DISTRICT OF COLUMBIA REGISTER OCT 31 1997

GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

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| MCI CONSTRUCTORS, INC. | ) | |
| | ) | CAB No. D-924 |
| Under Contract No. 0477-02-0-5-LA | ) | |

For the Appellant: Thomas B. Newell, Esq., and Charlie C.H. Lee, Esq., Watt, Tieder & Hoffar. For the Government: Warren J. Nash, Assistant Corporation Counsel.

Opinion by Administrative Judge Jonathan D. Zischkau, with Administrative Judges Lorilyn E. Simkins and Phyllis W. Jackson, concurring.

## OPINION

In this appeal, the Appellant, MCI Constructors, Inc. ("MCI"), seeks convenience termination costs pursuant to the Board's previous entitlement decision in CAB No. D-835, reported at 39 D.C. Reg. 4305, which converted the District's default termination of MCI's contract into a termination for the convenience of the District. We conclude that MCI is entitled to recover $764,842, plus interest pursuant to D.C. Code § 1-1188.6.

## BACKGROUND

This case requires us to determine the appropriate award due MCI as a result of our entitlement decision which converted the District's improper default termination of Contract No. 0477-AA-02-0-5-LA into a termination for the convenience of the District. The contract was for the construction of the Chlorination/Dechlorination Facility at the Blue Plains Wastewater Treatment Plan. It was a fixed-price contract in the amount of $2,882,850.00. 39 D.C. Reg. at 4305. The Project was designed to provide the final treatment of wastewater from the Blue Plains Wastewater Treatment Plant before the water is discharged into the Potomac River. MCI was required to build one new building largely for instrumentation; to furnish and install chlorination and sulfonation equipment, chemical piping, railroad spur tracks, process steam analyzers, and electrical power and control circuits; and to rehabilitate and repair existing chlorine injectors and chlorine injector water pumps. 39 D.C. Reg. at 4310; Appeal File ("AF") 1, at SP-1.

The entitlement decision sets forth the Board's findings of fact and conclusions of law supporting its decision to convert the termination for default into a termination for the convenience of the District. Neither party challenges our prior findings and we will not restate those findings except as necessary to explain our determinations with respect to quantum.

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In the entitlement decision, we directed the parties to resolve termination for convenience quantum in accordance with Article 6 ("Termination for Convenience of the District") of the General Provisions of the contract.[1] Pursuant to those directions, MCI submitted a termination for convenience claim to the Director of the Department of Administrative Services ("DAS") on November 6, 1991. On December 17, 1991, a representative of the DAS Director ordered the

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[1] Article 6 provides in pertinent part:

> E. In the event of the failure of the Contractor and the Contracting Officer to agree . . . upon the whole amount to be paid to the Contractor by reason of the termination of work pursuant this Article, the Contracting Officer shall, subject to any review required by the District's procedures in effect as of the date of execution of Contract, determine, on the basis of information available to him, the amount, if any, due the Contractor by reason of the termination and shall pay to the Contractor the amounts determined by the Contracting Officer, as follows, but without duplication of any amounts agreed upon in accordance with D above.
>
> 1. With respect to all Contract work performed prior to the effective date of the Notice of Termination, the total (without duplication of any items) of:
>
> a. The cost of such work;
>
> b. The cost of settling and paying claims arising out of the termination of work under subcontracts or orders as provided in B.5. above, exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the subcontractor prior to the effective date of the Notice of Termination of work under the Contract, which amounts shall be included in the cost on account of which payment is made under E.1 as above; and
>
> c. A sum, as profit on E.1.a. above, determined by the Contracting Officer to be fair and reasonable; provided however, that if it appears that the Contractor would have sustained a loss on the entire Contract had it been completed, no profit shall be included or allowed under this subparagraph and an appropriate adjustment shall be made reducing the amount of the settlement to reflect the indicated rate of loss; and provided further that profit shall be allowed only on preparations made and work done by the Contractor for the terminated portion of the Contract but may not be allowed on the Contractor's settlement expenses. Anticipatory profits and consequential damages will not be allowed. Any reasonable method may be used to arrive at a fair profit, separately or as part of the whole settlement.
>
> 2. The reasonable cost of the preservation and protection of property incurred pursuant to B.9; and any other reasonable cost incidental to termination of work under the Contract including expense incidental to the determination of the amount due to the Contractor as the result of the termination of work under the Contract.
>
> F. The total sum to be paid to the Contractor under E 1. above shall not exceed the total Contract price as reduced by the amount of payments otherwise made and as further reduced by the Contract price of work not terminated. . . .

District and MCI to negotiate a termination for convenience settlement. From December 1991 to June 1992, the District was dilatory in negotiating the termination claim with MCI. No meaningful negotiations took place and ultimately MCI filed the captioned appeal with the Board from the Director's deemed denial of MCI's termination cost claim. The parties conducted additional discovery on the issue of termination quantum, the Board conducted a six day quantum hearing in June 1993, and the parties submitted posthearing briefs.

Under paragraph E of Article 6, the contractor whose contract has been terminated for convenience is entitled to recover its total costs incurred in performing the contract work (including changes to the contract work), the costs of settling claims arising out of the terminated contract work, and a reasonable profit on the terminated work. Paragraph F of Article 6 caps the contractor's recovery at the "total Contract price", minus payments previously received by the contractor, and minus the contract price of any work not terminated. The phrase "total Contract price" in Paragraph F, consistent with the phrase "Contract work" in Paragraph E, means the total contract price as properly adjusted for *inter alia* contract changes. *See A.A. Beiro Constr. Co.*, CAB No. D-822, 40 D.C. Reg. 4574, 4626. Thus, a decision by the DAS Director to terminate a contract for convenience (or, as here, a Board decision converting a default termination to one for convenience) effectively converts a fixed-price contract into a cost reimbursement contract, subject to the properly adjusted contract price as a ceiling. *E.g.*, *Worsham Constr. Co.*, ASBCA No. 25907, 85-2 BCA ¶ 18,016 at 90,369.

**MCI's Revised Termination Claim Summary**

As set forth in its posthearing brief, MCI claims $1,828,018.36 in termination costs, consisting of:

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| I. | Unpaid contract costs plus profit (limited to the contract cap) | $1,029,130.52 |
| II. | Jones & Artis (subcontractor) claim | 291,450.09 |
| III. | Settlement expenses: "related legal expenses" | 180,016.00 |
| | "claim preparation costs" | 131,887.00 |
| IV. | Interest (through 8/29/93) | 195,534.75 |

The District has challenged numerous elements of cost under each of the categories identified by MCI. We will analyze the categories seriatim.

## I. Unpaid Contract Costs

In determining MCI's total costs of performance under paragraph E.1.a of Article 6, MCI's accounting experts, Messrs. Richard Watkins and Jerry Hahne of Watkins, Meegan, Drury & Company, calculated that from inception of the contract to the date of termination, MCI incurred $3,350,949.66 in total direct costs and $268,475.98 in allocable general and administrative expenses. Pursuant to paragraph E.1.c of Article 6, the accountants added profit of 12 percent, to arrive at a total project cost of $4,053,308.72 under Article 6, paragraph E.1. Subtracting from that total the sum of all project payments MCI has previously received, $2,802,716.48, the accountants concluded that MCI's total unpaid performance costs equal $1,250,592.24. Recognizing that its total unpaid performance costs are subject to the adjusted contract price cap of Article 6, paragraph F (recovery limited to the lesser of total unpaid performance costs and the adjusted contract price cap), MCI calculates its adjusted contract price as follows:

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|---|---|
| Original Contract Amount | $2,882,850.00 |
| Plus: | |
| Change Order No. 1 | 94,833.00 |
| Pending Change Orders | 199,443.00 |
| Delay Damages | 315,238.00 |
| Labor Inefficiency and Disruption | 431,994.00 |
| Adjusted Contract Price | $3,924,358.00 |

MCI calculates the adjusted contract price cap pursuant to paragraph F of Article 6, as follows:

| | |
|---|---|
| Adjusted Contract Price | $3,924,358.00 |
| Less: | |
| Payments received | 2,802,716.48 |
| Value of uncompleted work | 92,511.00 |
| Adjusted Contract Price Cap | $1,029,130.52 |

Under its calculations, MCI's adjusted contract price cap ($1,029,130.52) is lower than total unpaid performance costs ($1,250,592.24). Therefore, says MCI, this element of recovery is limited to the amount of the adjusted contract price cap. However, the District challenges MCI's inefficiency and disruption costs, the delay damages, and MCI's entitlement to costs for instrumentation coordination. The parties' disputes in these areas affect the calculation of the adjusted contract price, and, therefore, the calculation of the adjusted contract price cap.

**A. Original Contract Amount and Change Order No. 1**

The parties have stipulated to the original contract price of $2,882,850.00 and the amount of $94,833.00 for Change Order No. 1. (Joint Stipulations, filed June 21, 1993).

**B. "Pending Change Orders"**

Under the "Pending Change Orders" category, the parties have stipulated to various change order amounts totaling $171,956 of the $199,443 claimed by MCI. (Second Joint Stipulations, filed June 21, 1993). The difference, $27,487, is based on MCI's claim for a constructive change arising from a District-caused redesign in some of the instrumentation. According to MCI's president, Mr. Clement Mitchell, District design errors forced him to assign a project engineer, Mr. Richard Fawley, to review and coordinate design changes between the District and one of MCI's instrumentation suppliers, Fischer & Porter. (6/21/93 Tr. 67). MCI seeks to recover 1,032 labor hours for coordination and revision work performed by Mr. Fawley, during the period March 1988 through September 1988, in connection with the instrumentation design change. We know from the record that the District in December 1987 approved of the design changes sought by MCI. An undated MCI change proposal shows Mr. Fawley's labor rate at $22 per hour, multiplied by 1,032 hours, plus some unstated labor burden, for a total of $22,735. After applying some markup, the total claim is $27,487. (6/21/93 Tr. 70-72; MCI Vol. 2, Exhibit 5). Although Mr. Fawley, as manager of MCI's construction planning and review department, had been involved with instrumentation submittals on the project at least as early as February 1987 (*e.g.*, AF 4.11), he started working at the Blue Plains site beginning in March 1988. The evidence also shows, however, that he was doing more than simply coordination work associated with the instrumentation redesign on this one project. Mr. Richard Vroom, MCI's project manager during the period September 1987 through September 1988, testified that Mr. Fawley, as MCI's manager of document control, was responsible for managing the submittal processes for all projects, including during the time period when Mr. Fawley was physically located at Blue Plains from March through September 1988. (6/23/93 Tr. 161-62). Based on our review of the relevant portions of the record, MCI's initial action to assign Mr. Fawley's time to an overhead account was probably the correct one since his time benefited more than one contract. We give little weight to the records submitted by MCI in support of its change proposal for instrumentation coordination. (*Cf.* 6/21/93 Tr. 197; MCI Vol. 2, Exhibit 3, Ex. B, Ex. 1 and Ex. 2-1 at 6; MCI Vol. 2, Exhibit 5, Ex. 9, Ex. 1). Even if we were to treat Mr. Fawley's costs as direct costs, MCI has not attempted to segregate the portion of his coordination time allocable to this contract and the portion allocable to other contracts. In addition, MCI shares some of the responsibility for coordination problems relating to the Fischer & Porter instrumentation (*see, e.g.*, 6/21/93 Tr. 151-54; 6/23/93 Tr. 240-41; District Exs. 56-57; AF 4, Attachments 4.22-4.24, 5.96), but it has not accounted for its share of that responsibility. Accordingly, MCI is not entitled to an equitable adjustment for Mr. Fawley's coordination work.

**C. Labor Inefficiency and Disruption**

The law recognizes that an equitable adjustment may include as an element of recovery additional costs incurred by a contractor for loss of productivity or efficiency arising from disruptions for which the government bears cost responsibility. Like other types of claims, the contractor must prove that it suffered a loss of efficiency and that the government or owner is responsible for the loss of efficiency costs. *U.S. Industries, Inc. v. Blake Constr. Co.*, 671 F.2d 539, 546-47 (D.C. Cir. 1982); *Williams Enterprises v. Sherman R. Smoot Co.*, 938 F.2d 230, 236 (D.C. Cir. 1991). Unlike a delay claim, which seeks compensation for the additional costs of having to stay on a project longer than it would have but for the delaying acts, a loss of efficiency claim seeks compensation for the additional costs resulting from the government-caused disruptions that made the contractor's work more difficult and expensive than it would have absent the disruptions. *U.S. Industries*, 671 F.2d at 546. Courts and boards of contract appeals have addressed a wide array of disrupting factors which may cause loss of productivity or labor inefficiency, including factors such as: disruption of the contractor's work sequence, disruptions from numerous contract changes creating delays and accelerations, disruptions causing crowding or stacking of trades, disruptions or accelerations which force the contractor to initiate overtime work, and government changes to one portion of a project which decrease efficiency on another part of the project. *See, e.g., U.S. Industries*, 671 F.2d at 546-47; *William Enterprises*, 938 F.2d at 236; *Luria Brothers & Co. v. United States*, 369 F.2d 701, 713-14 (Ct. Cl. 1967); *Fischbach & Moore Int'l Corp.*, ASBCA No. 18146, 77-1 BCA ¶ 12,300, at 59,237-38; *Continental Consolidated Corp.*, ASBCA No. 10662, 67-1 BCA ¶ 6127; *Casson Constr. Co.*, GSBCA No. 4884, 83-1 BCA ¶ 16,523.

The proper measure of the adjustment is the difference between what it would have cost to perform the work without the government-caused disruption and what it actually cost to perform the work with the disruption. *General Railway Signal Co. v. WMATA*, 875 F.2d 320, 325 (D.C. Cir. 1989); *Williams Enterprises*, 938 F.2d at 236. Having said that, it is well-recognized that proof of quantum for labor inefficiency is often a difficult task. *Luria Brothers*, 369 F.2d at 713; *Paccon, Inc.*, ASBCA No. 7890, 1963 BCA ¶ 3659, at 18,356.

MCI claims that the District-caused delays, changes, and accelerations significantly affected MCI's labor productivity and interrupted its rhythm and sequence of work. For example, MCI claims that District delays arising from its poor design and project mismanagement led to numerous contract changes which forced MCI repeatedly to shift its workforce and resequence contract work and caused MCI's workforce to work excessive overtime. MCI presented two methods for calculating its labor inefficiency and acceleration costs, principally through the testimony of Mr. Edward Ripper of The Barrington Consulting Group who was qualified as an expert in construction contract cost analysis and pricing.

First, MCI relies on a modified total cost method to estimate its inefficiency costs. This method compares actual costs with the bid estimate rather than with a would-have-cost estimate. The inefficiency cost is equal to the actual cost of performing the affected work, minus costs

incurred due to the contractor's fault, minus the contractor's bid price for the affected work. To use this method, the contractor must show that: (1) the actual inefficiency costs cannot be estimated reasonably by a more reliable means; (2) its estimate of the disrupted work is substantiated by its bid and the bid estimate is reasonable; (3) its actual costs are reasonable; and (4) government-caused disruption was responsible for the inefficiencies. *See Servidone Constr. Corp. v. United States*, 931 F.2d 860, 861 (Fed. Cir. 1991); *WRB Corp. v. United States*, 183 Ct. Cl. 409, 426 (1968). In *Servidone*, the court approved of a modified total cost award in which the trial court substituted a reasonable bid amount for the original bid because of bid inaccuracies. 931 F.2d at 861-62.

MCI states that it incurred total labor costs of $952,808. This amount was derived from MCI's job cost recap which showed total labor costs of $912,365.55. The job cost amount was adjusted upward by $17,707.45, to account for adjustments arising from MCI's change to new accounting system software, plus $22,735 for the coordination work of Mr. Fawley. (6/21/93 Tr. 196-98; MCI Vol. 2, Exhibit 3, Ex. B, Tab 1). From the total labor costs of $952,808, Mr. Ripper subtracted labor costs of $18,055 for pipe dope rework attributable to MCI, and total labor supervision and administration costs of $306,535, in order to obtain "adjusted manual labor costs" of $628,218. (6/24/93 Tr. 102; MCI Vol. 2, Exhibit 6, at 2). From the adjusted manual labor cost total, he subtracted the budgeted (bid) manual labor costs of $197,374, labor in approved change orders of $18,096, and labor included in unapproved change orders claimed elsewhere of $74,344, for a total manual labor loss of $338,404. To this amount, he added labor supervision costs of $47,305 and 12 percent profit for a total labor inefficiency and acceleration claim of $431,994.

MCI also presented an alternative set of calculations which it calls a "measured mile" analysis. The measured mile method (also variously called "yardstick" or "benchmark") is one form of a would-have-cost analysis where the productivity that the contractor achieved in an undisrupted work period is compared to the contractor's productivity on identical or similar tasks during a disrupted work period. *See U.S. Industries*, 671 F.2d at 547; 2 R. NASH & J. CIBINIC, FEDERAL PROCUREMENT LAW 1412-13 (3d ed. 1980). As a generalization, the difference in productivity or labor costs between the disrupted and undisrupted periods represents the loss of productivity or efficiency costs. The more comparable the project conditions during the two periods (other than the disruption), the more persuasive the analysis. Mr. Ripper testified that he performed a measured mile productivity analysis of MCI's labor inefficiencies in order to verify that the amount calculated under the modified total cost approach was reasonable. (6/24/93 Tr. 122; MCI Vol. 2, Exhibit 6, at 8). Focusing on MCI's civil and mechanical activities, Mr. Ripper used MCI's payment requisitions as an indication of the progress that was being made on a monthly basis on the project. (6/24/93 Tr. 123). Mr. Ripper determined that there was no unimpacted performance period with regard to those activities. He analyzed the period from October 1, 1986 through December 20, 1987 and determined that this period was a "moderately" impacted period. He determined the period from December 21, 1987 through September 30, 1988 to be a "severely" impacted period. He concluded that during the moderately impacted period, MCI labor was 25 percent inefficient due to District-caused

disruptions. (6/24/93 Tr. 128-29). For the moderately impacted period, Mr. Ripper calculated the number of manhours spent to accomplish one percentage of completion for civil activities (90.45) and for mechanical activities (30.07) by dividing the total actual manhours for the civil activities (7,966) and mechanical activities (1,617) by the percentages of civil (88.08%) and mechanical (53.77%) work completed. Then, he reduced the manhours per percent complete by 25 percent to derive a "should have been" manhours per percent complete for civil (67.83) and mechanical (22.55). Finally, he multiplied the "should have been" manhours per percent complete by the actual percentages completed for the moderately and severely impacted periods to arrive at the number of manhours MCI should have been required to spend to accomplish the civil (5,975) and mechanical (1,213) work in the moderately impacted period. Under Mr. Ripper's method, the difference between the "should have been" manhours and the actual manhours constitutes the inefficient manhours spent on civil (1,992) and mechanical (404) in the moderately impacted period. To determine the number of inefficient manhours spent in the severely impacted period, Mr. Ripper calculated from the project's payment requisitions the percentages of completion accomplished for civil (9.35%) and mechanical (44.69%) work during the severely impacted period. Using the "should have been" manhours per percent complete for civil and mechanical, he arrived at total inefficient labor hours for civil (1,551) and mechanical (5,638) work for the severely impacted period. Multiplying the total number of inefficient labor hours (9,585) times an hourly manual labor rate ($26.79) yields a manual labor inefficiency and acceleration cost of $256,778. Adding labor supervision and administration ($47,305) and 12 percent profit yields a final total of $340,573. (6/24/93 Tr. 103-04, 125-32, 147-48, 159-60). MCI also presented, at the Board's request, an alternative analysis which used the bid, rather than the moderately impacted period as adjusted, to calculate a baseline manhours per percent complete rate for the civil activities (42.7 manhours per percent complete) and the mechanical activities (45.2 manhours per percent complete). Using these baseline rates, the total labor acceleration and inefficiencies amount is $347,188. (*Id.*).

The District does not dispute that MCI experienced significant inefficiencies (6/29/93 Tr. 255) but claims that the inefficiencies were the result of MCI's own poor execution and coordination of the work rather than the result of District-caused disruptions. The District contends that MCI failed to adduce specific proof that any District changes or disruptions caused MCI to experience inefficiencies. Also, the District claims that MCI underbid the project in a number of areas but because the original bid papers cannot be located the District states that it cannot determine whether cost overruns are the result of bid errors or MCI inefficiencies. The District's Mr. John Livengood, qualified as an expert in construction claim analysis, did not believe that MCI's measured mile analysis using percentage of completion data from payment requisitions was appropriate under the circumstances. Mr. Livengood testified that there is no support for MCI's deduction of 25 percent from the manhours per percent complete rate for the "moderately impacted period" in order to arrive at a baseline manhour per percent complete rate for the civil and mechanical activities. Moreover, the District argues that MCI never established a causal link between District-caused disruptions or delays and particular MCI labor activities as a necessary predicate for showing District-caused labor inefficiencies.

Under the particular facts of this case, we conclude that neither method used by MCI to estimate inefficiency quantum provides a sufficiently reliable measure of MCI's inefficiency costs arising from District-caused disruptions. Our conclusion on the inadequacy of proof of quantum originates in MCI's overly general proof of causation. The evidence does not convince us that the various District disruptions caused labor overruns in the labor activities covered by MCI's modified total cost or measured mile analyses. In a number of areas, MCI's presentation suffered from a lack of reasonable detail as to (1) the work activities which were disrupted and rendered inefficient, and (2) the causal connection between the District's disruptions and MCI's increased labor costs. MCI's presentation on causation -- often no more than general statements that it suffered inefficiencies resulting from out of sequence work, work delays and suspensions, and accelerations -- failed to reasonably specify what work activities were rendered inefficient and how the disruptions made those activities more difficult and expensive. For example, MCI did not explain why, according to its job cost records, some activities were performed below budget while others greatly exceeded budget. MCI did not explain the 30-fold increase in labor for installing seed and fertilizer (labor code 601) and the nearly 150-fold increase in the "piping-exc. bed & refill" work (labor code 603) under the civil work, and the 10-fold increase in labor for installing the stainless steel pipe (labor code 204) and the 50-fold increase for installing diffusers (labor category 230) under the mechanical work. (MCI Vol. 2, Exhibit 3, Ex. B, Ex. 1; District Ex. 5, Attachment 5-12, at 1-4; District Ex. 130). Because the level of analysis and proof was much too general, we are unable to conclude that either MCI's modified total cost method, addressing a single adjusted total manual labor cost, or MCI's measured mile method, addressing MCI labor costs under composite civil and mechanical categories, provides a reasonable measure of MCI inefficiency costs for which the District bears cost responsibility.

There are additional reasons why we cannot adopt either MCI method for measuring quantum. For its modified total cost approach, MCI did not persuade us that its bid, as generally reflected in the project's initial budget document which summarizes labor and non-labor bid estimates (District Ex. 130; *see* 6/21/93 Tr. 52), provides a reliable estimate of labor for MCI to perform the contract work excluding the disruptions, changes, and accelerations for which the District bears cost responsibility. Other than the totals for each labor code, the budget summary contains no information relating to the labor estimates. It contains no supporting documentation speaking to productivity assumptions. Because the underlying bid worksheets are missing (6/21/93 Tr. 115, 117), more persuasive evidence could have been presented in the form of an independent would-have-cost estimate. Having carefully reviewed the record, we are convinced that there were some bidding errors by MCI, as reflected in the budget summary document, that had the effect of understating the estimated labor costs. MCI did not persuasively address those errors in its case or make adjustments accordingly. In fact, MCI makes an adjustment only for the pipe dope rework performed by MCI in the June and July 1988 period. As discussed earlier, the evidence shows that MCI also bears some responsibility for coordination problems that existed on the project. (*See, e.g.*, 6/21/93 Tr. 151-54; 6/23/93 Tr. 240-41; District Exs. 56-57; AF 4, Attachments 4.22-4.24, 5.96). Although those coordination problems did not translate into critical path delay (*see infra*), they affected MCI's labor efficiency and its labor supervision costs.

MCI presented its measured mile analysis "to check and verify that the amount calculated under the modified total cost approach was reasonable and accurate." However, we fail to see how the results of that analysis verify the modified total cost result. In addition, we do not have confidence in the reliability of the baseline productivity rates calculated for the composite civil and mechanical activities. The problem of reliability does not arise primarily from the expert's use of a composite civil and mechanical percentage of completion approach derived from the payment requisition records, a measurement standard MCI's Mr. Ripper readily agreed was less preferred than having actual data on quantities of materials installed. (6/24/93 Tr. 122-23, 161-62). Rather, we do not believe the record provides adequate evidence to justify the calculated baseline productivity rates for the civil and mechanical categories against which the moderately and severely impacted periods were assessed. Specifically, we cannot find adequate evidence in the record to support the 25 percent deductive adjustment which Mr. Ripper made to the manhours per percent complete rate for the moderately impacted period in order to arrive at the baseline rate. He arrived at the 25 percent adjustment based on discussions with MCI's president and personnel concerning "impacts that were occurring on the job,"[2] from "studying the fluctuations on a monthly basis,"[3] and from his experience in having performed a "great many productivity calculations" in "various environments" under "various levels of impact." (6/24/93 Tr. 128-29). Mr. Ripper is not a construction engineer and did not offer an engineering estimate. None of MCI's fact witnesses offered a meaningful estimate. Nor do the baseline mechanical and civil rates (22.55 and 67.83, respectively) compare in any logical manner with the manhours per percent complete rates that Mr. Ripper calculated for the mechanical and civil portions (45.2 and 42.7, respectively) of MCI's bid as reflected in the

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[2] MCI's president testified that in the latter part of 1987 he and others at MCI made a review of project status and costs and "it was our opinion at the time we were running an inefficiency factor of between 20 and 30 percent." (6/21/93 Tr. 60-61). Although he testified that the inefficiency was caused by certain delays and contract changes, the explanation was superficial and lacked any substantiating evidence for quantifying the inefficiency. (*Id.* at 61-63). These general observations do not adequately establish a reliable basis for Mr. Ripper's use of a 25 percent adjustment to the "moderately impacted period" manhour per percent complete rates in order to arrive at baseline rates. Mr. Vroom, the MCI project manager for this project and another ongoing project at Blue Plains, testified that when he joined the project in September 1987, he reviewed actual labor and material costs incurred to date, compared those costs with percentage completion, and made a cost to complete analysis for his management. (6/23/93 Tr. 139-142). To the extent that Mr. Vroom testified that as of September 1987 MCI's labor costs exceeded budget by 20 to 30 percent because of District "delay", we give little weight to such testimony because he admittedly had little or no knowledge about the job when he came aboard and he gives no reasons supporting his conclusion. (*Cf. id.* at 140-142 and 256-59). While the 20 to 30 percent figure may well represent MCI's labor *overrun* on the project at that time, neither the testimony from Mr. Mitchell nor from Mr. Vroom convinces us that those numbers represent MCI labor inefficiency solely attributable to the District.

[3] Although the record is unclear, the "fluctuations" appear to refer to monthly fluctuations in the manhours per percent complete. Because MCI's documentation did not permit Mr. Ripper to calculate quantities of materials installed, or the like, we must presume that Mr. Ripper never studied fluctuations in the productivity for actual project activities.

budget summary.[4]

Notwithstanding that we cannot rely on the modified total cost or measured mile analysis presented by MCI, the record convinces us that the District's disruptions, delays, and accelerations caused MCI to incur inefficiency and acceleration costs for which the District bears cost responsibility. The District concedes that MCI is entitled to some compensation for the acceleration which began in May 1988. Well before December 1987, MCI had to contend with numerous significant disruptions caused by the District's failure to drain the forebays, untimely approval of the Fischer & Porter chlorination/dechlorination equipment submittals, and untimely action on the console redesign. The District's untimely actions and the design problems regarding the chlorine water injection pumps and the stop logs problem also disrupted MCI operations. The District also imposed constructive and directed accelerations to MCI's work. (6/23/93 Tr. 111-117). The changes forced MCI to resequence work not only in 1987 but also in 1988 when the District was demanding that MCI get the facility operational to meet an EPA deadline. The District does not dispute that MCI resequenced work or incurred acceleration costs. The District's expert testified, and his exhibits show, that MCI accelerated performance in varying degrees from the beginning of May 1988 through at least July 1988. (District Ex. 5, Attachment 5-6).

Owing to the difficulty here in substantiating with direct and specific proof the quantum for each labor activity or group of activities subjected to inefficiency and acceleration, our use of a "jury verdict" method for estimating the inefficiency and acceleration costs is appropriate. *Nolan Brothers, Inc. v. United States*, 437 F.2d 1371, 1387-88 (Ct. Cl. 1971); *Joseph Pickard's Sons Co. v. United States*, 532 F.2d 739, 742 (Ct. Cl. 1976); *Fischbach & Moore*, 77-1 BCA ¶ 12,300, at 59,237. In making a "jury verdict" determination, we have reviewed the scope and types of District-caused changes and disruptions, the estimated labor hours and costs, and the actual labor hours and costs for each job activity code under equipment and piping installation (labor code series 100 and 200) and civil installation (labor code series 600). Based on our review, we conclude that MCI is entitled to a total of $180,000 for direct labor inefficiencies and acceleration for which the District bears cost responsibility. We add ten percent for supervision and administration, resulting in a subtotal of $198,000.

The parties dispute the proper profit rate that should be applied to the contract adjustments pursuant to paragraph E.1.c of the Article 6 termination for convenience clause. In its original termination for convenience proposal, MCI's accounting expert, Mr. Watkins, used a 10 percent profit rate on MCI costs with regard to the labor inefficiencies and acceleration claim (MCI Vol. 2, Exhibit 3, Ex. D), but used a 12 percent profit rate elsewhere (*id.*, Ex. B). A 10 percent profit rate was used in Change Order No. 1, the only bilateral change order executed by the parties. (*See* A.F. 5.1 at 5-2). MCI's budget summary identifies

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[4] Using composite rates derived from the budget summary of the bid would not be a proper measure here because the result would effectively duplicate the modified total cost method, excluding only the labor activities not included in the civil and mechanical composites. (6/24/93 Tr. 153).

projected income at approximately 9.5 percent of total budgeted costs. (District Ex. 130, at 7). Mr. Ripper determined that a 12 percent profit rate was justified by MCI's profit history on other jobs. Mr. Mitchell, MCI's president, also testified in support of a 12 percent rate. MCI, therefore, applies a 12 percent profit rate in its current quantum request. Based on our review of the record, including the 10 percent rate used in Change Order No. 1, we find that a profit rate of 10 percent is reasonable and should be applied. Adding ten percent profit to the labor inefficiency and acceleration subtotal of $198,000, yields a final total of $217,800 for MCI's labor inefficiencies and acceleration costs.

**D. Delay Damages**

MCI seeks a total of $315,238 in delay damages, consisting of extended labor supervision and administration amounting to $107,877, unabsorbed or extended home office overhead amounting to $127,702, and costs for extended equipment and general conditions equal to $79,659. For the most part, MCI's calculation of delay damages relies on its determination that the District caused a 252-day critical path delay to project completion and that MCI was not responsible for any concurrent critical path delay. The District contends that MCI was responsible for significant concurrent delays and is entitled to compensation for at most 62 days of District-caused delay. Because MCI seeks compensation for costs its says it incurred on account of project delays, we need to determine the magnitude of the compensable delay period. We will address that issue under the claim for extended home office overhead before we reach the claims for costs associated with extended labor supervision and administration and extended equipment and general conditions.

**1. Unabsorbed Home Office Overhead**

Overhead refers to indirect costs that a contractor must expend for the benefit of the business as a whole, as opposed to direct costs which are costs specifically identified with a final cost objective such as a contract. A contractor typically incurs the majority of its overhead costs operating a home office. Because overhead costs are generally fixed, and time-related, a contractor continues to incur them even during periods of reduced contract activity caused by a delay or suspension. When contract performance is delayed by the government in such a manner that the contractor cannot absorb a fair share of its on-going overhead costs, the law allows the contractor to recover its unabsorbed or extended overhead costs as an element of delay damages. *Eichleay Corp.*, ASBCA No. 5183, 60-2 BCA ¶ 2688, *aff'd on recon.*, 61-1 BCA ¶ 2894; *George Hyman Constr. v. WMATA*, 816 F.2d 753, 756 (D.C. Cir. 1987); *Williams Enterprises*, 938 F.2d at 235; *Wickham Contracting Co. v. Fischer*, 12 F.3d 1574, 1577 (Fed. Cir. 1994); *Interstate General Government Contractors, Inc. v. West*, 12 F.3d 1053, 1057 (Fed. Cir. 1993); *C.B.C. Enterprises, Inc. v. United States*, 978 F.2d 669, 672-74 (Fed. Cir. 1992); *Capital Electric Co. v. United States*, 729 F.2d 743 (Fed. Cir. 1984). In its standard form, the formula used in *Eichleay* for quantifying the amount of recoverable unabsorbed home office overhead for a construction contractor consists of the following three calculations:

$$\frac{\text{contract billings}}{\text{total billings during performance period}} \times \text{corporate overhead incurred during performance period} = \text{corporate overhead allocable to contract}$$

$$\frac{\text{corporate overhead allocable to contract}}{\text{total days of contract performance}} = \text{corporate overhead allocable to contract per day}$$

$$\text{corporate overhead allocable to contract per day} \times \text{number of days of compensable delay} = \text{recoverable overhead}$$

To the extent that the contractor has recovered some part of the unabsorbed overhead during the delay period (*e.g.*, a markup for fixed overhead on direct costs for change order work), it must be deducted from the amount of recoverable overhead calculated under the *Eichleay* formula.

To justify use of the *Eichleay* formula for calculating a daily rate for unabsorbed home office overhead expenses, the contractor must show that: (1) the government has caused a compensable delay or suspension; (2) the delay or suspension interrupts or reduces the stream of income from payments for contract direct costs; and (3) it was unable to absorb a fair share of its home office overhead costs during the delay or suspension period. *George Hyman*, 816 F.2d at 756-57; *Wickham Contracting*, 12 F.3d at 1577-78. If the contractor shows that the delay or suspension was sudden and of unpredictable duration, it makes a prima facie showing that it was unable to absorb a fair share of its home office overhead expenses because in those circumstances it is presumed that it was not prudent or practical for the contractor to mitigate the impact by reducing overhead costs (*e.g.*, by reducing home office personnel, facilities, or other fixed costs of running the business) or by taking on new work. *George Hyman*, 816 F.2d at 757; *Williams Enterprises*, 938 F.2d at 235; *Mech-Con Corp. v. West*, 61 F.3d 883, 886-87 (Fed. Cir. 1995); *Wickham Contracting*, 12 F.3d at 1577-78. The government may rebut the presumption by showing that the contractor "did not suffer or should not have suffered any loss because it was able to either reduce its overhead or take on other work during the delay." *Mech-Con*, 61 F.3d at 886.

MCI's claim for $127,702 in extended or unabsorbed home office overhead costs consists of $86,963 for a 252-day delay during contract performance and $40,739 for a 101-day pre-performance delay by the District in issuing the notice to proceed. The District contends that the 101-day pre-performance delay is not compensable and that MCI concurrently delayed the project's critical path and therefore is entitled to no more than $21,397 based on a 62-day non-concurrent District delay.

The 252-day performance delay claim

Notice to Proceed was issued to MCI on July 21, 1986. 39 D.C. Reg. at 4305. Construction of the project was to be completed 550 consecutive calendar days after Notice to Proceed, *i.e.*, on or before January 21, 1988. (*Id.*). MCI claims that it is entitled to compensation for 252 days of delay measured from the original completion date, January 21, 1988, through the date its contract was improperly default terminated, September 30, 1988. MCI takes the position that because the Board in its entitlement decision found that the 252-day delay period was caused by District acts or omissions, and did not make any findings that MCI had caused concurrent delay, it has made out a prima facie case that the 252-day delay period was not only excusable but also fully compensable. MCI witnesses testified at the quantum hearing that MCI did not concurrently delay critical path activities.

The District claims that MCI was responsible for concurrent delays through July 29, 1988, and therefore is only entitled to compensation for the 62 days of delay from July 30, 1988 through September 30, 1988. The District contends that the Board in its entitlement decision did not find that the 252-day delay period was compensable but rather was merely excusable. The District has stated that it is not challenging the findings of fact made by the Board in its entitlement decision. Rather, it says that the issue of whether there were any concurrent delays caused by MCI was not before the Board in the entitlement phase and was not resolved in the entitlement decision. An expert witness for the District testified at the quantum hearing that MCI was responsible for approximately 190 days of concurrent critical path delay to project completion.

We begin our analysis by reviewing our underlying entitlement decision on the issue of delay. In that decision, the Board found that the District had significantly delayed the completion of the project, based primarily on three grounds: (1) the District's failure to drain the six forebay containment areas in order to allow MCI to perform its piping work in the forebays; (2) the District's failure to timely approve submittals for the instrumentation equipment and the failure to timely resolve deficiencies in the District's design of the instrumentation panel; and (3) the District's failure to respond timely to MCI's proposal for rehabilitation of the chlorine injection water pumps and the District's failure to resolve its defective design for rehabilitating the pumps. The District correctly argues that the Board in its entitlement decision did not make any express finding that the 252-day delay period was compensable delay. The Board did find that the delay was excusable on MCI's part. It is in this quantum phase of the case that the parties have focused on the issue of whether MCI caused concurrent critical path delays. Nevertheless, the Board in the entitlement decision did find that the District was responsible for: (1) a 149-day critical path delay from October 1987 to March 1988 because of the forebay problems; (2) an approximate six and one half month critical delay between October 1987 and May 2, 1988 based on the District's failure to timely approve MCI's proposal for rehabilitating the pumps; and (3) a critical delay to completion -- measured up to September 30, 1988, the termination date, caused by the District's failure to resolve its defective design for the

chlorine injection water pumps.[5]

Given the District's stipulation on the record that it is not challenging the findings made by the Board in the entitlement decision, we will not reexamine our prior findings with regard to the District-caused critical path delays. If we find that MCI cannot be charged with any concurrent critical path delay, then the record requires us to hold that MCI is entitled to recover its delay costs for a period of 252 days. To determine the issue of concurrency we must examine whether MCI is responsible for delays in the prosecution of its work and whether any such delays caused a concurrent critical path delay to project completion.[6] The District bears the burden of proving concurrency because it is in the nature of an affirmative defense to liability for delay damages. *See Williams Enterprises v. Strait Mfg. & Welding, Inc.*, 728 F. Supp. 12, 16 (D.D.C. 1990), *aff'd sub nom. Williams Enterprises v. Sherman R. Smoot Co.*, 938 F.2d 230 (D.C. Cir. 1991). As in the case of demonstrating compensable delay, the party asserting a concurrent delay must show that the delay affects the critical path of performance. *See Blackhawk Heating & Plumbing Co.*, GSBCA No. 2432, 76-1 BCA ¶ 11,649 at 55,579; *Fischbach & Moore Int'l Corp.*, ASBCA No. 18146, 77-1 BCA ¶ 12,300 at 59,224.

The District argues that it established concurrent critical path delays caused by MCI in (1) delivering the built-up roofing system, (2) fabricating and delivering the monitor and control console, and (3) fabricating, delivering, and installing the chlorinators, sulfonators, evaporators, and associated valves, piping, and fittings. According to the District, MCI-caused delays and District-caused delays were concurrent through July 29, 1988, and that the only period of non-concurrent District-caused delay was the period July 30, 1988 through the termination date of September 30, 1988, a total of 62 calendar days.

The District contends that MCI delayed the roofing installation of Chlorine Building No. 2 by failing to enter timely into a subcontract with the roofing subcontractor, by submitting late and incomplete roofing submittals, and by failing to timely install both the lightweight concrete roof topping over the precast concrete roof deck and the built-up roofing system. Placement of the lightweight concrete roof topping had to precede installation of the built-up roofing. MCI completed placing the concrete topping on August 26, 1987. MCI's subcontractor began installing the built-up roofing system on October 13, 1987, and finished on October 20, 1987. The District's scheduling expert concluded that MCI had delayed roofing installation by 146 calendar days (May - September 1987). MCI does not dispute that the roofing work was completed later than originally scheduled. It argues that installing the roofing system simply did

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[5] The other District-caused delays identified by the Board in its entitlement decision, particularly the delays associated with untimely approval of the instrumentation equipment and resolution of the design deficiencies, were in the nature of concurrent District delays subsumed by the critical delays caused by the District's problems with the forebays and chlorine injector water pumps.

[6] The parties have taken the same approach in presenting their quantum cases to the Board. (District Ex. 5, at 2-3 to 2-4; 6/28/93 Tr. 176-77).

not delay the project in any manner. Once the lightweight concrete topping was placed, the building was in the dry and MCI could have proceeded with the instrumentation work in the building notwithstanding that the built-up roofing had not yet been installed. (6/23/93 Tr. 134). MCI was not able to proceed with the instrumentation work in the building because the District did not approve the chlorination and sulfonation equipment until December 1987. The late completion of the built-up roofing did not delay any follow-on activities and had no effect on the project's critical path. (6/24/93 Tr. 23-24). Because the District did not approve the instrumentation package until December 1987, there was no reason for MCI to complete the built-up roofing any earlier than October 1987. Based on the evidence, we agree with MCI that the roofing-related activities were not a source of MCI-caused concurrent critical path delay.

The District contends that MCI concurrently delayed project completion by delaying the installation of required instrumentation, including the chlorine control panel, the dechlorination control panel, the monitor control panel, and the chlorinators, sulfonators, and related items.[7] The District concludes that MCI is responsible for critical delays to the monitor and control panels because MCI submitted late and incomplete submittals and failed to originally schedule time for the fabrication and delivery. The monitor and control panels were delivered to the project site by June 9, 1988, and were installed by June 10, 1988. Adjusting for 75 days of its own submittal review delay, the District states that MCI caused a net delay of 318 calendar days (May 5, 1987 to March 26, 1988) which is concurrent with the District-caused delays to the chlorine injector water pumps, the forebays, and the instrumentation. (6/28/93 Tr. 282-84). The District also charges MCI with concurrent delay caused by MCI's late installation of the chlorinators, sulfonators, and related equipment, valves, fittings, and accessories. According to the District, the root causes for the delays were late and incomplete submittals by MCI's subcontractor, Fischer & Porter; MCI's failure to originally schedule time for fabrication and delivery of the chlorinators and sulfonators; evidence of performance delays and deficiencies by Fischer & Porter; and coordination problems between MCI and Fischer & Porter. The District's scheduling expert testified that MCI delayed the installation of the chlorinators, sulfonators, and related items by 471 calendar days (April 15, 1987 through July 29, 1988). (District Ex. 5, Att. 4-10; 6/29/93 Tr. 38-39). According to this expert, these delays translated into a 290-day overall delay to MCI's work between October 13, 1987 and July 29, 1988. (6/29/93 Tr. 40). The expert identified two components of the 290-day delay, a period of 253 days covering the time between October 13, 1987 (the expert's adjusted late finish date when the work should have been completed) and June 23, 1988 (the date the piping was actually installed) and a period of 37 days between June 23, 1988 and July 29, 1988 where MCI performed the pipe dope rework. (*Id.*).

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[7] The chlorinators are devices that measure the flow of chlorine gas to an injector where the gas is mixed with water. The chlorinators measure the appropriate amount of chlorine gas to mix with the wastewater in order to disinfect the water prior to discharge into the Potomac River. The sulfonators perform a function analogous to the chlorinators except that they feed a measured amount of sulfur dioxide gas to the injectors. (6/28/93 Tr. 13-14, 22).

We find that MCI should not be charged with concurrent delay arising from the fabrication, delivery, and installation of the instrumentation. First, the District bore a significant responsibility for the delays up to December 1987 in instrumentation by failing to respond to submittals in a timely manner, improperly rejecting Fischer & Porter's equipment, and failing to respond to District design deficiencies and MCI requests for information. 39 D.C. Reg. 4312-13. To the extent that some contractor submittals were submitted after the due dates shown in the as-planned schedule, through no fault of the District, we are not persuaded that this caused any critical path delay. Beginning two months before the December 17, 1987 meeting (in which the District finally approved of the Fischer & Porter instrumentation and resolved various outstanding instrumentation design issues), and extending well into 1988, the District was causing critical delays to project completion as a result of its failure to drain the forebays and its failure to respond to MCI's chlorine injector water pump rehabilitation proposal. And even after the chlorine injector water pumps were installed at the site on May 2, 1988, testing showed that the pumps failed to create sufficient system pressure because of the District's defective rehabilitation design. The pumps' performance failure was the primary reason why the plant was not operational at the time of termination in September 1988. 39 D.C. Reg. at 4314.

We agree with MCI that the delays attributed to MCI by the District were not critical path delays and generally come within the category of "why hurry up and wait." *See* J. Wickwire, *et al.*, *Critical Path Method Techniques in Contract Claims: Issues and Developments, 1974 to 1988*, 18 PUB. CONTRACT L.J. 338, 381 (1989). "[W]here the government causes delays to the critical path, it is permissible for the contractor to relax its performance of its work to the extent that it does not impact project completion." *Id.*; *see Utley-James, Inc.*, GSBCA No. 5370, 85-1 BCA ¶ 17,816 at 89,109, *aff'd*, *Utley-James, Inc. v. United States*, 14 Cl. Ct. 804 (1988). Although it is clear that MCI completed roofing later than the date called for in the as-planned schedule, and it is true that MCI was having difficulty prodding Fischer & Porter in early 1988 to complete its delivery of instrumentation, we conclude that those delays simply did not affect project completion in view of the overriding District-caused critical path delays.

The 101-day notice to proceed delay claim

MCI claims that it is entitled to recover extended home office overhead costs for an additional 101-day delay because the District unreasonably delayed issuing notice to proceed on the project. MCI added this claim shortly before the quantum hearing commenced and well after it submitted its termination proposal to the contracting officer. Bids were opened on September 9, 1985, and MCI was the lowest bidder. 39 D.C. Reg. at 4305. MCI received notice of award of the project on March 10, 1986. The performance and payment bonds bear an execution date of June 3, 1986. The construction contract between the District and MCI bears the same execution date, June 3, 1986. Notice to Proceed was issued to MCI on July 15, 1986, directing MCI to commence construction on July 21, 1986. MCI's president, Mr. Clement Mitchell, testified that in his experience on other contracts, a notice to proceed would issue 5 to 10 days,

but no more than 30 days, after notice of award. MCI calculated the 101-day delay period by deducting 30 days from the 131 days between notice of award and notice to proceed. (6/21/93 Tr. 57-59). The District responds that MCI has failed to demonstrate that its home office overhead was underabsorbed during the 101-day period and that the District was responsible for MCI not receiving the notice to proceed earlier than July 21, 1986.

We agree with the District that MCI has failed to establish its right to recover extended home office overhead costs for any portion of the 101 days between receipt of notice of award and notice to proceed. Mr. Mitchell's testimony, coupled with the timing of the notice of award, the execution of the bonds and contract, and the notice to proceed, do not persuade us that the District breached its implied duty to issue its notice to proceed in a reasonable period of time.

Recoverable overhead

In sum, 252 days of delay caused by the District are compensable to the extent that MCI can meet the other requirements for establishing its right to recover using the *Eichleay* formula. Here, the record demonstrates, and the District does not seriously dispute, that the other requirements are met. The District-caused delays arising from the forebay, instrumentation, and chlorine injector water pump problems interrupted MCI's prosecution of the work and reduced the stream of income on the project. The delays were sudden and of unpredictable duration. In addition, the District's constructive and directed acceleration orders also made it even less prudent or practical for MCI to reduce home office overhead costs or to take on new work during the course of the substantial delays.

MCI and the District agree that contract billings during performance of the project were $3,029,506, MCI's total company-wide billings during the performance period were $39,922,455, and MCI's total corporate overhead during the performance period was $3,647,386. Using the first equation of the *Eichleay* formula, corporate overhead allocable to the contract equals $276,781. Dividing the allocable overhead by the total contract period of 802 days yields allocable overhead at a daily rate of $345.11. Multiplying the daily rate by the 252 days of compensable delay results in recoverable unabsorbed home office overhead of $86,968.

From this amount we must deduct home office overhead amounts MCI has recovered under other equitable adjustments to the contract. The parties have not identified what portion of the $94,833 adjustment resulting from Change Order No. 1 and the $171,956 stipulated adjustment for the "pending" change orders represents a mark-up for home office overhead. Based on the record presented here, we make a jury verdict finding that a deduction of two percent of the total adjustments, amounting to $5,336, is proper. Accordingly, MCI is entitled to $81,632 for unabsorbed home office overhead, to which we add ten percent profit for a final total of $89,795.

**2. Extended Labor Supervision and Administration**

Additional labor supervision and administration costs, incurred by a contractor by virtue of having to perform contract work for an additional duration beyond what it would have had to perform but for delay and disruption for which the government bears cost responsibility, are recoverable like other delay or disruption damages in order to make the contractor whole. *Williams Enterprises v. Strait Mfg. & Welding*, 728 F. Supp. at 19-20. Like home office overhead, some field office costs are fixed and time-related, and the contractor continues to incur such costs during periods of reduced contract activity caused by delay or suspension. *George Hyman Constr. Co.*, ENG BCA No. 4541, 85-1 BCA ¶ 17,847 at 89,353. Construction contractors may carry field office costs, such as project supervision and administration, as direct costs to the job where the costs are specifically identifiable with that one project. *See Wickham Contracting*, 12 F.3d at 1581; *B.D. Collins Constr. Co.*, ASBCA No. 42662, 92-1 BCA ¶ 24,659. In a compensable delay situation where project supervision and administration are carried as direct costs, an equitable adjustment for extended field supervision and administration is calculated as a direct cost item. Field overhead which is charged, for example, to a G&A expense pool as indirect costs should not be commingled in the direct cost calculation. *See, e.g., Santa Fe Engineers, Inc.*, ASBCA No. 31762, 91-1 BCA ¶ 23,571 at 118,195. Where it is impracticable to derive actual cost data during the delay period, one recognized measure of the direct costs for extended labor supervision and administration is to compute a daily rate by dividing total labor supervision and administration costs on the project by the total days of contract performance and then multiplying the result by the number of days of compensable delay. *Santa Fe Engineers, Inc.*, 91-1 BCA ¶ 23,571 at 118,195-96; *George Hyman Constr. Co.*, 85-1 BCA ¶ 17,847 at 89,353. To the extent that the contractor already has recovered some field supervision costs during the delay period as part of another equitable adjustment under the contract, those amounts must be deducted from the amount of recoverable extended field supervision costs. *George Hyman Constr. Co.*, 85-1 BCA ¶ 17,847 at 89,353.

MCI claims that it is entitled to extended labor supervision and administration costs for the 252-day delay period. MCI states that it incurred a total of $306,535 in labor supervision and administration costs on the project. With a total contract period, as extended, of 802 days, MCI calculated a daily labor supervision and administration rate of $382.22. Multiplying the daily rate times the 252 days constituting the delay period yields $96,319, to which MCI adds 12 percent profit in arriving at a total claim of $107,877. The District argues that MCI significantly underbid its labor supervision and administration costs and that overruns in these cost categories were not due to District actions. Using MCI's planned labor supervision and administration cost expressed as a daily rate of $296.20 (budget of $162,911 divided by the planned 550 days of performance) and multiplying by 62 compensable delay days, the District calculates MCI extended supervision costs to be $18,364.

The record shows that MCI bid the project assuming that the salary for the project manager and project superintendent would be direct costs charged to the project under labor codes 330 and 332. The bid amount for those two tasks totaled $162,911. (District Ex. 130).

MCI did not bid any other costs for labor supervision and administration, such as for the categories of project engineer (labor code 331), main office engineering (labor code 335), main office expediting (labor code 336), and clerical (labor code 338), because MCI planned to have the project manager and project superintendent handle such tasks. (*Id.*; 6/21/93 Tr. 126-27). MCI's job cost records indicate that MCI began incurring payroll expenses under labor code 330 in June 1986 and under labor code 332 in May 1986. (MCI Vol. 2, Exhibit 3, Ex. B, Ex. 1-1). MCI's job cost records also indicate, however, that MCI began incurring payroll expenses under labor code 331 (by a person other than Mr. Fawley) beginning in January 1987, payroll and project administrative expenses under labor code 335 beginning in July 1986 and May 1986 respectively, and payroll expenses under labor code 338 beginning in May 1986. (MCI Vol. 2, Exhibit 3, Ex. B, Ex. 1-1). The job cost records further show that MCI incurred other labor supervision and administration costs beginning early on the project: payroll and project administrative expenses under labor code 333 (mechanical superintendent) beginning in June 1986 and May 1986 respectively, and payroll and project administrative expenses under labor code 334 (field office drafting) beginning in December 1986 and May 1986 respectively. (*Id.*; 6/21/93 Tr. 126-27).

A review of the job cost records shows that costs under some of the supervision and administration labor codes increased during the major periods of delay and disruption while others decreased. There is no evidence that the actual supervision and administration costs were unreasonable or did not benefit this project. Although there was some testimony that MCI's field management and staff were responsible for both this project and another project (the sludge degritting and grinding project) being performed contemporaneously at the same Blue Plains site (6/21/93 Tr. 129-32; 6/23/93 Tr. 158-61), the District never effectively rebutted MCI's evidence that the costs charged to the supervision and administration labor codes were costs incurred only on the present contract. On the whole, we believe that the fairest measure of the extended labor supervision and administration costs is obtained by computing a daily rate, *i.e.*, dividing the total actual labor supervision and administration costs by the 802 total days of performance. Even though MCI commenced charging directly to the job some supervision and administration costs it had not bid, we see no reason to deny MCI a pro rata share of such costs actually incurred during a *compensable delay period*. To the extent that MCI underbid some of these tasks for performing the original contract scope of work, our approach does not give MCI any undue recovery because this computation applies only to the delay period and covers labor supervision and administration that MCI would not have incurred but for the District's constructive changes. Based on our review of the job cost records and the other record evidence, we find that the total project labor supervision and administration costs amount to $303,624.80. (MCI Vol. 2, Exhibit 3, Ex. B, Ex. 1-1). This total does not include the amounts MCI claimed for project coordination performed by Mr. Fawley. Dividing this amount by the total performance period of 802 days, we arrive at a daily rate of $378.58. Multiplying the daily rate by the 252-day delay period yields $95,402.

From the $95,402 total we must subtract any duplicative supervision and administration amounts MCI has recovered under other equitable adjustments to the contract. The parties have

not identified what portion of the $94,833 adjustment resulting from Change Order No. 1 and the $171,956 stipulated adjustment for the "pending change orders" represents a mark-up for field supervision and administration. In addition, it is difficult from the record to determine which of the many changes consolidated in those change orders relate to the compensable delay period. Based on our review of the job cost records, MCI proposals, and negotiations data, we make a jury verdict finding that three percent of the change order adjustments, *i.e.*, $8,004, should be deducted as duplicative mark-up from the pertinent change orders. We must also deduct the $18,000 for labor supervision which is a component of the adjustment due MCI for labor inefficiencies and acceleration. Thus, a total of $26,004 should be deducted from MCI's extended labor supervision and administration total. Accordingly, MCI is entitled to extended labor and supervision costs amounting to $69,398, to which we add ten percent profit for a final adjustment of $76,338.

### 3. Extended Equipment and General Conditions Costs

Additional equipment and general conditions costs, incurred by a contractor by virtue of having to perform contract work for an additional duration beyond what it would have had to perform but for delay and disruption for which the government bears cost responsibility, are recoverable. *Williams Enterprises v. Strait Mfg. & Welding*, 728 F. Supp. at 19-20; *George Hyman Constr. Co.*, ENG BCA No. 4541, 85-1 BCA ¶ 17,847 at 89,353; *Shirley Contracting Corp.*, ASBCA No. 29848, 85-1 BCA ¶ 17,858 at 89,406; *Santa Fe Engineers, Inc.*, 91-1 BCA ¶ 23,571 at 118,195-96. Where it is impracticable to derive actual cost data during the delay period, one recognized measure of the direct costs for extended equipment or general conditions costs is to compute a daily rate by dividing total equipment and general conditions costs on the project by the total days of contract performance and then multiplying the result by the number of days of compensable delay. *Santa Fe Engineers, Inc.*, 91-1 BCA ¶ 23,571 at 118,195-96; *George Hyman Constr. Co.*, 85-1 BCA ¶ 17,847 at 89,353. To the extent that the contractor already has recovered some equipment or general conditions costs during the delay period as part of another equitable adjustment under the contract, those amounts must be deducted. *George Hyman Constr. Co.*, 85-1 BCA ¶ 17,847 at 89,353.

MCI claims that it is entitled to extended equipment and general conditions costs for the 252-day delay period. MCI states that it incurred $67,865 in equipment costs and $158,485 in general conditions costs on the project, for a total of $226,350. MCI calculates a daily equipment and general conditions rate of $282.24. Multiplying the daily rate times the 252 days constituting the delay period yields $71,124, to which MCI adds 12 percent profit in arriving at a total claim of $79,659. The District argues that MCI did not use the appropriate contract measure for determining its costs for rented and owned equipment, that MCI underbid its equipment and general conditions costs, and that MCI's total equipment and general conditions costs were $216,464 rather than $226,350. Using MCI's planned costs expressed as a daily rate of $296.20 (budget of $162,911 divided by the 802 days of performance) and multiplying by 62 compensable delay days, the District would allow MCI extended equipment and general conditions costs of $13,210.

Based on our review of the record, we believe that in this case the proper measure of extended equipment and general conditions costs is obtained by computing a daily rate by dividing the total actual equipment and general conditions costs by the actual performance period. To the extent that MCI underbid some of the general conditions costs, such as CPM scheduling, we see no reason to deny MCI a pro rata share of such costs actually incurred during the compensable delay period. The District has not persuaded us that MCI's actual incurred costs were unreasonable. Moreover, the District has not established in fact that the equipment costs calculated by MCI by using a percentage of the blue book value differs materially from equipment costs calculated using the hourly rates set forth in the Associated Equipment Distributor's Manual. Based on our review of the job cost records and the testimony, we find that the total equipment and general supervision costs amount to $226,350, as stated by MCI. (MCI Vol. 2, Exhibit 3, Ex. B, Ex. 1-1). The daily rate is $282.24, and for the 252-day delay period, MCI's equipment and general conditions costs are $71,124.

From this amount we must subtract any duplicative equipment and general conditions amounts MCI has recovered under other equitable adjustments to the contract. As with the case of the labor supervision and administration, the parties have not identified what portion of the $94,833 adjustment resulting from Change Order No. 1 and the $171,956 stipulated adjustment for the "pending change orders" represents equipment and general conditions costs. We find that a deduction of two percent, amounting to $5,336, is proper on the record presented here. Accordingly, MCI is entitled to $65,788 for extended equipment and general conditions, to which we add ten percent profit for a final adjustment of $72,367 for extended equipment and general conditions.

**E. Payments received/Value of uncompleted work**

The parties have stipulated that MCI was paid a total of $2,802,716.48 prior to termination. (Second Joint Stipulation ¶ 12). The Board has previously found that the contract was 96.96 percent complete at the time of termination. 39 D.C. Reg. at 4306. Based on that finding, MCI computed the value of uncompleted work to be $92,511. We find that amount to be supportable and generally consistent with MCI's project cost-to-complete estimates at the time of termination.

**F. Adjusted contract price and contract cap summary**

MCI's adjusted contract price is calculated as follows:

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| Original Contract Amount | $2,882,850 |
| Plus: | |
| Change Order No. 1 | 94,833 |
| Stipulated Change Orders | 171,956 |

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|---|---|
| Delay Damages | |
| Home Office Overhead | 89,795 |
| Extended Labor Supervision & Administration | 76,338 |
| Extended Equipment & General Conditions | 72,367 |
| Labor Inefficiency and Disruption | 217,800 |
| Adjusted Contract Price | $3,605,939 |

MCI's contract cap, pursuant to paragraph F of Article 6, is calculated as follows:

| | |
|---|---|
| Adjusted Contract Price | $3,605,939 |
| Less: | |
| Payments received | 2,802,716 |
| Value of uncompleted work | 92,511 |
| Adjusted Contract Price Cap | $ 710,712 |

Because MCI's contract cap is lower than total unpaid performance costs, MCI's recovery under this element is limited to the amount of the adjusted contract price cap, $710,712.

## II. Jones & Artis (subcontractor) claim

MCI seeks on behalf of its subcontractor, Jones & Artis Construction Company, delay and impact costs in the amount of $291,450.09. MCI subcontracted with Jones & Artis to perform site work, including asphalt paving, concrete paving, excavation and back fill work, railroad work, and miscellaneous landscape items. (6/24/93 Tr. 192). Jones & Artis' subcontract amount was $588,125.00 which MCI has paid. (6/24/93 Tr. 192, 194). Jones & Artis' delay and impact costs consist of $48,692.84 for unabsorbed home office overhead, $51,725 for labor and equipment inefficiencies, and $191,032.25 for extended supervision and equipment costs. Jones & Artis has supported its claim with the following documentation of record: Jones & Artis' initial claim, dated April 3, 1992, in the amount of $337,406.08, transmitted to the District by MCI's April 10, 1992 letter (MCI Vol. 2, Exhibit 5, Ex. 10); Jones & Artis' second claim, dated May 13, 1992, in the amount of $647,756.81 (MCI Vol. 2, Exhibit 5, Ex. 11); and Jones & Artis' current claim as presented during the quantum hearing, in the amount of $291,450.09 (MCI Vol. 2, Exhibit 5, Ex. 19). Mr. Carl Jones, Jones & Artis' president and 50 percent owner, was the sole witness testifying in support of the claim.

Mr. Jones testified that Jones & Artis had an anticipated method and duration of performance for its work under the subcontract and that Jones & Artis was not able to perform its work as anticipated due to the constant delays, interruptions, and changes to its work caused by the District. Mr. Jones testified that Jones & Artis' anticipated method of performance was

disrupted by the District due to delays in shop drawing reviews for piling, changes in the grades for the paving work, restricted access to its work areas, draining the forebays, the instrumentation problems, and chlorine injector water pump problems. (6/24/93 Tr. 198-99, 240, 244-47). According to Mr. Jones, because MCI's schedule and Jones & Artis' plan were disrupted by the District, Jones & Artis was required to work in and around MCI's work and work in a piecemeal fashion. Jones & Artis had to stay on the job as long as MCI had to stay on the job, which was 252 days past the expected MCI contract completion date. (6/24/93 Tr. 239, 242-44).

There are a number of problems with Jones & Artis' delay and impact claim which dictate our denying the claim in its entirety.

First, Jones & Artis never presented into evidence any schedule or plan for its subcontract performance. In fact, Mr. Jones testified that he did not submit a schedule to MCI for the subcontract work. (6/24/93 Tr. 228). Mr. Jones testified only that Jones & Artis intended to perform its work in 180 days, that it would perform its work in "two different phases" (*id.* at 238-42), and that the subcontract work required Jones & Artis to be at the jobsite at the beginning of the project to perform the piling work (*id.* at 252) and to be at the jobsite at the end of the project to complete paving work (*id.* at 253). Mr. Jones did not attempt to tie and validate any Jones & Artis performance schedule or plan to any MCI schedule. In sum, Jones & Artis never established and validated a performance schedule or plan for the subcontract work, including any mobilizations, demobilizations, and usage of field office personnel and equipment.

Beyond failing to establish a performance baseline from which to measure critical path delay in its performance, Jones & Artis never established the fact of compensable delaying actions for which the District bears cost responsibility. Mr. Jones' conclusory testimony -- that Jones & Artis experienced a 77-day delay due to submittal delays on the piling work and some unspecified delay attributable to the District's changing grades for the paving work and restricting site access -- is unsupported by either specific documentary or testimonial evidence (6/24/93 Tr. 198-200, 228-31). This deficiency is compounded by the absence in the record of any contemporaneous notice of a delay or claim for delay. Mr. Jones testified that the delays occurred throughout the project, from 1986 through termination of its subcontract on September 30, 1988 (*e.g., id.* at 233). The first claim, or notice of delay, in the record is the one dated April 3, 1992, some three and a half years after MCI's contract was terminated. Even accepting that Jones & Artis experienced delay in performing its work, the record simply does not substantiate that it suffered any compensable, critical path delay.

As an alternative, Jones & Artis attempts to bootstrap itself onto the 252-day delay period which the Board has determined was a compensable, critical path delay for MCI. The attempt must fail. First, that a subcontractor has a work activity that chronologically follows a compensable, critical path delay period of the general contractor, does not of necessity mean that

the subcontractor experiences the same -- or any -- *compensable* delay. In the absence of a specific and validated performance plan, and persuasive documentary and/or testimonial evidence establishing how the critical delays to MCI translated into a compensable injury to Jones & Artis, Jones & Artis cannot recover. Jones & Artis did not establish what portion of its grading and paving activities were delayed. It also did not show a planned or would-have-cost estimate of labor, supervision, and equipment for such grading and paving. The record, as developed by Jones & Artis, does not reliably show Jones & Artis' actual commitment of resources to this project during MCI's 252-day critical path delay. Finally, Mr. Jones' explanation that he could not obtain other work during project delays to absorb home office overhead because of cash flow problems (Jones & Artis had "completed a lot of work and had not been paid for it") does not by itself demonstrate District responsibility. (6/24/93 Tr. 204-05).

Jones & Artis states that it incurred $51,725 in inefficiency costs because the District forced it to work in a piecemeal fashion and restricted its right to proceed with the subcontract work, "thereby causing delays and idle personnel and equipment." (MCI Vol. 2, Exhibit 5, Ex. 19). The documentation of inefficiency consists of a single page, listing: (1) various labor categories, manhours, and pay rates, and (2) various types of equipment, hours, and equipment rates. (*Id.*). Mr. Jones testified that on "many days" Jones & Artis field personnel and equipment would "show up" at the site "to work only to be sent back." (6/24/93 Tr. 206). He stated: "We had to send the men back because the District had people, other contractors, occupying the work area and . . . we did not have access to the site area." (*Id.*). This evidence is insufficient to establish causation. Mr. Jones' testimony does not constitute the type of reasonably specific evidence necessary to demonstrate causation linking disruptions to the activities rendered inefficient. With regard to jobsite access, Mr. Jones' testimony does not establish that the *District* alone bears cost responsibility for whatever instructions Jones & Artis was receiving at the jobsite. Finally, the record does not support inefficiency quantum. The documentation is not self-explanatory and Mr. Jones did not explain how he derived any of the figures. Jones & Artis has furnished no would-have-cost baseline for the activities rendered inefficient and no data on actual costs for those activities. Therefore, even if we were to conclude that Jones & Artis had proved entitlement, there is a fatal deficiency in quantum evidence.

## III. Settlement expenses

The termination for convenience clause provides that the contractor is entitled to recover the reasonable expenses "incidental to the determination of the amount due to the Contractor as the result of the termination of the work under the Contract." Article 6, ¶ E.2. The District's cost principles governing convenience termination settlement costs provides in pertinent part:

> The costs of settlement of the termination (such as accounting, legal, clerical, and similar costs reasonably necessary for the preparation and presentation of settlement claims to the contracting officer) shall be allowable. Indirect costs related to salary and wages incurred as a result of the preparation and

presentation of settlement claims shall be allowable.

27 DCMR § 3318.8. Reasonable expenses incurred in negotiating a convenience termination claim are allowable as are expenses incurred preparing, presenting, and negotiating adjustments in the contract ceiling due to changes. *Systems & Computer Information, Inc.*, ASBCA No. 18458, 78-1 BCA ¶ 12,946, at 63,138. Expenses incurred in prosecuting a claim or appeal against the government are not allowable settlement expenses. *J.E. Robertson Co. v. United States*, 437 F.2d 1360, 1364 (Ct. Cl. 1971). In determining the allowability of termination for convenience settlement expenses, such as legal, accounting, and consulting fees, we examine the nature and form of the services rather than simply the point in time when the expenses were incurred. *Kalvar Corp. v. United States*, 543 F.2d 1298, 1305 (Ct. Cl. 1976); *Acme Process Equip. Co. v. United States*, 347 F.2d 538, 545-46 (Ct. Cl. 1965).

MCI seeks settlement expenses under two categories, "related legal expenses" of $180,016.00, and "claim preparation costs" of $131,887.00. The "related legal expenses" were incurred by MCI in overturning the wrongful default termination and consist of the following costs: $138,522 in legal fees paid to its outside counsel, $8,847 in fees paid to its scheduling expert, $7,605 in accounting fees paid to Watkins, Meegan, Drury & Co., and an estimated $3,000 in consulting fees to be paid to The Barrington Group. (MCI Exhibit 1-80). The claim preparation costs consist of $26,109 in legal fees paid to its outside counsel, $41,103 in fees paid to Brower & Company (its scheduling expert), $11,385 in accounting fees paid to Watkins, Meegan, Drury & Co., $10,280 in consulting fees paid to The Barrington Group, and $43,010 in internal MCI costs. (MCI Exhibit 1-80).

We address first MCI's request for professional fees labeled as "related legal expenses" which MCI incurred in proceedings to overturn the default termination. Professional fees incurred in prosecuting an appeal to convert a termination for default into a termination for the convenience of the government are not allowable settlement expenses. *E.L. David Constr. Co.*, ASBCA No. 29225, 89-3 BCA ¶ 22,140 at 111,437; *Paul E. McCollum, Sr.*, ASBCA No. 23269, 81-2 BCA ¶ 15,311 at 75,823-24. MCI's reliance on *Baifield Indus.*, ASBCA No. 20006, 76-2 BCA ¶ 12,096 at 58,103-04, is misplaced because MCI has not shown that the "related legal expenses" were in the nature and form of settlement negotiations with the contracting officer. Indeed, MCI did not make the billing records or invoices a part of the record. Accordingly, the "related legal expenses" are not allowable settlement costs.

With regard to MCI's request for claim preparation costs, there are five elements making up the total amount claimed. MCI did not introduce into the record the actual invoices. Instead, MCI introduced an exhibit (MCI Ex. 1-80) which summarizes total "claim preparation" and total "legal proceedings" costs for each of the five elements of settlement expenses, *i.e.*, legal fees and expenses charged by MCI's outside counsel, Watt, Tieder & Hoffar; fees and expenses charged by MCI's scheduling consultant, Brower & Company; fees and expenses charged by MCI's outside accounting firm, Watkins, Meegan Drury & Co.; fees and expenses charged by MCI's accounting consultant, Barrington Group; and estimated internal costs of MCI personnel

who worked on claim preparation. (MCI Ex. 1-80, at 1). Dates and descriptions of the services are not set forth in Ex. 1-80 or anywhere else in the record. Pages 2 and 3 of Ex. 1-80 only identify, by month from November 1988 through May 1993, the monthly legal billings of Watt, Tieder, & Hoffar allocable as either "claim preparation" or "legal proceedings." Some supporting testimony came from Mr. Gerald Holladay, MCI's controller, who testified that he made the determination as to whether billing amounts or costs under each of the five elements of settlement costs constituted "claim preparation" or "legal proceedings" costs with the assistance of outside counsel. From our review of his testimony, and MCI Ex. 1-80, we are not convinced that he had an adequate understanding of the types of legal costs which would be allowable costs of preparing, presenting, and negotiating MCI's settlement claim. (*E.g.*, 6/23/93 Tr. 7-8, 32-34). The one page settlement costs summary attached to MCI's termination for convenience claim (MCI Vol. 2, Exhibit 3, Ex. B, Ex. 7) and the April 14, 1992 MCI letter (MCI Vol. 2, Exhibit 5, Ex. 9) do not aid us in making a determination. The fact that the District did not properly audit these claimed costs, or, specifically challenge cost items during the quantum hearing, does not excuse MCI from presenting adequate and reliable evidence of costs.

With regard to the legal fees of Watt, Tieder & Hoffar, we find that Mr. Holladay's testimony and Ex. 1-80, absent the actual invoices, is insufficient to support the full claim preparation amount of $26,109. Based on our review of the portions of the record which show the timing of claim preparation, presentation, and attempted negotiation activity by MCI's counsel (MCI Vol. 2, Exhibit 5, Exs. 1, 2, 8, 9, 12-17), and MCI Ex. 1-80, we apply a 15 percent reduction to arrive at an allowable amount of $22,193 for legal fees. With regard to the fees for the scheduling consultant, Brower & Company, we find that Mr. Holladay's testimony and Ex. 1-80, absent the actual invoices, is insufficient to support the full claim preparation amount of $41,103. Based on our review of the record, including the testimony of scheduling consultant (6/24/93 Tr. 69-74), we apply a 50 percent reduction to arrive at an allowable amount of $20,552 for the scheduling consultant services. With regard to the fees of Watkins, Meegan, Drury, & Co., we allow the full amount requested because the record, including Mr. Watkins' testimony, persuades us that the $11,385 amount represents only claim preparation costs. We find that $10,280 amount sought as claim preparation costs of the Barrington Group constitutes litigation costs and are not allowable. (6/24/93 Tr. 163, 183). With regard to MCI's internal costs, we find that Mr. Holladay's testimony (6/23/93 Tr. 15-19) and the documentation of record on the issue (MCI Ex. 1-80; MCI Vol. 2, Exhibit 3, Ex. B, Ex. 7; MCI Vol. 2, Exhibit 5, Ex. 9) fail to establish a reliable estimate of MCI internal costs incurred in preparing, presenting, and negotiating MCI's termination claim. Although Mr. Holladay testified that five employees (including himself) performed claim preparation work, MCI has offered no evidence on either the number of hours expended by these employees on allowable activities, the figures and calculations by which it derived labor rates for these employees, or even the allowable costs incurred by each employee. The internal cost total also includes unallowable costs for employee time expended on activities other than claim preparation. (MCI Vol. 2, Exhibit 5, Ex. 9). Therefore, MCI has not demonstrated its right to MCI internal settlement costs.

In summary, MCI is entitled to recover a total of $54,130 in settlement costs pursuant to paragraph E.2 of Article 6.

## IV. Interest

MCI seeks interest pursuant to D.C. Code § 1-1188.6 at four percent per annum from the date the Director of DAS received MCI's appeal of the contracting officer's default termination. The District argues that interest should commence on November 8, 1991, which is when MCI submitted its termination for convenience settlement claim.

The interest provision of the Procurement Practices Act recognizes the time value of money and in conjunction with equitable adjustment compensation -- here, more broadly, termination for convenience compensation -- contributes to making a contractor whole monetarily in those areas for which the government bears cost responsibility. In providing the contractor interest on amounts found due "from the date the Director receives the claim," the interest provision gives the contracting officer and the contractor an opportunity to settle the claim before interest begins to accrue. Thus, in the normal equitable adjustment situation or in the context of a termination for convenience initiated by the contracting officer, the government does not have to shoulder interest costs for a reasonable period during which the contractor and the contracting officer attempt to negotiate and settle the claim amount. Only when the contractor appeals (or submits its "claim") to the Director does interest begin to accrue on any amounts subsequently determined to be due the contractor.

In this case, the contracting officer initiated a termination for default action against MCI. MCI appealed the default action to the Director, and ultimately appealed to the Board. The requirement of section 1-1188.6 was satisfied when the Director received MCI's "appeal" of the contracting officer's default action because, by appealing the default, the contractor contested not only the default termination act but also the monetary consequences flowing from that act. *See A.A. Beiro Constr. Co.*, CAB No. D-822, 40 D.C. Reg. 4574, 4628-29 (1992). Similarly, by initiating the 1988 default action, the contracting officer not only initiated a series of default termination procedures but also denied *any* termination for convenience cost recovery. When we held in our 1991 entitlement decision that the default action was improper and converted the default into a convenience termination, we remanded for a quantum determination. It would be unfair to deny the contractor section 1-1188.6 interest during the period of time from MCI's challenge of the default action until its submission of the convenience termination cost proposal after quantum remand by the Board. Certainly, the implicit statutory purpose of providing the contracting officer some reasonable time to consider costs and settlement is better served by measuring interest from receipt of the default "claim" rather than receipt of a termination proposal after Board remand. To hold otherwise would produce the absurd result of rewarding the government for improperly defaulting a contract -- and having it later converted to a convenience termination -- rather than terminating for convenience in the first instance. Nor is it logical that the date for accruing interest should depend on whether the Board, as a matter of procedure, treats the propriety of the default and quantum in a single proceeding as we did in

*Beiro*, or bifurcates those issues as we did in this case.

Accordingly, MCI is entitled to interest on its unpaid contract performance costs (limited to the adjusted contract price cap) at four percent per annum pursuant to section 1-1188.6 from November 30, 1988, the date that the Director received MCI's claim challenging the default action, until paid by the District.

MCI is entitled also to interest on its settlement expenses. Because MCI incurred its settlement expenses during the period from approximately October 1988 through June 1992, it is not appropriate to award interest using the same date we used for MCI's unpaid performance costs. Instead, the District shall pay interest on the settlement expenses at four percent per annum commencing from June 30, 1992, by which time termination settlement negotiations had ended.

## CONCLUSION

MCI is entitled to recover from the District its Article 6 termination for convenience costs amounting to $710,712 for unpaid contract performance costs and $54,130 for settlement expenses, plus interest on those amounts pursuant to D.C. Code § 1-1188.6.

**SO ORDERED.**

DATE: June 4, 1996

JONATHAN D. ZISCHKAU
Administrative Judge

CONCURRING:

LORILYN E. SIMKINS
Chief Administrative Judge

PHYLLIS W. JACKSON
Administrative Judge