[Cite as *Conti Corp. v. Ohio Dept. of Admin. Serv.*, 1992-Ohio-266.]

IN THE COURT OF CLAIMS OF OHIO

CONTI CORPORATION	:	
Plaintiff	:	**CASE NO. 88-14568**
v.	:	**REFEREE REPORT**
OHIO DEPARTMENT OF ADMINISTRATIVE SERVICES, et al.	:	**Jack Graf, Referee**
Defendants	:	

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Peter D. Welin, Esq.
For Plaintiff

Lee Fisher, Attorney General and
William M. Mattes, Esq.
For Defendant

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This cause arises from the renovation and reconstruction of the Ward Beecher Science Hall, a multiple building complex, which is located upon the campus of defendant Youngstown State University (YSU). The project was let for bids by the Department of Administrative Services, Division of Public Works (DAS), also a defendant herein. Multiple prime contractors were selected based upon the lowest and most responsible bids. It is noteworthy that this renovation project was considered highly complex and many local contractors did not submit bids upon it. Plaintiff, the Conti Corporation, was selected to perform the

plumbing portion of the project, which work was to be completed within 730 days from the issuance of the order to proceed.

Evidence at trial indicated that the project encompassed two buildings, known as building 14 and building 82, an infill area and a planetarium. The planners gave great deference to the needs of the YSU faculty as well as the impact of the construction upon the scheduling of classes in the Ward Beecher Science Hall. Thus, renovation work was initially conducted in building 14 while classes, offices, and laboratories were **maintained in building 82.**

Conti began working on the project on August 23, 1984, and all of the renovations for building 14 were concluded by the beginning of winter quarter (January) 1986. Upon the completion of that phase of the project, all of the classes, offices and laboratories, including one containing radioactive materials, were relocated into the completed building 14. Obviously, such moves required a considerable degree of advance planning and coordination, and the contractors were required to adhere to the scheduled completion dates.

As will be explored in more detail in the following subsections, the project encountered considerable budget

difficulties. These were due to the discovery, after renovations began, of a number of serious defects in the existing structures. Also, when contractors began the initial stages of demolition on building 82, asbestos was discovered. This brought the entire project to a halt from early 1986 through approximately the first week of July. The asbestos—laden conditions were thereafter closely examined and the asbestos was completely removed from the premises.

When contractors were permitted to resume performance, certain aspects of the heating, ventilation, and air conditioning (HVAC) duct work for building 82 required extensive redesign. Conti did not resume work on building 82 until approximately August 1986. From that time until the end of the project, *i.e.*, March 1987, further conditions were discovered requiring all contractors to perform extra work. Throughout the entirety of the renovation process, discrepancies were discovered between the existing conditions of the site and the drawings provided for the project.

At the close of the project, Conti had several unresolved claims that it had submitted for payment. These claims related to certain extra services allegedly performed by Conti to complete

the project, as well as for certain injuries allegedly incurred due to the projects delay. None of these disputes were resolved through the multi—stage process established for the review of such disputes by Article 8 of the contract. Approximately one year after the conclusion of the Article 8 process, Conti submitted two additional claims, one of which, a claim for lost man—hours, was quite extensive. These claims defendants likewise denied.

Thereafter, plaintiff filed suit in the Ohio Court of Claims. This referee was appointed by the Chief Justice of the Ohio Supreme Court pursuant to R.C. 2743.03(C)(3) and R.C. 153.12(B). At the trial of the issues, the parties presented extensive and conflicting testimony as well as a fair number of exhibits, but very little applicable legal authority. The case, having been submitted, is determined by a preponderance of the competent and credible evidence set forth hereinafter.

I

The first issue to be considered, and one that initiated considerable difficulties for the parties, is the claim for services performed by Conti's subcontractor, Bill Mitchell. It is

alleged that Mitchell performed plumbing design work on building 82 that was necessitated both by unforeseen conditions in the building and the failure of the associate architects mechanical consultant, Mosure & Syrakis, to supply the necessary design expert for that stage of the renovation. This claim was originally submitted as a proposed change order toward the end of the project, but was refused by the associate architect, Hayek and Associates.

In defendants' views, plaintiff may not validly claim extra expenses for work that was not properly approved through the change order process prior to its performance. Article 3 of the contract states that:

> [n]o alterations shall be made in the work shown or described by the plans and specifications, except upon the written order of the Deputy Director, and when so made, the value of the work added or omitted shall be computed or approved by the Deputy Director, and *** added to or deducted from the contract price.

Also, Article 7 of the specifications further requires that the contractor notify the associate architect in writing upon the discovery of any "physical conditions at the site differing materially from those indicated on the Contract documents." The

section further provides that the associate architect shall promptly investigate the report and, if it is substantiated, he is required to make an "equitable adjustment" to the contract price. If the parties cannot agree upon the amount of the adjustment, the issue is to be submitted to the Article 8 process. Thus, the initial consideration is whether such services as Conti claims were actually authorized, and if so, how. Defendants also claim that the amount of hours for which compensation is sought is excessive.

As with other contracts, the one governing this dispute requires that all change orders be accomplished in writing. Such clauses typically are inserted in construction contracts "to protect the owner from claims that his project superintendent orally modified the contract so as to have the builder do extra work," as well as to prevent the contractor from changing the work, and making it more expensive without the owner's consent. Farnsworth, Contracts, Section 7.6 at p. 474.

Nevertheless, "[t]he most ironclad written contract can always be cut into by the acetylene torch of parol modification supported by adequate proof. *** The hand that pens the writing may not gag the mouths of the assenting parties." *Id.* at 475,

quoting *Wagner* v. *Graziano* (1957), 390 Pa. 445, 136 A. 2d 82. "Those who make a contract may unmake it. The clause which forbids a change may be changed like any other." Farnsworth, *supra*, at 475, note 9, quoting Judge Cordozo in *BeatLy* v. *Guggenheim Exploration Co.* (1919), 225 N.Y. 380, 122 N.E. 378. See, also, Restatement, Second, Contracts 283, comment b; Calamari & Perillo, Contracts, (Third Ed. 1987) ("This rule stems from the notion that contracting parties cannot today restrict their power to contract with each other tomorrow.").

More particularly, "when an owner requests a builder to do extra work, promises to pay for it and watches it performed knowing that it is not authorized in writing, he cannot refuse to pay on the ground that there was no written change order." Farnsworth, *supra,* at 475, quoting *Universal Builders* v. *Moon Motor Lodge* (1968), 430 Pa. 550, 560, 244 A. 2d 10, 16. The law has long required, as implied in the above, that for an oral modification of a written contract to be valid, there be assent by both parties, new legal consideration, and detrimental reliance by the contractor. *Thurston* v. *Ludwig* (1856), 6 Ohio St. 1.

The requirement that modifications or change orders shall

only be made in writing may also be defeated by evidence that defendants, through conduct or expressly, waived this or any other clause of the contract. This is usually accomplished by the presentation of evidence that the owner or his agent regularly authorized and accepted the performance of extra work without the benefit of a written change order. The difficulty with the application of the waiver theory in the case here is that, while defendant may well have waived the requirement of a pre—authorized written change order, it is also possible that the condition was reinstated for later change orders.

A clause, once waived, may be reinstated by re—publication of the written change order policy. From time to time over the course of the project, the associate architect did repeat the policy, regardless of whether re—publication was intended. Nevertheless, the formal requirements of the change order process may have been waived for Conti alone, and not for any other contractor; or reinstated for all other contractors, but not for Conti. Similarly, the associate architect may well have waived the requirement for individual extras, yet not for all extras. See Farnsworth, *supra,* at Section 8.5. Untangling such a web becomes unnecessary if it is shown that the contract was modified

by the parties.

It is observed that a great portion of the law of construction contracts is concerned with issues involving extra work and change orders. No matter how carefully the parties structure a contract, it cannot possibly encompass the myriads of conditions likely to be encountered on even a simple construction project. *Wyandotte & Drco* v. *King Bridge Co.* (6th Cir. 1900), 100 F. 2d 197. When the project involves renovation of an existing structure, requiring the removal of finish surfaces so that the basic structures are uncovered, the likelihood that the contractor will encounter unforeseen, and therefore uncontracted for, conditions is greatly magnified.

Owners, including YSU here, retain the right under the contract to order the contractor to alter the scope of the work. The contractor is then obligated to make those changes, regardless of whether the parties can agree upon the price at that time. When conditions require improvement or replacement of existing structures or materials, whether to upgrade for code purposes or to meet the demands of the new installations, then the contractor will be entitled to a change order. Nothing about the mere discovery of unexpected conditions and the ordering of

new work or materials constitutes a modification of the existing contract, but rather is accomplished within the framework of the existing, contractual change order process. See comments and cases collected in Public Works and Contracts, 78 Ohio Jurisprudence 3d (1987), Section 132. Most owners will allow a percentage of the total contract price to be set aside in order to fund such unforeseen, yet necessary, additional construction.

As previously mentioned, the Ward Beecher Science Hall project had both budgetary difficulties and unforeseen condition difficulties from the very outset of construction. The bids for the project were $1,357,000 more than the total funds allocated by the General Assembly for this project. The phase II bids alone were roughly $600,000 above the established budget. This was due, in part, to the complexity of the project, and the fact that very few contractors had sufficient expertise to participate in the project. Also, certain necessary equipment purchases and additional construction could not be evaluated until the final stages of pre-bid planning. Nevertheless, pursuant to the evaluation of the associate architect, YSU was forced to request additional funding from the General Assembly to meet these initial shortfalls.

From the very beginning of the project, major structural problems were discovered, including defective anchoring of two entire brick walls, roofing problems, structural support of the new planetarium, electrical upgrades for different portions of the project, emergency fire and other systems, plus many repairs of all sorts. By the completion of building 14, a considerable sum had been expended in change orders alone, very little of which had been allocated to Conti. The discovery of asbestos in building 82 created further budgetary difficulties, again necessitating additional funding on a large scale.

By the time renovation activities on building 82 began, very little remained in the project contingency fund. It was then discovered that the air duct system, which must be installed prior to the plumbing installations, was out of code and had to be completely redesigned. As this and other conditions manifested, the shortfall in projected funds needed to complete the project increased $400,000 in the month of October 1986 alone.

In light of these plagues of repeated budgetary shortfalls, it is not at all difficult to understand the associate architect's written mandate throughout the project that there

could be no entitlement to payment for any extra labor or material without a pre—approved change order. Moreover, it was repeatedly stated to all contractors that change orders could not be applied for unless there were funds available. Similarly, the evidence indicated that the associate architect regularly denied submissions for change orders, based upon budgetary concerns, and was often quite hesitant in approving such change orders as were ultimately authorized.

In contrast to the associate architect's rather punctilious approach to the formal change order process was the large body of evidence indicating that many changes were verbally authorized as utterly necessary to the timely completion of the project. A review of the exhibits indicates that a considerable amount of work and materials that were eventually authorized by change orders were completed well in advance of the issuance of the applicable change order.

As for example, the meeting minutes for November 6, 1986, indicate that the bulletin, a first step in the change order process, would be ready for plumbing changes in building 82's second and third floors by November 11, 1986, and for the fourth floor changes by November 14. Yet, the same meeting minutes

record that Conti was already seventy—five percent finished with the second floor rough in, fifty percent complete with the third floor rough in and one hundred percent complete with the fourth floor rough in. As it occurred, the actual issuance of the change orders was much later, and at a time when all three floors were nearly completed. Conti was, of course, unable to bill YSU until the change order was processed. In addition to the above, there were many other change orders that were processed well beyond the time when the actual work specified had been initiated, or even completed.

The greater weight of the competent credible testimony at trial was to the effect that Conti was instructed, in certain and strong terms, to perform all work necessary for the completion of this project, whether it involved additional work or not, and that all work be completed so as to maintain the pace of the other contractors. Above all, Conti was told to meet the scheduled completion date, and that any failure to do so would result in proceedings for liquidated damages against Conti.

It is therefore undeniable that Conti and the other contractors were installing all necessary labor and materials throughout the course of the project without the benefit of

formal change orders. Further, these records set forth the previously mentioned events in plain terms and dates, which indicate that all the parties were fully cognizant of this process and took it for granted. It is therefore concluded that the parties to this contract intended to, and did, assent to the modification of the change order process, and this was done in order to accommodate the stress between the lagging budget/funding problems and the requirement that deleterious field conditions not hinder achievement of the necessary completion date. *Cincinnati* v. *Cameron* (1878), 33 Ohio St. 336, 363—64. Conti relied upon the representations made to him by YSU and its agents and performed changes as necessary, many of which were ultimately paid for.

Likewise, any acceptance of changes made without written change orders constituted an oral waiver of the requirement as to all and accurately reflects the parties' true course of dealing on the project. *Reif* v. *Smith* (S.D. 1982), 319 N,W. 2d 815. See, also, *Frantz* v. *Guhten* (1987), 36 Ohio App. 3d 96 (written change order is waived when alterations have been made with the knowledge and participation of all concerned); *Brinderson Corp.* v. *Hampton Roads Sanitation District* (4th Cir. 1987), 825 F.2d 41.;

Huang International, Inc. v. Foose Construction Co. (Wyo. 1987), 734 P.2d 975.

As to the claimed extra hours for design work, it was shown beyond any reasonable doubt that the associate architect's engineering consultant for plumbing, Mosure and Syrakis, provided almost no engineering guidance to Conti during the tumultuous period of renovating building 82. It was during this time that a considerable portion of the HVAC work was completely redesigned. These HVAC redesigns had a considerable impact upon Conti's plumbing installations, so much so that Conti was ordered to suspend all of its work until Mosure & Syrakis could redesign the entire HVAC system for building 82.

Mosure & Syrakis's engineer, who drafted all of the plumbing drawings for the project, stated that part of his job was to be available on the project to resolve conflicts between and among contractors relative to the plumbing systems and drawings. Instead, Mosure & Syrakis gave him other assignments that required him to be elsewhere. Later, he was told that Mosure & Syrakis was losing money on the Ward Beecher project and that he should also cease attending the regular job meetings. It was contemplated that the HVAC specialist of Mosure & Syrakis could

also be responsible for plumbing issues.

The redesigns by Mosure & Syrakis were apparently quite deficient from the plumbing viewpoint, so much so that excellent plumbers could not make useful layouts from those drawings. When this became apparent, Conti saw that its work would fall further behind. In order to meet its scheduling obligations, Conti asked its independent contractor project consultant, *i.e.,* Bill Mitchell, to take on an additional role, that of engineering consultant.

Mitchell agreed to perform the role of on—site engineer, and began to act upon the project in that capacity. Although he was not formally licensed as an engineer, Mitchell had been a master plumber and was vastly experienced in engineering and design tasks. It became Mitchell's job to remedy the defects in the plumbing designs supplied by Mosure & Syrakis and to coordinate Conti's work with that of the HVAC contractor. It is clear from the testimony presented at trial that he did so quite well. Without his efforts, Conti, and other contractors, would not have been able to complete the Ward Beecher project on time.

The competent credible evidence indicates that the associate architect was fully aware of, and apparently quite happy with,

Mitchell's activities on the project. At one point during this phase of the project, it was expressed to Conti that Mitchell's services were crucial to Conti as well as to other contractors. The associate architect was also aware, due to plaintiff making it aware, that Conti had not contracted to perform any engineering services and, therefore, expected full compensation for Mitchell's extra services. The court finds that the associate architect represented to Conti that Mitchell's services were needed to keep the project moving due to Mosure & Syrakis's preoccupation with the HVAC problems, and that Mitchell's time would eventually be compensated through a change order to be processed at a later date. This authorization, which was only one of many such authorizations, was strongly relied upon by Conti.

Having found that defendants modified their contract and waived certain prerequisites, both constructively and expressly, and that Conti acted according to expectations and instructions in engaging Mitchell's services, it remains only to determine the amount of compensation for Conti. A principle objection, both before and during trial, was that Conti's claim was excessive. The claim was first submitted to the associate architect's

representative, Dominic DeLuca, who objected to the amount of hours for which compensation was sought. In his view, echoed throughout the Article 8 process, Mitchell need not have expended five hundred hours to design plumbing adaptations for change orders totaling a mere $100,000.

The records indicate that Mitchell's time spanned a twenty week period. During this time, he was required to redesign nearly every run of pipe and to coordinate these redesigns with the other trades. The competent and credible evidence presented at trial indicated that Mitchell billed and was actually paid for 848 hours of engineering work. Of these, five hundred hours were spent on the job site, and it is these that form the basis of plaintiff's claim. Thus Conti did not claim any of the more than 300 hours that it may have; nor did it attempt to obtain compensation for Mitchell's travel time.

The mere opinion expressed by the associate architect's representative that Mitchell's expended hours seemed excessive is hardly useful considering the abundant evidence that Mitchell did, in fact, work more than the hours claimed. Not only were his daily logs produced, but also Conti's logs showing that Mitchell was paid for the work. As to whether he expended the

time alleged upon the engineering and design work necessitated by the poor performance of Mosure & Syrakis, the manifest weight of the competent credible evidence indicates that he did.

It is possible that the associate architect or its mechanical engineer could have more expeditiously performed those tasks placed upon Conti. Nevertheless, extras to a contract are typically calculated by the amount of time the contractor actually requires to complete the task. So too here, Conti will be compensated for the full five hundred hours.

Another issue raised is that Conti paid Mitchell at the rate of $16 per hour, yet seeks compensation at the rate of $35 per hour. In defendant's view, this allows plaintiff more than twice what he paid and constitutes a windfall. Of course, defendant's associate architect then charged $49 per hour for such extra work and the engineering consultant would have no less than $48 per hour. Both of these rates were charged irrespective of the rates of pay their employees charged them to complete the work.

Further, what is calculated here is not a measure of damages, but the amount plaintiff ought to have been entitled to through the change order process. Contrary to plaintiff's

assertion, the contract was not so substantially breached as to have been at an end, and consequently, those processes encompassed by it, including modifications and waivers, are yet viable for calculating amounts due to the contractor. Evidence indicates that the amount sought for engineering the building 82 changes is reasonable and includes components for overhead and other matters. t is therefore recommended that plaintiff be awarded $17,500 against YSU for that part of its claim premised upon Conti' extra design and coordination activities.

II

Approximately one year following the completion of the contract process set forth in the specifications under Article 8, Conti, through legal counsel, submitted two additional claims, the first of which was a claim for lost man—hours over the entire course of the project. Conti asserts that it is owed at least four thousand man—hours for extra work performed on the Ward Beecher Science Hall. his additional labor directly resulted, in Conti's view, from two assertedly grievous courses of conduct by defendants. Conti claims that it was given an inaccurate set of plans, both at the bidding stage and later for the construction stage, which faulty plans created myriads of individual

breakdowns in momentum, productivity, efficiency and morale. Additionally, it is contended that defendants forced Conti to accelerate its productivity throughout the project.

A.

In response, defendants assert that all such claims must first be submitted through the contract specification's Article 8 process, and that, having failed to do so, plaintiff's claims have become untimely. The threshold inquiry then is whether submission of a claim through the Article 8 process as a prerequisite for bringing a cause of action in the Court of Claims.

The statutory basis for the Article 8 provision is contained in R.C. 153.12(B), which states:

> In the event of a dispute between the state and a contractor concerning the terms of a public improvement contract let by the state or concerning a breach of the contract and after administrative remedies provided for in such contract between the state and contractor are exhausted, the contractor may bring an action to the court of claims in accordance with Chapter 2743 of the Revised Code.

On the basis of this provision, defendants have created the process roughly outlined in Article 8 of the specifications section of the contract, which provides as follows:

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Art. 8. Disputes

> Except as otherwise provided in this Contract, any dispute concerning a question of fact arising under this Contract which is not disposed of by agreement with the Associate shall be decided by the Architect, who shall render his decision in writing to the Contractor. The decision of the Architect shall be final and conclusive unless, within thirty (30) days from the date of receipt, the Contractor furnishes the Architect a written appeal addressed to the Deputy Director. The Deputy Director shall then set a fair price for the work and his decision shall be final and binding upon all parties so concerned.

The formal outlines of this process as practiced are that the contractor first submits a disputed item to the associate architect, usually the private architect firm that has coordinated the project from the beginning. The matter may then be appealed to the appropriate representative of the state architect's office, whose identity may vary depending upon the trade of the contractor, but who is invariably one charged with supervisory functions for that trade on the project at issue. Appeals may then be taken to the state architect, Carol Qlshavsky in the present case; and from there to the Deputy Director of DAS, Division of Public Works, who was then Daniel F. Shields.

The manner in which the typical Article 8 process is conducted was set forth at trial as essentially the record of

Conti's journey through this contractual, but also administrative, process. Such evidence was offered to support other claims to be later considered, and also as an assertion that Conti was not treated fairly during the process. A review of the competent credible evidence indicates that the procedures created and administered by DAS fall short, in several regards, of satisfying the statutory mandate. Moreover, the process as administered by DAS is not structured to produce an unbiased finding, factually or legally, and, as normally conducted, does not comport with any of the fundamental notions of fairness or due process required for the administration of disputed claims.

A review of the statute indicates that defendants were to create "administrative remedies." Implicit in this term, but also a fundamental requirement of every dispute resolution mechanism, is the requirement that the decision maker be unbiased. This is the minimum requirement for valid determinations of factual disputes, without which, a process may easily degenerate into a mere impediment to obtaining an unbiased hearing.

The evidence here demonstrates that all of the lower level determinations are made by individuals who have personally worked

with the complaining contractor on the very project at issue. These may be friends or enemies of the contractor. They may have developed grudges against, or favoritism toward, him during the course of the project. As supervisors of the construction process, they would have been subject to all of the pressures, budgetary and scheduling, that gave rise to the decision forming the basis of the complaint. Similarly, these were more than likely involved in the decision making process from which the contractor's dispute arises. At the very least, they have personal knowledge of facts affecting the issues, and would likely have formed opinions regarding those matters that are at the root of the contractor's claim.

Similarly, the decisions of the state architect and the deputy director are tainted by the involvement of these interested individuals at the higher levels of the appeal process. Testimony established that the associate architect, the state architect's project supervisor, and several other representatives of each of these organizations who were actively involved in the project at issue were present at each of the later hearings. Representatives of YSU, who had participated in the project, were also present. It is clear that these had

unimpeded and *ex parte* access to the decision makers and, out of the hearing of Conti's representatives, actually advised upon the courses adopted by both Olshavsky and Shields. Conti can hardly be said to have received an impartial hearing when those who would be witnesses against his claim, as several of them were at trial, stand at the ear of the decision maker and have a preferred role in the deliberations.

Furthermore, the contract requires that such process resolve disputes of fact. The statute indicates that legal issues also be contemplated. By no means does the Article 8 process at work here lend itself to any meaningful resolution of such issues. The competent and credible evidence indicated that both Olshavsky and Shields engaged in mere bartering and sought only to make an offer of settlement. Of course, defendants contended at trial that the sum total of the Article 8 process was that of negotiations only. However, the statute upon which this process is predicated clearly requires a remedy of administrative proportions, and implies that a hearing be held, the results of which constitute findings by the agency.

Each hearing lasted no more than ten to fifteen minutes, and this was to resolve issues that, at trial, required many days of

testimony and hundreds of pages of exhibits. Conti was given an opportunity to only generally express its views on the claim, and was allowed no opportunity to support the elements of each claim by reference to specific evidence. Rather than calculations and meaningful review of the claims, these triers of the issues relied upon the judgments of the various state, architectural and engineering representatives seated in the room, all of whom had previously ruled against, or advised upon the positions and calculations urged by Conti at the lower level hearings. Such process is fraught with flaw.

There was also evidence that some members of this advisory group were, in fact, biased against Conti. There was testimony of existing sentiment to the effect that "Conti gets no extras," and that someone urged all to deny Conti any Article 8 relief whatsoever, These statements occurred out of the presence of the representatives of Conti and were made during the deliberative process.

Nor was the Deputy Director himself uninvolved or neutral as to the matters at issue. There came a time, approximately early September 1986, when Conti asserted its intention to halt work on the Ward Beecher Science Hall. As of September 10, 1986,

Conti was owed the following: Partial payments for January 31, 1986 ($19,506.60), February through July 31, 1986 ($7,200), August 31, 1986 ($25,592), and October 17, 1984 ($49,375).

There were also approximately seven outstanding change orders for work completed dating from November 1985 and totaling approximately $20,000 that had not been paid to Conti. At about this same time, Conti had several applications for change orders either denied or the amounts reduced by the associate architect. Additionally, the associate architect sought to have Conti increase its forces on the project to make up for the more recent HVAC delays. Conti asserted that it could no longer afford to fund the project from its own pocket and informed the associate architect that it would leave the project as of October 3, 1986, unless matters were resolved. Conti also complained to DAS.

The competent and credible evidence presented at trial indicates that, shortly thereafter, Deputy Director Dan Shields personally arrived at the YSU campus and arranged a private meeting with Conti's president, Ralph Conti. At the meeting, which occurred in an empty classroom, Shields urged Conti to

continue manning the project, and at the accelerated rate. He promised that the overdue payments would be expedited. He also

promised that Conti would be properly compensated for its extra work through the change order process at the end of the project. Shields intentionally created the impression that if, due to recalcitrant or biased local representatives, the Article 8 process was required to obtain payment for Conti, then he, Shields, would be waiting at the end of that process to see that Conti was paid.

Conti, in reliance upon this express authorization, returned to work with considerable vigor. Shortly thereafter, the delinquent payments began to be paid. Nevertheless, when confronted at the end of the Article 8 process by Ralph Conti and reminded of the meeting, the Deputy Director denied that it had ever taken place.

In conclusion upon this issue, the Article 8 process as structured, and as it was conducted between the parties in this case, is violative of the requirements of the statutory mandate. Additionally, it is an inherently unfair process by which the very agencies and agents that are parties to the dispute allow those of their employees with the most personal involvement in the dispute to act as adjudicators of the issues. Clearly, such arises to the level of a vain act and the rights to appeal to the

next level are mere vapors. To require a contractor to submit to such is against public policy and plaintiff was certainly not required to submit to it for his additional claims.

Alternatively, Conti did submit its additional claims for Article 8 resolution, and that by its comprehensive outline of all its claims in the letter of September 22, 1988. In response, legal counsel for DAS responded by letter of November 18, 1988, and stated that: DAS will not process the claims outlined in your letter of September 22, 1988, due to the fact that Conti has already exhausted the Article 8 administrative process. By refusing to examine the new claims, and by informing Conti that the Article 8 administrative process was at an end, defendants have rendered any further submissions by Conti a vain act. Certainly, Conti was justified in so concluding.

B.

Turning now to the merits of Conti's claimed lost man—hours, the first legal basis for consideration is that of the asserted defects in the plans and specifications. A crucial underpinning to the competitive bidding approach to the letting of contracts is that the plans and specifications issued for the bidding, and

upon which the bids are to be based, must be dependable, *i.e.*, accurate. Intelligent bidding cannot occur if the contractor is unable to rely upon such documents. Likewise, when an owner, such as YSU, provides detailed specifications of the conditions to be found on site and the designs of the materials to be wrought into the project, it must be implied before the law that they are indeed accurate representations. More to the point, when an owner provides defective, *i.e.*, inaccurate, plans or specifications, a contractor must be able to recover his extra expenditures occasioned by the owner's act.

The greater weight of legal authority allows such recovery in the form of a breach of implied warranty action. *United States* v. *Spearin* (1918), 248 U.S. 132; *Hollerbach* v. *United States* (1914), 233 U.S. 165; *Souza & McQue Construction Co., Inc.* v. *Superior Court* (Cal. 1962), 370 P. 2d 338; J.L. *Sammons Co.* v. *United States* (Ct. Cl. 1969), 412 F. 2d 1360; *Chaney & James Construction Co.* v. *United States* (Ct. Cl. 1970), 421 F. 2d 728; *Chicago College of Osteopathic Medicine v. George A. Fuller Co.* (7th Cir. 1983), 719 F. 2d 1335; see, also, generally, Annotation, Right of Public Contractor to Allowance of Extra Expense Over What Would Have Been Necessary if Conditions Had

Been as Represented by the Plans and Specifications, 76 A.L.R. 268 (1932); Harrington, Thum, & Clark, The Owners Warranty of the Plans and Specifications for a Construction Project, 14 Public Contract Law Journal 240 (1984); Cushman & Carpenter, Proving and Pricing Construction Claims (1990), Section 13.9 ("The main warranty [implied by law] is that the plans and specifications are adequate."); Simon, Construction Claims and Liability, (1989), Section 8.11.

The competent and credible evidence presented at trial establishes beyond doubt that the plans prepared and submitted to Conti were substantially defective. The preparer of the plumbing contractors portion of the plans and specifications testified that he was allowed only six weeks by Mosure & Syrakis to prepare twenty—five drawings, a project that normally requires at least twelve weeks. Also, he was not furnished with any recent drawings that might have more accurately displayed the actual conditions at the Ward Beecher Science Hall. He was aided in this process by a student. She apparently was quite inexperienced and made many errors, such as transferring piping designs onto the drawings of the wrong floor.

Defendants' project was much more complex than other

plumbing projects in that it included a large number of laboratories, each containing multiple work benches. Every individual station on the work bench required not only a supply of hot and cold running water, but also a supply of air, vacuum, and natural gas. Additionally, each station is required to have separate drains for acid wastes. Thus, errors in the design of so complex an undertaking would have more than the average consequences upon the contractor.

The initial impact of such drawings was upon Conti's estimator. In creating the bid, he relied upon the accuracy of the plans and specifications supplied by defendants. Estimations are created by multiplication of certain key components of the installation by a predetermined number of man-hours. Precisely which components are used and the exact man-hour factor are often protected trade secrets of each contractor. The product equals the estimated total number of man-hours required to complete the project, which is the basis for other calculations resulting in the ultimate bid submitted.

The plumbing contractor must also review the plans and total the exact number of all the components shown on the plans. For

the plumber, every angle in the piping, every intersection with other piping, and every connection to a fixture has economic significance. The locations of major drains as well as plumbing to be removed are also crucial to determining the amount of labor and materials to be installed. The plans must depict an entire system capable of draining discharges and venting fumes as well as supplying the water. Because of defendants' inaccurate bids and specifications, Conti's estimations of labor and materials were well—below that which was actually required.

The draftsman for Mosure & Syrakis attested to a number of drafting errors that supported the testimony of Conti's employees as to errors in both plans and existing conditions in both building 14 and 82. There were divergent pipe specifications, and this in an incredibly complex environment requiring up to twenty different kinds of pipe. This required Conti to return materials already purchased and to provide new materials. Pipes shown sometimes did not exist and existing pipes were shown in the wrong locations. This caused a constant starting and stopping of work in different areas. Conti's employees began to be cautious in the progress of the project, which untoward hesitancies deprived Conti of productivity and anticipated momentum,

Furthermore, upon the discovery of adverse and hidden conditions, additional drawings were created. However, these too were done hurriedly, with the result that they were also inaccurate and confusing. As a result of the inaccurate drawings, Conti was forced to expend considerable manpower above what it had reasonably estimated.

What is perhaps most unfortunate, and also quite frustrating, is that, following the completion of the project, it was discovered that a complete set of very accurate and recently produced drawings had been available to defendants throughout the project. These had not been made available to Conti at any time, and were discovered by a simple inquiry at one of YSU's offices.

C.

Plaintiff additionally contends that it suffered losses as a result of being forced to accelerate its work. The generally applicable law is to the effect that a contractor is entitled to the full amount of time set forth in his contract to complete the tasks contracted for, plus all justified extensions of time. Whenever an owner reduces the contractor's allotted time for the performance of the contract, by forcing him to complete the job

in advance of the date to which he is entitled, then the owner has accelerated the contractor and is subject to liability for any increased costs incurred by the contractor.

Acceleration may be accomplished by the owner in either of two ways. Directed acceleration occurs whenever the owner directs the contractor to finish the project in advance of the time for completion. *Nat Harrison Associates* v. *Gulf States Utilities Co.* (5th Cir. 1974), 491 F. 2d 578. Of course, when time is expressly stated to be of the essence, and the contractor unjustifiably falls behind schedule, then the owner may rightly insist that the contractor accelerate the pace of his work. *Mount Vernon Contracting Corp.* v. *State of New York* (1976), 54 A.D. 2d 37, 386 N.Y.S. 2d 894.

The usual factors in directed acceleration cases are: that the contractor, who had not delayed the job himself, was ordered to accelerate performance; that he in fact accelerated his performance; and that he incurred extra costs because of that acceleration. *Novair Engineering* v. *United States* (Ct. Cl. 1981), 666 F. 2d 546. It would appear that Conti was not directed to complete its performance prior to the completion date. Consequently, there is no claim for directed acceleration.

Constructive acceleration, on the other hand, may well provide a basis for liability. Whenever the contractor has a justified claim for an extension of time and the owner refuses to adjust the completion date of performance, and instead requires the contractor to complete the project by the original completion date, then constructive acceleration may have occurred. *Elite, Inc.* v. *S.S. Mullen, Inc.* (9th Cir. 1972), 469 F. 2d 1127,

The elements required to prove such a claim are as follows: There must be an excusable delay experienced by the contractor; the owner must have been given timely notice of the delay and a proper request for a time extension; the time extension request must be either postponed or refused; the owner must act by coercion, direction, or in some other manner that reasonably can be construed as an order to complete the project within the unextended performance period, or an order demanding a larger effort than would be necessary to complete the work within a properly adjusted schedule or completion date; the contractor must actually accelerate its performance and thereby incur added costs. Bramble & Callahan, Construction Delay Claims (2d Ed. 1992), Section 6.8, at p. 179, citing *McNutt Construction Co.* (1985), ENGBCA No. 4724, 85—3 B.C.A. (CCH) Paragraph 18,397;

Simon, Construction Claims and Liability, *supra,* at 308. This theory not only provides a basis to recover expenses incurred by the contractor, but is also an excellent defense to a claim by the owner for liquidated damages in the event a contractor refuses to so accelerate performance.

The requirement that the contractor must have been excusably delayed requires proof that some event occurred that, in the ordinary course of construction, would reasonably require the contractor to invest additional effort. Sometimes the contract itself provides the guidelines that justify extensions of time. More often than not, however, it is the unforeseen condition or circumstance that creates the need for a change order.

Usually, change order decisions contemplate both the change to be effected as well as whatever additional time may be required. In order for constructive acceleration to be found, there must not only have occurred an event, or events, giving rise to the necessity for extra labor, but plaintiff must also show that a time extension should have been given to the contractor.

In the present case, Conti set forth abundant evidence of a host of circumstances that caused delays on the project.

Initially, Conti was given a set of plans that were defective. This, along with the unexpected plethora of surprises in the existing conditions, caused delays at specific points throughout the entirety of the project. During these times, Conti had to perform numerous redesigns, exchange specified materials for those actually required, discover and trace the existing pipes that were not depicted upon defendants supplied plans, perform numerous reroutings of pipe as well as correct defective and out—of—code portions of the existing plumbing.

Similarly, after all of the other contractors were allowed back on the project, in late June and early July of 1986, Conti was kept from meaningful performance for a period of not less than four weeks, nor more than six weeks, while plans were being completed for the 1-IVAC construction. In addition, when plans were completed and supplied to Conti, they too were defective. Because of these and other excusable delays, the totality of which created inordinate time demands on the plumbing contractor, Conti was fully entitled to receive extensions of time at each point it remedied unanticipated conditions.

It must also be shown, in order to demonstrate that he was constructively accelerated, that the contractor gave notice to

the owner of the delay and requested an extension of time. *Johnson Controls, Inc.* v. *National Valve & Mfg. Co.* (E.D. Okla. 1983), 569 F. Supp. 758. This requirement is excused only if the acceleration was directed, the owner has indicated that no time extensions will be permitted, or the owner has waived the need for notice. It is considered a sufficient waiver if the owner has informed the contractor that no extensions will be contemplated until after the contract date; has informed the contractor that the construction must be completed by the contract completion date; or has indicated that no delays in scheduling will be tolerated. *Corbetta Construction Co. of Ill., Inc.* (PSBCA 1977), 77—2 B.C.A. (C.C.H.), Paragraph 12,699. As set forth in Simon, Construction Claims and Liability, *supra,* at 307:

> The application of the constructive acceleration theory stresses the importance of timely and properly requested extensions of time. It also stresses the fact that, upon receipt of a request for an extension of time, the owner or its design professional cannot arbitrarily set it aside and fail to consider it. All too often owners will simply state we are not granting the time extension now. 'We will consider it only if you are unable to make the original scheduled completion date.' This attitude is not only wrong but subjects them to potential liability. The right to a constructive acceleration claim arises when a contracting party has a right to an extension

> of time but the owner nevertheless expressly or constructively orders that the contracting party comply with the original schedule. This creates the constructive acceleration.

The coerced performance within the unextended time frame, which constitutes the demand to accelerate, is a requirement that may be satisfied in several ways, a number of which are expressed in the following observations:

> The acceleration order need not be phrased "in explicitly mandatory terms." For example, pressure on the contractor to employ larger crews and more equipment and communications with a contractor's bonding company in an effort to force the contractor to accelerate have been recognized as valid orders to accelerate. In addition, an expression of concern about lagging progress may have the same effect as an order to accelerate. Other common owner designed actions that may constitute an order to accelerate include repeated assertions in job meetings (and job meeting minutes) that no time extensions will be permitted despite the occurrence of excusable delays; a statement of the urgency of completion on the original contract completion date, despite redesign delays that result in suspension of the work.

Bramble & Callahan, Construction Delay Claims, *supra,* Section 6.12 at p. 192–193. (Citations omitted.)

Proof of actual acceleration must also be set before the court by plaintiff. It is sufficient that the contractor

demonstrate that he should have been given extra time to complete the project, and, that because he was not given such extra time, he incurred extra expense in order to complete performance by the time actually allotted. Of course, the contractor must have mitigated all damages that he should reasonably have been able to avoid by the use of alternative methods or materials. However, the burden of proof of such is upon defendant.

Testimony at trial indicated that defendants were fully aware of the difficulties experienced by Conti and other contractors. After continuous discoveries of field conditions that were either unexpected or were different than as set forth in the plans, the associate architect imposed a policy, often repeated, that time extensions were not to be granted. It was shown that the specific causes of delays were regularly reported to the associate architect, and others, as the project progressed. In response, the associate architect told Conti that no time extensions would be allowed.

Also, as previously shown, it was defendants' practice on this project to ignore the written change order process until, and unless, funding materialized. Only then would the associate architect allow change orders to be processed. Thus, the

contractor was required to provide items of labor and materials and, most crucially here, time to resolve the difficulty encountered. Insofar as each change order was also an application for an extension of time, the continuous repetition over the entire project that no change orders would be authorized without funding in place certainly limited the ability of the contractor to apply for a time extension prior to initiating the extra work. This, in conjunction with the certainty that defendants approved the additional work, constituted a waiver of both the notice to the owner and the request for a time extension.

Further, Conti did apply for time extensions in its application for a change order on more than one occasion. Written upon the approved change order was the following statement, which was also signed by the associate architect: "Time extension not approved at this time." Later, the meeting minutes for November 6, 1986, reflected that: "Contractors are not to request an extension of time for additional work on the change orders authorizing work. *** The Associate Architect will not sign change orders which request an extension of time."

Also, defendants' formal policy, which had been previously expressed from the very beginning of the project, was set forth

as follows: "Delay time will be evaluated near the completion of the project and consideration will then be given for any extensions the Deputy Director of Public Works believes has been justified." Implied in this last statement is the fact that no lesser authority could authorize an extension of time, which is somewhat unusual and was no doubt intended to discourage applications for time extensions. Additionally, and as confirmed by the testimony at trial, the refusal to consider the time extension until the end of the project holds the contractor in thrall to Article 7 of the contract, the liquidated damages provision, which is especially applied when contractors fail to perform on time. It states as follows:

> If the contractor, due to his own reasons or fault, shall neglect, fail, or refuse to complete the work specified herein by the date above mentioned, then the contractor shall forfeit to or pay to the state of Ohio as liquidated damages for breach of contract, the sum of TWO HUNDRED FIFTY DOLLARS ($250.00) per day for each and every calendar day that said work remains in an unfinished condition beyond the date specified above for completion. (Emphasis in original.)

Furthermore, set forth within the Plumbing General Notes of the plans was the instruction for Conti to: "Coordinate all work with General, Duct work, Electrical, Structural Contractors. Any

work done by this contractor which is not first coordinated, shall be removed and relocated at Plumbing Contractor's Expense." What is not apparent from this condition is that the plumbing work must be initiated and completed before the work of some contractors and after the work of others. If Conti does not have its plumbing installations completed by the appropriate stage, other contractors may install materials that obstruct the plumbing pathways or access necessary to install pipes. In that event, Conti must remove and reinstall, if possible, the finished work of other trades. Thus, Conti was required to make immediate decisions and move at whatever rate other contractors were progressing regardless of whether it had been excusably delayed, or whether a change order/time extension request had been made and granted.

Defendants could hardly have failed to realize the inherent contradiction in the demands being made upon Conti. Conti was told that no extra work could be authorized without a written, pre—approved change order, that no change orders would be issued without available funds in the project contingency fund, that no time extensions would be granted to it, and that Conti must meet the targeted completion date upon pain of liquidated damages plus

any expenses related to removing and reinstalling other contractor's work. While these devices are often useful in regulating complex construction projects, nevertheless, when utilized under circumstances such as existed on the Ward Beecher Science Hall project, such decrees imposed a veritable Inferno's gallery of contradictory demands upon Conti. Moreover, these demands were imposed upon plaintiff with draconian fervor and went well—beyond the working relationship established by the contract, in light of the applicable law.

The preponderance of the competent, credible evidence indicated that Conti was forced to accelerate its performance upon the project. This was accomplished through the doubling of its work force at crucial times on both buildings.

In conclusion upon this issue, plaintiff's evidence indicates that it expended an additional 4,033 man—hours on this project. These hours were attributable to both forced acceleration and defective plans, which caused plaintiff to lose productivity, efficiency, and momentum and to suffer constant interruptions in its mobilization efforts on the project. Conti seeks only its normal pay rate plus insurance, taxes, and fringe benefits, along with the overhead and profit factors allowed by

the contract. See *New York Ship Building Co.* (1976), ASBCA No. 16164, 76—2 B.C.A. (CCH) Paragraph 11, 979, 57,427. Thus Conti's total damages for lost man—hours, caused jointly and severally by both YSU and DAS, was $129,459 and it is recommended that an award against YSU and DAS be entered in that amount.

III

There were additional claims set forth by Conti that derive from the asbestos abatement delay. As previously mentioned, asbestos was discovered in building 82 of the Ward Beecher Science Hall when the general contractor began the process of demolition. Since the general contractor's insurance policy did not permit his workers to engage in the removal of asbestos, a separate contractor had to be obtained for that purpose. The removal process itself took approximately seven months, or one hundred and forty working days, during which time, Conti and the other contractors were unable to man the project. At the close of construction, Conti submitted its claims through the Article 8 process, which effectively denied them.

The principle claim among these is Conti's claim for unabsorbed and lost home office overhead. By its claim, Conti asserts that it was forced to maintain all of its overhead

expenses during the period of the asbestos abatement delay, and that these basic costs were not reimbursed to it by the eventual payment of the total contract price. At trial, Conti sought to demonstrate the amount of such claimed losses through the testimony of its own accountant, who made calculations, over strong objection, based upon what was referred to as the Eichleay formula.

The type of damages that a contractor may recover for delay caused by the owner depends upon the circumstances of each case. Even so, damages in a construction claim must be proven with specificity. *John E. Green Plumbing & Heating Co.* v. *Turner Construction Co.* (6th Cir. 1984), 742 F. 2d 965; see, also, Bramble & Callahan, Construction Delay Claims, *supra,* at 351. It is recognized that "[t]he contractor's efficient use of its productive resources is inhibited by any delay in the project, which in turn delays receipt by the contractor of the agreed compensation." Acret, Construction Litigation Handbook (1986), Section 7.01, p. 96. These delays very often cause an injury to the contractor that is commonly referred to as unabsorbed home office overhead.

Home office overhead is precisely what the term implies. It

includes general and administrative expenses such as costs for blueprints, office supplies, bid bonds, depreciation expenses, auto expenses, advertising and promotion (but not entertainment or travel), cleaning, maintenance, dues, subscriptions, light, heat, legal costs, accounting costs, office expenses, office wages, salaries, rentals, telephones, various taxes and insurances. *Salt City Contractors, Ltd.* (1980), VBAC No. 1362, 80—2 B.C.A. (CCH) Paragraph 14,717.

Usually, a contractor's home office will support more than one job at a time, and often supports multiple projects. The general and administrative costs of operating the home office are borne, *i.e.,* absorbed, by all of the projects that the contractor is presently engaged in. An interruption in any of these projects, with the resulting interruption in the flow of income from that project, will require that the portion of expense usually allocated to that project be reallocated among all of the other projects. The result is that, while the contractor may eventually recover the amounts due to him from the one project, he will not make as much money from the other projects as he would have made without the interruption. See generally, Simon, Construction Claims and Liability, *supra,* at Sections 6.13 and

6.14; Annotation, Overhead Expenses as Recoverable Element of Damages, 3 A.L.R. 3d 689; Cushman & Carpenter, Proving and Pricing Construction Claims (1990), at Sections 5.13 and 5.19.

There is considerable difficulty in calculating home office overhead losses. This is often due to the fact that contractors do not typically attribute overhead costs to the office until the end of the fiscal year, and then only in gross terms. A contractor's record keeping process does not narrowly relate costs in the home office to particular projects or phases of projects. Nor do contract documents set forth any method for calculating or awarding such overhead in the event of loss. That part of the contract allowing, for example, ten percent for profit and fifteen percent for overhead on the contractor's expended labor and materials takes no account of the time of the delay or the fact that money is lost from those other construction projects that must bear the additional costs of overhead during the period of delay. Thus contractors, including Conti, typically apply some sort of generalized formula in order to calculate these losses.

Of course, the use of a mere formula must be approached with trepidation, since the application of any formula, including the

one contended for, does not automatically flow from the event of a delay. *George Hyman Construction Co.* v. *Washington Metro. Area Transit Auth.* (D.C. Cir. 1987), 816 F. 2d 753. The impact of delay upon home office overhead must be shown prior to the application of the formula calculating its extent. *Southwestern Engineering Co.* v. *Cajun Elec. Power Coop., Inc.* (5th Cir. 1990), 915 F. 2d 972; *Massman Construction Co.* v. *Tennessee Valley Authority* (6th Cir. 1985), 769 F. 2d 1114; *Williams Enterprises* v. *Strait Manuf. & Welding Co.* (D.D.C. 1990), 728 F. Supp. 12.

Further, the contractor must show that he either mitigated his damages or was unable to do so. This requirement is satisfied by proof that it was unreasonable for the contractor to obtain other jobs during the delay period, which would have reduced the amount of unabsorbed overhead by absorbing the ongoing overhead expenses. The contractor must also show that it was impractical to reduce home office personnel and expenses. Both of these elements may be satisfied by proof that the delay occurred suddenly and that it was of uncertain duration. *George Hyman Constr. Co., supra,* 816 F. 2d at 757. If the delay is of uncertain duration, the contractor risks dual commitments of resources should he begin a similar construction project and the delay on

the initial project comes to an end. Also, if the contractor attempts, but is unable to actually obtain an additional similar project, then the mitigation requirement is satisfied. *Capital Electric Co.* v. *United States* (Fed. Cir. 1984), 729 F. 2d 743. See, also, *Steeltech Bldg. Products Inc.* v. *Edward Sutt Associates, Inc.* (1987), 18 Conn. App. 469, 559 A. 2d 228.

A principle that has emerged, with various modifications, for the measurement of unabsorbed home office overhead is called the Eichleay formula. It is based upon the Federal Board of Contract Appeals decision in *Eichleay Corp.* (1960), 60—2 B.C.A. (CCH) Paragraph 2688. The formula appears as follows:

$$\frac{\text{Contract Billings For This Contract}}{\text{Total Billings for Contract Period}} \times \text{Total Overhead for Contract Period} = \text{Overhead Allocable To The Contract}$$

$$\frac{\text{Allocable Overhead}}{\text{Days of Performance}} = \text{Daily Contract Overhead}$$

Daily Contract Overhead x Days of Delay = Amount Claimed.

The formula is treated in three phases. In the first, the contractor's total of all billings on the contract are divided by the total of all billings during the performance period. This yields a percentage that is applied against the total home office overhead for the period of the entire project. The product of

this calculation equals the total proportion of overhead allocable over the time period of the entire project. This is then divided by the total number of days required for performance, which produces the daily contract overhead. The daily contract overhead is then multiplied by the precise number of days of delay to arrive at the amount claimed.

The attraction of this formula is that, once "the contractor has shown that it has suffered a loss resulting from unabsorbed overhead, the application of the formula is relatively straightforward." Cushman & Carpenter, Proving and Pricing Construction Claims, *supra,* Section 5.13, p. 125. It is the relative simplicity of the approach that has caused criticism and at least one court, despite a spirited dissent, refused to allow the calculation. *Berley Industries Inc.* v. *City of New York* (1978), 45 N.Y. 2d 683, 385 N.E. 2d 281, 412 N.Y.S. 2d 589. See, also, *Novak & Co.* v. *Facilities Development Corp.* (1986), 116 A.D. 2d 891, 498 N.Y.S. 2d 492; McGeehin, A Farewell To Eichleay? (1984), 14 Public Contr. L. J. 276.

As has been often pointed out, the Eichleay calculation does not account for the potential fluctuations in home office overhead that may be caused by factors unrelated to the delay of

the project. Nor does the formula account for any activity on the job site accomplished by the contractor despite the delay. However, these and other shortcomings are capable of being addressed in the adversary proceeding and do not auger for the wholesale rejection of the formula. Furthermore, the formula does allow the calculation of home office overhead expenses in circumstances where these expenses are not otherwise capable of precise measurement.

In the great majority of jurisdictions to have considered this formula, most have adhered to it.

> Although the *Eichleay* approach was subject to intense scrutiny and met with some disfavor in the late 1970's, it is clear today that its acceptance in the federal and state courts has been reaffirmed. It is also now generally recognized that the use of the *Eichleay* formula does not automatically flow from the event of delay.

Cushman & Carpenter, Proving and Pricing Construction Law Claims, Section 5.13, p. 124—125. (Citations omitted.) However, a review of the abundant literature supports the common sense approach implicit in the Eichleay formula, and there is little reason not to apply the formula in the present case, if the evidence so allows. See, *e.g., George Hyman Constr. Co.* v. *Washington Metro. Area*

Transit Auth. (D.C. Cir. 1987), 816 F. 2d 753; *Nebraska Pub. Power Dist.* v. *Austin Power, Inc.* (8th Cir. 1985), 773 F. 2d 960; *Capital Electric Co.* v. *United States* (Fed. Cir. 1984), 729 F. 2d 743; *Meva Corp.* v. *United States* (1975), 511 F. 2d 548; *Luria Bros. & Co.* v. *United States* (1966), 369 F. 2d 701; *J.D. Hedin Constr. Co.* v. *United States* (1965), 347 F. 2d 235; *General Insur. Co.* v. *Hercules Co.* (8th Cir. 1967), 385 F. 2d 13; *PDM Plumbing & Heating, Inc.* v. *Findlen* (1982), 13 Mass App. 950, 431 N.E. 2d 594; *Dewey Jordan, Inc.* v. *Maryland National Park and Planning Comm.* (1970), 258 Md. 490, 265 A. 2d 892; *General Fed. Constr., Inc.* v. *D.R. Thomas, Inc.* (1982), 52 Md. App. 700, 451 A. 2d 1250; *Southern New England Contraction Co.* v. *State* (1975), 165 Conn. 644, 345 A. 2d 550; *Gulf Landscaping, Inc.* v. *Century Constr. Co.* (1984), 39 Wash. App. 895, 696 P. 2d 590; *Cives Corp.* v. *Callier Steel Pipe and Tube, Inc.* (Me. 1984), 482 A. 2d 852. See, also, cases collected in Bramble & Callahan, Construction Delay Claims, *supra,* at p. 374, fn. 90; Ernstrom & Essler, Beyond the Eichleay Formula: Resurrecting Home Office Overhead Claims, The Construction Lawyer (Winter 1982); Elger & Darbyshire, Recovering Home Office Overhead as Damages for Delay, 4 Construction Litigation Reporter 170 (Nov. 1983); Note, Home Office Overhead as Damages for Construction Delays, 17

Ga. L. Rev. 761 (1983).

There is no real dispute that Conti was excusably delayed by the asbestos abatement, or that the period of delay was one hundred and forty working days. Also, to that extent, all of the contractors on the project were given an extension of time for completion.

The preponderance of the competent credible evidence at trial indicated that Conti was unable to mitigate, although it certainly made an effort to do so. The discovery of the asbestos was most unexpected and, consequently, Conti could have made no advance provision for alternative work during that period of time. Also, the fact that the delay began during the winter is important for two reasons. The first is that the Ward Beecher Science Hall was Conti's only source of large scale inside work for that period. The second is that very few other projects can be started at such times. Conti, of course, began to bid on "everything that came down the pike." However the bidding process is slow and bids are submitted well in advance of the letting of the contract or the initiation of construction. It is therefore understandable that Conti's efforts to mitigate, actually to stave off financial disaster, met with very little success,

although the company did survive.

The greater weight of the evidence adduced at trial does indicate that Conti suffered a loss of unabsorbed home office overhead. As with other construction contract cases, it is difficult to ascertain with precision the amount by which Conti was injured. Conti's accountant did, however, provide sufficiently exact financial data to justify applying the Eichleay formula to it. These calculations are contained in plaintiff's exhibit 32 and conclude that the amount by which Conti was damaged is $25,554. This referee finds these calculations supported by the preponderance of the evidence and concludes that Conti did, in fact, suffer a loss of unabsorbed overhead in this amount.

Defendants did object to the use of the formula at trial, asserting that only an expert could apply the formula and that plaintiff's accountant may not so testify. However, the Eichleay formula was expressly spoken of by plaintiff's counsel on page 9 of its September 22, 1988, application for additional payments. Thus, defendants were fully aware that Conti's damages calculations were based upon the application of this formula. Moreover, the formula itself is a judicial device for calculating

damages, and is a mere mathematical formula. Once the appropriate base amounts have been shown, as they were here, one need only plug them into the formula, and the result is virtually self-calculating.

Defendants contend that there must be expert verification that the Eichleay formula accurately reflects the kind of home office overhead losses incurred by plaintiff, and not some other formula or variation of the Eichleay formula. Defendants are, of course, free to challenge plaintiff's evidence upon such issues. However, in light of the great number of judicial opinions applying Eichleay, as well as the credible testimony by both the owner of the company and the company accountant that the formula does embrace the actual damages suffered, no formal expert was required.

IV

Conti has also maintained a claim for $11,780 for revised plumbing work required by the redesign of the HVAC duct work. The work involved removal and replacement of certain acid waste lines as well as redesign of all plumbing lines to avoid the duct work. These changes were located in the first floor ceilings of building 82, and served plumbing fixtures to be located on the

second floor.

The preponderance of the credible and competent evidence adduced at trial was to the effect that Conti was not only authorized to perform the work prior to its inclusion in the written change order, see the discussion, *supra,* regarding the change order process, but the plumbing company was also pressured into performing it at a more expeditious rate. Conti was promised that it could include this extra in the change order for the first floor, which was change order No. 064—07.

When the extra was sought through the application of that change order, the associate architect's representative deleted it, Initially, Conti was told that the change order could be included in those changes that affected the second floor. When Conti sought to include it in that change order, No. 071—07, it was again rejected. As time went by, the associate architect's position hardened to the point where he was unwilling to allow the change order at all.

Having determined that Conti performed authorized work in excess of the contract, it is recommended that plaintiff recover the $11,780 from defendant YSU for the change order that was wrongfully withheld.

V.

Conti also made claims for several expenses that were incurred directly by it during the asbestos abatement delay period. These costs were directly related to maintaining the job site during the delay period, and were demonstrated as such by the preponderance of the competent credible evidence adduced. Thus, plaintiff is entitled to recover $238 for storage expenses; $2,338 for the maintenance of two storage trailers at the job site; $750 for a truck driver's hours and mileage; $2,249 for a foreman's time used to vacate and reoccupy the job site; $2,147 for a journeyman's time to vacate and reoccupy the job site; and $6,330 for the foreman's time required to attend job meetings and to regularly inspect the security at the job site during the period of delay, plus mileage. These amounts total $14,043 and it is recommended that an award against YSU be entered in that amount.

VI

It is also contended by Conti that it is owed for interest on certain payments that were made past the time when they should have been. The list of progress payment requests and the date each was actually paid are listed in plaintiff's exhibit 30. A review of the progress payments reveals considerable irregularity, with several payments delayed for more than one hundred days.

Plaintiff asserts that, pursuant to R.C. 153.14, all progress payments must be made within thirty days. This statute provides that:

> Payment on approved estimates filed with the owner or its representative shall be made within thirty days. Upon the failure of the owner or its representative to make such payments within thirty days, or upon an unauthorized withholding of retainage, there shall be allowed to the contractor, in addition to any other remedies allowed by law, interest on such moneys not paid within thirty days.

The term "approved estimate" refers to the provision in R.C. 153.12 that requires all progress payments to be "prepared by the contractor and approved by the architect or engineer." The progress payment is then forwarded to the Deputy Director of Public Works and then to the using agency for payment.

Defendants' best argument is that the specifications of the

contract provide at Article 17(f) that: "Payment of approved contractor's requests shall be made within thirty days from the date of approval by the Deputy Director of Public Works." Obviously, the contract conflicts with the statute and the issue narrows to whether the parties may contract out of the statute. While private parties are free to contract around the impact of certain statutory provisions, a state agency may not, by contract or otherwise, avoid one of the conditions imposed by the General Assembly for the construction of public improvements. Thus, plaintiff is entitled to the interest at issue, which was "the average of the prime rate established at the commercial banks in the city of over one hundred thousand population that is nearest the construction project." R.C. 153.14. It is recommended that Conti be awarded interest payments jointly and severally against defendants YSU and DAS in the amount of $4,722.

VII

Based upon the evidence, in light of the applicable law, it is recommended that judgment be entered in favor of plaintiff and against defendants as follows:

1) $17,500 to plaintiff from YSU for extra design

and coordination activities;

2) $129,459 to plaintiff from YSU and DAS, jointly and severally, for lost man hours over the course of the project;

3) $25,554 to plaintiff from YSU for unabsorbed home office overhead;

4) $11,780 to plaintiff from YSU for changes in Building 82;

5) $14,043 to plaintiff against YSU for direct job site maintenance expenses during the period of delay;

6) $4,722 to plaintiff against YSU and DAS, jointly and severally, for interest on payments wrongly withheld.

_____

JACK GRAF
Referee

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