UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT GRANTED IN PART, DENIED IN PART:
March 9, 2022

CBCA 6597

ACTIVE CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Terry R. Marston II of Marston Legal, PLLC, Kirkland, WA, counsel for Appellant.

Rayann L. Speakman, Office of the Chief Counsel, Federal Highway Administration, Department of Transportation, Vancouver, WA, counsel for Respondent.

Before Board Judges **LESTER**, **VERGILIO**, and **GOODMAN**.

Opinion for the Board by Board Judge **LESTER**. Board Judge **VERGILIO** concurs.

LESTER, Board Judge.

The Federal Highway Administration (FHWA) has filed a motion for partial summary judgment on two damages issues in this construction delay case. Specifically, the FHWA asks us to find that, even if appellant, Active Construction, Inc. (ACI), were to prevail on its argument that the Government is responsible for delays that entitle ACI to an equitable adjustment, ACI is precluded as a matter of law from recovering extended field office overhead as a direct cost and from recovering extended home office overhead using the formula set forth in *Eichleay Corp.*, ASBCA 5183, 60-2 BCA ¶ 2688. With regard to

extended field office overhead, the FHWA asserts that ACI is using an accounting practice and allocation method for field office overhead in its claim that are inconsistent with the practice and method that it used throughout contract performance, which the FHWA contends ACI cannot do. With regard to extended home office overhead, the FHWA asserts that, because such overhead is available under the *Eichleay* formula only for periods of work stoppage or suspension, neither of which (the FHWA alleges) occurred during contract performance, *Eichleay* damages are unavailable to ACI.

Because Federal Acquisition Regulation (FAR) 31.105(d)(3) (48 CFR 31.105(d)(3) (2014))[1] requires a contractor consistently to treat extended field office overhead costs as either direct costs or indirect costs under a contract, we grant the FHWA's motion for partial summary judgment insofar as it seeks to preclude ACI, which consistently allocated field office costs as indirect costs throughout contract performance, from now attempting to recover them as direct costs. Because factual disputes that the Board will have to resolve through a hearing affect whether ACI qualifies for extended home office overhead expenses under the *Eichleay* formula, we deny the FHWA's motion on ACI's extended home office overhead claim.

Background

On March 12, 2014, the FHWA's Western Federal Lands Highway Division awarded to ACI a firm-fixed-price contract for just under $15 million to reconstruct approximately 9.7 miles of Middle Fork Road in King County, Washington. The contract incorporated standard contract clauses from the Federal Acquisition Regulation (FAR), including the Changes clause at FAR 52.243-4. In addition, in the Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects, FP-03, incorporated into the contract, section 109.06, titled "Pricing of Adjustments," required the parties to "[d]etermine all costs [in equitable adjustments] according to the cost principles and procedures of FAR Part 31" and to "[f]ollow the requirements of all FAR clauses providing for an equitable adjustment." Appeal File, Exhibit 3 at 48.[2]

During contract performance, ACI attached markups of 7.42% for home office overhead and 5.99% for field office overhead to change order and contract modification requests, treating both sets of costs as indirect costs. Exhibit 137-001 at 7, 11-15, 17-105; *see* Exhibit 48-13 (accepting overhead rates as reasonable). Numerous bilateral contract

---

[1] For purposes of this decision, we cite to and will rely on the version of the FAR that was in effect when the contract was awarded.

[2] Unless otherwise noted, all exhibits are found in the appeal file.

modifications negotiated based upon ACI's cost proposals were executed during contract performance.

The original contract completion date was August 31, 2016, but ACI did not complete performance and demobilize from the site until July 7, 2017.

On November 18, 2018, ACI certified a claim to the FHWA contracting officer seeking damages for 310 days of alleged Government-caused delay. Exhibit 9-2. ACI asserted in its claim that it had encountered numerous differing site conditions and Government-caused delays that affected performance, that the FHWA had not provided appropriate responses to requests for assistance, and that the collective result of all changes on the project was extreme disruption of the planned sequence and orderly performance of the work, which, taken together, delayed completion of the project from August 31, 2016, to July 7, 2017. In its claim, ACI requested payment of the following costs:

(1) $3,110,103 for unresolved change requests. *See* Exhibit 9-1 at 199, 204, 208-11. Each of its unresolved change request claims includes an indirect cost markup for field office overhead (usually 5.99%, although sometimes 6.19%) and an indirect cost markup for home office overhead (usually 7.42%). *See, e.g.*, Exhibits 80-1, 83-11, 96-7, 110-3, 114-1, 121-2.

(2) $2,136,910 in labor inefficiency costs arising from the alleged cumulative impact of labor and equipment inefficiencies, which ACI calculated by identifying a total man-hour loss of 21,733 hours and multiplying it by an average composite daily labor rate of $98.33. Exhibit 9-1 at 199-200, 204-05. ACI calculated the $98.33 composite daily labor rate by calculating a composite daily rate of $61.97 for job trade labor, $26.43 for Type 5 and 6 equipment, and $4.37 for Type 8 equipment before adding $5.56 as a 5.99% indirect cost markup for field overhead. *Id.* at 206.

(3) $688,347 as a direct cost for extended field office overhead (calculated by multiplying a daily rate of $2222.48 by 310 days of alleged delay). Exhibit 9-1 at 201, 204, 212-13.[3]

[3] ACI identifies the claim amount for extended field office overhead as $822,914 on one page on its claim, Exhibit 9-1 at 201, but we presume this figure was either identified in error or encompasses markups that were not identified.

(4) A home office overhead markup of 7.42% on the claimed amounts for labor inefficiency costs and the extended field office overhead, which, in ACI's claim summary, totaled $209,634. Exhibit 9-1 at 198, 204.

(5) $306,936 for extended home office overhead, purportedly calculated in accordance with the *Eichleay* formula. Exhibit 9-1 at 201, 204, 214.[4]

(6) $272,548 in consultant fees. Exhibit 9-1 at 202, 204, 215.

ACI's total claim, inclusive of a profit markup and a bond and state taxes line item, was identified as $7,101,818. Exhibit 9-1 at 202, 204.

On August 16, 2019, the FHWA contracting officer issued a 279-page decision addressing each of ACI's unresolved change order arguments and ultimately finding ACI entitled to payment of $297,923.36, plus interest. Exhibit 10 at 278. That figure encompassed payment for some of the unresolved change orders that ACI had identified, a 5.03% markup for field office overhead on those change orders, another markup for home office overhead that ranged from 6.02% to 6.54% (depending on the year in which costs were incurred), and a 10% profit markup. *Id.* at 4, 278. The contracting officer denied in their entirety ACI's requests for extended field office overhead as a direct cost, for extended home office overhead under *Eichleay*, and for labor and equipment inefficiency costs. *Id.* at 278.

ACI elected not to accept the contracting officer's decision and filed its notice of appeal with the Board on September 9, 2019. Since then, the parties have engaged in extensive discovery, and discovery disputes between the parties are still being resolved.

On November 5, 2021, the FHWA filed a motion for partial summary judgment through which it seeks to preclude ACI from pursuing two damages issues. First, the FHWA argues that, because ACI had chosen during contract performance to treat extended field office overhead costs as indirect costs, FAR 31.105(d)(3) bars it from changing cost accounting practices now and claiming them as direct costs, particularly since, in its claim, it has extended field overhead markups added to each of its claimed direct costs. Second, the FHWA argued that, as a matter of law, ACI cannot recover extended home office overhead costs under *Eichleay* in this case.

---

[4] On one page of its claim, ACI identifies $341,593 as the amount of its *Eichleay* claim, Exhibit 9-1 at 201, but, given that ACI consistently lists $306,936 as the proper amount elsewhere in its claim, we presume that one reference to $341,593 was in error.

Discussion

Standard for Partial Summary Judgment

Pursuant to Board Rule 8(f), "[a] party may move for summary judgment on all or part of a claim or defense." 48 CFR 6101.8(f) (2020). "Partial summary judgment, at the request of a party, is appropriate if there is no genuine issue as to any material fact (a fact that may affect the outcome of the litigation) regarding the issue at hand and the moving party is entitled to judgment as a matter of law." *Mayberry Enterprises, LLC v. Department of Energy*, CBCA 5961, 20-1 BCA ¶ 37,616. The Government, as the moving party, bears the burden of demonstrating the absence of genuine issues of material facts. *Id.*

Field Office Overhead

The general rule is that "a contractor can recover extended [field office] overhead as damages for government-caused delay." *K-Con Building Systems, Inc. v. United States*, 107 Fed. Cl. 571, 597 (2012); *see George Sollitt Construction Co. v. United States*, 64 Fed. Cl. 229, 242 (2005) ("Extended field office overhead also may sometimes be recovered as delay damages."). The FHWA does not challenge that general rule. Its complaint here is that ACI is attempting to recover field office overhead as a direct cost item when, over the course of contract performance, it treated field office overhead as an indirect cost, recovering it through a percentage markup to change orders. The FHWA argues that ACI's change in accounting practice violates FAR 31.105(d)(3), framing its argument as follows:

> By applying a Field Office Overhead markup . . . on negotiated contract modifications and change requests, ACI recovered its field office/job site overhead as a percentage markup on its direct costs. If ACI is successful in its appeal of the 53 unresolved change requests, it will continue to recover its field office/job site overhead as a percent markup on its direct costs. The job site cost principle at FAR 31.105(d)(3) expressly authorizes a contractor to use this allocation method by charging these costs indirectly (as a percent markup on direct costs) as ACI did throughout the project and within its certified claim, but FAR 31.105(d)(3) requires that the accounting practice is consistently followed. In its certified claim, ACI now attempts to use a different allocation method to recover its field office/job site overhead by switching from its percentage markup on direct costs distribution method to a time distribution base (per diem rate), and furthermore ACI now claims both methods of quantification simultaneously. FAR 31.203 does not allow a contractor to switch between a percentage markup on direct costs distribution base and a time distribution base (per diem rate).

Respondent's Motion for Partial Summary Judgment at 6 (citations omitted).

FAR 2.101 defines a direct cost as "any cost that is identified specifically with a particular final cost objective" and provides that "[c]osts identified specifically with a contract are direct costs of that contract." The FAR defines an indirect cost as "any cost not directly identified with a single final cost objective" – in the circumstances here, a specific contract – "but identified with two or more final cost objectives or with at least one intermediate cost objective." *Id.* If a contractor is working only one contract at a particular job site, "any field office overhead costs incurred on [that] contract, [at that] job site, are in reality direct costs" of performing that contract. *Watts Constructors, LLC*, ASBCA 59602, 15-1 BCA ¶ 35,873; *see* 2 Karen L. Manos, *Government Contract Costs & Pricing* § 87:24 (2d ed. 2009) ("Job site overhead costs, which are also sometimes referred to as field office overhead costs, are not really 'overhead' costs at all (unless the contractor happens to be performing two or more contracts at the same job site). They are direct costs of performing a construction . . . contract at that site.").

Nevertheless, FAR 31.105(d)(3), which applies to construction contracts like this one, gives contractors the option of treating costs incurred at a job site, also known as field office costs, as either direct costs or indirect costs, but it makes clear that the contractor must maintain consistency in whichever accounting practice it chooses:

> Costs incurred at the job site incident to performing the work, such as the cost of superintendence, timekeeping and clerical work, engineering, utility costs, supplies, material handling, restoration and cleanup, etc., are allowable as direct or indirect costs, provided the accounting practice used is in accordance with the contractor's established and consistently followed cost accounting practices for all work.

48 CFR 31.105(d)(3) (2014). Applying this provision, "contractors may charge [field office] overhead costs either directly (per diem) or indirectly (percentage), as long as they are charged consistently." *Watts Constructors*; *see* Defense Contract Audit Agency Contract Audit Manual 7640.1, § 12-802.4(b) (Jan. 2015) ("Job site/field overhead costs are allowable as direct or indirect costs provided the costs are charged in accordance with the contractor's established accounting system and consistently applied for all contracts (FAR 31.105(d)(3)).").

Here, during contract performance, ACI elected to treat its field office overhead expenses as indirect costs and to recover them when there were contract changes through a markup added to direct cost charges that were then paid through contract modifications. In the claim now before the Board, ACI continues to allocate field office overhead as an indirect cost in some instances (those involving unresolved change order requests and labor and

equipment inefficiencies resulting from delays) but also seeks to recover field office overhead as an independent direct cost. FAR 31.105(d)(3) precludes that type of inconsistent treatment. ACI had the right under FAR 31.105(d)(3) to elect to allocate field office overhead as either direct costs or indirect costs. Once it elected to view them as indirect costs, it was bound to act consistently with that election.

That limitation is further supported by FAR 31.202(a), which, in addressing what costs can be charged as direct, provides that, once costs "have been included in any indirect cost pool to be allocated to . . . any [particular] final cost objective," "other costs [later] incurred for the same purpose in like circumstances" cannot be reallocated as a direct cost. FAR 31.202(a). Similarly, FAR 31.203(d) provides that, "[o]nce an appropriate base for allocating indirect costs has been accepted, the contractor shall not fragment the base by removing individual elements" and move them into a direct cost pool.

In *M.A. Mortenson Co.*, ASBCA 40750, et al., 98-1 BCA ¶ 29,658, the Armed Services Board of Contract Appeals (ASBCA) recognized that FAR 31.203(d)(3), when applicable, prohibits a contractor from doing exactly what ACI is trying to do here – use more than one accounting practice for recovery of field office overhead. In *M.A. Mortenson*, the contractor used a direct cost per diem method (with a daily field overhead rate) when claiming job site overhead for changes and delays that increased the contract performance period, but it attempted to use an indirect cost percentage markup for changes that did not affect the contract performance period. The ASBCA found that the contractor's attempt to allocate some field office overhead costs as indirect was inconsistent with the contractor's normal direct cost per diem practice and violated the FAR requirement.

> Appellant's job site overhead claims must be denied because they violate the requirement of the FAR cost principles for the use of one distribution base for allocating a given indirect cost pool.
>
> FAR 31.203, "Indirect costs," subparagraph (b), requires grouping of indirect costs "so as to permit distribution of the grouping on the basis of the benefits accruing to the several cost objectives," and then selection of "a *distribution base* common to all cost objectives to which the grouping is to be allocated" (emphasis added). In our view, this reference to "a distribution base" requires use of a single distribution base for allocating a given overhead pool to cost objectives (such as changes). A contractor may choose any acceptable distribution base for allocating its job site overhead pool to particular cost objectives, but not more than one. We hold that appellant's practice of switching between a time distribution base (per diem rate) and a direct cost distribution base (percentage markup) for allocating job site overhead costs to changes, depending on whether a time extension was involved, on its face

> violated the FAR requirement for a single distribution base for allocating a given overhead pool.

Id.

ACI argues that "[t]he board in *M.A. Mortenson* was not presented with and did not rule on facts comparable to those here where, because the claim is a pure delay claim with no direct cost component, [i]t would be impossible to use a percentage rate . . . because there are no direct costs to apply it to." Appellant's Memorandum in Opposition to Government's Motion for Partial Summary Judgment at 1-2. Even if that were a sufficient reason to evade FAR 31.105(d)(3), which it is not, ACI is ignoring the fact that, on the more than $2 million in labor and equipment inefficiency costs that it is seeking, it has added a 5.99% field office overhead markup. ACI has also included 5.99% (or greater) field office overhead markups in all of its unresolved change payment requests. It is impossible to see how ACI's effort to recover its field office overhead both as a direct cost of delay and as an indirect cost markup to its other delay costs is anything other than double-counting. Pursuant to FAR 31.105(d)(3), ACI had to choose how to treat its field office overhead, and, during contract performance, it chose to treat it as an indirect cost. FAR 31.105(d)(3) and the other cost principles at FAR 31.202 and 31.203 preclude ACI from changing that election now.

ACI also asserts that, unlike in *M.A. Mortenson*, it is pursuing not only a changes claim but also a suspension of work claim, and it argues that different kinds of claims warrant different accounting practices and cost allocation methods. As an initial matter, we note that nowhere in ACI's lengthy certified claim or in its complaint does ACI ever mention that it is pursuing a claim under the Suspension of Work clause. Both the certified claim and the complaint focus exclusively on alleged changes caused by delays or differing site conditions for which the FHWA is allegedly responsible. In any event, ACI's argument that it should be allowed to treat field office overhead costs as indirect costs on its changes claim and as direct costs when seeking damages under a different but related theory ignores the rationale underlying *M.A. Mortenson* and, more importantly, is inconsistent with FAR 31.105(d)(3) itself. Were we to adopt the rule that ACI advocates, it would seem virtually impossible to maintain any kind of consistency in the contractor's allocation bases and to preclude the type of double-counting that seems prevalent in ACI's current claim.

Finally, to the extent that ACI suggests that it is unfair to limit its ability to treat field office overhead as a direct cost now, it ignores the benefits that it gained by electing to treat field office overhead as an indirect cost throughout contract performance. "[T]reatment as a direct cost would [have] require[d] the contractor to substantiate its job site overhead expenses 'change-by-change,'" rather than just being able to add a simple percentage markup to other direct costs. *Caddell Construction Co.*, ASBCA 53144, 02-1 BCA ¶ 31,850 (quoting *M.A. Mortenson*). "Moreover, if field office overhead were treated as direct costs, a

contractor often could not expect any significant recovery for change orders that did not extend contract performance because field office overhead expenses . . . tend to be fixed costs which do not increase in the absence of a time extension." *Id.* By electing to treat its field office overhead as an indirect cost throughout contract performance, ACI eliminated the burden of having to prove impact on overhead for each change and was able instead to apply indirect cost markups to changes that, had field office overhead been viewed as a direct cost, it might not otherwise have been able to recover. ACI's current argument about inequity is unpersuasive and, in any event, does not change the regulatory requirement.

We grant the FHWA's motion for partial summary judgment to preclude ACI from recovering field office overhead as a direct cost. ACI may continue to apply a field office overhead markup to the direct cost claims that it is asserting in this appeal.

ACI's Request for Home Office Overhead

"Home 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." *Altmayer v. Johnson*, 79 F.3d 1129, 1132 (Fed. Cir. 1996). Because FAR 31.105(d)(3) is limited to field office overhead costs, it does not apply to or control the accounting of extended home office overhead. Manos, *supra*, § 87:24.

"Generally, a contractor recovers [home office overhead as] indirect costs by allocating a proportionate share to each of its contracts." *Nicon, Inc. v. United States*, 331 F.3d 878, 882 (Fed. Cir. 2003); *see* Manos, *supra*, § 87:24 ("Home office overhead is almost always an indirect cost (unless the contractor has only one contract), and expressed as a [general and administrative (G&A)] rate or other indirect cost rate."). "However, when the government causes a delay or suspension of performance, this 'decreases the stream of direct costs against which to assess a percentage rate for reimbursement,'" such that a portion of the home office overhead remains "unabsorbed." *Nicon*, 331 F.3d at 882 (quoting *C.B.C. Enterprises, Inc. v. United States*, 978 F.2d 669, 671 (Fed. Cir. 1992)). The *Eichleay* formula "is used to 'equitably determine allocation of unabsorbed overhead to allow fair compensation of a contractor [for its home office overhead expenses resulting from] government delay.'" *Nicon*, 331 F.3d at 882 (quoting *Wickham Contracting Co. v. Fischer*, 12 F.3d 1574, 1578 (Fed. Cir. 1994)).

Eichleay is viewed as "an extraordinary remedy." *West v. All State Boiler, Inc.*, 146 F.3d 1368, 1377 (Fed. Cir. 1998). As a result, "[b]efore using the *Eichleay* formula to quantify an amount of damages, the contractor must meet certain strict prerequisites for the application of the formula." *Nicon*, 331 F.3d at 883. The concept underlying *Eichleay* is that it is impractical for a contractor to "obtain[] replacement work or reduc[e] home office overhead when it must 'standby' during an 'uncertain' period of government-imposed

delay." *Mech-Con Corp. v. West*, 61 F.3d 883, 886 (Fed. Cir. 1995). Accordingly, to establish a prima facie case in support of an *Eichleay* recovery, a contractor must show that there was "a government-caused delay of uncertain duration," that "the delay extended the original time for performance" or precluded the contractor from finishing earlier than scheduled, and that "the contractor [was] on standby and unable to take on other work during the delay period." *Nicon*, 331 F.3d at 883. The burden of production then shifts to the Government "to show either that it was not impractical for the contractor to obtain 'replacement work' during the delay, or that the contractor's inability to obtain or perform replacement work was caused by a factor other than the government's delay." *Id.* "If the government shows that the contractor was able to handle other work – whether or not it actually did so, which may have depended upon circumstances other than the delay – it refutes the underlying fact on which *Eichleay* damages are based." *Satellite Electric Co. v. Dalton*, 105 F.3d 1418, 1423 (Fed. Cir. 1997).

In its motion for partial summary judgment, the FHWA challenges ACI's ability to meet two specific, though related, prerequisites for recovery under the *Eichleay* formula. First, the FHWA argues that "Eichleay damages are limited only to periods for which a contractor is on standby *because of work stoppage or suspension of work*, not times in which it was on the job performing the original and additional contract work." Respondent's Motion for Partial Summary Judgment at 7 (emphasis added). Because there was no complete work stoppage or suspension during contract performance, the FHWA argues, *Eichleay* is automatically unavailable. Yet, the Federal Circuit in *Altmayer* expressly held that "[t]here is no requirement that a contract be suspended before a contractor is entitled to recover under *Eichleay*." 79 F.3d at 1134. It recognized that "an extended project – like a suspended project – may result in reduced income vis-a-vis overhead costs" and provide the same type of home office overhead allocation loss as a suspended contract. *Id.* (quoting *Williams Enterprises v. Sherman R. Smoot Co.*, 938 F.2d 230, 235 (D.C. Cir. 1991)); *see Roy McGinnis & Co.*, ASBCA 49867, 01-2 BCA ¶ 31,622 (allowing contractor to recover unabsorbed home office overhead even though it performed contract work during the Government-caused delay where its performance, though not suspended, was "significantly interrupted"). We recognize that the Federal Circuit later clarified the holding in *Altmayer* to require that the delay creating the extension must effectively act like "a suspension, whether formal or functional, of all or most of the work on the contract," *P.J. Dick Inc. v. Principi*, 324 F.3d 1364, 1373 (Fed. Cir. 2003), and that it can be difficult to determine, when reviewing all of the Federal Circuit's guidance on the availability of *Eichleay*, the exact degree of delay and disruption necessary to find a "functional" suspension. Nevertheless, the factual record before us is sufficiently disputed to preclude us from deciding in the FHWA's favor on summary judgment on this issue.

The second basis of the FHWA's motion for partial summary judgment on *Eichleay* is that ACI was performing "additional contract work" during any periods of delay that

should be viewed as absorbing ACI's home office overhead, rendering *Eichleay* unavailable. If ACI was able to find *replacement* work (which could have been through change orders adding work to this contract or other work outside the context of this contract) during periods of constructive suspension or delay, that would mean that there was another revenue stream to which ACI could temporarily have assigned the home office overhead expenses at issue here, which, as the FHWA argues, would render *Eichleay* relief unnecessary. *Nicon*, 331 F.3d at 883. The FHWA finds support for its assertion that ACI was able to find additional work in a declaration that ACI provided from its expert witness:

> ACI was constructively suspended throughout the 310 day period because the only work it was able to perform related to either disputed changed contract work, undisputed changed contract work, or original base contract work dependent upon the completion of the changed work.

Declaration of Bruce Blake (Nov. 22, 2021) ¶ 53. Yet, the record here does not tell us what additional work ACI was performing or whether the additional work was sufficient to be viewed as "replacement" work. The Federal Circuit has made clear that "the appropriate inquiry [in analyzing whether *Eichleay* is available] is whether . . . [the contractor] was able to take on 'replacement work,' not just any additional work." *Melka Marine, Inc. v. United States*, 187 F.3d 1370, 1377 (Fed. Cir. 1999); *see All State Boiler*, 149 F.3d at 1137 n.2 ("[A]dditional work is not automatically considered replacement work which would preclude recovery under the *Eichleay* formula."). Further, the replacement work has to be sufficient "to compensate for the disruptive effect" of any Government-caused suspension. *Alderman Building Co.*, ASBCA 58082, 20-1 BCA ¶ 37,613. If the contractor is performing "some work" on "minor items" susceptible to prompt completion, that might not be sufficient to absorb all of the home office overhead originally allocated to the delayed or suspended work or to preclude the application of *Eichleay*. *Altmayer*, 79 F.3d at 1134.

ACI's *Eichleay* request is inherently tied to its fact-intensive construction delay claims, which, given their fact-based nature, are understandably not a part of the FHWA's summary judgment motion. The Board therefore does not have a sufficiently detailed factual record to rule upon ACI's *Eichleay* claim. Resolution of ACI's Eichleay request will have to await a more fulsome factual development of those claims at a hearing.

The FHWA does not in its motion ask us to address ACI's other home office overhead claim – ACI's attempt to recover home office overhead through markups to its labor inefficiency and extended field office overhead claims. Having now reviewed that claim, though, we note that the Federal Circuit has made clear that *Eichleay* "is the exclusive formula for the calculation of damages for unabsorbed overhead due to a period of government-caused delay in situations in which contract performance has begun." *Nicon*,

331 F.3d at 888. The parties can address in future proceedings the extent to which ACI's home office overhead indirect cost markups are consistent with that direction.

Decision

For the foregoing reasons, we **GRANT IN PART** the FHWA's motion for partial summary judgment to preclude ACI from recovering extended field office overhead expenses as direct costs, rather than as indirect cost markups to its direct cost claims. We **DENY IN PART** the FHWA's motion for partial summary judgment on ACI's request for extended home office overhead expenses under *Eichleay*.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

I concur:

Allan H. Goodman
ALLAN H. GOODMAN
Board Judge

VERGILIO, Board Judge, concurring.

I concur in the result, but with a simplified explanation. The standards of summary judgment review are well-established, not contested, and here applied.

ACI consistently has treated field office costs as indirect costs. Federal Acquisition Regulation (FAR) 31.105(d)(3) (48 CFR 31.105(d)(3) (2014)) requires a contractor to treat such costs as either direct costs or indirect costs under a contract. ACI is precluded from recovering these costs as direct costs. I grant FHWA's request for summary judgment on this issue. However, as the agency seems to recognize, this result does not preclude the contractor from obtaining an appropriate mark-up on its claims as indirect costs.

Regarding the recovery of unabsorbed overhead, FHWA has not demonstrated that factually or legally the contractor is precluded from recovering such costs that it incurred. Changes, suspensions, and delays do not absolve an agency from providing relief available

under the contract. The contractor is entitled to present its case; I deny this aspect of the agency's motion.

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge