

What If the Levee Breaks? Board Balances Safety against Economic Waste

IN THE FEDERAL contracting world, damages awarded for construction defects are typically determined by the cost to repair or replace the defective work. However, when the requested repair is clearly disproportionate or unreasonable, given the value of the installed work, there is a question about whether making the repair would constitute economic waste.

Rooted in the concepts of equity and justice, the economic waste doctrine centers on the idea that forcing a contractor to bear the financial burden of ripping out perfectly good work to meet the hypertechnical requirements of a contract should not be permitted. It is a defense that is not often litigated and very difficult to prove, as we see in this month's Armed Services Board of Contract Appeals (ASBCA) case, *Appeal of Buck Town Contractors & Co.*

The Dispute

The U.S Army Corps of Engineers awarded a contract to Buck Town Contractors & Co., of Kenner, Louisiana, to construct part of a hurricane protection levee in St. Charles Parish, Louisiana. The placement of geotextile fabric by a subcontractor to Buck Town was integral to the levee construction. The contract included specific requirements regarding the installation, namely that seams and overlaps between the sections of fabric be installed perpendicular, not parallel, to the centerline of the levee. The fabric was also to meet contractually specified quality-control testing requirements.

Buck Town was required to ensure quality control and adherence to the contract specifications. The contract also specified that nonconforming geotextile work would be subject to remedial measures at the contracting officer's discretion "at no additional expense to the Government." The contract additionally included an inspection clause

that placed the burden of replacing or correcting nonconforming work on the contractor.

During construction, Buck Town's subcontractor "installed some of the geotextile rows using overlapped, partial-length pieces of geotextile, when the end of a geotextile roll was reached in the middle of installing a row," according to the case summary. This practice was documented repeatedly in the daily quality-control reports and was observed by inspectors. This meant that some seams were parallel to the center line of the levee. The fabric was later covered with 7 ft of soil.

During the installation, Buck Town and the Corps submitted daily quality-control reports documenting the work. The Corps's quality-assurance and engineer reports occasionally included pictures of the noncompliant installation yet deemed the work "acceptable." The contracting officer visited the jobsite and observed the geotextile installation.

The Corps did not identify the geotextile installation as noncompliant until Buck Town began installing geotextiles on a separate levee reach under a separate contract. Upon learning of the method of overlapping, the Corps required Buck Town to pull apart the first levee, replace the geotextile, and install a second layer of geotextile. Buck Town did so under protest.

After Buck Town completed the levee reconstruction as directed by the Corps, the Corps then argued that Buck Town failed to fully comply with the geotextile testing protocol. The Corps again required Buck Town to pull apart the levee and install yet another layer of geotextile fabric. Buck Town argued that this would constitute economic waste because, on average, the levee met the contractual requirements for strength. Buck Town then commissioned an engineering report to support its contention.

Buck Town ultimately submitted a

claim to the contracting officer for approximately \$3 million for all costs associated with the Corps's directives. When the contracting officer denied the claim, Buck Town appealed to the ASBCA.

The Decision

With respect to the first reconstruction, the board agreed with Buck Town that the Corps had constructively waived the geotextile seam requirement, even though the contracting officer claimed no actual knowledge of the noncompliant work. The board noted that in order to successfully allege constructive waiver, a contractor must demonstrate four requirements. First, that the contracting officer possessed knowledge of work outside the scope of the contract. Second, that action or inaction by the contracting officer indicated acceptance of the noncompliant work. Third, that the contractor acted in reliance on that acceptance. And finally, that there would be inequity if the initial acceptance was retracted.

For Buck Town, proving the contracting officer had knowledge was the key hurdle. The board recognized it was legally possible for a contracting officer without "actual" knowledge of the noncompliance to nevertheless be charged with what is called "constructive" knowledge (i.e., knowledge you are presumed to have, regardless of whether you have it). Here, the board reasoned that there was ample evidence that the contracting officer knew or should have known about the parallel seams. The contractor's and Corps's quality-control reports, coupled with the Corps's description of the work as "acceptable," along with the presence of the contracting officer at the jobsite during the work in question all pointed toward constructive knowledge.

Buck Town fulfilled the remaining requirements because this constructive knowledge as well as the direction it was given to proceed with work indi-

cated that the Corps had accepted the work. Buck Town relied on that acceptance to its detriment by installing the fill over the fabric, and the board found that it would be inequitable if the contracting officer required a correction of the already installed fabric.

With regard to the second reconstruction, Buck Town alleged that the Corps's direction constituted economic waste. The board observed that while the government usually has a right to demand strict compliance with contract specifications, there are exceptions in which work "is acceptable for its intended purpose" and obtaining strict compliance would be economically wasteful. In order to prove an economic waste defense, the board stated that the contractor had to show that the work substantially complied with contract specifications, the work was adequate for its intended purpose, and the cost of correction was economically wasteful.

Considering all this, the board declined to find for Buck Town. Buck Town's expert witness did not convince the board by a preponderance of evi-

dence that the average strength of the levee satisfied the contractual requirements of geotextile strength. Rather, the board agreed with the Corps's expert that the contract required individual tests to meet contract requirements, highlighting the expert's characterization of levee systems as "only as strong as their weakest links."

The Analysis

This decision gives important guidance to owners and contractors. The board rejected Buck Town's economic waste argument in part because of the implications for public safety. The board noted that the potential damage from a levee failure could result in the loss of hundreds of thousands of structures, property damage in the billions of dollars, and substantial loss of life—potentially rivaling the damage incurred during Hurricane Katrina.

However, owners should take notice of the fact that Buck Town proved that the Corps had constructive knowledge of its means and methods and thus waived the contract requirements. It

is very unusual to prove government waiver, as knowledge is not often imputed to government actors only by their review of the work. But the board found that it would be unfair to saddle Buck Town with the costs of the first reconstruction when, based on what everyone should have known at the time, Buck Town's approach to the geotextile installation seemed acceptable. **CE**

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