BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of J. ROLAND DASHIELL & SONS, INC.	)	Docket Nos. 1324, 1360, 1369
Under DGS Contract No. KO-004-821-001	)	

February 22, 1991

Equitable Adjustment - Unabsorbed Overhead - Eichleay Formula - Use of the Eichleay Formula is a reasonable method for calculating a contractor's unabsorbed general and administrative expense attributable to an extended contract performance period resulting from owner caused delay.

Equitable Adjustment - The Board rejected under the facts of the appeal an Eichleay Formula type approach for the calculation of a contractor's field expense during periods of extended performance resulting from owner caused delay.

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OPINION BY CHAIRMAN HARRISON

Appellant on its own behalf and on behalf of its subcontractors timely appeals the denial by the Department of General Services (DGS) of its claims for an equitable adjustment and time extension for work on a portion of the Eastern Correctional Institution (ECI) known as Bid Pack #4 Housing Support Buildings and Gatehouses (and sometimes referred to herein as the project).[1]

Findings of Fact

1. Appellant executed a contract for the subject work on or about January 7, 1985 with notice to proceed being issued on January 14, 1985.

2. The work included construction of two housing support compounds and two gatehouses. Under the initial schedule (IS) agreed to by DGS the work was to be completed by October 1, 1986. Board Exhibit 1. However, the work was not finally completed until 278 days later on July 7, 1987, including a 30 day

[1]The appeal and decision concerns MSBCA 1324. MSBCA Nos. 1360 and 1369 were effectively withdrawn during the hearing.

period of acceleration for which DGS paid additional compensation and time extensions of twenty-one days[2] (20 days for electrical changes, 1 day for weather) agreed to by DGS.

3. The cause of the delay in completion is initially attributable to substantial revisions to the structural steel drawings to include beam to column connections which revisions were the responsibility of DGS and delayed the start of fabrication of the steel until on or about August 19, 1985 when the revisions were substantially completed. DGS concedes that it is responsible for 98 days of delay related to these revisions but asserts that Appellant is responsible for 55 days and that Appellant and DGS were concurrently responsible for 10 days of delay. DGS argues that the Appellant and its fabricator Bristol Steel and Ironworks, Inc. (Bristol) were directed and should have fabricated the steel piecemeal as drawings were approved. We find the record fails to support such alleged direction, that even had such direction been given steel erection would not have been appreciably speeded up and that Bristol and Appellant acted reasonably in delaying steel fabrication until the drawings were all approved. The record also reflects that Appellant, Bristol and Bristol's agent for shop drawing review (PDS) acted with reasonable promptness in all circumstances. See Tr. Vol 13, pp. 2546-2547, 2620-2653; Tr. Vol 12, pp. 2472-2483; Tr. Vol 10, pp. 2012-2020; Respondent's Supp. Rule 4 File, Vol 3, Tab 50.

The consequent delay in steel erection flowing from the delay in approval of the drawings delayed exterior masonry work which was then on the critical path from a planned start under the IS of May 24, 1985 to November 11, 1985.[3] Of this 170 day delay (May 24, 1985-November 11,

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[2] Whenever used herein "days" means calendar days unless otherwise stated.
[3] The planned steel erection under the IS commenced with D Section, Compound 2. See Appellants Ex. 10.

1985) DGS is responsible for 163 days. Appellant is responsible for the remaining seven days of delay after factoring in allowance for time required for bridging of the steel and mobilization for the masonry work during the period October 28, 1985 when steel erection should have been complete on D Section until November 11, 1985 when exterior masonry work actually commenced. Appellant is responsible for this seven day delay due to its failure to timely schedule fabrication and delivery of hollow metal frames (i.e. door and window frames) which needed to be installed following completion of steel erection and prior to commencement of efficient and practical exterior masonry work.

The Board also finds that DGS is responsible for 163 days of delay attributable to late approvals of the hardware submittals for the hollow metal frames, such that exterior masonry would have been delayed under the IS even if the structural steel had not been delayed. See Tr. Vol 6, pp. 1176-1212. In this regard we reject as unpersuasive the testimony of Mr. Colvin, Tr. Vol 5, pp. 884-1008, concerning the catalog cut issue and accept the testimony of Mr. Ryerson thereon. However, as noted such owner caused delay in the hardware approvals does not excuse the seven day delay for which we have found Appellant responsible for its failure to properly scheduled delivery of the frames to coincide under the actual schedule in the October/November 1985 time frame with the twenty-eight day period the record reflects would be necessary to erect the structural steel upon which placement of the frames was dependent.

4. Exterior masonry originally scheduled to commence under the IS on May 24, 1985 did not, as noted, commence until November 11, 1985. Under the IS exterior masonry was to commence on May 24, 1985 and all masonry was to be completed by January 25, 1986, a period of 246 days. Under the actual

schedule exterior masonry commenced November 11, 1985, and all masonry was substantially completed by January 16, 1987, a period of 421 days. The record reflects that the additional 175 (421-246=175) days to complete the masonry work from that originally planned was primarily due to a shortage of masons in the Eastern Shore labor force in November of 1985 when the masonry work actually commenced such that it was difficult for the masonry subcontractor Allen Tyler & Son, Inc. (Tyler) to adequately man the job. The record reflects that this absence of sufficient manpower was beyond Appellant's and Tyler's control when the masonry work actually commenced and that Tyler had sufficient manpower either on payroll or otherwise committed to work on the project under the IS which projected commencement of the masonry work in the late spring of 1985.[4] The record also reflects that the work was impeded by Tyler having to work in winter weather in the winter of 1985/86 without completion of exterior walls for Compound 2 which would have been completed under the IS prior to the onset of the winter of 85/86 and would have facilitated interior masonry work. Nevertheless, the record reflects that Tyler worked as expeditiously as possible under the actual conditions encountered (which necessitated use of reduced crew sizes from the size of crews that may be productively employed in warm weather months) through use of vinyl panels for weather shields, propane heaters to heat working areas and aggressive snow removal provided by Appellant. Tr. Vol 2, pp. 265-271. The record further reflects that Tyler made reasonable efforts

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[4]The record reflects that Tyler had sufficient masons on payroll working on five other jobs in the vicinity of the instant project that were nearing completion in late May 1985 to adequately man the project in the May-July 1985 timeframe. See Board Exhibits 4 and 5. Tr. Vol. 13, pp. 2656-2664. There is some question about the number of masons not on Tyler's payroll who made verbal commitments to Mr. Harry Grunden, Tyler's superintendent for the instant project, in February and March of 1985 that they could be available in the summer of 1985 for the project. We find from the record that at least 13 made such a commitment. See Tr. Vol 5, pp. 1073-1096; Tr. Vol 6, pp. 1153-1170.

to secure adequate manpower to include recruiting masons from Kentucky and housing them in the vicinity of the project. See Tr. Vol 2. pp. 271-279. The Board also finds that Tyler offered a reasonable wage for masonry work and that wages were not a factor in the availability of masons for the project. In this regard the Board notes the testimony based in part on a contemporaneous document of Mr. Keith Schedel the project manager for the DGS construction manager (Heery Program Management) that the steel delay caused the masonry contractor to lose forces. Tr. Vol. 13, pp. 2654-2657, 2663-2664.

As a result of the steel delay and consequent delay to masonry and the work of certain other trades dependent on masonry (i.e. owner caused delay), Appellant on its own behalf and on behalf of its subcontractors timely filed claims for time extensions and additional costs related to extended performance which the Board resolves as follows.

J. Roland Dashiell & Sons, Inc. (Appellant)

5. Based on the record the Board finds that Appellant is entitled to a 271 day time extension measured from the IS completion date of October 1,1986 up to the actual completion date of July 7, 1987 inclusive of the 21 days (20 days for electrical changes, 1 day for weather) already acknowledged by DGS, and exclusive of 7 days of delay attributable to Appellant's failure to properly schedule delivery to the job site of the hollow metal frames.

6. The Board finds that Appellant is entitled to compensation for field costs (referred to in Appellant's Proof of Costs as indirect cost of construction) incurred during its 271 day extended period of performance from October 1, 1986 to July 7, 1987; 278 days of delay as set forth in its Proof of Costs (pp. 16-17) less the 7 days which the Board has found Appellant to be responsible for. The nature and amounts of such costs after adjustment

pursuant to the Stipulation of the parties entered into after the hearing the Board finds to be allowable, allocable and reasonable under COMAR 21.09.01 and thus determines that Appellant is entitled to an equitable adjustment therefore in the amount of $182,077.[5]

7. Appellant has also claimed (1) costs for labor related to additional effort resulting from the method and time of year (winter) certain work involving the support compounds was required to be performed due to owner caused delay[6] and (2) costs for winterizing to permit masonry work to be performed in winter weather because owner caused delay required such work to be performed during the winter months of 1985/1986 rather than during the summer and fall of 1985 as contemplated under the IS. Appellant's claim for extra labor determined as a weighted average of labor expended during the entire period of performance[7] is in an amount of $56,646. The record reflects that such additional labor effort was necessary and that its method of calculating the additional labor cost is reasonable. Accordingly, Appellant is entitled to an equitable adjustment in the amount claimed, adjusted downward to reflect the lesser labor burden 17.16% v. 22% stipulated to by the parties following the hearing for an actual equitable adjustment of $54,398. The record likewise supports Appellant's claim for $12,247 in costs for winterizing and we determine Appellant is entitled to an equitable adjustment for such

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[5]Appellant originally claimed $190,784 for its indirect field costs over the entire 278 day extended period. This was reduced as a result of post hearing stipulation to $186,780. The Board has found 7 days of the claimed 278 day extended period to be the responsibility of Appellant. The amount allowed is thus reduced by $4,703 which represents the dollar amount attributable for these 7 days derived on a percentage basis as follows:

$$\frac{7}{278} \times \$186,780 = \$4,703; \quad \$186,780 - \$4,703 = \$182,077.$$

[6]This additional labor involved extra carpentry labor for layout, resetting of door bucks and interim and exterior borrow light frames and parapet blocking. See Appellant's Proof of Costs pp. I.A.-1 to I.A-6; Tr. Vol 7 pp. 1386-1415.

[7]See Appellant's Proof of Costs p I.A-6 and Exs. 21 and 22.

amount adjusted downward to $12,005 to reflect the lessor labor burden 17.16% v. 22% stipulated to by the parties following the hearing. See Appellant's Proof of Costs at pp. 14-15; Tr. Vol 2, pp. 278-279; Tr. Vol. 7, pp. 1383-1438; Stipulation of the parties entered into after the hearing.

8. Appellant claims pursuant to the Eichleay Formula[8] $202,570 in general and administrative expenses (sometimes referred to herein as g&a) for 278 days of extended performance calculated on a daily rate of $728.67. We find the use of the Eichleay Formula (i.e. percentage) approach to be an acceptable method for calculating this Appellant's g&a in this particular appeal. The record supports a daily rate of $718.14. See Appellant's Proof of Costs at pp. 18-21; Stipulation of the parties entered into following the hearing; Respondent's Response to Appellant's Proof of Costs at Schedules 5, 6 and 7. The Board has in accord with Findings of Fact Nos. 3 and 5 reduced Appellant's period of extended performance to 271 days. We therefore determine Appellant to be entitled to an equitable adjustment in the amount of $194,779 ($718.74 x 271 = $194,779) for general and administrative expense related to the extended performance on the project.

In summary, the Board finds Appellant entitled to an equitable adjustment of $443,259.

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[8]The so called Eichleay Formula specifically dealing with equitable adjustments for home office overhead expense during periods of suspension of contract work due to government delays has its origin in the case of Eichley Corp., ASBCA 5183, 60-2 BCA ¶ 2688, 61-1 BCA ¶ 2894. See Standard Mechanical Contractors of Maryland, Inc., MSBCA 1145 & 1165, 2 MSBCA ¶ 127 (1986) at p. 28. The Eichleay Formula approach to calculating g&a, in this case for periods of extended job performance, is one based on a percentage relationship between the contract that involves extended performance and all other jobs of the contractor for the period covered by the contract involving extended performance and assumes that g&a for all jobs is proportionately reflected by this ratio. With certain limitations as discussed at pp. 8, 29-31 below, the Board approves the use of the Eichleay Formula herein.

Field Costs	$182,077
Extra Carpentry	54,398
Winterizing	12,005
G&A	194,779
	$443,259

Kerry B. Coldiron and K.B. Coldiron, Inc., Joint Venture (Coldiron)

9. Coldiron was the ceiling and wall systems installation subcontractor on the project. Coldiron alleges that its on site work was to be performed within a 404 day period between May 4, 1985 and June 12, 1986. Appellant's Proof of Costs, at p. 23. Because of the aforementioned owner caused delay, work was actually performed on site between March 3, 1986 and May 22, 1987, a performance period of 446 days. Coldiron claims various costs for field operation during the extended period from October 1, 1986, the original completion date for the project under the IS, to May 17, 1987 (site supervision, i.e. superintendent), May 22, 1987 (pickup truck for superintendent), May 22, 1987 (office trailer) and February 22, 1987 (telephone). These various claimed costs for extended field operations totaling $19,250 are disallowed because such costs are of a nature that would have been incurred had work actually proceeded as called for under the IS and were incurred during the actual performance period (3/1/86 -5/22/87) which was not materially in excess of the 404 days originally anticipated.

10. Coldiron also claims pursuant to the Eichleay Formula general and administrative expenses of $29,060 based on a daily rate of $85.22 (computed on the basis of 814 days of alleged total performance) for 341 days of alleged extended performance computed from the IS completion date for Coldiron of June 12, 1986 until substantial completion on May 19, 1987. While we find the use of the Eichleay Formula to be acceptable as a method of calculating g&a for periods of extended performance, such formula or other percentage (in lieu of an actual dollar for dollar) approach for calculating g&a must not

be applied blindly where it produces an inequitable result. Application of the Eichleay Formula based on the alleged length of the contract performance period herein distorts the general and administrative expense of Coldiron for the project. Coldiron's general and administrative expense for the instant project as set forth in Appellant's Proof of Costs (pp. 27-29) is calculated as if Coldiron actually absorbed g&a for 814 days for this project commencing in its 1985 fiscal year (ending 8/31/85) on February 24, 1985 through substantial completion on May 19, 1987. However, Coldiron did not execute the subject contract until April 22, 1985 and performed no on site work until March 3, 1986. The record reflects that Coldiron performed virtually no preparatory work for the instant project until shortly before it commenced on site work in March of 1986. By the end of May 1985, Coldiron was aware that the project was experiencing substantial delay as confirmed in the June 28, 1985 schedule update moving the start of its work to March 3, 1986. Allowing two days for startup from March 1, 1986 derives an actual performance period of 448 days from March 1, 1986 to May 19, 1987. The Board finds that Coldiron's extended performance, assuming as the Board has found that DGS is responsible for the steel delay and that neither Appellant nor its masonry subcontractor is responsible for the extended duration for masonry erection, was for a period of 44 days.[9] The Board also accepts the reductions to Coldiron's g&a set forth in Schedule 8 to Respondent's Response to

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[9]See Respondent's Ex R-3, Schwartz Report at pp. 7-8; Tr Vol 4, pp. 796-808. The Board derives the 44 days of extended performance as follows. The schedule under the IS envisioned performance of work from May 4, 1985 to June 12, 1986, a period of 404 days. Work was actually performed on site from March 3, 1986 to May 22, 1987, a performance period of 446 days to which the Board adds two days from March 1, 1986 for preparatory work for a total of 448 days. The difference between 448 days and 404 days is 44 days.

Appellant's Proof of Costs (depreciation and bad debt expenses). Recalculating Coldiron's daily rate pursuant to the reduced performance period we have found to be applicable yields a daily rate of $63.17.[10] Coldiron is thus entitled to an equitable adjustment of $2,779 ($63.17 x 44 = 2,779).

C&H Mechanical Corporation (C&H)

11. C&H, the mechanical subcontractor, claims and the record supports its entitlement to 269 days of extended performance due to the owner caused delay herein measured from the IS completion date of October 1, 1986 to June 27, 1987 when its work was substantially completed. C&H asserts entitlement to $94,750 for g&a for the 269 days of extended performance. The record reflects that C&H's daily rate for purposes of the Eichleay Formula calculation of its g&a appropriately was $282.45.[11] C&H is therefore entitled to an equitable adjustment of $75,979 (269 x $282.45 = $75,979).

John W. Tieder, Inc. (Tieder)

12. Tieder was the electrical subcontractor for the project. Tieder claims pursuant to the Eichleay Formula $53,780 for extended g&a based on a daily rate of $192.76 for 279 days of extended performance from the IS completion date of October 1, 1986 until it substantially completed its work on July 7, 1987. Appellant's Proof of Costs at pp 34-37. We find the record supports

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[10] In deriving the daily rate we have only included reductions for depreciation and bad debt expense that are reflected in Coldiron's financial statements for FY 1986 and the applicable portion of FY 1987. See Appellant's Supp. Rule 4 File, Vol 6, Tab 30.

[11] C&H's claim of $94,750 as set forth in Appellant's Proof of Cost (pp 30-33) is based on a total g&a for all its contracts for the period in question of $3,426,885. This amount includes contributions and selling expense which are not allowable costs and must be subtracted from its total g&a to derive an appropriate daily rate. C&H incorporates both field and home office overhead in its financial statements and both were included for purposes of application of the Eichleay Formula to derive the daily rate set forth in the Proof of Costs. C&H offered no evidence to prove what its field overhead was for this particular project. For reasons set forth below for certain other subcontractors, field overhead is excluded by the Board in deriving the allowable daily rate for g&a under the Eichleay formula. See Respondent's Response to Appellant's Proof of Costs, Schedule 6 and 9.

Tieder's entitlement to 279 days of extended performance. Tieder's daily rate is derived from operating expenses that include both field expenses and corporate overhead. While it is possible to segregate Tieder's annual gross field expenses from its annual operating expenses an allocation of field expenses for this particular project cannot be made. Appellant argues that Tieder's method of accounting which lumps field and corporate expenses is appropriate for an electrical contractor such as Tieder with 8 to 10 million in annual billings. DGS disagrees and asserts that under proper accounting procedures g&a calculations must exclude field expenses. The Board determines that inclusion of field expenses with corporate overhead will not be permitted to determine Tieder's g&a for the period of extended performance herein. The Board does not find, based on the record presented, that it would have been unduly burdensome for Tieder to prove what its actual field expenses for this project were. Accordingly, the Board recalculates Tieder's daily rate under the Eichleay Formula to exclude field expenses and other inappropriate items to derive an equitable adjustment for g&a as follows:

A. Tieder's daily rate is adjusted from $192.76 to $192.35 to reflect disallowance as an item of g&a of amounts for contributions, uncollectible accounts and legal claim preparation (Schedule 10 of Respondent's Response to Appellant's Proof of Costs).

B. Tieder's daily rate is further reduced by $86.34 to remove field expense thus yielding a daily rate for g&a of $106.01 (Schedule 39 of Respondent's Response to Appellant's Proof of Costs).

C. $106.01 x 279 days of extended performance = $29,577.

We thus find Tieder to be entitled to an equitable adjustment for owner caused delay of $29,577 for g&a during the period of extended performance.

13. Mace performed the sheet metal work on the project. Due to the owner caused delay, the reasonable originally anticipated delivery schedule of ten to twelve deliveries of a larger quantity of ductwork was severely impacted such that forty (40) deliveries in piecemeal fashion of smaller quantities were actually made. Appellant's Proof of Costs, Ex. 17; Tr. Vol 6, pp. 1305-1352; Respondent's Response to Appellant's Proof of Costs, Schedule 25. We find the number of actual deliveries (40) to be reasonable given the extended period over which work was required to be performed. Id. The cost of such actual deliveries was $12,607. Appellant's Proof of Costs at p. 39. Mace's anticipated transportation cost in its subcontract price for the ten to twelve deliveries originally contemplated was $6,000. Mace is therefore entitled to an equitable adjustment of $6,607 ($12,607-$6000 = $6,607) for the additional cost of transportation for the actual number of deliveries required.

The Board finds that Mace also incurred 400 additional man hours of labor in connection with handling the loading and off-loading of the ductwork for the additional number of deliveries required. Appellant's Proof of Costs at p. 40; Respondent's Response to Appellant's Proof of Costs at Schedule 25. Mace's reasonable hourly labor cost for such work (exclusive of burden) was $5.20. Mace is thus also entitled to an equitable adjustment of $2,080 (400 x $5.20 = $2,080) for its additional labor costs related to delivery of ductwork to the project.

14. Mace claims pursuant to the Eichleay Formula general and administrative expenses of $78,592. Appellant's Proof of Costs at pp. 40-42. This amount is based on 366 days of extended performance from the IS completion date for its work of May 29, 1986 until Mace substantially completed its work on May 30, 1987. We find 359 days (366 days less 7 days determined in Finding

of Fact No. 3 to be attributable to Appellant) of the period of Mace's extended performance to be due to owner caused delay. Mace's daily rate for purposes of the Eichleay Formula calculation of its g&a we find to be $173.91.[12] Accordingly, Mace is entitled to an equitable adjustment of $62,434 (359 x $173.91 = $62,434) for g&a during the period of extended performance. Mace is entitled to a total equitable adjustment of $71,121 ($62,434 + $2,080 + $6,607 = $71,121).

Fire Protection Industries, Inc., T/a

Penn-Del Sprinkler Company (Penn-Del)

15. Penn-Dell was the fire protection subcontractor for the project. Penn-Del seeks $5,017 for field costs during a claimed 370 day extended period of performance. Penn-Del's actual field costs are not broken out by individual projects since records are not kept on an individual project basis but are kept only for individual corporate divisions. See Appellant's Proof of Costs at pp. 46. Penn-Del has used financial statements from the Delaware Division (which had area responsibility for the instant project) and extracted gross items of indirect field expense (field overhead) and equipment use expense of a type normally incurred for a project such as the instant project for all Delaware Division projects for the 833 day period of total performance for the instant project. Appellant has then calculated extended indirect field expense and equipment use expense pursuant to an Eichleay Formula approach under which this project's field costs are assumed to bear the same percentage relationship to total field costs as this project's billings bear to total Delaware Division billings over the 833 day period of total performance for

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[12] Mace like Tieder and C&H included field costs in its corporate overhead pool. The Board in re-calculating Mace's daily rate pursuant to the Eichleay Formula excluded such costs and has also excluded bad debt expenses from its total g&a. See Respondent's Response to Appellant's Proof of Costs, Schedules 11 and 39.

this project. See Appellant's Proof of Costs, Exhibit 18. See also Appellant's Ex. 17. We deny Penn-Dell's claim based on this percentage methodology in this appeal. We do not have sufficient confidence based on the record that Appellant's methodology results in a reasonable approximation of Penn-Dell's actual field costs for purposes of calculating an equitable adjustment. We do not find in this appeal that it would be unduly burdensome to require Penn-Dell to prove its field costs with specificity.

16. Penn-Dell also claims pursuant to the Eichleay Formula general and administrative expenses of $14,704. Appellant's Proof of Costs pp. 46-48. This amount is based on 370 days of extended performance (off and on site to include intermittent testing and head installation and miscellaneous work) from May 13, 1986 to May 18, 1987 which we find to be attributable to the owner caused delay herein. Penn-Dell's claimed daily rate for purposes of the Eichleay Formula calculation of its g&a was $39.74. The record supports a daily rate of only $37.01, however. See Respondent's Response to Appellant's Proof of Costs, Schedules 5, 6 and 12. Accordingly, Penn-Del is entitled to an equitable adjustment of $13,694 (370 x $37.01 = $13,694).

Walter A. Braun Company, Inc. (Braun)

17. Braun entered into a subcontract with Appellant to furnish and install telescopic bleachers for $24,987. The subcontract price was based upon a purchase price of $14,310 for Hussey telescopic bleachers tied to delivery of the bleachers to the job site prior to the end of September 1986. The area for the bleachers was not available for their installation until the end of April 1987 due to the owner caused delay herein. The price actually paid for the bleachers delivered was $15,169, an increase of $859. See Appellant's Proof of Costs at p 49; Stipulation of the parties entered into after the hearing. However, DGS refuses to concede entitlement and Appellant (Braun)

presented no evidence that the increase in cost for the bleachers occurred during the period of owner caused delay rather than prior to such delay or was otherwise attributable to the delay. We thus deny Braun's claim for an equitable adjustment of $859 since there is no evidence that the increased costs of the bleachers was due to owner caused delay.

Bristol Steel & Iron Works, Inc. (Bristol)

18. Bristol the steel supplier was issued a purchase order by Appellant dated January 7, 1985 which Bristol accepted on January 21, 1985. The purchase order required Bristol to furnish and deliver f.o.b. job site structural steel complete to include column and beam anchors shop-welded in accordance with the relevant contract drawings and specifications. The purchase price to include steel, freight to job site and sales tax totalled $841,340, subsequently increased to $887,692 as a result of several change orders.

19. Bristol claims additional unreimbursed costs of $20,891 related to additional steel handling in 1985 required by the owner caused delay herein. These costs resulted from handling of steel material out of storage in Bristol's yard in Richmond, Virginia which had to remain there longer than anticipated as a result of the delay in the steel design resolution. See Finding of Fact No. 3. Steel stock for the project was delivered to Bristol's Richmond yard substantially complete for fabricating all the steel members for the project between March 4, 1985 and July 29, 1985. The total weight of steel received for the project during such period was approximately 552.44 tons of which 548.7 tons were paid for on or about August 21, 1985. The steel was stored in the Richmond yard in multiple vertical stacks in anticipation of receipt of approved fabricating and erecting drawings. Other material

for other projects was also stored in the yard. As a result of the delay in the steel drawing approvals, steel for the project became mixed with steel for other projects due to a lack of space in the yard.

All the drawings were finally approved and received by Bristol on or about August 19, 1985 so that fabrication could commence. Steel that had been stored had to be sorted and picked out of the piles. That operation was accomplished by an operated overhead rolling crane and an average of 1.5 man-hours on the ground to select and handle the steel. Bristol employed personnel from Local #10, International Association of Machinists and Aerospace Workers, AFL-CIO. The classifications for this work included a material controller and a material checker whose hourly wage rates in 1985 were $9.45 and $7.28 respectively. The average cost per man-hour for the two man crew was $8.35 ($9.45 + $7.28 ÷ 2 = $8.35). Indirect labor burden and shop overhead which is predicated upon labor hours expended was $16.86 for each hour of work in 1985. The extra cost per man hour of the additional handling of the steel resulting from owner caused delay was therefore:

Average manhour rate	$ 8.35
Shop overhead	16.86
Cost per manhour	$25.21

Historically, Bristol's experience is that it takes 1.5 manhours to move 1 ton of steel in storage. As noted above the amount of steel that had been prestored was 552.44 tons. Thus Bristol's claim for additional steel handling is calculated as follows: 552.44 tons x 1.5 manhours x $25.21/manhour = $20,891. We find this cost to be reasonable and attributable to owner caused delay and therefore Bristol is entitled to an equitable adjustment of $20,891. 20. Bristol also claims g&a of $45,075 for the additional period of time required to fabricate and deliver the steel.

Bristol accepted its purchase order to furnish steel on January 21, 1985. That was the date its obligation commenced to furnish the steel under the IS on or before June 15, 1985; i.e. within 145 calendar days. As a result of design corrections, the drawing process took 27 weeks (January 28, 1985 -August 2, 1985). Had problems not arisen with the steel design we find it reasonable to assume that Bristol would have been able to start fabrication seven weeks after the drawing process had started, and that the beams and girders, bridging and other structural steel, including columns, would have been delivered complete by June 15, 1985. The process was extended because of delay attributable to the steel design for which the owner is responsible. We further find that Bristol was justified in not commencing fabrication until on or about August 19, 1985 when all the drawings were finalized and received by Bristol.

21. As a result of the aforementioned delay the steel for the project was not completely delivered until April 29, 1986. Bristol's claim for g&a based on an Eichleay Formula approach utilizes a performance period from January 21, 1985 when it accepted the purchase order from Appellant until April 29, 1986 when the last of the steel was delivered. However, the record reflects that 95% of all steel was paid for by Bristol's payment request for the period ending November 25, 1985 and that the bulk of the main frame items had been delivered by the week of October 14, 1985 with delivery thereafter of incidental items not pertaining to the main structures complete by April 29, 1986. We thus find that by November 25, 1985 Bristol had fabricated and delivered most of the steel to a point where its work was substantially complete and that Bristol's g&a attributable to the project would have been negligible thereafter. See Tr. Vol 3, pp. 440, 510-513; Tr. Vol 11, pp. 2355-2356. We shall therefore revise the performance period as set forth in

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Appellant's Proof of Costs for Bristol and recalculate Bristol's g&a using a total performance period of January 21, 1985 to November 25, 1985 (308 days) and an extended period from June 15, 1985 to November 25, 1985 (163 days). Such recalculation under the Eichleay Formula yields the following result.[13]

Statistics:

Contract executed 1/21/85 and orders placed. Contract work to be completed by 6/15/85. 1/21/85—6/15/85 =	145 calendar days
Total period actually expended on project between 1/21/85 and 11/25/85	308 calendar days
Extended period between 6/15/85 and 11/25/85	163 calendar days

Billings

FYE 9/30/85	$9,658,459	
$9,658,459 ÷ 365 days x 252 days =		$6,668,306
FYE 9/30/86	$9,777,311	
$9,777,311 ÷ 365 days x 56 days =		$1,500,072
Total Billings for Bristol's period of performance		$8,168,378

(The billings are annualized to determine approximate billings between 1/21/85 and 9/30/85 which included 252 calendar days. In Fiscal Year ended 9/30/86 the period included 56 calendar days between 9/30/85 and 11/25/85.)

General and Administrative Expenses (similarly annualized):

FYE 9/30/85		$950,327	
Less: Sales salaries	$102,349.37		
Fringe Benefits @ 24.77599%	25,358.07	(127,707)	
Travel		(6,745)	
Subtotal		$815,875	
$815,875 ÷ 365 days x 252 days =			$563,289
FYE 9/30/86		$743,637	
Less: Sales salaries	$112,645		
Fringe benefits			

[13]Compare Appellant's Proof of Costs, pp. 57-58.

@ 18.02402%	20,303	(132,948)	
Travel		(10,448)	
	Subtotal	$600,240	

$600,240 ÷ 365 days x 56 days = $ 92,091

Total Allowable G&A Expenses During Period of Performance $655,380

Billings under the contract totaled $887,692

Application of Eichleay Formula:

A. $ 887,692 x $655,380 = $8,168,378

B. $ 66,128 ÷ 308 days = $203.67 daily rate

C. $ 203.67 x 163 days (6/15/85 - 11/25/85) of extended performance = $33,198

Bristol is thus entitled to an equitable adjustment of $33,198 for extended g&a.

In summary, Bristol is entitled to an equitable adjustment for additional steel handling of $20,891 and an equitable adjustment of $33,198 for extended g&a for a total equitable adjustment resulting from owner caused delay of $54,089.

Cambridge Tile Company (Cambridge)

22. Cambridge entered into a subcontract with Appellant to provide tile for the project. Cambridge's total bid to Appellant was $91,000.

Due to the owner caused delay herein, the tile work was performed one year later than anticipated. The original cost quoted to Cambridge by Maryland Tile Distributors for tile and related materials was $82,445. That is the amount which Cambridge included in its bid to Appellant. The purchase of the aforementioned tile and materials was originally intended to be accomplished in late 1985 or early 1986. However, due to owner caused delay such material was not actually purchased for use on the project until approximately November 1, 1986. The parties stipulated after the hearing of

the appeal that the excess cost for such materials when purchased was $1,192.00. Cambridge claims reimbursement for this excess cost. We find that the potential for owner caused delay of the magnitude herein and consequent increase in costs could not have been anticipated at the time Cambridge submitted its bid to Appellant and was beyond Cambridge's control. However, Appellant (Cambridge) presented no evidence concerning entitlement (which DGS refuses to concede) that the increase in price was attributable to the owner caused delay, i.e. that such prices did not increase prior to the delay. We therefore deny Cambridge's claim for an equitable adjustment.

Kent County Painting Company

23. Kent County was the painting and coating subcontractor. Its subcontract price including change orders was $245,109. Appellant's Proof of Costs at pp. 61-62.

Kent County claims pursuant to the Eichleay Formula methodology g&a and field expense of $45,448 based on an alleged extended period of performance of 317 days between May 14, 1986 and March 27, 1987 and an alleged total period of performance of 620 days between July 15, 1985 and March 27, 1987.

Field and g&a expense are combined in Kent County's financial statements and the record does not permit the Board to separate field expense from g&a. For the reasons discussed above for Tieder and Penn-Del we would require for purposes of proof of quantum that Kent County's field expense be separated from g&a and actually documented. However, since it is not possible to separate field expense from the aggregate of field expense and g&a and since, as discussed below, Kent County's proof of damages is otherwise deficient, we deny Kent County's claim in its entirety.

Even had Kent County presented evidence which would have permitted the Board to determine its actual g&a for purposes of an Eichleay Formula determination of extended g&a we would have reduced the amount sought as a result of the following additional deficiencies in Appellant's Proof of Costs relative to Kent County.

As noted, Kent County claims pursuant to the Eichleay Formula methodology aggragated g&a and field expenses of $45,448. Such amount is predicated on an alleged extended period of performance of 317 days between May 14, 1986 and March 27, 1987 and an alleged total period of performance of 620 days between July 15, 1985 and March 27, 1987.

Under the IS painting work was to commence on October 21, 1985 and was to be completed by May 14, 1986, a total of 205 days. Kent County actually commenced continuous work on May 29, 1986 [14] and had substantially completed its work by March 19, 1987, a period of 294 days. Respondent's Ex. 3, Schwartz Report at p. 11. Appellant's Proof of Costs at p. 62. The Board finds that delay to steel erection would have been apparent by late May 1985. By July 15, 1985 (when Kent County claims its performance period for purposes of its g&a calculation should commence) the delays to the project had been reflected in the June 28, 1985 schedule update with painting in D section, Compound 2 (the initial section for work) moved from October 21, 1985 to a February 23, 1986 start date. Therefore, three to five months before its scheduled start under the IS and ten to twelve months before its actual start, Kent County knew or should have known that its work was going to be significantly delayed.

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[14] For approximately ten days in December 1985, however, Kent County had also been on-site doing touch up work on the structural steel. Tr. Vol. 7, pp. 1464, 1474-1476.

Under such circumstances and in the face of testimony from Kent County's owner, Mr. Anthony Maccari (Tr. Vol. 7, pp 1458-1477), indicating that Kent County did not significantly absorb g&a when not actually working on the project, the Board would limit the number of days Kent County is entitled to g&a for extended performance to 99 days representing the difference between the 294 days it was continuously working from May 29, 1986 until March 19, 1987 and the ten days of touchup work performed in December, 1985 and the 205 days originally estimated for the work (294 + 10 = 304, 304-205 = 99). We would also limit for purposes of determining Kent County's g&a for the period of extended performance the total period of performance to the 294 days of continuous performance from May 29, 1986 until March 19, 1987.[15]

Maryland Sales and Service Corporation (Maryland)

24. Maryland entered into a subcontract with Appellant for $110,000, subsequently increased through change orders to $127,413, to complete in conformance with the specifications metal wall and roof panel systems for the project's penthouses.

There were three penthouses in Compound 2 and four penthouses in Compound 1. The original schedule contemplated work being performed starting on Penthouse #2, D Section, Compound 2 on October 13, 1985, with the three Compound 2 penthouses to be completed on or before November 3, 1985. Penthouse #4 in Compound 1 was scheduled to start on October 25, 1985 and all four compound 1 penthouses were to be completed by November

[15] Respondent's auditors pursuant to an Eichleay calculation were apparently able to identify from Kent County's records approximately $28,774 in g&a attributable to the project. However, such amount is derived using Kent County's claim of 620 days of total performance and 317 days of extended performance and it is not possible for the Board to allocate an approximate g&a using the reduced time frames the Board has found applicable.

22, 1985. The IS construction window within which all of the penthouses were to be metal-clad thus allowed a total of 40 days between October 13, 1985 and November 22, 1985.

As a result of the owner caused delay herein the metal cladding of the penthouses did not start until April 16, 1986, and all of the work was not completed until January 27, 1987. There were 25 payrolls reported in this period which included 125 workdays. However, only 78 days were worked during the period; such intermittent performance resulting from impacts caused by the delay. The delayed performance increased the cost of installation.

Maryland claims (pursuant to stipulations entered into after the hearing) additional costs resulting from the delay of $1,481 for increased cost of labor, $2,077 for increased cost of material and $1,692 for the cost of renting (including move-in and move-out costs) a trailer. We find these costs (totalling $5,250) to have been incurred as a result of the owner caused delay herein and that such costs were unavoidable and reasonable. See Appellant's Proof of Costs at pp. 68-72; Tr. Vol 4, pp. 851-877; Appellant's Rule 4 Supplement, Vol 7, Tab 34, Documents 2727-2728. Appellant claims 10% overhead of $525 on this total amount of $5,250 which we find to be reasonable.

We thus find Maryland to be entitled to an equitable adjustment of $5,775 ($5,250+ $525 = $5,775).

Allen Tyler & Son, Inc. (Tyler)

25. Tyler was the masonry subcontractor for the project. Tyler entered into a subcontract with Appellant dated January 7, 1985 for $1,972,754. Change orders increased the subcontract price to $2,093,340.

Work under the IS was to commence on May 24, 1985 and was to be completed by January 25, 1986. Due to the owner caused delay herein, work was not substantially completed until January 16, 1987. Tyler claims pursuant to the Eichleay Formula both indirect field costs and g&a for the 356 day period of extended performance from January 25, 1986 to January 16, 1987 in an aggregate amount of $259,524. Appellant's Proof of Costs relative to Tyler lumps both field costs and g&a together without any breakdown between the two. It is not possible from the record to determine what Tyler's actual field costs for the project were for the period of extended performance. Accordingly, Tyler's claim for such indirect field costs is denied.

DGS does not dispute an amount of $469.41 for Tyler's daily rate for g&a for the period of claimed extended performance. See Respondent's Exhibits R-47 and R-48. We find 349 days of the claimed period of extended performance (356 days) to be due to owner caused delay (356 days less 7 days of delay attributable to Appellant). Accordingly, we find Tyler to be entitled to an equitable adjustment of $163,824 ($469.41 x 349 = $163,824).

26. Appellant (and its subcontractors as their interests appear) is entitled to a total equitable adjustment pursuant to the findings set forth above of $860,097. Pre-decision interest is barred by General Conditions Section 6.15 E. The statutory provision granting the Board discretion to award such interest notwithstanding such a contract provision, State Finance and Procurement Article, Section 15-222, does not apply to contracts executed prior to July 1, 1986. Corman Construction Inc., MSBCA 1254, 3 MICPEL ¶206 (1989); Rice Corporation, MSBCA 1301, 2 MICPEL ¶167 (1987). This contract

was entered into in early 1985 and thus General Conditions Section 6.15 precludes an award of interest. Further, Appellant has agreed not to request predecision interest. See letter from counsel for Appellant to counsel for Respondent dated March 22, 1989, attached to Respondent's Post Hearing as Exhibit D confirming that Appellant would not claim predecision interest because it is not allowable.

Decision

A. Entitlement

DGS challenges Appellant's right to any entitlement asserting that while DGS is responsible for 98 days of delay due to changes in the steel design, Appellant was responsible for 55 days of delay and DGS and Appellant were concurrently responsible for 10 days of delay. DGS argues that delay in steel erection was the responsibility of Appellant, because Appellant should have commenced fabrication of steel piecemeal as the steel shop drawings were approved and was otherwise tardy in incorporating certain changes into the drawings. We have rejected this argument finding that no direction was actually given to Appellant to commence fabrication before all the drawings were approved, that Appellant's determination to wait for approval of all drawings was reasonable and that Appellant incorporated all changes with reasonable promptness. See Finding of Fact No. 3.

In making its findings concerning responsibility for the delay in steel erection the Board has reviewed the details of relevant events that occurred over five years ago. Due to the passage of time, and the natural erosion of memory over time, the Board has placed great reliance on contemporaneous written description of the relevant events to sort out discrepancies in present

recollection and opposing views of experts concerning what should or might have occurred. See Appeal of Bates Lumber Company, Inc., AGBCA Nos. 81-242-1, 84-210-1, 88-2 BCA ¶ 20,707 (1988).

For example in a letter from Heery, Construction Management, the DGS construction manager for the project, to the project architect dated March 11, 1985 it is noted that:

> "I am astonished that the quantity and quality of such changes would exist following the completion of the design and bidding phases, while 50-plus days have been completed in the construction phase. I am even more astonished following your receipt of the November 26, 1984 Memorandum of Understanding Regarding Construction Phase procedures for the Somerset project prepared by Heery, that your staff would send a list of contract revisions directly to the contractor."

The architect's response was apparently not considered to be satisfactory because on July 9, 1985 another letter was sent to the architect signed by Mr. Eric Walbeck an Assistant Secretary of DGS but authored by John Hartlove, DGS's Chief Construction Engineer. The July 9, 1985 letter stated in part:

> "Your analysis that the project is now four weeks behind schedule is in error. The review of the construction schedule will reveal that the project is closer to three months behind schedule and this delay will later be compounded when we get into winter weather. We believe the facts are clear that the delays are due to your failure to adequately check the steel drawings and your firm's lack of response to many of the field problems."

This same letter also stated:

> "The resubmittal to [the architect] was June 7, 1985. It wasn't until our meeting of June

> 25 [1985] that Dashiell was finally authorized to begin fabrication of steel, and the contractor is still waiting for 39 drawings to be approved."[17]

As a result of its review of such contemporaneous documents and the pertinent testimony and exhibits the Board is persuaded that DGS is responsible for 163 days of delay due to the steel design.

DGS next contends that Appellant is reponsible for concurrent causes of delay, thus exonorating it. See Wilson F. Klingensmith, Inc., v. United States, 731 F. 2d. 805 (Fed. Cir. 1984) (where both parties contribute to the delay, neither can recover damages, unless there is evidence of a clear apportionment of the delay and expense attributible to each). See also Avedon Corporation v. United States, 15 Cl. Ct. 648 (1988). DGS bases its concurrent delay argument on two asserted factual premises. The first is that the Appellant was responsible for delay in the hardware submittal process and the delivery of the hollow metal door frames such that even if the steel had not been delayed, the masonry work could not have commenced prior to the October/November 1985 time frame.

The Board has found seven days of concurrent delay due to Appellant's failure to timely schedule fabrication and delivery of the hollow metal frames. Finding of Fact No. 3. Additional delay pertaining to the hardware submittal process and delivery of hollow metal frames, the Board has found to be attributable to DGS. In this regard we also note that Mr. Schedel, the Heery project manager for the project, was of the opinion that delay to the hollow metal frames being on site was secondary to the steel delay and that any delay impacting project completion should be attributable to the revisions

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[17]Indeed, an earlier letter of July 1, 1985 from Mr. Schedel, the project manager for Heery Program Management (the construction manager for the project), to Appellant is also equivocal on the question of any alleged direction relative to commencement of fabrication.

to the steel drawings. See Tr. Vol. 13, pp. 2648-2659. We thus reject DGS's concurrent delay argument based on the hardware submittal process and hollow metal frame delivery since we find any such delay to be the fault of DGS (save seven days) and not concurrent delay attributable to Appellant.

The second ground of concurrent delay advanced by DGS concerns masonry work. DGS correctly observes that a contractor bears the responsibility for obtaining a sufficient work force to assure that the work is adequately manned. However, such responsibility is excused where an inadequacy in work force is caused by the owner and the contractor makes a reasonable effort to perform. DGS asserts that the project would have been delayed even had there been no delay to the steel because it contends there would have been insufficient numbers of masons to man the job under the IS in the summer of 1985. The Board has reviewed the record on this issue and finds that Tyler could and would in fact have properly manned the job with 24 masons as planned had work proceeded in the summer of 1985 as called for under the IS (i.e. had there been no owner caused delay involving the steel). See Finding of Fact No. 4. The Board has also found that Tyler made reasonable efforts to proceed with the work under the actual schedule and that delays to the masonry work and the work of other trades dependent on the progress of masonry work resulted from owner caused delay. See Finding of Fact No. 4. The Board thus rejects DGS's concurrent delay argument based on masonry work.

B. Quantum

DGS challenges Appellant's proof of damages for g&a for periods of extended performance. DGS accepts use of the Eichleay Formula as a methodology to calculate g&a for periods of extended performance. However, DGS asserts that Appellant (and its subcontractors) have failed to prove that it

could not take on replacement work or reduce its overhead expenses and that the Eichleay Formula may properly only be applied to extended periods of work during which Appellant's (and its subcontractors) personnel and resources were dedicated to the project or contract. The Board agrees that the Eichleay Formula, use of which we approve, does not dispense with the duty to mitigate damages or to prove that actual damages resulted from the contractor's extended performance. See e.g. Corman Construction., MSBCA 1254, 3 MICPEL ¶ 206 (1989); Capital Electric Company v. United States, 729 F.2d 743 (Fed. Cir. 1984). Such duty to mitigate only requires reasonable efforts, however, and the essential question for the fact finder is what evidence exists that replacement work could not be undertaken and that personnel and resources were dedicated to the contract at issue (i.e. overhead could not reasonably be reduced) during the claimed period of extended performance.[18] See George Hyman Construction Company v. WMATA, 816 F.2d 753 (D.C. Cir. 1987); Brinderson Corp. v. Hampton Roads Sanitation Dist., 825 F.2d 41 (4th Cir. 1987). In the instant appeal the Board has found that Appellant and each of its subcontractors given the nature of the project, their size and work or trade specialized in and the nature of the delay encountered by each has met its burden to prove mitigation relative to the Board's findings of entitlement to specific amounts for g&a for specific periods of extended performance as set forth in Findings of Fact Nos. 5 through 25. Such findings find specific support in the record in part as follows: Appellant Tr. Vol. 1, pp. 25-179, Vol. 2, pp. 194-435, Vol. 3 pp. 557-659, Vol. 7, pp. 1383-1457, Vol. 12, pp. 2473-2541, Vol. 14, pp. 2763-2775; Coldiron Tr. Vol. 4, pp. 796-850; Mace Tr. Vol. 6, pp. 1305-1352; Tyler Tr.

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[18]Stated another way the Board looks to the evidence which answers the question - has the contractor met its legal burden to mitigate its damages and not be in breach of its ongoing duty to perform in the face of owner caused delay.

Vol. 6, pp. 1213-1296, Vol. 5 pp. 1009-1036, 1037-1109; C&H Tr. Vol. 4, pp. 666-749; Tieder Tr. Vol. 4, pp. 753-791; Penn-Del Tr. Vol. 7, pp. 1360-1382; Bristol Tr. Vol. 3 pp. 448-555.[19]

DGS also challenges Appellant's proof of damages for field costs for periods of extended performance. We agree with DGS that field costs in certain respects have not been proven by Appellant (or its subcontractors) and in such instances we have denied the appeal. The task of fairness in evaluation of contract claims requires the utilization of methods which accurately reflect the damages. In documenting construction claims arising out of vast-prolonged projects one must attempt to use a method of documenting the claim which is accurate and at the same time practical.

In a world of perfect accounting the contractor would be able to demonstrate with specificity each cost, minute of extra work and item of material expended directly resulting from a delay, including extended office overhead and field expenses. However, the record keeping for this method of proving each cost may not be practical for extended office overhead. The burden of maintaining records to demonstrate extended field expenses, however, is not prohibitive. For instance under an extended office overhead scenario, the contractor in order to prove a direct cost for an extra letter required due to delay would have to log that letter and office personnel time spent in its generation along with a percentage use of the office space and overhead. In contrast, a contractor could prove the direct cost of a rented generator on the job ten extra days by receipts documenting the cost or use

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[19] The Board has also considered the expert testimony and reports of Messrs McCullough, Clark, Schwartz and McGeehin on the question of mitigation and dedication.

of Blue Book or other commonly used rate book where appropriate. Clearly there is a dramatic difference in the burden of record keeping between these two types of costs.

The Board's acceptance of a general percentage method to calculate the cost of extended g&a as reflected in the Eichleay Formula is indicative of the degree of proof the Board will require to sustain such claims. In contrast the use of specific records or an industry rate book in certain instances to calculate the cost of field expenses during extended performance for each item claimed we believe to be reasonable since under most accounting methods these items can be separately determined.

Even with extended g&a, however, the Board's analysis must be claim specific. The use of a general method such as the percentage approach embodied in the Eichleay Formula to ascertain extended g&a can result in unfairness and therefore is subject to modification[20] as the facts of the claim unfold. On the other hand, in the ascertainment of extended field expenses the Board will require the contractor to shoulder the burden to prove the direct and indirect costs incurred in the field with specificity.

For the foregoing reasons, the appeal is sustained in part, denied in part and remanded for appropriate action consistent with this opinion.

Dated: February 22, 1991

Robert B. Harrison III
Chairman

[20]An example of a modifier would be mitigaton efforts by the contractor as discussed above.

I concur:

Sheldon H. Press
Board Member

Neal E. Malone
Board Member

* * *

I certify that the forgoing is a true copy of the Maryland State Board of Contract Appeals decision in MSBCA 1324, 1360 and 1369, appeal of J. ROLAND DASHIELL & SONS, INC., under DGS Contract No. KO-004-821-001.

Dated: February 22, 1991

Mary F. Priscilla
Recorder