

Client Alert

Federal Circuit Affirms Board Decision on Pandemic-Related Claim

June 21, 2021

The Federal Circuit recently affirmed the Civilian Board of Contract Appeals' (CBCA) decision denying a pandemic-related claim in *Pernix Serka Joint Venture v. Secretary of State*, CBCA No. 5683, 20-1 BCA ¶ 37,589. *Pernix* involved a firm-fixed-price construction contract in Sierra Leone that was impacted by an Ebola outbreak several months into the project. The Department of State (DOS) declined to provide direction or to issue a suspension of work order, and instead advised Pernix to make its own business decisions regarding performance and employee safety. Pernix chose to demobilize its workforce and, later, to remobilize with the addition of its own on-site medical facility and services. Pernix then submitted a claim for the increased medical, safety, and demobilization and remobilization costs. DOS granted an adjustment to the schedule for the Ebola-related delays under the contract's excusable delay clause, but denied Pernix's monetary claim.

At the CBCA, Pernix argued that the Ebola outbreak resulted in a cardinal change, a constructive change, and/or a constructive suspension of work. The Board rejected each argument. First, the Board held that a cardinal change cannot occur when the work required by the contract is unchanged (and the Board found that the additional medical and safety precautions did not change the fundamental construction work required under the contract). Second, the Board held there was no constructive change in the absence of direction from the Government, and noted that the Government permitted Pernix additional time to perform. Third, the Board dismissed Pernix's constructive suspension of work argument because it had not been presented to the contracting officer in Pernix's certified claim.

Pernix appealed to the Federal Circuit. However, on June 9, 2021, the Circuit affirmed the Board's decision in a one-line summary Rule 36 decision. Although the Federal Circuit did not address the specific issues and legal theories in Pernix's claim, the summary decision is a reminder to contractors that actions taken in the absence of government direction may potentially be treated as business decisions, even if they were intended to safeguard employee health during a pandemic. Moreover, contractors should be aware that even where they may be entitled to time extensions, they may not necessarily be entitled to additional costs. Thus, as always, contractors who anticipate submitting claims should carefully consider and consult with counsel regarding potential legal theories for recovery and, where possible, ground those theories in specific direction from the cognizant Government contracting officer.

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