

PUBLICATION

Federal Court Affirms Ebola Case: What Does it Mean for Projects Impacted by COVID-19?

Authors: Joseph C. Kovars

June 14, 2021

Approximately one month after the coronavirus was declared a global pandemic, the United States Civilian Board of Contract Appeals (Board) issued an opinion denying a contractor's claim for additional compensation due to disruptions caused by an Ebolavirus outbreak in Sierra Leone. See *Pernix Serka JV v. Dept. of State*, CBCA 5683 (U.S. Civilian Bd. of Contract App. Apr. 22, 2020). The contractor appealed to the United States Court of Appeals for the Federal Circuit, and the case was watched with great anticipation because it might have provided insight into how coronavirus-related claims would be handled. On June 9, 2021, the Federal Circuit issued a "nonprecedential" *per curiam* opinion affirming the Board's decision. Thus, while the Board's underlying decision sheds light on how coronavirus-related claims may be analyzed, it remains to be seen how appellate courts will rule on the issues raised.

Factual and Procedural Background in *Pernix Serka JV v. Dept. of State*

The Pernix Serka Joint Venture (the Contractor) was awarded a firm, fixed-price contract to construct a rainwater capture and storage system in Sierra Leone. The contract contained an "Excusable Delay" clause that provided "[t]he Contractor will be allowed time, *not money*, for excusable delays as defined in FAR 52.249-10," which specifically mentions "epidemics." The project began in December 2013 and was scheduled to be complete in November 2014. In August 2014, the project was approximately 65 percent complete, but by that time, an Ebola virus outbreak which had originated in Guinea had spread to Sierra Leone.

The Contractor sought guidance from the Branch of Overseas Operations (a division within the Department of State (DOS)), but the DOS would not provide direction. Essentially, it said the Contractor had to decide what was best for its employees, but the Contractor was not under orders from the DOS to shut down yet. A member of the Contractor's staff testified that he felt like the DOS was playing a "game of chicken," and refused to give advice until the Contractor had no choice but to pack up and leave.

The Contractor decided to temporarily close the project site and evacuated all its employees. Immediately, the DOS said that since the Contractor was acting unilaterally, it did not see how the Contractor could possibly be entitled to additional compensation. The Contractor remobilized in early 2015 and had to pay to provide additional medical care onsite.

The Contractor submitted requests for equitable adjustments for additional time and money. The DOS agreed to extend the contract time due to the Ebola virus epidemic but declined to award additional compensation.

The Board's Denial of the Contractor's Claim for Additional Compensation

The Contractor submitted a certified claim for \$1.255 million to the Board. The DOS moved for summary judgment arguing that, because this matter involved a firm, fixed-price contract, the Contractor assumed the risks of any unexpected costs not attributable to the DOS. The Board agreed, offering these specific findings:

- First, the Board found that it is well settled, under a firm, fixed-price contract, that a contractor must bear the additional costs of contract performance, even if the contractor did not contemplate those

measures at the time it submitted its proposal or at the time the contract was awarded.

- Second, the Board rejected the Contractor's argument that there had been a cardinal change, stating, "A cardinal change is a breach that occurs if the Government effects 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." The DOS never ordered a change in the Contractor's work. In fact, the DOS consistently refused to provide guidance. Thus, the DOS never changed the Contractor's work.
- Third, the Board rejected the Contractor's argument that there was a constructive change. "A constructive change occurs where a contractor performs work beyond the contract requirements without a formal order, either by an informal order or due to the fault of the Government." As noted, the DOS did not order a change in work and steadfastly refused to provide guidance to the Contractor.
- As a final point, the Contractor raised for the first time in its response brief a claim for constructive suspension of work. Because this argument was not properly raised, the Board refused to consider it.

The Federal Circuit's *per curiam* Affirmance

More than a year after the Board issued its order, on June 9, 2021, the Federal Circuit issued a *per curiam* opinion affirming the Board's decision. The Federal Circuit's opinion merely says "AFFIRMED" and specifically notes that "[t]his disposition is nonprecedential."

Takeaways from *Pernix Serka JV*

Although the Federal Circuit's opinion offers no precedential value, the Board's underlying decision provides insight into how similar claims related to projects impacted by the coronavirus may be analyzed. Nonetheless, it is important to keep in mind the limited issues the Board was considering. For example, the contract at issue was a firm, fixed-price contract; the contract had an "excusable delay" clause that was expressly limited to additional time, not money, and incorporated FAR 52.249-10; and the Board only considered the Contractor's request for additional compensation since the DOS allowed additional time. Different contracts with different terms and factual circumstances could change the result.

Baker Donelson's Construction Practice Group is closely monitoring the ever-evolving developments in construction law related to COVID-19. If you have any questions or have a project that may be impacted by the coronavirus, contact a member of Baker Donelson's Construction Practice Group [here](#).