

GOVERNMENT CONTRACTING

Government Contracting

Broward County v. Brooks Builders, Inc.,
908 So. 2d 536 (Fla. 4th Dist. App. 2005)

Contractors claiming *Eichleay* damages for lost overhead expenses resulting from a government-imposed delay must satisfy the “stand by” element of the *Eichleay* damages test. This element requires a showing that the imposed delay caused a total or near-total suspension of the contractor’s performance of the contract.

FACTS AND PROCEDURAL HISTORY

Broward County and Brooks Builders, Inc. (Brooks) entered into a contract in which Brooks agreed to construct a fire station adjacent to a runway at the Fort Lauderdale airport. The contract required strict compliance with all airport security measures. Shortly after the contract was executed, the September 11th terrorist attacks occurred. Following this unforeseeable event, the airport enacted new and more stringent security measures to which Brooks’s construction crews were subject. Consequently, delays became longer and more frequent than anticipated by the contract. Much of the increased delay time resulted specifically from increased airport access gate security requirements.

In response to these delays, Brooks filed timely requests with the County for project extensions and for additional compensation. The County granted some of these extensions and paid Brooks an additional \$386,221.86. However, the County denied Brooks’s request for payment on additional work that was not authorized. Because the County refused to pay these additional monies, Brooks filed suit. In its complaint, Brooks sought damages on a breach of contract theory, specifically asking for delay damages, compensation for underpaid or unpaid work, and *Eichleay* damages. The County filed a countersuit containing two claims—one for defective work, and one for delay damages.

At trial, Brooks obtained a successful damages verdict for approximately \$1,000,000, while the County’s claims were both denied. The County appealed.

ANALYSIS

The Fourth District Court of Appeal, on rehearing, examined the trial court's decision to award Brooks the three types of damages. With regard to the delay damages, the Fourth District found that these damages should not have been awarded. The court based its conclusion upon a reading of the express language in the contract. The contract contained a provision that assigned the risk of loss from unforeseen delays solely to Brooks. The only potential exception was any delay resulting from a written stop-work order from the County Chief Engineer. The court held that the losses due to additional security delays did not fall within the Chief Engineer exception in the contract.

Next, the court addressed the trial court's award of damages to Brooks for underpaid and unpaid work. The contract required Brooks to request payment on unpaid work within ten days of completing the work. Therefore, the court affirmed all of the damages that complied with this express provision, but the court reversed damages awarded pursuant to an unpaid work request that Brooks filed more than a year after the work was completed.

Finally, the court reversed the trial court's decision to grant Brooks *Eichleay* damages. *Eichleay* damages relate to a builder's overhead costs. See *Eichleay Corp.*, ASBCA No. 5183, 60-2 R.C.A. (CCH) ¶ 2688 (ASBCA 1960). As part of the bid price on a building contract, contractors charge clients a pro rata share of their overhead costs. This pro rata overhead charge depends primarily on two factors—the length of the project and how many other projects are occurring at that time. Thus, unexpected delays, especially if they prevent contractors from undertaking other projects, increase a client's pro rata share of the overhead cost burden. *Eichleay* damages may be awarded to compensate for additional pro rata overhead costs incurred from governmentally imposed delays.

In evaluating Brooks's situation, the Fourth District applied the federal interpretation of the *Eichleay* damages rule. Federal courts have held that *Eichleay* damage recovery requires "three elements: (1) that a government-imposed delay occurred; (2) the government required the contractor to 'standby' during the delay; and (3) while 'standing by,' the contractor was unable to take on additional work." *Triple R Paving, Inc. v. Broward County*, 774 So. 2d 50, 57 (Fla. 4th Dist. App. 1998). Once elements (1) and

(2) are proven, a claimant has made a prima facie case of entitlement to *Eichleay* damages. The burden of proof then shifts to the government, and it may avoid paying the *Eichleay* damages only by demonstrating "either (1) that it was not impractical for the contractor to obtain 'replacement work' during the delay, or (2) that the contractor's inability to obtain such work, or to perform it, was not caused by the government's suspension." *Id.*

Ultimately, the Fourth District's decision to deny Brooks *Eichleay* damages turned on its adoption of the Federal Circuit Court of Appeals's recent clarification of the test's "stand by" element in *P.J. Dick, Inc. v. Principi*, 324 F.3d 1364 (Fed. Cir. 2003). In accordance with *P.J. Dick, Inc.*, the Fourth District ruled that in order to satisfy the "stand by" requirement, the contractor must show a suspension of all or most of the work being performed on the contract. The Fourth District relied on several cases to establish how much work could be performed while still meeting the "stand by" suspension requirement. See e.g. *E.R. Mitchell Constr. Co. v. Danzig*, 175 F.3d 1369 (Fed. Cir. 1999); *West v. All St. Boiler, Inc.*, 146 F.3d 1368 (Fed. Cir. 1998); *Satellite Elec. Co. v. Dalton*, 105 F.3d 1418 (Fed. Cir. 1997). In general, those cases that found the "stand by" requirement was satisfied did so when contractors were able to do only insubstantial amounts of work. Conversely, the cited cases that found the standard was not satisfied involved scenarios in which post-delay billable costs were comparable to pre-delay billed costs and where at least a quarter of the contracted work could still be performed.

The Fourth District found that Brooks was not entitled to *Eichleay* damages because the County's actions had not caused a sufficient suspension of Brooks's work. Despite significant delays, Brooks still sent the County substantial monthly invoices.

SIGNIFICANCE

Brooks clarifies what a claimant must demonstrate to satisfy the "stand by" element of the *Eichleay* damages test. This case precisely recounts each element of the *Eichleay* damages test, and makes clear that *Eichleay* claimants must show either a full cessation of work on a contract, or if work continued, that the work was insubstantial in relation to the whole of the work to be performed.

RESEARCH REFERENCE

- 64 Am. Jur. 2d *Public Works and Contracts* § 174 (Westlaw database updated Aug. 2005).

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