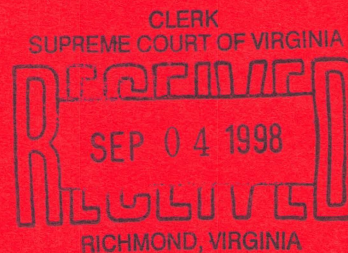


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**IN THE
SUPREME COURT OF
VIRGINIA**



RECORD NO. 980731

FAIRFAX COUNTY REDEVELOPMENT AND HOUSING AUTHORITY,

Appellant,

v.

WORCESTER BROTHERS COMPANY, INC.,

Appellee.

JOINT APPENDIX

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1 which we knew more accurately what our G and A total
2 costs were, and we recalculated the Eichleay formula
3 based on what really happened during the period of the
4 job as far as G and A expenses, and we reduced the total
5 amount of G and A on which the Eichleay calculation was
6 based down to \$405,000.

7 Initially when we prepared the claim, we
8 used 1995 figures for both 1995 and 1996 because that was
9 what we had.

10 Now as soon as we got new numbers, we
11 revised it, and as it turned out, it amounted to
12 substantially less G and A money.

13 It went down to \$37,000 from \$67,000.

14 THE COURT: Is there any objection to the
15 receipt of this document?

16 MR. BATES: Yes, Your Honor.

17 Again, the relevancy is that Eichleay is
18 the discreet formula by which home office overhead is
19 requested, and I believe the contract document requires a
20 percentage markup on direct costs which after the home
21 office looks at it, that is being requested by the
22 contractor.

23 This is essentially, it would appear to

1 me, a regulation that is lifted bodily out of the federal
2 sector and sought to be introduced in a contract governed
3 by state law.

4 And I think, once again, it is totally and
5 wholly irrelevant.

6 THE COURT: Okay. It may or may not be,
7 but it is relevant to the claim that is being made by
8 this plaintiff, and I will receive it. We will deal with
9 the question of Eichleay at the motion-to-strike stage.

10 MR. GOERGEN: Thank you, Your Honor.

11 (The document referred to above was marked
12 Plaintiff's Exhibit Number #29 for identification and
13 received in evidence.)

14 BY MR. GOERGEN:

15 Q. Now, Mr. Noonan, on the second page of
16 Exhibit Number #29, the bottom line number, would you
17 tell us what that is, where the Eichleay calculations
18 were made at that time?

19 A. \$37,266.79.

20 Q. Now subsequent to this revision and today
21 in Court, have you made any changes to your Eichleay
22 calculations?

23 A. We went through the G and A expenses

1 during that time from the general ledger printout, and we
2 reduced the G and A in that period by an additional
3 \$30,000 in the efforts to be more fair because there are
4 \$30,000 of that total, of the \$405,000, was for
5 professional fees, and attorney fees directly related to
6 specific jobs; not just this job, but other jobs.

7 And perhaps -- and this is on the advice
8 of the accountant -- our outside accountant -- that they
9 maybe belonged above the line up on the job costs and not
10 below the line in the G and A expenses.

11 So we removed them. Essentially that
12 money would have gone up above the line, and all that
13 remained in the G and A would have been \$30,000 less than
14 the \$405,000.

15 Q. And what is -- did you then, after
16 removing the \$30,000, did you recalculate Eichleay?

17 A. That is correct. We recalculated Eichleay
18 based on -- made a second adjustment based on a G and A
19 figure which was less further by \$30,000, for a total of
20 \$375,000 and did the arithmetic on that, and it came up
21 at an even lower number of \$34,495.89.

22 Q. And that number that you just named --
23 would you say it again?

1 A. \$34,495.89.

2 Q. Is that the number you are claiming for
3 your Eichleay calculations in this court?

4 A. That is as accurate as we can get it at
5 this point in time and probably as accurate as we are
6 going to get it. That is the number.

7 Q. I would ask you now to -- please turn to
8 Exhibit Number #30.

9 (The document referred to above was marked
10 Plaintiff's Exhibit Number #30 for identification.)

11 BY MR. GOERGEN:

12 Q. Do you know what Exhibit #30 is?

13 A. That is, I guess, your letter to Mr. Bates
14 revising our claim. This was after we received the
15 December report -- or we incorporated the figures from
16 the December report into the math and reduced the G and A
17 from the initial \$67,000 figure down to \$37,000.

18 Q. Does then this bottom line have to be
19 reduced further to reflect the reduction that you just
20 said -- --

21 A. Yeah. In fairness, it ought to be reduced
22 another approximately \$3,000 because of the \$30,000 in
23 professional fees and consulting fees and attorney fees

1 that were paid, that were job specific, during 19 -- --
2 well, during the whole period, from September until June
3 of '96.

4 Q. So on the second page, the third number
5 that says Home Office Overhead of \$37,266, is that the
6 number that changes to the new number that you just said?

7 A. Yeah. That is correct. That number
8 should change from \$37,266 down to \$34,495.89 for the
9 most accuracy.

10 Q. Now in this calculation, you have credits
11 for overhead paid on change orders, and credit for
12 overhead in NPC 14 and 23.

13 Now the number of deductions that you are
14 taking out off of your claim; do you see that, where the
15 numbers are in parentheses there?

16 A. That is right.

17 Q. Why are you subtracting out moneys in the
18 claim that you are making to the County?

19 THE COURT: I am sorry. Where are those?

20 MR. GOERGEN: It is on page two of Exhibit
21 #30, Your Honor.

22 THE COURT: Okay.

23 MR. GOERGEN: You will see the credits for

1 home office --

2 THE COURT: Yes, I see.

3 THE WITNESS: We took out anything that
4 could be construed as duplicity. Theoretically some
5 supervision and burden and overhead, it was paid on
6 changes, and it doesn't belong in there.

7 And in NPC 14, which we were denied -- no,
8 it is up above. It would be -- let's see, why did we
9 take it out of there?

10 23 was paid, 14 was not. But we just
11 reduced it in the best effort to arrive at a better
12 figure, a tighter figure.

13 BY MR. GOERGEN:

14 Q. Well, were these numbers home office
15 overhead and job-site overhead that had been included in
16 previously-granted change orders?

17 A. By the contract documents, the change
18 orders allowed overhead of ten and profit of five for a
19 combined total of 15.5, but it doesn't tell you whether
20 it is home office overhead or field overhead.

21 And our company, like other contracting
22 companies, the factory is out in the field, it is not in
23 the office.

1 So there is an overhead associated with
2 factories out in the field, and then there is the G and A
3 overhead in the office.

4 It could be construed that they paid us
5 for G and A expenses in the overhead that was paid, and
6 the job-site overhead that was paid as part of the
7 supervision, I guess, paid us part of the changes. So we
8 took them out.

9 But there are two sets of overhead in this
10 business.

11 Q. All right. So what is your purpose of
12 taking this money out?

13 A. To get down to the bare costs of doing the
14 work and make sure that there was no possibility of this
15 claim being construed to say that overhead and profit
16 were duplicate because of previous change orders or
17 because of other pending change orders in this overall
18 claim that we are looking for.

19 Q. Now would you please skip Exhibits #31 and
20 #32 and go to Exhibit Number #33?

21 A. Okay.

22 Q. And while you have got #33 there, I am
23 going to ask you to tell the Judge what #33 and #34 are,

1 total job costs?

2 A. I don't have the paper in front of me. If
3 I could get that from Mike, please?

4 Okay.

5 The \$800,000 is from our general ledger on
6 the Concord system. And the general ledger has all the
7 costs, every dime we spent.

8 Q. Okay.

9 Now isn't it a fact that you did not
10 create a separate category to capture claim costs
11 associated with the amounts you are sending to the
12 County?

13 A. That is true.

14 Q. Is there any reason for that?

15 A. It was extremely difficult to identify
16 which items were being impacted by what was happening
17 down there, and we have a job cost system that
18 corresponds to the CSI format, that being the Divisions
19 of Work.

20 And we identify within those Divisions of
21 Work where we were working and what item -- for instance,
22 on concrete, whether we were forming the concrete --

23 Q. Right.

1 A. -- or whether we were reinforcing --
2 putting reinforcing wire in there -- or whether we were
3 replacing the concrete or whether we were finishing the
4 concrete, or whether we were stripping the forms, curing
5 the concrete, all of those items were listed out in our
6 CSI format, and each man's hours on their time cards --
7 we turned in weekly time cards -- our site supervision
8 kept records on the daily reports and on the weekly time
9 cards on which tasks each of the men worked on, and we
10 broke it down within each day, and in some cases, we
11 would have three or four different tasks that a man
12 worked on.

13 Now the amount within that task that was
14 done that might be attributable to a change directive or
15 to a question to a problem or to down time because of a
16 problem which we ran into a lot of, we -- it is very
17 difficult to keep track of -- we have got seventy-some
18 odd men in the field, and we have each job broken down
19 like this one for CSI, so there are thousands of
20 different numbers to keep track of.

21 Q. Isn't it true that Mr. Tipnis indicated
22 that your job cost records -- I am sorry, your job
23 records were lacking in --

1 never researched it or read a lot of research about it.
2 But I know -- and we do a lot of different types of work,
3 and I have been involved in this business all my life --
4 I have seen Eichleay used on private jobs as a way to
5 identify costs.

6 And I have certainly seen it used on
7 federal jobs when delay issues have been presented.

8 Q. Isn't it true --

9 A. And knowing that it is there is another
10 reason not to have to try and separate out the bottom two
11 feet of an excavation into a delay thing knowing that it
12 is a way to go back in some methodical fashion and assign
13 a value to the delays that have occurred.

14 So that is why we thought we would use it
15 because we have used it in the past, and it is as good as
16 any way we know to try and more carefully identify the
17 costs that are attributable to what we are up against.

18 Q. There is nothing in your contract which
19 refers to the Eichleay formula at all; is there?

20 A. No.

21 Q. And did you provide any notice to the
22 County that you intended to price this claim using
23 Eichleay?

1 A. No, we did not.

2 Q. All right.

3 And you concede that the way in which
4 change orders are priced in the contract involves
5 ascertaining the direct cost plus a percentage markup for
6 overhead?

7 A. Well, it doesn't identify which overhead
8 that is, number one; whether it is a field overhead or a
9 G and A overhead. It just calls it overhead, and it is
10 always an issue that can create some problems because I
11 think only the U.S. Navy separates out in their claims
12 process or change process a second line item to pick up
13 the other overheads that are involved.

14 Q. And you didn't consider that to be
15 ambiguous at any time though for purposes of any -- I am
16 sorry, for purposes of making any inquiry with the
17 County, the meaning of overhead in the contract?

18 A. No, we didn't raise a question with it.
19 Quite frankly, we were, you know, dealing with trying to
20 get the job done. We weren't expecting to be here. We
21 were expecting to have worked out whatever might have
22 come up with the County, and we were trying, really
23 trying, to keep things moving and to keep answers coming

1 A. I would say both.

2 Q. When you say that the contractor -- that
3 it's reasonable -- in your letter, Exhibit #25, you
4 essentially state the contractor -- Let me read you a
5 sentence: Therefore the owner will approve additional
6 compensation established by the following formula to
7 reflect the authorized period in which to complete the
8 work described above, 104 calendar days from March 16th
9 to June 27th. That was your statement.

10 A. Right.

11 Q. Is it your position today that indeed the
12 contractor is entitled to an extension of time from the
13 adjusted completion date of March 16th to June 27th?

14 A. Yes.

15 Q. And could the contractor, but -- Strike
16 that.

17 Does that extension -- what does that
18 extension result from? And strike that.

19 What does the contractor's entitlement to
20 that extension derive from?

21 A. Fundamentally, the delay in accessing the
22 west parking area and also subsequently, as is contained
23 -- referenced I this letter, delay in the specifics of

1 the work related to the quay wall.

2 Q. Also does that include site furnishing
3 delays, for example the bus shelter?

4 A. The bus shelter was associated in terms of
5 its installation with the west parking lot, so it would
6 have. However, purchase of the bus shelter was
7 authorized, I believe, by request for proposal,
8 subsequent notice of potential change number 001 and
9 contained in change order number 1. It was the
10 contractor's option not to purchase it at that time,
11 which was understandable perhaps, but he did have the
12 authorization to buy it.

13 Q. And if he had bought it and brought it on
14 site, what you're saying is he could not have installed
15 it until completion.

16 A. That's correct.

17 Q. The delays -- why was the west parking lot
18 delayed? Why couldn't the contractor have access to it
19 until March?

20 A. There was a problem -- there was an
21 ownership relation problem -- relationship problem that
22 was a County issue. It was not something that was under
23 purview.

1 Q. Did you know about it at the time that the
2 contract was bid that there was a problem with getting
3 access to the site?

4 A. At the time the contract was bid, no.

5 Q. When did you and/or the County first
6 become aware of this problem?

7 A. In -- within the 90-day period of
8 executing the contract and the notice to proceed.

9 Q. So prior to the time the contract was
10 signed, you and the County knew that the contractor
11 wasn't going to be able to have access to the entire
12 site? I say that because the contract was signed
13 September 14th.

14 A. I believe that's correct.

15 Q. Did you or, in your presence, anyone from
16 the County inform the contractor prior to the contract
17 signing of the lack of access to this area of the job?

18 A. Yes.

19 Q. And in what form did -- was it you or was
20 it the County?

21 A. I would have to refer to the minutes, but
22 I believe it was stated in the meeting minutes recorded.
23 I believe it was the preconstruction meeting that was

1 While the removal of that concrete fill,
2 in fact, took a period of time, it was -- it was not a
3 great deal of time in my estimation and it resulted in
4 our ability to determine that the basin below that and
5 the foundations for the structure were, in fact, intact
6 and could be reutilized, which, in my view, could
7 actually have resulted in a time savings.

8 THE COURT: In your judgment, was it
9 reasonable for the owner to have not provided the west
10 parking lot at the beginning of the project?

11 THE WITNESS: Clearly, it would have been
12 preferable to have that, but I have to say that the west
13 parking was a discrete piece of work and, therefore, I
14 don't believe affected the job in total. But it would
15 have been preferable to have it all available at the
16 outset.

17 THE COURT: Well, my question was one of
18 reasonableness. Was it reasonable for this job to be bid
19 and for the contractor to be told to begin work and then
20 not afforded a portion of the project?

21 THE WITNESS: Under the circumstances, I
22 don't feel that it was unreasonable.

23 THE COURT: You don't think it was

1 unreasonable. Why?

2 THE WITNESS: Again, because that portion
3 of the work was discrete and, while it would have been
4 preferable, I don't believe it was unreasonable. There
5 were some issues of schedule related to the community
6 surrounding the Plaza and its use of it that was
7 determining, actually, the schedule that we were trying
8 to achieve.

9 THE COURT: When did you first learn of
10 the west parking lot permit problem?

11 THE WITNESS: I believe that we had
12 assumed that we would have access to it prior to notice
13 to proceed. I believe we did not learn that that would
14 not be available to us until about that time.

15 THE COURT: Until September of '95?

16 THE WITNESS: Approximately, yes.

17 THE COURT: You made reference in your
18 testimony to end caps and I believe that was in the
19 context of the roller bricks.

20 THE WITNESS: Roll-lock bricks.

21 THE COURT: Roll-lock bricks, well. Would
22 you tell me, first of all, what a roll-lock brick is and
23 what -- how the end caps -- what the end caps are?

1 And I think you indicated that they didn't exist. Were
2 there any as-built drawings that you -- that you relied
3 on or any drawings of pre-existing condition that you
4 relied on, even though they might have not been the
5 original drawings for the project?

6 THE WITNESS: For some of our work, we had
7 reference to the original construction drawings, in other
8 words what was intended -- how the work was intended to
9 be built. Unfortunately, they did not necessarily
10 present the way the work was actually built. We had
11 access to them.

12 We did have one drawing related to the
13 fountain, but it was -- it was more related to the water
14 display and mechanical aspects of the fountain than its
15 actual structural construction.

16 THE COURT: You were in Court and heard
17 the contractor's personnel testify to the problems that
18 they encountered with respect to angles that, in effect,
19 did not conform to the actual situation in the ground.
20 Can you tell me about that situation and what the -- what
21 the -- most importantly, what the basis was for those
22 drawings that had been -- that were the project drawings?

23 THE WITNESS: Certainly. That instance

1 did certainly occur. Again, we took the nature of that
2 from the original construction drawings that showed how
3 the wall was to be constructed. The wall in place turned
4 out to be different. That was discovered when the
5 existing -- portions of the existing wall were demolished
6 and removed and soil excavation was made. It was found
7 that the exact construction of that wall was different
8 than the original construction drawings had indicated it
9 would be. And that's what our drawings were based on.
10 Again --

11 THE COURT: So, in this case, your
12 drawings were based on pre-existing drawings?

13 THE WITNESS: That's correct, on the
14 original construction drawings.

15 THE COURT: Okay. Mr. Bates, do you have
16 any follow up questions to my questions?

17 MR. BATES: No, Your Honor.

18 THE COURT: Mr. Goergen?

19 MR. GOERGEN: One aspect I think is a fair
20 follow up to your question.

21 THE COURT: Very well, sir.

22 FURTHER CROSS EXAMINATION

23 BY MR. GOERGEN:

1 Q. And is it fair to say that the theory
2 behind unabsorbed overhead is that when you plan work to
3 be performed in a certain period of time and for one
4 reason or another you can't finish it in that period of
5 time that even though you've had these overhead costs
6 that you assumed were going to be absorbed by the income
7 from that contract that they now can't be absorbed by the
8 income from that contract in the time period that was
9 planned?

10 A. That's the -- that's the meaning there and
11 that's how it's interpreted, yes.

12 THE COURT: I'm sorry, you're going to
13 have to speak a little louder, sir.

14 THE WITNESS: I'm sorry. His analogy was
15 -- was fair. That was correct.

16 THE COURT: Next question.

17 BY MR. GOERGEN:

18 Q. And it's your testimony that the
19 difference in approach that the contractor uses is that
20 the Eichleay is a daily formula, whereas your formula is
21 not based on time at all, it's based on additional
22 dollars work that's performed; isn't that the essential
23 difference between the two approaches?

1 THE WITNESS: It was even during the same
2 year.

3 THE COURT: But his G&A is continuing
4 throughout this period of time until June of '96; is it
5 not?

6 THE WITNESS: His G&A goes on all year,
7 yes, sir.

8 THE COURT: Precisely. And so the
9 question is: In this case, if the delay is attributable
10 to the County, because if it is the County's fault that
11 his G&A -- that he is having to continue applying his
12 home office resources to this project, is that not an
13 appropriate damage for the County to pay?

14 THE WITNESS: I would -- I would -- again,
15 if he is incurring additional direct costs, to allow him
16 markup on the additional direct costs.

17 THE COURT: Well, I understand that's what
18 you were saying. But as you've agreed with Mr. Goergen
19 in the back and forth that has taken place --

20 THE WITNESS: Uh-huh.

21 THE COURT: -- what you are suggesting
22 does not take time into account, it does not take into
23 account the fact that while the amount of work being done

1 him whole and he doesn't -- he doesn't go through any
2 damages.

3 THE COURT: Let me take it from a slightly
4 different standpoint. Let's assume when this contract
5 was let that the County and the contractor had both
6 recognized in this case that the west parking area would
7 not be available and therefore the date of contract
8 performance would have run from September of '95 through
9 June of '96. In that situation, as a County auditing
10 officer, you would have assumed, would you not, that the
11 contractor would have charged G&A for that entire nine-
12 month period?

13 THE WITNESS: Uh-huh.

14 THE COURT: And built it into it's
15 contract bid.

16 THE WITNESS: Sure.

17 THE COURT: Okay. Thank you.

18 Mr. Bates or Mr. Goergen, if either of you
19 want to follow up on that, you may.

20 MR. BATES: No, Your Honor. Thank you.

21 THE COURT: Mr. Goergen.

22 MR. GOERGEN: Thank you, Your Honor.

23 THE COURT: Okay. Thank you, sir.

1 the Court why you agree or disagree with Mr. Salisbury's
2 description of overhead.

3 A. Well, Mr. Salisbury's description of
4 overhead would be fine if we didn't have time that we
5 were measuring as our basis for our allocation for
6 overhead.

7 When the contractor enters into the
8 contract, he is looking at how long it's going to take.
9 And part of his bid is going to be how much overhead or
10 how much G&A he is going to recover based upon the amount
11 of work that he is doing and the amount of time that the
12 contract is going to take.

13 In this case, the contract was originally,
14 as I understand, for a 150-day period. So therefore
15 built into the original bid and to the original contract
16 was an amount for G&A to be covered over 150 days, not
17 over 270 days. As I understand, the extended period of
18 the contract was approximately 270 days, which would
19 almost be twice as much as the original contract.

20 Now, during -- since G&A basically is the
21 cost of keeping your doors open, you're talking about
22 things like rent, utilities, as Mr. Salisbury indicated,
23 the payroll clerk. You have to pay the payroll clerk

1 regardless of whether she is issuing 100 checks, 10
2 checks, or 1 check. She still gets the same amount of
3 money. You still have to pay her.

4 Your rent is going to be the same very
5 month. You have to pay your rent.

6 So when you enter into a contract for a
7 period of time, such as this one, your hopes are that
8 you're going to recover -- or your intention is that
9 you're going to recover your G&A over that period of
10 time. So when we bid -- and as I recall the number is
11 somewhere around \$61,000, it was anticipated that over
12 150-day period our G&A costs would be \$61,000.

13 Now, and as Mr. Salisbury indicated,
14 clearly in every progress payment a portion of that was
15 G&A. However, it was a much reduced portion or a much
16 reduced G&A as a result of the extension of the period to
17 270 days because rather than taking G&A over 150 days, it
18 was effectively doubled which effectively cut the amount
19 of G&A on a per day basis in half.

20 Q. One other area, having to do with the
21 attorneys fees which were originally included in the
22 overhead pool. You heard Mr. Salisbury's testimony. And
23 I believe you have -- if you noticed something about his

V I R G I N I A:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

96 NOV -6 PM 1:56

CLERK, CIRCUIT COURT
FAIRFAX, VA

WORCESTER BROTHERS COMPANY, INC.,
2147-H Wicomico Street
Baltimore, Maryland 21230

Plaintiff,

vs.

At Law

FAIRFAX COUNTY REDEVELOPMENT
AND HOUSING AUTHORITY
3700 Pender Drive, Suite 300
Fairfax, Virginia 22030-7444

Serve: Fairfax County Attorney
Office of the County Attorney
12000 Government Center Parkway
Suite 549
Fairfax, Virginia 22035-0064

Also Serve:

Mr. Walter Webdale, Director
Fairfax County Redevelopment
and Housing Authority
3700 Pender Drive, Suite 300
Fairfax, VA 22030-7444

Defendant.

NL156573

MOTION FOR JUDGMENT
(Breach of Contract)

Now comes Plaintiff, Worcester Brothers Company, Inc.,
through its undersigned counsel, and moves for judgment against
Defendant Fairfax County Redevelopment and Housing Authority, and
states:

1. Worcester Brothers Company, Inc. ("WBC") is a Maryland
corporation with its principal place of business in Baltimore,
Maryland, and is engaged in the construction business as a
general contractor.

2. The Fairfax County Redevelopment and Housing Authority ("FCRHA") is a political subdivision of the Commonwealth of Virginia, pursuant to the Housing Authorities Law, Code of Virginia §36-4, and has the ability to be sued under §36-19.1. FCRHA has its principal place of business at 3700 Pender Drive, Suite 300, Fairfax, Virginia.

3. On or about September 14, 1995, FCRHA signed a contract whereby WBC acted as FCRHA's general construction contractor for "Site Renovations and Improvements" at Washington Plaza in Lake Anne Village in Reston, Virginia ("the Project").

4, FCRHA's public advertisements for the Project when bids were submitted, in June, 1995, stated that Project construction would start in July, 1995. However, the actual award of the Project was delayed beyond all parties' expectations, and work could not begin until September, 1995.

5. FCRHA executed the contract with WBC on the 90th day after WBC's bid was submitted, which was the last day allowed by law to hold the Project's bidders to their bids.

6. When FCRHA entered into the contract with WBC, FCRHA did not have the unobstructed right to allow WBC to perform construction work on a large part of the Project site, and was still in the process of obtaining the right of access. Months

after the start of construction, and from week to week during the Project, all parties were uncertain as to when WBC would be able to obtain access to that work area.

8. The Contract's required performance period was 150 calendar days from Notice to Proceed to Date of Substantial Completion. Thus, if the Contract had been awarded in mid-June (when bids were submitted) and work started in July (as expected based on FCRHA's advertisements) the Project would be expected to be finished by December, 1995. This was WBC's reasonable expectation when WBC prepared and submitted its bid for the Project.

9. The delay in the award of the Contract to the actual mid-September execution date pushed the required Substantial Completion date to mid-February, 1996.

10. FCRHA did not receive the appropriate clearances from the adjoining property owner to allow work to proceed on the west parking lot area until on or about March 6, 1996 (a delay of six months after the Contract award), three weeks after the time when WBC was supposed to have been able to finish the Project.

11. The delay in awarding the Contract and the delay in providing access to the project site extended the duration of the project the full extent of the Winter of 1995-1996, one of the

worst winters in memory, with repeated heavy snowfalls. This resulted in additional costs to WBC for Winter protection and snow removal above and beyond what could reasonably have been anticipated in WBC's bid.

12. FCRHA engaged in other behavior which unreasonably and substantially delayed the Project's completion, including the failure to make final decisions and release the Project's signage for shipment, until the Summer of 1996.

13. FCRHA also ordered additional work, including the purchase and installation of a specially-manufactured bus shelter which could not be delivered until the Summer of 1996.

14. WBC requested compensation for the additional costs it suffered from FCRHA's actions, and sought an additional \$143,598.50 contract adjustment to compensate WBC for the additional winter protection costs for the Project and for disputed additional work items (tree grates and a bicycle rack), as well as compensation for the additional direct jobsite costs for the numerous days of delay and compensation for the extended general and administrative overhead incurred during the extended Project performance period.

15. FCRHA's designated representative for the Project is the Architect, Robert W. Good, and on behalf of FCRHA he

initially rejected WBC's claim by his letter of May 5, 1996, and subsequently, reconsidering his position in light of a re-submission of WBC's claim, offered to pay for the tree grates and bicycle rack, and to offer approximately \$10,000.00 for the costs of the delay.

16. The contract requires that WBC file a Court action to challenge the adverse decision on its contract claim within six (6) months from the time the adverse decision was issued, and thus the genesis of the filing of this action.


17. WBC has been harmed by the delay caused by unreasonable acts and omissions of the FCRHA, and said delay was due to causes which were within FCRHA's control, and these acts and omissions amounted to a either breach of the parties' contract, or alternatively, a situation for which WBC is entitled to an equitable adjustment under the Contract.

18. WBC has complied with all conditions precedent to the filing of this lawsuit, and has continued to work on the Project pending resolution of this dispute.

19. WBC's damages amount to at least \$143,598.50¹, plus interest from June 21, 1996,

WHEREFORE, Plaintiff Worcester Brothers Company, Inc. respectfully requests judgment against Defendant Fairfax County Redevelopment and Housing Authority in the amount of at least \$143,598.50, plus interest and attorney's fees if allowed by law or the parties' contract, and such other and further damages as to the Court seems just under the circumstances.

Respectfully Submitted,
Worcester Brothers Company, Inc.
By Counsel:



Michael J. Goergen
4910 Massachusetts Avenue, N.W., #18
Washington, D.C. 20016
(202) 537-0253 (voice)
(202) 537-0256 (fax)
Virginia State Bar #24659

November 4, 1996

¹This amount includes the price of the tree grates and bike rack, but if the FCRHA is agreeing to that request, and that amount is added to the contract price by agreement (unclear at the time of filing), then the damages sought would be reduced by the corresponding amount (\$9,004.00).

1 Procurement Code, which I put as an exhibit --

2 THE COURT: Is that the one you cite in
3 your memorandum?

4 MR. GOERGEN: I believe so. And the
5 statute itself is laid out in Exhibit #19, one of the
6 exhibits to Exhibit #19. And it says that Virginia
7 contracts from public bodies cannot contain a clause
8 forbidding the contractor to recover delay damages where
9 there is unreasonable delays on the project, a public
10 procurement project.

11 And so therefore, Your Honor, I would say
12 this fits under that legislative prong because it's --
13 the question then becomes a legal one for the Court to
14 decide, was it a reasonable or an unreasonable delay.

15 If the Court finds that the delays that
16 were imposed on Worcester were unreasonable, then the
17 contract cannot prevent Worcester's recovery under the
18 law of those damages.

19 THE COURT: Okay. Thank you, sir.

20 MR. GOERGEN: Thank you.

21 THE COURT: If you will go to your second
22 point, Mr. Bates.

23 MR. BATES: Your Honor, the second point

1 is in wake of the exclusion of the accounting expert the
2 costs associated with the application of the Eichleay
3 formula should be excluded from the case. The Eichleay
4 formula indicated in our trial brief where it responds to
5 defendant's trial brief is the creature of Federal
6 regulatory accounting as it pertains to construction
7 contracts. It requires --

8 THE COURT: Let me just stop there,
9 because I don't agree with you.

10 MR. BATES: Okay, Your Honor.

11 THE COURT: I think that whether it
12 actually made it into evidence or not that this Court is
13 certainly familiar with Eichleay, to some degree at
14 least, and it's recognized indeed in the case law that
15 was submitted by Mr. Goergen, that Connecticut, I gather,
16 although I haven't read the case, has applied it. Other
17 states have.

18 So I don't think it's an animal of -- only
19 a matter of Federal contract accounting. And it seems to
20 me the real issue maybe that you're framing is whether
21 expert testimony is necessary for me to apply Eichleay.
22 And isn't the formula itself set forth in these other
23 cases to such an extent that so long as the numbers are

1 in evidence that this Court could then -- if it finds
2 that Eichleay is appropriate, which is -- and I think you
3 cited that you filed your case citing -- it's not
4 Berkeley, but the New York --

5 MR. BATES: Burley.

6 THE COURT: Burley. The New York case
7 that is always cited vis-a-vis Eichleay. And I guess
8 I've got to make a decision whether Virginia would
9 recognize Eichleay under appropriate circumstances.

10 MR. BATES: The only argument we have,
11 Your Honor, is I certainly concur that the Court could
12 make application of the formula to the costs that were
13 presented, the difficulty is that the formula has been
14 qualified by a number of conditions as part of a
15 precedence surrounding its use.

16 And one of the main ones is that where the
17 contractor's forces are put on standby status then the
18 formula is applied, then the contractor has the
19 obligation to show that it couldn't do -- couldn't
20 perform other work.

21 Here I think the evidence clearly showed
22 that there was never any pure delay in that the
23 contractor's forces were idle. It seems to me that the

1 condition precedent to the use of the formula would have
2 to have -- required evidence of idle forces which would
3 then create a need to carry this project at their home
4 office.

5 THE COURT: I understand your argument.
6 Without reading the cases, my inclination would be that
7 there are a number of Eichleay formulas that are used --
8 excuse me, recognized.

9 MR. BATES: Yes, Your Honor.

10 THE COURT: And I guess this Court has to
11 determine whether the Eichleay formula, as ultimately
12 argued at the end of case by this contractor, is an
13 appropriate one, which would take into account the
14 standby arguments you're making. I mean, it also might
15 deal with, you know, whether we -- whether home office
16 overhead ought to be calculated on the basis of billings
17 or some other basis for apportioning that. And if that
18 isn't -- if it's something else -- if this Court got over
19 the first hoop, that is that some Eichleay formula might
20 work, but I would say that under these circumstances it's
21 a different one perhaps than is advocated by Worcester,
22 if the evidence isn't in then to support that other --
23 that other formula, then Worcester would lose. But I'm

1 speaking hypothetically now.

2 MR. BATES: Thank you, Your Honor.

3 The last argument would be the attempt --
4 would focus on the attempt of Mr. Anderson to reserve
5 rights to file additional claims for contract extensions
6 in the notices of potential change.

7 Under those circumstances, Your Honor,
8 notice of potential change by it's use suggest a request
9 from the contractor, Worcester, to have the execution of
10 a change order for costs and/or time on the project. And
11 under the circumstances of this particular case, you've
12 had testimony which involves several notices of potential
13 change which then were considered as part of a change
14 order for costs or time, primarily change orders 1 and 2.

15 It's the argument of the County at this
16 point that the execution of a change order essentially
17 integrates the agreement of the parties and it binds the
18 parties to the time and costs contained therein.

19 THE COURT: So your argument is that it's
20 -- that any claim for damages has been waived?

21 MR. BATES: That's correct.

22 THE COURT: Effectively by virtue of the
23 change order.

1 the County's right. It would seem to be, but --

2 MR. BATES: Yes, Your Honor.

3 And insofar as NPC 15 is concerned, the
4 evidence coming from Worcester simply is that by virtue
5 of the change orders 1 and 2 containing NPCs 10, 11, 12,
6 and 13 there was some block of time added to the contract
7 performance which then should be subject of a total cost
8 claim of job site overhead, home office overhead, and it
9 seems to me that on construction claims context there
10 ought to be, at a minimum, the type of proof that would
11 allow this Court to look at the contract performance
12 period and make a determination within that period about
13 which of these activities were impacted and how they were
14 impacted.

15 And it's the County's position that that
16 sort of analysis was not forthcoming.

17 THE COURT: To be quite honest with you,
18 Mr. Bates, I don't understand, and it doesn't make sense
19 to me, the County's view of damages. Now, if the
20 contract says that's the way they are to be calculated
21 and that Eichleay or whatever shouldn't be used, that's
22 one scenario.

23 But the testimony of Mr. Salisbury, who I

1 found to be a very good witness and a very knowledgeable
2 witness, really didn't answer that. And I gave him
3 several opportunities to. And his problem, I frankly
4 think is, that it can't be answered. That is those home
5 office functions continue. And if so long as you're
6 talking about substantial completion rather than punch
7 list work, that is -- Eichleay is as good a way as any to
8 calculate damages.

9 Now, I'm going to go back and read the
10 case that you cite in your brief and maybe some of those
11 that are cited by counsel, but I -- you know, basically
12 in Virginia the Court is left with the situation of
13 having to decide what is fair -- whether damages have
14 been proven and a fair way of approximating them.

15 And as between the two alternatives I've
16 been furnished, the Eichleay formula appears to -- to be
17 a lot more on point than the approach that otherwise has
18 been furnished. So that's where -- I'll tell you, that's
19 where I am and I'm not sure there's anything, in all
20 candor, that you can do about it, because I think the
21 testimony is pretty clear and it was understandable.

22 MR. BATES: Well, Your Honor, the point I
23 was going to make is that the -- that the causation that

1 we have here would appear to be lacking for purposes of
2 allowing this Court to make a determination at the end of
3 the job resulting from NPCs 11, 12 -- 10, 11, 12, and 13.
4 There is this amount of time that's automatically added
5 and automatically to be charged to the County's account.

6 THE COURT: Well, there's no question that
7 but that because of -- and, frankly, it's a little
8 disturbing, a little disturbing to hear this type of
9 nondisclosure of circumstances like this. But getting
10 over that, clearly they get to the end. Clearly, this
11 contract cannot be substantially completed until June
12 because of the failure to obtain the area.

13 So you got some concurrent -- you know, so
14 you've got a situation where but for that maybe they --
15 maybe they would have had a hard time finishing, maybe
16 they wouldn't.

17 MR. BATES: Yes, Your Honor.

18 THE COURT: But that's not a very
19 persuasive argument to this Court when the County is
20 guilty of a much more egregious delay that is frankly
21 inexcusable.

22 MR. BATES: Well, if the County's delay is
23 inexcusable, I believe the evidence would show that if

1 it's limited to the west parking lot area, then the Court
2 would be constrained from awarding a hundred percent of
3 the job site overhead and home office overhead to
4 compensate the contractor for this sort of delay.

5 THE COURT: And what contract exactly --
6 excuse me. What case do you rely on for that
7 proposition?

8 MR. BATES: Well, Your Honor, at this
9 point I'm simply relying on the notion that the total
10 costs of the job ought not be utilized in making --

11 THE COURT: We're not talking about total
12 costs. We're talking about home office overhead.

13 MR. BATES: And job site overhead, Your
14 Honor.

15 THE COURT: Fair enough, and job site
16 overhead.

17 MR. BATES: And it's the County's argument
18 that home office and job site overhead under these
19 circumstances should be limited to the area of work
20 which, in fact, caused the delay, as opposed to having
21 the award reflect the total administrative
22 responsibilities for all other job activities that were
23 being pursued at the time.

1 THE COURT: So long as that project
2 manager had to deal -- talking about -- had to deal with
3 those, his entire salary had to be paid; didn't it, as
4 far as the west park -- the western portion of the
5 parking was concerned? If he had to be there to do it --

6 MR. BATES: Your Honor, if he had --

7 THE COURT: He is not being paid a lesser
8 amount of money, presumably.

9 MR. BATES: He isn't, Your Honor, but it
10 seems to me that under circumstances where he also had to
11 be there to do base contract work --

12 THE COURT: Well, that, frankly, is highly
13 questionable. And I will tell you the testimony of your
14 architect was conclusory and not persuasive, not
15 persuasive at all.

16 So I don't mean to be -- to let too much
17 of the -- my decision out of the bag.

18 MR. BATES: Thank you, Your Honor.

19 THE COURT: On the facts with respect to
20 the breach by the contractor, I didn't frankly think that
21 the County made it's case. I understand there was work
22 to be done. There was also 30 days to do that work.

23 MR. BATES: Yes, Your Honor.

1 if it's going to be a total job cost request. And that's
2 the ultimate position that we have, if he's going to come
3 before the Court and say this is what I anticipated, we
4 had an extended period of contract performance and this
5 is what I actually had to spend for every activity, every
6 operation, and every purpose, then I don't think that you
7 can automatically assume as a matter of causation that
8 the County has to pay for the difference.

9 THE COURT: I would agree with you, but I
10 don't think that's what they're doing here. That's the
11 reason I keep coming back and saying it's only overhead.
12 If this were a total job cost claim, which I guess is
13 what the subject of Peeble was, we would be dealing with
14 a host of other expense categories.

15 And I don't see that that is what they're
16 doing. They're saying that -- they are limiting their
17 claim to those overhead costs that they necessarily
18 incurred as a consequence of the breach of the contract,
19 or the delays, if you will, that were caused by the
20 County.

21 That's how I understand their claim in
22 this matter.

23 MR. BATES: Yes, Your Honor. Once again,

1 serve at the job site.

2 Accordingly, it contends that its job site
3 expenses must be fully awarded; and the Eichleay formula
4 utilized in federal contract law claims, or I should say
5 often used in federal contract law claims, is appropriate
6 for determining the extended home office or unabsorbed
7 home office overhead expenses to which it is entitled.

8 Although this court found the contractor's
9 accountant did not have sufficient experience to comment
10 on the applicability of the Eichleay formula to this
11 case, in part because his testimony would have been based
12 on his review of legal decisions and legal articles, or I
13 should say principally based on his review of legal
14 decisions and legal articles, as well as his lack of
15 experience otherwise demonstrated in his testimony to the
16 court, I conclude that there is enough authority
17 explaining the limitations of the Eichleay formula in the
18 law books for this court to make a reasoned judgment as
19 to its application in this case. And I would refer
20 specifically to Worcester's brief and the cases cited
21 therein, as well as the application of the Eichleay
22 formula set forth in Plaintiff's Exhibit 29 that was
23 introduced into evidence.

1 In evaluating Eichleay, there are first of
2 all several preconditions to its application. I would
3 cite particularly Altmeyer versus Johnson, 79 Fed III,
4 1129, a Fed Circuit decision in 1996. The first
5 condition is that the government caused delay. Here that
6 has already been found and is manifest on this record.

7 Two, that the contractor's forces were
8 placed on standby. They could not engage in other work.
9 In other words, was there a suspension of work on the job
10 such that the contractor might be required to commence
11 work on short notice? Clearly a large part of this
12 project, the west parking area, work on that area could
13 not be commenced.

14 Here the evidence reflects that the County
15 never could advise the contractor that the area would not
16 be available until a particular date. Instead it was a
17 rolling deadline. The evidence suggests that the area
18 would soon be available but wasn't.

19 Third, it must be shown that the
20 contractor was unable to take on other work. The
21 contractor could not take on other work because its
22 forces would be necessary when the west parking area
23 became available and similarly its home office personnel

1 ready to address those needs as well.

2 The duration of the west parking area work
3 was obviously a matter of months, so the contractor could
4 not minimize his damage for instance by bidding other
5 work or by terminating home office personnel. Thus,
6 these conditions for the applicability of Eichleay are
7 met.

8 Several other areas of concern are these,
9 albeit not ones expressed by the County: Are the
10 contract billings an appropriate basis for determining
11 the proportion of total home office overhead to be
12 ascribed to the project in question? I suppose the ready
13 answer is, it is because quite a number of courts have
14 found it so. The assumption behind the formula is that
15 contract billings are integrally related to the cost of
16 construction operations. Billings would normally
17 constitute a contractor's attempt to recover direct and
18 indirect contract costs of performance plus profit.

19 While profit might in a given case skew
20 the directness of that relationship, the formula is
21 otherwise a legitimate approximation. In this case, the
22 contractor made its books and records available to the
23 County for circumstances such as the profit charged on

1 Worcester's contracts or for that matter the timing of
2 contract billing that might have been manipulated in
3 order to exaggerate unabsorbed home office overhead.
4 Those were circumstances that presumably would have been
5 uncovered and might have been advanced; and they were
6 not.

7 Nor did the County's auditor present a
8 reasoned argument against the use of Eichleay. Indeed
9 his testimony that the contractor had received, G and A
10 incorporated in the contract price or portions of it over
11 the delay period demonstrated the contractor was not
12 receiving his contract consideration as anticipated and
13 therefore was effectively financing the County's costs on
14 this project by extending that G and A anticipated during
15 the performance period over the adjusted extended
16 performance period.

17 In the end I conclude especially in view
18 of the County's opportunity to audit the contractor's
19 books and its failure to present any reasoned analysis of
20 why Eichleay is inappropriate, that Eichleay is a
21 reasonable way to approach home office overhead damages
22 in this case. The same comments might be made with
23 respect to job site expenses. Hypothetically some of the

1 job site personnel and equipment expenses claimed by
2 Worcester might have related to other jobs; that is,
3 might have been inappropriately claimed. But the County
4 audited Worcester's books and no such contention was
5 made; and indeed, the suggestion was quite to the
6 contrary.

7 In the end, any party proving damages has
8 only the burden of proving those damages with reasonable
9 certainty. I find Worcester has done so, finding that
10 Eichleay is appropriate. In evaluating the contractor's
11 damages in these circumstances, the court will award
12 damages based on the Eichleay formula.

13 I am somewhat concerned and have not done
14 the calculation; and accordingly I am going to ask
15 counsel to do so before leaving the courtroom today in
16 several respects. And that is the number of days that
17 ought to be used for calculation of the Eichleay formula.
18 In an effort to get an opinion to you, these are simply
19 matters that I have not gone back and determined or
20 calculated, but I think counsel can. If you have a
21 problem, then I will return to my notes and do that. I
22 am hoping that you can rescue me from that circumstance.

23 It appeared to me from, I believe it was

1 Exhibit 29, but I may be mistaken, the Eichleay
2 calculations -- that that figure went through the last
3 day in June rather than an earlier date. Furthermore, it
4 seems to me that that date has to start on March 15th. I
5 am unclear whether it was or not. So, I am going to ask
6 counsel to calculate those damages when I leave the
7 bench. I should add finally that I find that the basis
8 for the bond expense was not sufficiently proven to my
9 satisfaction. It was therefore not awarded.

10 Finally, again, I thank both counsel for
11 the way in which this case was tried. And that is the
12 ruling of the court. So, if you would put pencil to
13 paper and attempt to adjust those damages for the
14 concerns I have raised, I will enter an order today. It
15 may incorporate the transcript that is being made of my
16 ruling and the reasons for it.

17 Also, the order may be a suspending order,
18 Mr. Bates, to the extent that you would like a longer
19 period of time, or for that matter you Mr. Goergen -- you
20 prevailed in part but not in total. So either one of you
21 may wish a suspending order, and I am quite pleased to
22 accommodate you in that regard. We have forms for that
23 purpose. Thank you.

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THE COURT: This is a follow-up to my ruling in the Worcester/Fairfax Redevelopment and Housing case. I understand there is a question with regard to my ruling with respect to whether interest should or should not be awarded. I did not award interest nor did I see anything in the contract that provided for interest, nor was it argued. But I will hear -- Mr. Goergen, you may argue.

MR. GOERGEN: Your Honor, Mr. Bates and I are not in disagreement about prejudgment interest. The only question that has arisen is as to the legal question of whether the County is subject to post-judgment interest. I would argue that by becoming a contracting party, by the waiver of sovereign immunity and becoming a contracting party and subjecting themselves to the court, the County thus subjects themselves like any other litigant to post-judgment interest.

THE COURT: Mr. Bates.

MR. BATES: Your Honor, it is our position that when the Authority purports to build a housing project, it acts in a governmental capacity and is entitled to the same sovereign immunity that counties are



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Judicial Center
4110 Chain Bridge Road
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November 24, 1997

JAMES KEITH
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BURCH MILLSAP
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WILLIAM G. PLUMMER
THOMAS J. MIDDLETON
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12000 Government Center Parkway
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Michael J. Goergen, Esquire
4910 Massachusetts Avenue, N. W.
Suite 18
Washington, D.C. 20016

Re: Worcester Brothers Company, Inc. v. Fairfax County Redevelopment
and Housing Authority
Law No. 156573

Dear Counsel:

I have received a motion for reconsideration filed on behalf of the Fairfax County Redevelopment and Housing Authority in the captioned case. After considering that motion, I conclude that the final order in this case entered on November 5, 1997 should be vacated in order that Worcester Brothers Co., Inc. may file a brief in response. That order has been vacated.

In view of the above, counsel for Worcester Brothers is requested to file a brief, on or before Friday, December 5, not in excess of (5) pages, addressing the issues raised by the Authority in its reconsideration motion. I will notify counsel if oral argument is required. If not, I will attempt to decide the matter promptly on the basis of the briefs.

Very truly,

Arthur B. Viereg, Jr.

ABV/ree



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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December 16, 1997

Michael J. Goergen, Esquire
4910 Massachusetts Avenue, N.W.
Suite 18
Washington, D.C. 20016

Dennis R. Bates, Esquire
Senior Assistant County Attorney
12000 Government Center Parkway
Suite 549
Fairfax, Virginia 22035

Re: Worcester Brothers Co., Inc. v. Fairfax County Redevelopment and Housing Authority
Law No. 156573

Dear Counsel:

On November 5, 1997, this court entered an order awarding judgment in favor of Worcester Brothers against Fairfax County Redevelopment and Housing Authority ("Fairfax County") in the sum of \$80,855 plus interest from November 5, 1997. On November 24, 1997, I vacated this order and granted Fairfax County's motion to reconsider. I have review the briefs submitted by both parties, and I am prepared to rule.

First, Fairfax County argues that this court erred in ruling that Fairfax County's admission that it delayed Worcester's work on the west parking lot rendered the issue of Worcester's waiver of the costs of NPC 15 moot. I conclude my decision was correct for the reasons stated at trial.

Michael J. Goergen, Esquire
Dennis R. Bates, Esquire
Re: Law No. 156573
December 16, 1997
Page 2

Second, Fairfax County argues that this court erred in awarding Worcester post-judgment interest. In the absence of a specific statutory authorization, Virginia law specifically prohibits counties from paying interest on a judgment. Virginia Code § 15.1-549 ([n]o interest shall be paid on any county warrant.). Therefore, one facet of the interest issue presented is whether the Fairfax County Redevelopment and Housing Authority is a type of entity that comes within the purview of the statute and, therefore, is not required to pay interest on judgments. As neither side has addressed this issue, and in light of the Supreme Court's recent decision, County of Fairfax v. Century Concrete Services, Inc., No. 961854 (Va. S.Ct. October 31, 1997), both sides are directed to brief the issue. Briefs shall be filed in the Clerk's office by January 2, 1998.

Very truly,

A handwritten signature in black ink, appearing to read 'Arthur B. Viereg, Jr.', with a long horizontal flourish extending to the right.

Arthur B. Viereg, Jr.

ABV/bp

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

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Worcester Brothers Co. Inc.,
Plaintiff

v.

Fairfax County Redevelopment
And Housing Authority
Defendant

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Law No. 156573

FINAL ORDER


This cause came on for trial upon the pleadings filed by the parties herein.

Upon consideration of the evidence presented, the argument of counsel and the rulings of the Court, it is,

ADJUDGED and ORDERED that judgment be and hereby is entered in favor of the Plaintiffs Worcester Brothers Co., Inc., against the Defendant Fairfax County Redevelopment and Housing Authority in the sum of \$80,855.00 plus interest from November 5, 1997.

AND THIS CAUSE IS ENDED.

ENTERED this 19 day of January, 1998.



Arthur B. Viereggs, Jr.
Circuit Court Judge

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE RULES OF THE VIRGINIA SUPREME COURT. A COPY OF THIS ORDER HAS BEEN MAILED TO BOTH COUNSEL.



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, Virginia 22030-4009

(703) 246-2221

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THOMAS A. FORTKORT
QUINLAN H. HANCOCK
RICHARD J. JAMBORSKY
RETIRED JUDGES

January 14, 1998

Michael J. Goergen, Esquire
4910 Massachusetts Avenue, N.W.
Suite 18
Washington, D.C. 20016

Dennis R. Bates, Esquire
Senior Assistant County Attorney
12000 Government Center Parkway
Suite 549
Fairfax, Virginia 22035

Re: Worcester Brothers Co., Inc. v. Fairfax County Redevelopment and Housing Authority
Law No. 156573

Dear Counsel:

I have reviewed each sides brief on the issue of whether or not the Fairfax County Redevelopment and Housing Authority (the "Authority") is a type of entity that comes within the purview of Virginia Code § 15.1-549. I conclude that the Authority does not come within the purview of the statute; therefore, they are required to pay interest on the judgment in this case. An order embodying my decision is enclosed.

Very truly,

Arthur B. Vieregk, Jr.

REVISED EICHLEAY FORMULA CALCULATIONS
FOR EXTENDED HOME OFFICE OVERHEAD OF
WORCESTER BROTHERS CO., INC. FOR WASHINGTON PLAZA CONTRACT
(Exhibit Item #11b.3.)

1. The formula for calculating extended home office overhead to use in an award of damages for delay has been set forth by a number of courts. Here are the two recent statements from the courts:

In George Hyman Construction v. WMATA, 816 F.2d 753,757 (D.C.Cir.1987), the Court defined the formula as follows:

The total home office overhead for the contract performance period is multiplied by the ratio of contract billings to total company billings; this calculation results in the amount of home office overhead allocable to the contract. That amount is then divided by the number of days of contract performance; the result is the daily home office overhead rate attributable to the contract. That rate is then multiplied by the number of days of delay; the result is the amount of recovery."

This is consistent with the statement of the formula in Capital Electric Co. v. U.S., 729 F.2d 743,747 (Fed.Cir.1984):

Contract Billings	x	Total Overhead for Contract Period	=	Overhead Allocable To The Contract
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Total Billings for
Contract Period

Allocable Overhead

= Daily Contract Overhead

Days of Performance

Daily Contract Overhead	x	Days Delay	=	Amount Recoverable
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2. The revised Eichleay calculations for this Project are as follows (copies of relevant excerpts from financial statements enclosed):

Step #1:

Contract Billings	= \$ 746,531
Total Billings for the Contract Time Period:	
9/1/95 - 12/30/95 = \$1,829,270	
1/1/96 - 6/30/96 = <u>\$1,789,366</u>	
	= \$3,618,636

So, the percentage equals $\$746,531 / \$3,618,636 = 20.6\%$

Step #2:

General & Administrative Costs:	
9/1/95 - 12/31/95 (\$477,466 - \$345,101)	= \$132,365
1/1/96 - 6/30/96	= <u>\$272,810</u>
Total 9/1/95-6/30/96	= \$405,175

So, total G&A for contract time period is \$405,175, multiplied by 20.6% (representing this job's percentage of total billings), equals total allocable overhead of \$83,466.05.

Step #3:

Allocable overhead (\$405,175) divided by total number of days of performance (271 days, representing original performance period of 150 days plus delayed performance period of 121 days) = \$307.99 per day

Step #4:

Daily rate for overhead (\$307.99) times days of delay (121) =
total recoverable overhead for delay period =

\$37,266.79

WORCESTER BROTHERS COMPANY, INC.
Baltimore, Maryland

STATEMENTS OF INCOME
(See Accountant's Review Report)

	For The Years Ended December 31,			
	1995		1994	
	Amount	Percent of Revenue	Amount	Percent of Revenue
Construction income	\$4,325,802	100.00	\$5,160,696	100.00
Direct job costs	<u>3,435,412</u>	<u>79.42</u>	<u>4,437,505</u>	<u>85.99</u>
Gross profit	890,390	20.58	723,191	14.01
<u>General and Administrative Expenses</u>				
Accounting and legal	77,614	1.79	117,103	2.28
Salaries	119,342	2.76	93,372	1.81
Payroll taxes	18,990	.43	10,648	.21
Insurance	40,064	.93	86,354	1.67
Telephone	48,032	1.11	63,986	1.24
Rent expenses	24,760	.57	24,800	.47
Office expenses	23,715	.55	25,671	.49
Depreciation and amortization	34,674	.80	42,080	.81
Vehicle expense	15,303	.35	22,219	.42
Estimating expense	37,824	.88	105,622	2.04
Dues and subscriptions	1,657	.04	4,259	.09
Entertainment	-	-	203	.01
Tax and license	9,755	.23	8,386	.17
Advertising/marketing	3,715	.09	14,024	.27
Contributions	570	.01	-	-
Miscellaneous	<u>21,451</u>	<u>.50</u>	<u>31,270</u>	<u>.61</u>
	477,466	11.04	649,997	12.59
<u>Other Income and Expense</u>				
Interest income	-	-	31	.01
Miscellaneous income	933	.02	2,139	.05
Interest expense	<u>(35,283)</u>	<u>(.81)</u>	<u>(37,752)</u>	<u>(.75)</u>
	<u>(34,350)</u>	<u>(.79)</u>	<u>(35,582)</u>	<u>(.69)</u>
Income (loss) before taxes	378,574	8.75	37,612	.73
<u>Provision (Benefit) for Income Taxes</u>				
Current	78,493	1.85	-	-
Deferred	<u>74,961</u>	<u>1.70</u>	<u>(4,960)</u>	<u>(.10)</u>
	<u>153,454</u>	<u>3.55</u>	<u>(4,960)</u>	<u>(.10)</u>
Net income (loss)	<u>\$ 225,120</u>	<u>5.20</u>	<u>\$ 32,652</u>	<u>.63</u>

The accompanying notes to financial statements are an integral part of these statements.

WORCESTER BROTHERS COMPANY, INC.
Baltimore, Maryland

STATEMENTS OF INCOME
FOR THE SIX MONTHS ENDED JUNE 30, 1996 AND 1995
(See Accountant's Review Report)

	<u>1996</u>		<u>1995</u>	
	<u>Amount</u>	<u>Percent of Revenue</u>	<u>Amount</u>	<u>Percent of Revenue</u>
Construction income	\$1,789,366	100.00	\$1,799,166	100.00
Direct job costs	<u>1,367,312</u>	<u>76.41</u>	<u>1,355,042</u>	<u>75.32</u>
Gross profit	422,054	23.59	444,124	24.68
<u>General and Administrative Expenses</u>				
Professional fees	66,198	3.70	43,020	2.39
Salaries	74,624	4.18	92,608	5.15
Payroll taxes	1,588	0.09	15,331	0.85
Insurance	10,549	0.59	11,323	0.63
Telephone	27,024	1.51	20,718	1.15
Rent expenses	18,599	1.04	11,900	0.66
Office expenses	9,000	0.50	15,300	0.85
Depreciation	18,431	1.03	21,000	1.17
Vehicle expense	10,519	0.59	6,561	0.37
Estimating expense	16,715	0.93	9,911	0.55
Dues and subscriptions	4,873	0.27	895	0.05
Tax and license	279	0.02	2,111	0.12
Advertising/marketing	3,209	0.18	1,976	0.11
Miscellaneous	3,970	0.22	46	0.00
Utilities	<u>7,232</u>	<u>0.40</u>	<u>-</u>	<u>0.00</u>
	272,810	15.25	252,700	14.05
<u>Other Income and (Expense)</u>				
Miscellaneous income	2,534	0.14	6,623	0.30
Interest expense	<u>(8,696)</u>	<u>(0.49)</u>	<u>(17,573)</u>	<u>(0.97)</u>
	<u>(6,162)</u>	<u>(0.35)</u>	<u>(10,950)</u>	<u>(0.67)</u>
Income before taxes	143,082	7.99	180,474	9.96
<u>Provision for Income Taxes</u>				
Current	17,900	1.00	-	0.00
Deferred	<u>27,319</u>	<u>1.52</u>	<u>76,974</u>	<u>4.28</u>
	<u>45,219</u>	<u>2.52</u>	<u>76,974</u>	<u>4.28</u>
Net income	<u>\$ 97,863</u>	<u>5.47</u>	<u>\$ 103,500</u>	<u>5.68</u>

The accompanying notes to financial statements are an integral part of these statements.

WORCESTER BROTHERS CO., INC.
INCOME STATEMENT
FOR THE 8 PERIODS ENDED AUGUST 31, 1995

	+--- PERIOD TO DATE ---+		+--- YEAR TO DATE -	
	ACTUAL	PERCENT	ACTUAL	PERC
REVENUE				
REVENUE	\$308,493.67	100.0 %	2,496,531.65	100
TOTAL REVENUE	308,493.67	100.0	2,496,531.65	100
COST OF SALES				
DIRECT JOB WAGES & SALARIES- -	105,375.01	34.2	721,627.04	28.
PROJECT MANAGERS SALARIES	13,800.47	4.5	68,515.48	2.
BONUSES	13,000.00	4.2	47,000.00	1.
INDIRECT JOB COSTS	9,140.38	3.0	37,691.94	1.
ACCRUED GROSS PAYROLL	(5,212.87)	(1.7)	17,031.47	.
GENERAL CONDITIONS	9,269.00	3.0	23,262.25	.
MATERIALS & SUPPLIES	134,138.49	43.5	853,929.01	34.
EQUIPMENT RENTAL	12,510.16	4.1	54,658.56	2.
JOB COST-EMPLOYER FICA	9,875.00	3.2	54,304.80	2.
JOB COST-UNEMPLOYMENT TAXES	9,733.00	3.2	46,111.73	1.
JOB COST-WORKERS COMP.INSURANC	8,988.00	2.9	48,492.00	1.
JOB COST-GENERAL LIABILITY INS	2,500.00	.8	16,020.00	.
TOTAL COST OF SALES	323,116.64	104.7	1,988,644.28	79.
GROSS PROFIT	(14,622.97)	(4.7)	507,887.37	20.
OPERATING EXPENSES				
ADMIN.SALARIES & WAGES	8,221.00	2.7	62,715.62	2.
ADMIN.VEHICLE EXPENSE	1,834.33	.6	9,866.66	.
ADVERTISING EXPENSE	910.53	.3	2,674.31	.
BUSINESS LICENSES & PERMITS	150.00	.0	2,261.44	.
DUES & SUBSCRIPTIONS EXPENSE	(287.38)	(.1)	607.62	.
ESTIMATING EXPENSES	3,207.86	1.0	16,561.20	.
ADMIN.PAYROLL TAXES & INSURANC	2,400.00	.8	20,131.00	.8
PROFESSIONAL EXPENSES	10,372.44	3.4	59,604.12	2.4
MEDICAL INSURANCE EXPENSE	1,543.03	.5	11,794.01	.5
INSURANCE EXPENSE	(1,068.00)	(.3)	8,840.00	.4
MISCELLANEOUS EXPENSE	.00	.0	8.00	.0
PROJECT MGR-UNASSIGNED	3,389.00	1.1	53,032.05	2.1
RENT	2,150.00	.7	16,000.00	.6
SUPPLIES	2,648.95	.9	17,112.20	.7
TELEPHONE	6,753.32	2.2	32,328.49	1.3
TRAINING & EDUCATION	.00	.0	40.00	.0
UTILITIES	1,212.65	.4	3,524.47	.1
DEPRECIATION	3,500.00	1.1	28,000.00	1.1
TOTAL OPERATING EXPENSES	46,937.73	15.2	345,101.19	13.8
NET INCOME FROM OPERATIONS	(61,560.70)	(20.0)	162,786.18	6.5
OTHER INCOME & EXPENSE				
INTEREST EXPENSE	(3,268.38)	(1.1)	(22,897.40)	(.9)

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Admitted to Practice in
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- Via Fax (703)324-2665 (2 pages) -

October 10, 1997

Dennis R. Bates, Esquire
Senior Assistant County Attorney
12000 Government Center Parkway, Suite 549
Fairfax, Virginia 22035-0064

Re: Worcester Brothers Company, Inc.
v. Fairfax County Redevelopment and Housing Authority
Law No. 156573

Dear Dennis:

As I mentioned in my letter to you of September 17, 1997, Worcester discovered an error in its calculations for the Eichleay formula, which it uses to measure the appropriate allocation of home office overhead. I sent you the revised calculations at that time, and included the revised calculations in the box of documents provided to your auditor. Yesterday, your auditor called Worcester's accountant and left a message that he had just then seen the revised calculations, and had some questions about the numbers and wondered whether Worcester was formally amending its claim.

I want to make sure that there is no confusion. Indeed, Worcester is formally amending its claim downward, to account for the difference in the earlier-stated Eichleay calculations and the now-recognized proper calculations. Additionally, Worcester is dropping from the claim the "tree grates and bike rack" item which has already been settled between the parties, and (so I understand) recognized as a legitimate change order item. Finally, the bond premium claim has been reduced, based on the sliding scale stated by the bonding company instead of the 2.5% cost originally anticipated.

The revised calculations of the claim are as follows:

REVISED STATEMENT OF CLAIM:

Total claim for NPC #14, #15, and 121 days of delays:

NPC #14 (Snow removal, cold weather protection) = \$ 23,244.00

NPC #15 (Delays due to West Parking Area, etc.):

Jobsite Overhead = \$ 60,500.00

Home Office Overhead (G&A) = \$ 37,266.79

Credits for Overhead Paid on Change Orders:

A. Supervision & Burden = (\$ 4,320.00)

B. Overhead Markup (10%) = (\$ 15,484.89)

Credits for Overhead In NPC #14 and #23:

A. Supervision & Burden = (\$ 5,571.92)

B. Overhead Markup (10%) = (\$ 966.38)

Total Net Claim NPC #15 = \$ 70,923.60

Subtotal, NPC Nos. 14, and 15 = \$ 94,167.60

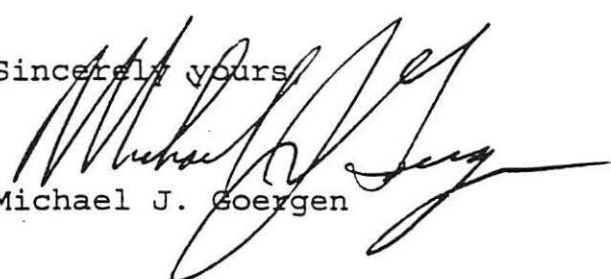
Bond Expense (@ 1%) = \$ 941.68

Claim Preparation Costs = \$ 10,000.00

Total Claim, NPC's #14 and #15 = \$105,109.28

With best wishes, I remain

Sincerely yours,


Michael J. Goergen

cc: Keith Novak, CPA
Mr. Joseph Noonan

ASSIGNMENT OF ERROR

The trial erred in finding that a contractor had proved its home office damages with reasonable certainty. Tr.-506.

