Will Pandemic-Related Construction Delays Be Compensable?

AN ENTIRELY NEW body of case law will unquestionably emerge from construction disputes related to the impacts of the COVID-19 pandemic. Last month we addressed the legal framework that courts will likely employ in resolving litigation related to these disruptions. The article, "Construction Industry Impacts in the COVID-19 World," was published online as part of *Civil Engineering*'s special coverage of the pandemic (news.asce.org/civil-engineering-special-coverage-covid-19).

The contract clauses that we anticipate will receive the most scrutiny will be related to force majeure or other, comparable provisions dealing with excusable delays, suspension of work, changes in laws, material cost escalation, safety/health requirements, protection of work, and notice requirements.

In what appears to be a preview of the newly evolving epidemic-related case law, the Civilian Board of Contract Appeals recently issued a decision evaluating a contractor's $1.2-million request for equitable adjustment relating to the 2014 Ebola outbreak in Sierra Leone. The result was not a good one for the contractor.

The Case

In 2013, the Department of State awarded a firm-fixed-price contract for $10 million to Pernix Serka Joint Venture (PSJV), of Lombard, Illinois, to build a rainwater capture and storage system in Freetown, Sierra Leone. The contract included an "excusable delays" clause that followed the Federal Acquisition Regulations (FAR). This clause provided for force-majeure-type scenarios that would entitle the contractor to time extensions only (but no money) for delays due to "acts of God," governmental acts, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, or unusually severe weather.

For the contractor to request a time extension for any of those reasons, the delay had to be through no fault or negligence of the contractor and had to meet at least one of three prerequisites: (1) it could not have reasonably been anticipated; (2) it could not have been overcome by reasonable efforts to reschedule the work, or (3) it could not directly and materially affect the final date of completion.

The State Department issued a notice to proceed on December 17, 2013, and the contract required project completion 11 months later, by November 17, 2014. By August 2014, PSJV had completed approximately 65 percent of the project.

At that time, an outbreak of the Ebola virus had spread from Guinea to Freetown, Sierra Leone. Concerned about the virus's impact on the project and the safety of its personnel, PSJV contacted the contracting officer seeking instructions or a joint consensus on how best to proceed. The contracting officer responded via email providing little to no guidance, saying, "I can't at this time tell you to leave the [p]ost due to current conditions. I do understand that the situation there is [going] downhill fast. … It is up to you to make a decision as to if your people should stay or leave at this time. … [B]ut the decision for your people to stay or leave for life safety reasons rests solely on your shoulders."

On August 7, 2014, PSJV sent the State Department a notice of delay because of the Ebola crisis. The next day, the World Health Organization declared the outbreak an "international public health emergency" and airlines suspended flights. Some contractor and subcontractor personnel were asked to leave Sierra Leone because of the threat of the virus and the increased risk of not being able to leave the country later. Given the worsening conditions, PSJV decided to temporarily shut down the project work site.

In response, the State Department sent a letter stating:

> We are aware and acknowledge your concerns … about the impact of the Ebola [o]utbreak. … 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 [g]overnment with respect to additional costs you may incur in connection with your decision to curtail work on this project.

PSJV submitted an order-of-magnitude cost proposal for the additional life-safety measures needed to complete the project. The State Department rejected it, saying that PSJV had a potential for only a time extension for this event, not costs.

PSJV ultimately returned to the project in March 2015. The State Department granted a time extension for the 195 additional days requested by PSJV resulting from the Ebola outbreak.

In 2017, PSJV submitted a certified claim for $1,255,759 ($608,891 for life-safety measures to maintain a safe work site and $646,868 in disruption and demobilization costs).

The Ruling

The State Department moved for a quick resolution by the Civilian Board of Contract Appeals, arguing on summary judgment that because the contract at issue was a firm-fixed-price contract, PSJV assumed the risk of any unexpected costs not attributable to the government.

The board began its analysis by agreeing with the government that fixed-price contracts are simply that: fixed. The board pointed out that the FAR clause at issue (52.249-10) specifically addresses what happens in the event of an epidemic—that the contractor is entitled to more time but bears the risk of additional costs. Notably, the board saw no other clause in the contract that shifted the financial risk of an unforeseen event to the government. The ruling was particularly harsh in that it affirmed that the government had no duty whatsoever to provide

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the contractor with direction on how to proceed in light of an epidemic.

PSJV pursued several other legal theories that it maintained shifted the risk of increased costs to the government, including the cardinal change doctrine, the constructive change approach, and suspension of work theories. Each was rejected out of hand.

The board stated that a cardinal change is a breach that occurs when the government makes 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." Here, the board found that the work itself did not change; what changed was the outbreak and "the host country's reaction to the outbreak." This is true even though State Department records reflected internal discussions debating whether to issue a suspension of work.

The board said the constructive change doctrine applies when a contractor performs work beyond the contract requirements without a formal order due to some fault of the government. The board found no constructive change because the government provided no direction whatsoever. The suspension of work argument was dismissed because the contractor had not made reference to it in its original claim.

The Analysis

While it may not follow logically that the financial costs of a force majeure should be exclusively shouldered by one party, that is exactly how the clause works under FAR. The board stated that the firm-fixed-price contractor should have accounted for the possibility of an epidemic in its bid. However, in the "lowest-bid wins" contracting world of federal contracts, that logic does not align with reality. Considering an unforeseen weather condition to be a force majeure is one thing—contractors know how to address and manage that type of risk. But how can a contractor price a "black swan" event that is truly unforeseeable?

We suggested in last month's article some ways that contractors might be able to obtain cost relief for a pandemic like COVID-19. Now might be a good time for the industry to reassess the responsibility of owners for the financial impact of force majeure events.

The owner ultimately gets the benefits of the project for the multiple decades of its useful life. Contractors have no meaningful way to absorb the costs of an unimagined event on a given project. Does it make sense that the contractor and its supply chain bear this risk? **CE**

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