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Contractor Recovery of Overhead Expenses - Eichleay Claim

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When contractors perform work and incur delays on a project, one often overlooked possible claim is for lost home office overhead. Home office overhead includes home office (not project site) rental or ownership costs, taxes, insurance costs not assigned to a particular project, utilities, travel for staff, depreciation, professional fees, advertising, salaries of staff and equipment/maintenance, etc. Home office overhead can refer to either extended home office or unabsorbed/underabsorbed costs. Some courts treat these two constructs interchangeably, but in reality, they are technically different claims. Extended home office expenses are those additional expenses incurred over time due to a delay that prevents a contractor from taking on additional work. Unabsorbed/Underabsorbed expenses refer to home office costs that are incurred and then spread out across a contractor's various projects. When a project is delayed or work is suspended, these unabsorbed costs are now spread across fewer projects.

There are various methods that can be employed to calculate unabsorbed home office overhead. The method of calculation that is applied most often is referred to as the Eichleay formula, which derives its name from a case by the same name heard by the federal Armed Services Board of Contract Appeals in 1960. This detailed formula takes into account the ratio of all contract billings to total company billing, to arrive at a portion attributable to one particular project based upon the number days of performance and delay.

In order to recover on a claim when applying Eichleay, there must be (1) an owner caused delay that extended the contract completion date; (2) the contractor had to be on standby for an uncertain period of time; and (3) the contractor could not take on replacement work during the delay. There are few cases in Texas that discuss Eichleay, but thus far the application of the Eichleay formula in Texas has not been precluded (e.g. *Chilton Ins. Co. v. Pate & Pate Enters., Inc.*, 930 S.W.2d 877, 892 n. 10 (Tex. App.—San Antonio 1996, pet. denied); *Alamo Community College Dist. v. Browning Const. Co.*, 131 S.W.3d 146, 161 (Tex. App.—San Antonio 2004, pet. denied) overruled on other grounds; *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006)).

However, home office overhead can be precluded from being recovered either by contract language or by statute (e.g. Section 271.153(b)(3) of the Texas Local Government Code, in unambiguous language, provides that "Damages awarded in an adjudication brought against a local governmental entity arising under a contract . . . may not include damages for unabsorbed home office overhead."). Note that, while this statute does not refer to claims for extended home office overhead (as opposed to unabsorbed home office overhead), the drafters of that provision did not differentiate between the two and considered them all as home office overhead per the drafter of the bill that later became Section 271.153). Additionally, many federal courts also treat extended and



unabsorbed home office expenses interchangeably.

Remember to check the contract language and any statutory bar or impediment to such a claim as it pertains to any governmental entity. If you are an owner, insert a clause precluding these claims, and if you are a contractor, don't agree to it if you can. Depending on the size of the contractor and the size of the project, the amount of such a claim can be substantial.