

PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 10

NUMBER 6

June 2024

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Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)
ISSN: 2688-7290

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt)
Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

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POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

Don't Leave Me Twisting in the Wind: Armed Services Board of Contract Appeals Paves Way for Potential Subcontractor Recovery for Pandemic-Related Claims

*By Edward V. Arnold and Zachary F. Jacobson**

In this article, the authors review a recent decision by the Armed Services Board of Contract Appeals that is pivotal for subcontractors facing hurdles due to the COVID-19 pandemic and other challenges.

In a significant ruling, the Armed Services Board of Contract Appeals (Board) has denied a government motion to dismiss claims from McCarthy HITT—Next NGA West JV, a joint venture under contract with the U.S. Army Corps of Engineers (USACE) for the construction of a new building to house the National Geospatial-Intelligence Agency. The decision is pivotal for subcontractors facing hurdles due to the COVID-19 pandemic and other challenges.

BACKGROUND

The subcontractors claimed hindrances and delays resulting from actions taken by the government in response to the COVID-19 pandemic, including government-directed changes in work methods, government-imposed restrictions unanticipated at the time of bid and award, changed conditions, and inflation. In particular, the subcontractors asserted the same three grounds for relief—the government's actions and inactions amounted to:

- (1) Constructive changes to the contract work under the changes clause;¹
- (2) Constructive suspension of work under the suspension of work clause;² and
- (3) The government's breach of implied contract duties.

The government sought dismissal, arguing the subcontractors failed to state any claims upon which relief may be granted. The government also argued that the claims were barred by the sovereign acts doctrine, which holds that the government is not liable for its legislative or sovereign acts if they render it impossible to fulfill a contract.

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¹ Federal Acquisition Regulation (FAR) 52.243-4.

² FAR 52.242-14.

THE DECISION

The Board found that the complaint stated valid claims for relief based on constructive changes, suspensions of work, and breaches of implied duties in the contract.

First, the Board found that McCarthy-HITT had alleged sufficient facts to state a constructive change claim, notably McCarthy-HITT's allegation that USACE required it to comply with government guidance on COVID-19 and implement COVID-19 exposure control procedures. In strictly applying applicable pleading standards, the Board rejected the government's argument that it directed neither the prime nor the subcontractors to do anything but perform their obligations set forth in the contract, which is not a constructive change. However, the Board noted that the government "makes a facially strong argument that McCarthy-HITT has no remedy under this fixed-price contract for unexpected cost escalations and other market conditions."

Second, the Board found that McCarthy-HITT had alleged sufficient facts to state a constructive suspension claim, where the complaint alleged that USACE's actions and inactions in administering the contract once the pandemic struck had the effect of unreasonably disrupting, delaying or hindering the work on the project. For example, McCarthy-HITT alleged that, rather than working with McCarthy-HITT to develop an approach to manage the pandemic impacts, the government insisted the work proceed on schedule, as well as refusing to acknowledge the work was being delayed by the pandemic, and this had the effect of unreasonably delaying the work.

Third, noting that this contract (like every contract) contained an implied duty on each party to perform in good faith, the Board held McCarthy-HITT alleged sufficient facts to plausibly suggest that the government violated this duty. For instance, McCarthy-HITT alleged that the government failed to cooperate with it once the pandemic had set in, but rather insisted that McCarthy-HITT and its subcontractors continue performing as if nothing had happened, thereby leaving the contractors "twisting in the wind."

"SOVEREIGN ACTS" DOCTRINE

The government attempted to invoke the sovereign acts doctrine as a basis for dismissal of McCarthy-HITT's complaint. As the Board explained in its decision, "sovereign acts" is a government affirmative defense to a contractor claim that protects the government from liability under its contracts arising from its general and public acts as a sovereign. The Board advised that this defense is an inherent part of every government contract. In a nutshell, the government is only liable for its actions in its capacity as a party to the contract. The government is not liable for any harm to contractors resulting from other

actions taken in its sovereign capacity. To succeed in invoking the defense, the government must prove that the government act in question (1) was public and general, and (2) rendered contract performance impossible.³ Here, the government did not meet its burden.

The critical weakness in the government's argument resulted in part from the timing of its motion. As the Board noted in its decision, a claim may be dismissed at the pleading stage when its allegations demonstrate the existence of an affirmative defense that will bar any remedy, but the applicability of the defense must be clearly indicated on the face of the pleading. This can be difficult, as contractors are not required to anticipate every possible affirmative defense that the government may raise and include negating facts in the complaint. In its decision, the Board was limited to relying on the facts provided in McCarthy-HITT's complaint to evaluate government's sovereign acts affirmative defense.

The government failed to convince the Board that the alleged actions taken by USACE that resulted in harm to McCarthy-HITT constituted public and general acts in its sovereign capacity. The Board found that many of the governmental actions cited as giving rise to the government's liability in the complaint appear public and general, but that it was not clear from the face of the complaint that the claims arose entirely from public and general government acts.

The Board noted that the various extracontractual requirements and restrictions USACE allegedly imposed on the contractor could have been imposed by public and general government acts or could have been attributed to USACE personnel acting in the government's contracting capacity. The answer, the Board concluded, required more facts than the complaint provided.

The Board also found that the government could not establish that its actions rendered performance impossible. The Board noted that the second element of the sovereign acts affirmative defense requires the government to show that its actions precluded the contractor from performing in accordance with the contract.⁴ The Board held that it was not clear on the face of the complaint that the law required USACE to impose the allegedly new requirements on the contractor or whether the imposition of the allegedly new requirements fell within the contracting officer's discretion. If the latter, the Board reasoned, then the impossibility element could not be established and the defense fails. For this

³ Aptim Fed'l Servs., LLC, ASBCA No. 62982, 22-1 BCA ¶ 38,127 at 185,218.

⁴ See Aptim, 22-1 BCA ¶ 38,127 at 185,218.

reason, the Board concluded that more information than available in the complaint was needed to determine whether the impossibility element of the sovereign acts defense is present.

CONCLUSION

The decision offers hope to contractors and subcontractors facing performance challenges resulting from the COVID-19 pandemic. Regardless of the merits of its actions, the government cannot ignore or dismiss out of hand claims resulting from additional requirements and delays resulting from the government's pandemic response.

Moreover, this ruling is also a significant victory for contractors and subcontractors because the Board upheld the general legal principle that the government must meet its evidentiary burden to prevail on an affirmative defense.

Here, the Board held that merely labeling alleged government actions related to COVID-19 in a contractor's complaint "sovereign acts" without the factual support needed to establish both elements of the affirmative defense will not succeed. To invoke this affirmative defense, the government must do the work and diligently engage in discovery to establish sufficient facts to convince a tribunal that its actions were taken within its sovereign capacity, and that those sovereign acts rendered contractor performance impossible. The fact that these acts relate to COVID-19 does not free the government of this basic obligation. It remains to be seen whether, after the parties conduct discovery, the government will prevail on this argument here.

