



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: April 22, 2020

CBCA 5683

PERNIX SERKA JOINT VENTURE,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

J. Randolph MacPherson of Halloran & Sage LLP, Washington, DC; and Douglas L. Patin of Bradley Arant Boult Cummings, Washington, DC, counsel for Appellant.

Erin M. Kriynovich, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Rosslyn, VA, counsel for Respondent.

Before Board Judges **SOMERS** (Chair), **VERGILIO**, and **SHERIDAN**.

SOMERS, Board Judge.

Appellant, Pernix Serka Joint Venture (PSJV), faced with concerns about performing a contract in Freetown, Sierra Leone, during an Ebola virus disease (Ebola) outbreak, sought guidance from the Department of State (DOS) contracting officer as to how to respond. DOS provided no guidance, stating that PSJV would need to make its own decisions about the process for completing contract performance under such conditions. PSJV temporarily demobilized, later returning to the site having contracted for additional medical services for its employees. After contract completion, PSJV requested an equitable adjustment for costs incurred. DOS moves for summary judgment on the grounds that the risk of performance in this firm, fixed-price contract remained with PSJV PSJV has identified no genuine issues

of material fact, and DOS is entitled to prevail as a matter of law. After considering the motion, opposition, and reply, we grant DOS's motion and deny the appeal.

Statement of Facts

In September 2013, DOS awarded a firm, fixed-price contract in the amount of \$10,864,047 to PSJV. The contract required PSJV to construct a rainwater capture and storage system in Freetown, Sierra Leone. The initial price included all labor, materials, equipment, and services necessary to complete the project. In addition to the fixed-price sum, the contract limited additional reimbursement for value added taxes, not to exceed \$1,626,195. The contract included a clause entitled "Excusable Delays," which stated:

F.8.1 The Contractor will be allowed time, not money, for excusable delays as defined in FAR 52.249-10, Default (see Section/Paragraph I.153). Examples of such cases include (1) acts of God or of the public enemy; (2) acts of the United States Government in either its sovereign or contractual capacity; (3) acts of the government of the host country in its sovereign capacity; (4) acts of another contractor in the performance of a contract with the Government; (5) fires; (6) floods; (7) epidemics; (8) quarantine restrictions; (9) strikes; (10) freight embargoes; and (11) unusually severe weather.

F.8.2 In each instance, the failure to perform must be beyond the contract and without the fault or negligence of the Contractor, and the failure to perform furthermore (1) must be one that the Contractor could not have reasonably anticipated and taken adequate measures to protect against, (2) cannot be overcome by reasonable efforts to reschedule the work, and (3) directly and materially affects the date of final completion of the project.

DOS issued a notice to proceed to PSJV on December 17, 2013. The contract required PSJV to complete the project within 335 calendar days, with a completion date of November 17, 2014. PSJV began performance, completing sixty-five percent of the project by August 7, 2014.

An outbreak of the Ebola virus began in the Republic of Guinea in March 2014. Ebola spread to Freetown, Sierra Leone, by July 2014. PSJV became concerned about the potential impact of the spread of the virus and the ability to support contractor personnel should they need to be evacuated. In an email to the contracting officer on July 31, 2014, PSJV sought "instructions on the way forward." On August 6, 2014, PSJV told the contracting officer that "we do not want to act unilaterally and need to have a discussion with

you, get directions, or at least a consensus of the right action of the way forward.” The contracting officer responded via email on August 6:

I just got off the phone with Najib Mahmood [the Africa Branch Chief for the Bureau of Overseas Operations (OBO), a branch within DOS] and understand that the Post has NOT issued an ordered departure for the Embassy at the present time. Therefore, I can't at this time tell you to leave the Post due to current conditions. I do understand that the situation there is go [sic] downhill fast and flights in and out of there have [decr]eased or stopped all together. It is up to you to make a decision as to if your people should stay or leave at this time. Until we get further word on this issue we can't tell you to leave the Post but the decision for your people to stay or leave for life safety reasons rests solely on your shoulders. Your peoples [sic] safety should be of the most utmost [sic] concern! Please let me know what action you decide to take in reference to this situation.

At least two members at PSJV then realized that DOS would not be providing any direction or guidance as to whether PSJV should leave the jobsite. A member of its executive committee testified in a deposition that he was the one who made the decision that PSJV should demobilize. On August 7, 2014, PSJV sent a notice of delay related to the crisis to DOS.

On August 8, 2014, the World Health Organization (WHO) declared the outbreak an “international public health emergency.” Airlines suspended flights. Some contractor and subcontractor personnel asked to leave Sierra Leone because of the escalated Ebola threats and the increased risk of not being able to leave Sierra Leone should conditions worsen. The U.S. Embassy in Freetown ordered eligible family members of embassy personnel to depart from the post. However, the U.S. Embassy and staff, as well as OBO, continued to operate throughout the outbreak.

On August 8, PSJV directed that the project be shut down and that all personnel in the country be evacuated. That same day, PSJV notified DOS of its decision to temporarily shut down the project work site as a temporary measure:

We have been planning to keep a small crew on the project site in Freetown to continue work as best as possible, mainly Tank #2 installation. However, with the further downside developments of today, the local Government declaring a curfew, and the WHO declaring an “international public health emergency” our plans have changed. All of our personnel and our subcontractor personnel have requested to leave Freetown in light of the

escalated virus threats and increased risk of not being able to depart Sierra Leone, if and when the conditions worsen. They all requested to be removed outside Sierra Leone immediately, to their points of origin. We could not leave a small work crew without necessary safety, security, quality and management attendance and supervision, so we had to arrange for a temporary site shut down, and the evaluation of all our expat and TCN personnel out of Sierra Leone. . . . This is only a temporary site shut down; we intend to re-mobilize our personnel once the EBOLA epidemic is under better control, and the life-threatening risks to our employees are reduced.

In response, DOS stated:

We are aware and acknowledge your concerns in your letter dated 08AUG2014 about the impact the Ebola Outbreak has towards continuing work on this project. Since you are taking this action unilaterally based on circumstances beyond the control of either contracting party, we perceive no basis upon which you could properly claim an equitable adjustment from the Government with respect to additional costs you may incur in connection with your decision to curtail work on this project.

DOS's contracting officer instructed PSJV "to keep us advised as to your plans and timeline to resume work." Ultimately, based upon the situation and its concerns for the safety of its employees, PSJV decided to secure all material and equipment, in part on-site and at an off-site location in Sierra Leone, and close the jobsite.

On August 15, OBO's project director emailed PSJV:

A week before you finalized your planned departure, I have indicated to you that OBO site office will be operating on business as usual until such time that the embassy issued an ordered evacuation for American workers. When you told me three days prior to your departure that you decided to turn off the site power I do not have any choice but to move my operation from the site to the embassy. PSJV's decision, planning and execution of shutting down the site did not include OBO staff and offices, we were informed accordingly as it evolved.

It is up to PSJV whether to maintain power and provide personnel at the site during the duration of the shutdown. If site power is restored OBO office will continue to operate at the site. It will be business as usual with the ACF activated and normal security checks of personnel including security will be

allowed access to the site on a regular basis provided names are submitted in advance as what we have done in the past.

PSJV responded, stating that it would keep the power on at the site. On August 16, PSJV's construction manager gave respondent keys to its on-site office and to its storage containers. PSJV arranged for temporary power and lighting at the construction site and hired local security to maintain the generator. OBO cancelled its plans to move and remained on the construction site. PSJV informed DOS that it intended to re-mobilize its personnel once the Ebola outbreak was under control and the risk posed to employees was reduced. Later, during his deposition, a PSJV representative explained PSJV's concerns:

We felt we were cornered to make a unilateral decision to save our people's lives essentially, and it felt like it was a chicken game with the Government. They waited us out until we had to leave, and then immediately you get a response that says this is unilateral.

PSJV and DOS representatives met on multiple occasions from August 2014 through January 2015, to discuss the ongoing crisis. PSJV continued to request guidance from DOS and expressed frustration that DOS would not provide any. As reflected in the minutes of a meeting held on September 30, 2014, DOS

clarified that DOS cannot agree upon or advise of any metrics, such as CDC [Centers for Disease Control and Prevention] travel warnings, infected cases declining, or airline carriers resuming flights, since these are neither known in terms of when they may occur nor under any direct control of DOS. . . . [and] confirmed that the measurement of any metrics and the decisions for any action on the way forward, which is related to PSJV employee[s] and their life safety for return to Freetown, will solely rest on PSJV determination and consequent decisions. As such, DOS will not provide any instructions or directions in this regard.

PSJV alleges that in October the contracting officer "verbally agreed that PSJV could submit a 'rough order of magnitude' [ROM] cost proposal for the additional life safety measures needed to complete the project." However, after receiving PSJV's cost proposal on November 6, 2014, DOS rejected it, stating, in part:

PSJV may be entitled to a non-compensable time extension under the excusable delay clause if it can prove that performance of the contract was impossible If the [U.S. Government] agrees to the existence of excusable delay conditions, PSJV would be entitled to a time extension only, and not an

equitable adjustment for delay costs or the other types of expenses included in PSJV's [cost proposal].

Later, on November 24, 2014, following a call with DOS representatives, including the contracting officer, PSJV sent an internal email to other PSJV personnel, stating:

It is now obvious [DOS] will neither provide directions, nor approve or pay extra money over this Ebola thing, and we will have to take the risks and bite the bullet to go back and get the job done, then seek compensation.

In January 2015, PSJV visited the project site to examine the availability and reliability of local medical facilities. After determining that the "resumption of construction works on the Project site should be planned and executed as soon as possible," PSJV decided "to contract . . . for basic medical facilities and services on the project site" and that remobilizing the crews should not have "a condition precedent of OBO approving our proposal." In a letter to the contracting officer dated January 2, 2015, PSJV raised the issue of OBO's failure to provide directions to address "cardinal change conditions" arising from the outbreak.

PSJV continued to press for compensation for the costs incurred during this time period. After a meeting with DOS personnel, although PSJV was under the impression that it would be compensated, no one from DOS explicitly made any promises.

In mid-March 2015, PSJV returned to the project site. When PSJV remobilized, it expanded the medical facility by converting a changing room to a medical facility and providing a licensed paramedic. On March 31, 2015, PSJV updated DOS on the status of remobilization activities and discussed a draft ROM estimate that it had prepared for the cost of the added medical, health, and safety provisions, as well as other costs arising from the Ebola outbreak.

PSJV submitted a revised baseline project execution schedule in April 2015, which shifted the project's substantial completion date to September 30, 2015. DOS accepted the revised schedule.

On July 6, 2015, PSJV submitted a request for equitable adjustment (REA), identified as REA-03, seeking \$907,110 for the "cost impacts associated with the additional Life Safety and Health provisions . . . undertaken to enable the return of our expat and TCN employees and workforce to the site, and complete the construction works within the adverse conditions of the Ebola Virus outbreak in Sierra Leone." Later, on August 4, 2015, PSJV submitted to DOS/OBO another REA, identified as REA-04, seeking \$844,402 "for time and cost impacts

associated with the additional works and efforts PSJV had undertaken in response to the project execution changed conditions resulting from the Ebola Virus Outbreak in Sierra Leone.”

The contracting officer denied REA-03 on August 5, 2015, stating that “there is no contractual basis for an adjustment to the contract price.” The contracting officer did not take action on REA-04.

On September 30, 2015, DOS issued a contract modification extending the project’s completion date to October 9, 2015. The time extension covered the 195 additional calendar days requested by PSJV for the Ebola outbreak. Over the next few months, DOS and PSJV discussed the REAs, but reached no mutually agreeable solution. On January 17, 2017, PSJV submitted a certified claim for \$1,255,759.88. The claim sought “(1) \$608,891 in additional life safety and health costs incurred due to differing site conditions, disruption of work and the need to maintain a safe work site for the Pernix Serka Joint Ventures work and Government personnel, and (2) \$646,868.88 in additional costs incurred resulting from that disruption of work, and the need to demobilize and remobilize at the work site.” The notice of appeal also stated that the claim “involves one or more breaches of the Department of State of the implied covenant of good faith and fair dealing.”

DOS argues in its motion for summary judgment that, because this involves a firm, fixed-price contract, PSJV assumed the risks of any unexpected costs not attributable to the Government. PSJV contends that genuine issues of material fact preclude summary judgment on its claims, described in its brief as cardinal change, constructive change, and breach of implied duty to cooperate.

Discussion

I. Standard for Summary Judgment

The standards of review and obligations of each party to prevail on a motion for summary judgment are well established, and are followed here. *See CSI Aviation, Inc. v. General Services Administration*, CBCA 6543 (Apr. 9, 2020); *Walker Development & Trading Group Inc. v. Department of Veterans Affairs*, CBCA 5907, 19-1 BCA ¶ 37,376, *motion for reconsideration denied*, 19-1 BCA ¶ 37,465.

After examining all of the pleadings, the motions, and the record, we conclude that the material facts are undisputed. The issue presented is a legal issue, appropriate for resolution through summary judgment.

II. A Firm, Fixed-Price Contract Places the Risk on Contractor

It is “well-established that ‘a contractor with a fixed price contract assumes the risk of unexpected costs not attributable to the Government.’” *Matrix Business Solutions, Inc. v. Department of Homeland Security*, CBCA 3438, 15-1 BCA ¶ 35,844 (2014) (quoting *IAP World Services, Inc. v. Department of the Treasury*, CBCA 2633, 12-2 BCA ¶ 35,119); see also *Fluor Intercontinental, Inc. v. Department of State*, CBCA 1559, 13 BCA ¶ 35,334. “[A]bsent a special adjustment clause, a contractor with a fixed price contract assumes the risk of increased costs not attributable to the Government.” *Southwestern Security Services, Inc. v. Department of Homeland Security*, CBCA 1264, 09-1 BCA ¶ 34,139.

PSJV’s firm, fixed-price contract obligated PSJV to perform and receive only the fixed price. The contract, in clause F.8.1 and the referenced FAR clause 52.249-10, explicitly addresses how acts of God, epidemics, and quarantine restrictions are to be treated. A contractor is entitled to additional time but not additional costs. Appellant’s attempts to shift the risks clearly articulated by the contract are unavailing. See, e.g., *Fluor Intercontinental, Inc.*

Particularly given the Excusable Delays clause, PSJV has not identified any clause in the contract that served to shift the risk to the Government for any costs incurred due to an unforeseen epidemic. Nor does the contract require the Government to provide PSJV with direction on how to respond to the Ebola outbreak. Thus, under a firm, fixed-price contract, PSJV must bear the additional costs of contract performance, even if PSJV did not contemplate those measures at the time it submitted its proposal or at contract award.

III. PSJV Attempts to Shift the Risk to the Government

PSJV pursues several legal theories that it maintains shift the risks of increased costs of performance from itself to the Government. It claims that PSJV “was forced to perform in cardinal change conditions,” or “was constructively ordered to provide medical and life safety measures outside the scope of the contract,” or “incurred costs due to the breach of the government’s implied duty to cooperate.” Finally, PSJV contends that a “constructive suspension of work may occur from causes not the fault of the contractor or government.” These legal theories do not entitle it to relief.

A. Cardinal Change

A cardinal change is a breach that occurs if the Government effects a change in the contractor’s work “so drastic that it effectively requires the contractor to perform duties materially different from” those found in the original contract. *Krygoski Construction Co.*

v. United States, 94 F.3d 1537, 1543 (Fed. Cir. 1996). In typical cases, a cardinal change arises from a unilateral modification that then results in a large increase in the contract burden.

PSJV asserts a cardinal change occurred here when:

OBO expected PSJV to work in . . . Ebola crisis conditions without any guidance or direction from OBO, or a suspension of work, and that OBO forced PSJV to return to the project site adding life safety measures not in PSJV's approved work plan.

PSJV points to DOS's internal discussions about whether DOS should issue a suspension of work. PSJV further claims that, when it entered into the contract, it did not know "the agency would pressure the contractor to remobilize and assume the risk and cost of providing independent medical treatment to its staff and subcontractor personnel because no safe local medical treatment could be relied upon in a city and country trying to recover from an Ebola epidemic that killed hundreds of people."

This argument fails to establish a cardinal change to the contract. Despite the difficulties encountered during the Ebola outbreak, the Government never changed the description of work it expected from the contractor. Throughout communications with PSJV, the Government repeatedly stated that it would not give directions to the contractor on how it should respond to the ongoing outbreak, instead leaving the decisions solely in the hands of the contractor. Any changes in conditions surrounding performance of the contract arose from the Ebola outbreak and the host country's reaction to the outbreak. This situation forced PSJV to reevaluate how it wished to proceed with the work outlined in the contract. Throughout the situation, DOS informed PSJV, on multiple occasions, that it would not order PSJV to evacuate the site and that PSJV must make its own business choices as to whether it needed to demobilize from the site.

The two cases that PSJV cites in support of its claim that working under Ebola conditions constituted a cardinal change are inapposite. In *Freund v. United States*, 260 U.S. 60 (1922), the Government awarded a contract for delivery of mail "on a particular route described by a schedule, for a certain annual gross sum, which being divided by the miles to be covered made a certain rate per mile." *Id.* at 61. When the performance period began, the post office that should have been the starting point for the route became unavailable, requiring the contractor to use a post office thirteen blocks away. *Id.* Despite the longer route, the Government refused to increase the contractor's per-mile payment. *Id.* The Court found the Government bore responsibility for changing the route, entitling the contractor to compensation.

In *Aragona Construction Co. v. United States*, 165 Ct. Cl. 382 (1964), a contractor constructing a Veterans Administration hospital during World War II alleged a cardinal change because the Government required it to use different building materials than it initially planned. The Government restricted the use of the planned materials in order to preserve the materials for production of armaments. The Court of Claims held:

In deciding whether a single change or a series of changes is a cardinal change and a breach of the contract, we must look to the work done in compliance with the change and ascertain whether it was essentially the same work as the parties bargained for when the contract was awarded. Plaintiff has no right to complain if the project it ultimately constructed was essentially the same as the one it contracted to construct.

Id. at 390-91. The court concluded that “[a]ll of the changes that plaintiff was asked to make on this contract were interstitial in nature” and “did not materially alter the nature of the bargain into which plaintiff had entered or cause it to perform a different contract.” *Id.* at 391. Here, the work required of PSJV was detailed in the contract. The addition of life safety measures after remobilization did not alter the nature of the thing it had contracted for; the contractor remained obligated to perform at the fixed price.

B. Constructive Change

“A constructive change occurs where a contractor performs work beyond the contract requirements without a formal order, either by an informal order or due to the fault of the Government.” *International Data Products Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007). To recover on a constructive change claim, a contractor must show that (1) it performed work beyond the contract requirements and (2) the Government ordered—expressly or implicitly—the contractor to perform the additional work. *Bell/Heery v. United States*, 106 Fed. Cl. 300, 313 (2012), *aff’d*, 739 F.3d 1324 (Fed. Cir. 2014); *IAP World Services, Inc.* A contractor cannot invoke a claim for constructive change against the Government unless the Government “effect[s] an alteration in the work to be performed.” *Bell/Heery*, 739 F.3d at 1335.

PSJV argues that both the demobilization and remobilization of its personnel and the additional site safety measures put in place due to the Ebola outbreak should be considered constructive changes made by the Government, thus entitling PSJV to an equitable adjustment for the increased costs. However, in both areas, PSJV’s arguments fall short in proving that the Government ordered it to take an action in response to the Ebola outbreak or that the Government’s inaction rose to the level of a constructive change.

PSJV acknowledges that DOS did not give it directions or orders to evacuate the project site. In effect, while PSJV concedes that the Government had no contractual obligation to provide direction, it continues to assert that the Government should have done so nonetheless. Simply put, PSJV fails to demonstrate a constructive change because no change to the contract occurred. PSJV remained obligated to perform throughout the performance period, and the Excusable Delay clause provided for additional time, but not additional money.

C. Constructive Suspension of Work

PSJV raises a constructive suspension of work claim in its opposition brief. As DOS notes, PSJV's new claim does not arise from the same set of operative facts as the legal theories raised in its certified claim, raising the question of whether we possess jurisdiction to entertain this claim. *See VSE Corp. v. Department of Justice*, CBCA 5116, 18-1 BCA ¶ 36,928 (2017). This is not a timely claim for this proceeding and is not addressed.

Decision

We grant DOS's motion for summary judgment. The appeal is **DENIED**.

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

We concur:

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge