

Subcontractors' COVID-19-Related Claims Survive Motion to Dismiss

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In the Armed Services Board of Contract Appeals (ASBCA) appeal of *McCarthy HITT – Next NGA West JV*, ASBCA No. 63571, 2023 WL 9179193 (Dec. 20, 2023), a contractor brought suit for a collection of COVID-19-related claims on behalf of three of its subcontractors. The government moved to dismiss, arguing the subcontractors' appeal failed to state claims upon which relief could be granted. The Board denied the government's motion to dismiss, leaving open the door for pleading COVID-19-related claims. The key facts and takeaways from this noteworthy case are discussed below.

The Facts

In March 2019, McCarthy HITT – Next NGA West JV contracted with the U.S. Army Corps of Engineers (USACE) to design and build a new building housing the National Geospatial Intelligence Agency (NGA) in St. Louis, Missouri, and it subcontracted part of the work. Those subcontractors contemplated certain price ranges and availability for materials and normal, customary means and methods and workplace safety protocols in agreeing to perform their work.

COVID-19, the economic shockwaves it caused, and related government health and safety actions all caused substantial impacts to the job — higher priced or unavailable materials, delayed and impacted workflows through changed means and methods of construction, and onerous workplace safety protocols. Despite those impacts, USACE did not change its contractual expectations for the project. USACE did not timely grant the contractor a reasonable time extension or contract price adjustment.

McCarthy-HITT filed certified claims on behalf of three of its subcontractors to address USACE's inadequate response. The claims alleged constructive changes, constructive suspensions of work, and breaches of the government's implied contractual duty of good faith and fair dealing. USACE denied the claims, relying in part on the Sovereign Acts Doctrine, which protects the government when it acts in a governmental capacity rather than a contractual capacity. McCarthy-HITT appealed to the ASBCA, and USACE moved to dismiss.

The ASBCA denied the government's motion to dismiss, holding that, as pleaded, the contractor

sufficiently alleged constructive change, constructive suspension of work, and breach of the duty of good faith and fair dealing. Notably, the ASBCA rejected USACE's argument that the Sovereign Acts Doctrine barred all the subcontractors' claims at the pleading stage. The board noted that while there likely was merit to many of the government's arguments around its actions as a sovereign, the Board could not conclusively say USACE's arguments all were so meritorious as to bar the entire appeal without a more thorough factual examination.

The Takeaway

It is important to note the procedural posture of this decision. Because this was a motion to dismiss, the ASBCA did not conclusively rule on the merits of any of the subcontractors' COVID-19-related arguments. In fact, the Board even suggested it found some of the government's arguments persuasive, but the Board also indicated these arguments were better saved for later in the litigation process when the facts could be more developed.

That said, the ASBCA also demonstrated that it would not allow the government to use the Sovereign Acts defense as a trump card without delving into the facts of a particular matter. This is noteworthy because the claims raised by the subcontractors echo familiar complaints of many government contractors working during COVID-19: new safety procedures, contact tracing, testing and quarantine programs, additional PPE, air filtration systems, changes in crew sizes and makeups, and lack of cooperation around schedule changes and materials delays, to name a few. In allowing McCarthy-HITT's claims to survive dismissal, the ASBCA implicitly acknowledged that contractors may have the opportunity to litigate COVID-19-related impact claims where they adequately plead the circumstances that led to those delays.

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