award of home office overhead in favor of the Contractor.

This case illustrates the test for home office overhead when a contractor is seeking delay damages against the government. If the government merely delays a project, without a suspension of the work, home office overhead will not be awarded. In addition to the other two elements of the rule (a government imposed delay and a contractor's inability to take on additional work during the delay), there must be a complete suspension or "standby" regarding the work.

About the Author:

About the Author: **Douglas J. Roberts** has been Board Certified in Construction Law since 2005, the first year the Florida Bar offered its members the opportunity to achieve such a designation. He served as a judicial intern to the Honorable Arthur Birken, Broward County Circuit Court Judge, a certified legal intern with the Broward County State Attorney's Office, and has practiced in the area of Construction Law for over 15 years, during which he has represented the FDIC, Hewlett-Packard, a Panel Bankruptcy Trustee in the Southern District of Florida, as well as general contractors, subcontractors, suppliers, sureties and owners in South Florida. Mr. Roberts has been recognized by his peers as a "Florida Super Lawyer" and focuses his practice exclusively on construction law related representation. For more information, please contact him at djr@stearnsroberts.com or view the website at www.stearnsroberts.com.

The *Eichleay* formula:

1.
$$\frac{\text{Delayed Contract Billings}}{\text{Contractor's Total Billings}} \times \frac{\text{Total Home Office Expenditures}}{\text{Total Home Office Expenditures}} = \text{Overhead Allocable to Contract}$$
2.
$$\frac{\text{Overhead Allocable to Contract}}{\text{Days of Contract Performance}} = \text{[Daily Overhead]}$$
3.
$$\text{Daily Overhead} \times \text{Days of Delay} = \text{Extended Overhead}$$