Crowell

CLIENT ALERT

"Drum" Roll: ASBCA Sides with the Government in Denying COVID-19 Related Costs to Contractor

May 23, 2022

The Armed Services Board of Contract Appeals recently denied two separate appeals that sought recovery for increased costs caused by Government-imposed base restrictions in response to the COVID-19 pandemic. Applying the Sovereign Acts Doctrine, the Board denied the contractors any monetary recovery because it found that the Government acted in its sovereign capacity. Notably, both appeals were decided without an evidentiary hearing because each appellant elected to have streamlined proceedings at the Board under Rules 11 and 12.3.

JE Dunn Construction Co., ASBCA No. 62936 (Apr. 25, 2022) involved a design-build contract with the U.S. Army Corps of Engineers ("USACE") at Fort Drum, New York, during the height of the pandemic. In June 2020, New York imposed a 14-day quarantine requirement for all persons traveling from states that were suffering from elevated COVID-positive test rates. The following month, USACE established its own 14-day quarantine period for all base visitors traveling from outside a 350-mile radius. In November, New York relaxed its quarantine restrictions to just three days, subject to the traveler testing negative both before and after quarantine. USACE's 14-day quarantine requirement remained. JE Dunn later sought to recover additional costs of performance it incurred due to the 14-day quarantine requirement, including hotel, food, and related expenses. The contracting officer ("CO") denied the monetary portion of the claim.

On appeal, the Government asserted the "Sovereign Acts" defense. It requires the Government to establish that (1) the Government's act was "public and general," and (2) the act rendered the Government's performance of the Contract impossible. To determine whether the Government's act is "public and general," the Board may look to whether the act "applies exclusively to the contractor" or more broadly to parties outside of the contract. Here, the Board held that Fort Drum's quarantine requirement applied to all visitors on the base and was not directed specifically at the contractor, and therefore qualified as a sovereign act. With regard to the second prong, the contractor argued that USACE's performance was not impossible because USACE could have adopted the less-stringent three-day New York quarantine protocols and, thus, drastically reduced the impact on the contractor's cost of performance. The Board found, however, that the contractor did not provide any evidence that employees would have tested negative following their three-day quarantines, which meant the contractor could not establish that it would have suffered any less damage under the New York protocols.

Three days later, the Board issued another decision applying the Sovereign Acts Doctrine to deny a contractor's request for monetary relief. *APTIM Federal Services, LLC*, ASBCA No. 62982 (Apr. 28, 2022), involved design-build construction work at Arnold Air Force Base in Tennessee. In response to the COVID pandemic, the base commander closed the base from April to June 2020 for all "non-operationally urgent personnel." The Government deemed APTIM's personnel non-operationally urgent and denied them access to the base for approximately two months. A week after regaining access, the contractor submitted a claim for the administrative costs it incurred during the time it was not able to access the job site, as well as a for a 59-day extension to the schedule. Initially, the CO requested additional information to establish the costs but noted the applicability of the Sovereign Acts Doctrine. Ultimately, the CO denied the claim for costs arguing that, because the contract was firm-fixed price, the contractor bore the risk of performance. The CO did, however, extend the period of performance.

On appeal, the Government asserted the Sovereign Acts defense. The Board denied the appeal, noting that the contractor's brief primarily focused on the Doctrine's second prong ("impossibility") but, regarding the first prong, "repeatedly conflate[d] the government as sovereign and the government as contracting party." The Board held that the base commander acted in the Government's sovereign capacity when using his executive authority to close the base, and that the circumstances satisfied the four-part test for establishing impossibility, which includes: "(i) a supervening event made performance impracticable; (ii) the non-occurrence of the event was a basic assumption upon which the contract was based; (iii) the occurrence of the event was not [the invoking party's] fault; and (iv) [the invoking party] did not assume the risk of occurrence."

These two decisions are among the first in which the Board has applied the Sovereign Acts Doctrine to deny recovery of cost impacts resulting from Government-imposed COVID restrictions. Contractors seeking recovery should be mindful of the need to establish a robust evidentiary record that demonstrates the impact of COVID restrictions on contract performance specifically directed by the CO. Moreover, contractors should carefully review their contracts to determine what guarantees the Government may have provided so that they may establish, if supported, that the Government assumed the risk of occurrence.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Stephen J. McBrady
Partner – Washington, D.C.
Phone: +1.202.624.2547
Email: smcbrady@crowell.com

Nicole Owren-Wiest
Partner – Washington, D.C.
Phone: +1.202.624.2863
Email: nowrenwiest@crowell.com

Skye Mathieson
Counsel – Washington, D.C.
Phone: +1.202.624.2606
Email: smathieson@crowell.com

Michelle D. Coleman
Counsel – Washington, D.C.
Phone: +1.202.654.6708
Email: mcoleman@crowell.com

John Nakoneczny
Associate – Washington, D.C.
Phone: +1.202.624.2814
Email: jnakoneczny@crowell.com