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GOVERNMENT ACCOUNTABILITY OFFICE
CONTRACT APPEALS BOARD

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DAVID A. ASHEN
Vice Chairman

GRUNLEY CONSTRUCTION CO., INC.
Appellant

v.

ARCHITECT OF THE CAPITOL,
Respondent

CAB No. 2009-1

Appearance for the Appellant: Herman M. Braude, Esq.
Braude & Margulies, P.C.

Appearances for the Respondent: Steven J. Gillingham, Esq.
Department of Justice

Peter M. Kushner, Esq.
Architect of the Capitol

DECISION

Grunley Construction Co., Inc., appeals the final decision of the contracting officer of the Architect of the Capitol (AOC), denying its claim of $1,095,128 for costs incurred as a result of work restrictions imposed by the government during performance of a construction contract to modernize portions of the Supreme Court of the United States. Pending before the Board are the parties' cross-motions for summary judgment. For the reasons set forth below, the Board grants the AOC's motion in part and denies it in part, and grants Grunley's motion in part and denies it in part.

BACKGROUND[1]

On April 30, 2004, the AOC issued Grunley a fixed-price contract in the amount of $74,550,000, pursuant to request for proposals No. GS-03P-03-AOC-0002, to provide "Phase II" construction services to modernize portions of the Supreme Court. Rule 4, Tab 5, at R0047; Tab 9A, at R0080. The contract included modernization of the mechanical, electrical, fire protection, interior architectural, and window systems of the Supreme Court main building and "fit-out" of an annex building. Rule 4, Tab 10, at R0151. Although the heaviest concentration of work in the main building was in the basement, where the major mechanical and electrical rooms were located, work on the distribution systems for the mechanical, electrical, fire alarm, and sprinkler systems was

[1] The facts set forth above are based on the undisputed facts presented by the parties.

to continue throughout the higher floors. In addition, the first floor--where the Justice's chambers, courtroom, and conference rooms were located--required retrofitting or replacing windows and expanding the cafeteria; and the third and fourth floors required architectural modifications to the library, health club, and other facilities. Grunley's Statement of Undisputed Facts ¶ 4. The contract required that the project be completed in the annex within 180 calendar days and in the main building within 1,460 calendar days of the notice to proceed. Rule 4, Tab 9G, at R0128.

The contract defined "[n]ormal work hours" for the construction project the same as the Supreme Court's "[o]ccupied [h]ours," which were Monday through Friday, 7 a.m. to 7 p.m., except for government holidays. Rule 4, Tab 10, at R0157. The contract also contained a number of clauses that required that Grunley perform the work "in a manner that minimizes disruption to the Court and public." Rule 4, Tab 10, at R0151; see also id. at R0155 ("Contractor shall conduct his operations and coordinate his work in such a manner that there will be a minimum of noise, obstruction and interference with activities within and around the [Supreme Court] building"); id. at R0162 ("Mechanical, electrical, plumbing, data, telecommunications, and life safety extensions and permanent improvements, including provision of utilities to all restrooms, shall be executed in a manner that does not disrupt Court operations). Grunley's proposal also recognized that construction services were to be provided "without disruption to the operations of the U.S. Supreme Court." Rule 4, Tab 7, at R0072; see also id. at R0070 (describing Court environment as "hushed and contemplative" and promising a "[z]ero tolerance for interruption of the Court's activities"); id. at R0071 (describing its method of working without disrupting Court occupants as "stealth contracting").

Some noisy or disruptive work was specifically required to be performed outside of normal working hours, as illustrated by the following clauses included in the contract:

- "Abatement, demolition, chopping, drilling, and similar activities that generate nuisance dust and/or noise must be performed after normal working hours." Rule 4, Tab 10, at R0151.

- "All abatement, demotion, drilling, cutting and debris removal work that . . . result in excessive noise and other nuisances, which may interfere with the business activities of the building occupants, shall be performed at a time that the [Supreme Court] pre-approves. For the purposes of bidding, such time will be considered as between the hours of 9:00 PM and 6:00 AM." Rule 4, Tab 10, at R0156.

- "Work necessitating disruption to Court activities shall be performed only during Court recesses or after hours for operations of the Court." Rule 4, Tab 10, at R0162.

- "Contractor shall perform abatement work that requires that [heating, ventilation, and air conditioning] and/or other utilities systems serving the occupied parts of the Building be de-energized after normal Court working hours . . . ." Rule 4, Tab 10, at R0163.

- "[C]utting and patching work that produces excessive noise should not be performed during [Supreme Court] Occupied Hours . . . ." Rule 4, Tab 10, at R0307.

With regard to the work required to be performed during unoccupied hours, the contract stated that the work "shall be performed at no additional cost to the Project." Rule 4, Tab 10, at R0157.

The contract required that all construction "[a]ctivities shall be synchronized with the Court Calendar to maintain normal Court operations and minimize disruptions to the Court." Rule 4, Tab 10, at R0161. The contract further stated that:

> Certain events during the construction period will require the Contractor to suspend work for given periods of time, including, but not limited to key events indicated on the Court calendar. . . . The Supreme Court's calendar has been issued as a part of the bid documents and will reflect days that the Court is in session. For bidding purposes[,] the Contractor shall anticipate sixteen (16) days per calendar year of interrupted work days.

Rule 4, Tab 10, at R0156. The Supreme Court calendar provided with the bid documents identified the argument, non-argument, and conference days of the Court for the 2003 term of the Court (October 2003 through June 2004).[2] In this regard, argument days were marked with red dots, non-argument days were marked with blue dots, and conference days were marked with green dots. As identified in the 2003 Court calendar, there were 38 argument days, 15 non-argument days, and 27 conference days. Rule 4, Tab 4, at R0036. The calendars for each of the subsequent years reflected the same or similar number of argument, non-argument, and conference days, and these calendars were provided to Grunley prior to the commencement of each term. Rule 4, Tab 11, at R0351; Tab 19, at R0375; Tab 49, at R0468; Tab 83, at R1062.

The contracting officer awarded the contract to Grunley on April 30, 2004, and issued the firm a notice to proceed on May 26, 2004. Grunley's Statement of Undisputed Facts ¶ 25; Rule 4, Tab 9, at R0080. Work commenced in the annex area shortly thereafter.

On September 29, 2004, the Marshal of the Supreme Court issued the first of four memoranda imposing work restrictions at the site.[3] This first memorandum, which accompanied the 2004 Court calendar and established work restrictions for the 2004 term (October 2004 through June 2005), imposed "Quiet Hours" from 8:30 a.m. until 12:30 p.m. on argument days, and from 8:30 a.m. until 15 minutes after the Court or

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[2] Although there existed other Supreme Court calendars that showed other Court events, Grunley admits that the only calendar provided with the bid documents is the one discussed above. Motion for Summary Judgment Oral Argument Transcript ("Tr.") at 21.

[3] All four memoranda were addressed to the AOC's project manager for this contract, and were provided to Grunley directly from the Marshal or through the AOC's project management company for this contract. Rule 4, Tab 13, at R0352; Tab 15, at R0355; Tab 20, at R0376-77; Tab 50 at R0469-71; Grunley's Statement of Undisputed Facts ¶ 34.

conference was adjourned on non-argument and conference days. Rule 4, Tab 13, at R0352-53. The Marshal defined "Quiet Hours" as "a period during which no construction noise will be allowed."[4] Id. at R0352.

On November 1, 2004, work began in the interior of the Supreme Court building. Grunley's Statement of Undisputed Facts ¶ 26. On February 23, 2005, the Marshal issued a second memorandum, further restricting work by prohibiting all work between 8:30 a.m. and 1:30 p.m. on all Court days (argument, non-argument, and conference days) and allowing only quiet work to be performed between 8:30 a.m. and 5:30 p.m. on non-Court days. Rule 4, Tab 15, at R0355. The memorandum further stated that the constraints would be in place through April of 2005. Id.

On September 30, 2005, the Marshal issued a third memorandum, identifying work restrictions for the 2005 term (October 2005 through June 2006). As stated in this memorandum, work inside the building was prohibited on argument days and non-argument days from 8:30 a.m. until the "closing buzzer." (The closing buzzer was identified to be by 1:00 p.m. on argument days and by 11:00 a.m. on non-argument days.) On conference days and non-Court days, only quiet work was allowed from 8:30 a.m. to 5:30 p.m. Rule 4, Tab 20, at R0377.

On October 6, 2006, the Marshal issued a fourth memorandum, identifying work restrictions for the 2006 term (October 2006 through June 2007). This memo contained the same restrictions as those in the immediately preceding year. Rule 4, Tab 50, at R0469.

The record contains extensive communications between the parties concerning delays and disruptions to the job. Grunley repeatedly complained that the Marshal's work restrictions were causing delays, and representatives of the AOC complained that Grunley's work was unacceptably noisy and disruptive. In October of 2005, Grunley shifted some day work to night shifts as a result of the Marshal's memoranda. Grunley's Statement of Undisputed Facts ¶ 43. In late 2006, however, Grunley determined that it "would be more productive to work all but specified 'night' trades (abatement, demolition and debris removal) in the normal work day and to have crews simply sit out the hours on Red, Blue and Green days" (i.e., argument, non-argument, and conference days). Id. ¶ 49. Beginning on January 1, 2007, Grunley directed its workforce and subcontractors to remain on site and on standby during the day hours when work was prohibited. Id. Grunley does not contend, and the record does not reflect, that the firm or its subcontractors were directed by any representative of the government to remain idle during restricted hours.

On October 1, 2008, Grunley submitted a certified claim to the contracting officer, seeking $1,095,128 in compensation as a result of the Marshal's memoranda (issued in September 2005 and October 2006) that suspended work during argument,

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[4] Grunley's appeal does not seek relief for work restrictions imposed by this memorandum.

non-argument, and/or conference days.[5] Rule 4, Tab 93, at R1276; Tab 95, at R1318-20. Grunley's claim consisted of costs for night shift premiums and loss of efficiency for night work performed from October 2005 through December 31, 2006. In addition, Grunley sought costs relating to idle or standby work since January 1, 2007. Rule 4, Tab 97, at R1325. The contracting officer denied Grunley's claim in a final decision issued on December 16, 2008. Id. at R1324.

Grunley filed this appeal on January 14, 2009. The parties submitted cross-motions for summary judgment on March 18, 2010, on matters concerning contract interpretation. The parties completed briefing on their motions on April 22, 2010, and the Board heard oral argument on May 11, 2010.

DECISION

Grunley argues that the Marshal's memoranda, which suspended work during normal working hours on certain calendar days, constituted a change to the contract that entitles Grunley to additional compensation. Grunley contends that, although the contract permitted the AOC to interrupt work due to events on the Supreme Court's calendar, the contract identified "for bidding purposes" that there would only be 16 interrupted days of work per calendar year. Thus, Grunley asserts, any interruptions greater than 16 days per calendar year are compensable under the contract.

The AOC has a different interpretation of the contract. The agency argues that the 16 interrupted days are in addition to any suspended work days due to scheduled Supreme Court events. Even if the Board were to disagree with this interpretation, the AOC argues, other provisions of the contract bar recovery. First, Grunley's claims for any expenses incurred during unoccupied hours must be denied because the contract provided that work performed during unoccupied hours was to be performed at no additional cost to the government. Second, the AOC argues, the no damages for delay clause included in the contract expressly bars the recovery of idle labor and lost productivity, which are significant components of Grunley's claim. Third, the AOC argues, the Marshal's memoranda were issued as a sovereign act that precludes recovery on all portions of Grunley's delay claim.

Summary judgment is appropriate where no material facts are genuinely in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1390 (Fed. Cir. 1987). A material fact is one that may affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Factual conflicts and ambiguities are not to be resolved as part of a motion for summary judgment, and all doubts as to the existence of genuine issues as to material facts should be resolved against the moving party. American Pelagic Fishing Co., LP v. United States, 379 F.3d 1363, 1371 (Fed. Cir. 2004). However, the party opposing summary judgment must show an evidentiary conflict on the record; mere

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[5] Although Grunley references the first and second Marshal memoranda (issued in September 2004 and February 2005) in its summary judgment argument, these memoranda do not cover the time period for which Grunley seeks compensation under its appeal.

denials or conclusory statements are not sufficient. Mingus Constructors, Inc. v. United States, supra, at 1390-91; Pure Gold, Inc. v. Syntex (U.S.A.), Inc., 739 F.2d 624, 626-27 (Fed. Cir. 1984).

The matters presented to the Board are one of contract interpretation. Contract interpretation, including whether a contract term is ambiguous, is a question of law that is amenable to summary judgment. Varilease Tech. Group, Inc. v. United States, 289 F.3d 795, 798 (Fed. Cir. 2002); Grumman Data Sys. Corp. v. Dalton, 88 F.3d 990, 997 (Fed. Cir. 1996). Contracts are not necessarily rendered ambiguous by the mere fact that the parties disagree as to the meaning of their provisions. Community Heating & Plumbing Co., Inc. v. Kelso, 987 F.2d 1575, 1578 (Fed. Cir. 1993). Where the contract language is unambiguous, the language is given its "plain and ordinary" meaning and the Board may not look to extrinsic evidence to interpret the provisions. Teg-Paradigm Envtl., Inc. v. United States, 465 F.3d 1329, 1338 (Fed. Cir. 2006). The various contract provisions must be read as part of an organic whole, according reasonable meaning to all of the contract terms, Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991), and the Board's interpretation of the contract must assure that no contract provision is made inconsistent, superfluous, or redundant. Hughes Comm'cns Galaxy, Inc. v. United States, 998 F.2d 953, 958 (Fed. Cir. 1993).

Suspended Work Associated With Supreme Court Calendar

The parties do not dispute that the AOC has the authority to suspend work under the contract. Rather, their dispute concerns the meaning of the contract provision, quoted above and again quoted here, that:

> Certain events during the construction period will require the Contractor to suspend work for given periods of time, including, but not limited to key events indicated on the Court calendar. . . . For bidding purposes[,] the Contractor shall anticipate sixteen (16) days per calendar year of interrupted work days.

Rule 4, Tab 10, at R0156. As noted above, Grunley contends that it is entitled to compensation for any interrupted work days greater than 16 days per calendar year. The AOC contends that the government can suspend work for calendared events, plus an additional 16 days for interrupted work, without compensating the contractor.

We agree with Grunley that any interruptions more than 16 days per calendar year are compensable (barring limitations stated in other contract clauses, as discussed below), and that the contract is unambiguous in this regard. The contract provision above does not indicate that suspended work due to calendared events are in addition to the 16 interrupted days for bidding purposes, as argued by the AOC. Rather, the contract unambiguously provides that the contractor was to price the work based on 16 total days of interruptions per calendar year. There is simply no language in the contract that would suggest that the 16-day limitation for bidding purposes did not apply to

interruptions caused by calendared events.[6] Thus, while the contract advised Grunley that the AOC could suspend or interrupt work for many more than 16 days per calendar year based on the Supreme Court's calendar, the contract did not advise that Grunley would be denied compensation for more than 16 days of interruptions per calendar year.[7]

That said, we do not agree with Grunley that the interruptions caused by the Marshal's memoranda are a matter to be resolved under the changes clause to the contract. A contractor's claim for increased costs associated with government-caused delays, such as the one here, cannot be recovered under the changes clause of the contract. Broome Constr., Inc., AGBCA No. 232 (1971), 71-2 BCA ¶ 9100 at 42,171, aff'd, 492 F.2d 829, 982 (Ct. Cl. 1974); Ridahl Constr., Inc., GSBCA No. 2051 (1966), 66-2 BCA ¶ 5771 at 26,825. The fact that the government may have directed that work be stopped does not necessarily constitute a change to the contract. See Broome Constr., Inc., supra (government directive that channel excavation be delayed three months did not constitute change); Ridahl Constr., Inc., supra (contracting officer's directive that work be deferred "until further notice" did not constitute change). In contrast, where the government's directive concerns the means or methods of performance, then a change may be found to have occurred. See H.E. Johnson Co., Inc., ASBCA No. 48248 (1996), 97-1 BCA ¶ 28,921 at 144,181 (government-caused resequencing of work based on water test constituted change).

Here, the contract makes numerous references to work not being disruptive to the Court and advises that work may be suspended for calendared events (although, as discussed above, Grunley may be entitled to costs for more than 16 interrupted days per calendar year). The Marshal's directives in this regard are consistent with the terms of the contract. Although the Marshal's directives to suspend work on certain calendared days delayed the work that Grunley could perform, they did not necessarily alter the means or

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[6] The AOC argues that the words "suspend" (referring to calendared events) and "interrupted" (referring to the 16 days) have different meanings and therefore the two events should be considered additively. AOC's Motion for Summary Judgment at 13. In support of this argument, the AOC points to the contract's suspension of work clause, which refers to "suspended, delayed or interrupted" work, and argues that the three words mean something different; therefore, the AOC argues, in the clause at issue here, interrupted work must be treated as something different from suspended work. AOC's Motion for Summary Judgment at 13; AOC's Opposition to Grunley's Motion for Summary Judgment at 3; see also Rule 4, Tab 9F, at R0113. However, neither clause indicates that the words suspend and interrupt are intended to have different meanings. See Rule 4, Tab 9F, at R0113; Tab 10, at R0156. Furthermore, the AOC has not provided any definitional distinction between the words suspend and interrupt, and the words are synonyms in the thesaurus. Roget's 21st Century Thesaurus 416, 707 (1992). The AOC also points to a singular reference in Grunley's proposal to 16 days of "unscheduled interruptions," which the AOC contends implies that scheduled calendar interruptions are something different. AOC's Motion for Summary Judgment at 13. However, a fair reading of Grunley's proposal does not support this distinction.

[7] The parties agree that any interruption during a day, no matter how small in duration, is counted as one of the 16 interrupted days. Tr. at 32, 66.

methods of performance and, therefore, the directives do not constitute a change to the contract. See Broome Constr., Inc., supra; Ridahl Constr., Inc., supra.

The applicable provision under the contract upon which Grunley could seek relief is the suspension of work clause. See Broome Constr., Inc., supra; Ridahl Constr., Inc., supra. That clause authorizes the contracting officer[8] to "suspend, delay, or interrupt all or any part of the work" and to compensate the contractor for the increased costs of performance for "unreasonable" suspensions, except where an equitable adjustment is "excluded under any other term or condition of this contract."[9] Rule 4, Tab 9F, at R0114. As discussed below, the no damages for delay clause prohibits the recovery of a significant portion of the costs that Grunley seeks to recover.

No Damages for Delay Clause

The damages Grunley seeks to recover here are the night shift differential plus night-time inefficiency costs incurred from October 2005 through December 31, 2006, and the standby costs incurred during the day commencing on January 1, 2007.

The no damages for delay clause of the contract provides that:

> The Architect shall not be obligated or liable to the Contractor for . . . any damages, of any nature whatsoever . . . as a result of delays, interferences, disruptions, suspensions, changes in sequence or the like arising from or out of any act or omission of the Architect. . . . [T]he Contractor's sole and exclusive remedies in such event shall be a reimbursement of direct costs necessarily incurred as a result of the foregoing causes, and an extension of the contract time . . . .

Rule 4, Tab 9F, at R0102 (emphasis added). This provision further provides that:

> For purposes of this Article, the term "Damages" shall include all indirect and/or impact costs which shall include, without limitation: unabsorbed Home Office Overhead (including calculations under the "Eichleay Formula"), Idle Labor and Equipment, Loss of Productivity, and Interest; the term "Damages" shall not include on-site direct costs, which shall include direct labor . . ., direct materials and supplies . . ., direct equipment, restoration and cleanup, [and] overhead and profit . . . .

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[8] The AOC argues that the suspension of work clause does not apply here because the contracting officer did not engage in any act to suspend the work. Tr. at 68-70. There are insufficient undisputed facts in the record for us to decide this issue.

[9] Our decision makes no findings whether the interruptions here were unreasonable. In this regard, if Grunley was seeking to perform work during the day that was too noisy or disruptive, then the AOC could have prohibited Grunley from doing the work during occupied hours without incurring liability under the suspension of work clause. Indeed, Grunley agrees that such interruptions would not be counted as one of the 16 interrupted days. Tr. at 86-87.

Id. (emphasis added). Thus, "indirect and/or impact costs" are not recoverable under the contract, and these costs include "without limitation" idle labor, idle equipment, and lost productivity.[10] Id.

Accordingly, by the express language of the contract, Grunley's claims for standby labor and inefficiency are prohibited under the contract. The standby labor and inefficiency costs, contrary to Grunley's argument, cannot be construed as the kind of direct labor costs which are compensable, because the contract unambiguously defines idle labor and lost productivity as an impact cost that is not recoverable here.[11]

Furthermore, even if idle labor charges incurred during the day were considered to be direct costs, the cost are not recoverable because they were not "necessarily incurred." The undisputed facts show that the Marshal's memorandum and the Court's calendar were provided to Grunley prior to the commencement of each Supreme Court term, and these documents advised Grunley on what days and for what time periods work would be prohibited during the entire calendar year. Rule 4, Tab 13, at R0352; Tab 20, at R0377; Tab 50, at R0469; see also Rule 4, Tab 15, at R0355. In response to this information, Grunley performed work at night in 2005 and 2006, but then Grunley made the unilateral decision to send its workers to the job site to remain on standby during the day commencing on January 1, 2007. Grunley's Statement of Undisputed Facts ¶¶ 43, 49. This decision to have idle labor during the day was a discretionary action of Grunley and was not attributable to any act or direction of the AOC or the Marshal. As a discretionary act of Grunley, the idle labor charges were not necessarily incurred. Therefore, even if construed to be a direct cost, the idle labor costs incurred by Grunley during the day are not compensable under this contract.[12]

The only remaining portion of Grunley's claim is the costs incurred as night shift differential from October 2005 through December 31, 2006. Here, the AOC contends that these costs are precluded by another provision of the contract that states: "Work accomplished during Unoccupied Hours shall be performed at no additional cost to the Project." Rule 4, Tab 10, at R0157. We interpret this provision as applying only to work

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[10] The contract also states that the no damages for delay clause supersedes all other clauses of the contract with respect to the issue of damages. Rule 4, Tab 9F, at R0103. Thus, to the extent that Grunley argues that other contract provisions (such as the changes or suspension of work clauses) permit recovery, those provisions are trumped by the no damages for delay clause.

[11] Grunley's labeling of its damages as standby labor and inefficiency does not alter the fact that the costs incurred are for idle labor and lost productivity.

[12] Grunley contends that the no damages for delay clause's bar to recovering idle labor costs refers only to idle damages that are "of a consequential type and nature such as 'Eichleay' damages." Grunley's Motion for Summary Judgment at 38; Tr. at 132. However, the no damages for delay clause in this contract separately identifies Eichleay damages, idle labor, and lost productivity as the kinds of impact and/or indirect costs that cannot be recovered. This separate delineation of damages shows that all three types of damages are not recoverable and does not permit the recovery of idle labor costs in the manner that Grunley contends.

required to be performed at night under the contract, not to work that was appropriately scheduled as day work and was shifted to night work as a result of the Marshal's memoranda. Accordingly, we find that Grunley's night shift differential claim is compensable as a direct cost, so long as Grunley can demonstrate that the cost was necessarily incurred, the work rescheduled was not otherwise required to be performed at night, and the conditions of the suspension of work clause are met.[13]

Grunley asserts that the no damages for delay clause should not be enforced here. Citing cases from Pennsylvania and the Fifth Circuit involving commercial contractors, Grunley contends that there are three judicially recognized exceptions that preclude enforcement of no damages for delay clauses: (1) active interference by the government, (2) delay not contemplated by the parties, and (3) the owner's breach of a fundamental contract obligation. Grunley's Opposition to AOC's Motion for Summary Judgment at 14 (citing E.C. Ernst, Inc. v. Manhattan Constr. Co. of Texas, 51 F.2d 1026 (5th Cir. 1977); Coatesville Contractors & Eng'rs, Inc. v. Borough of Ridley Park, 506 A.2d 862 (Pa. 1986)).

The enforceability of the no damages for delay clause at issue here was previously considered by a predecessor board in the matter of Clark Construction Group, Inc., GAOCAB No. 2003-1 (JCL) (2003), 05-1 BCA ¶ 32,843. That board found that the clause was enforceable. Id. at 162,567. The board recognized, as Grunley asserts, that some courts have carved out exceptions that bar the application of no damages for delay clauses. However, the board found that the exceptions did not apply, given that the clause was not a true no damages for delay clause inasmuch as some damages were expressly allowed.[14] Id. at 162,566-67. For the reasons stated below, we agree that the no damages for delay clause here is enforceable.

While strictly construed, limitations on contractor recovery involving public contracts have generally been upheld by the Supreme Court, even where the delays were long. Wells Bros. Co. v. United States, 254 U.S. 83, 87 (1920); see also Wood v. United States, 258 U.S. 120, 122 (1922). Unlike with private contractors, government contractors who perform large contracts for the government are "neither unsophisticated nor careless" and therefore the presumption is that the contractor protects himself against delays by charging a higher price for the work. Wells Bros. Co. v. United States, supra, at 87. Thus, no damages for delay clauses may provide more protection to public owners than to private contractors. See Bramble and Callahan, Construction Delay Claims, § 2.16[A]. Indeed, no damages for delay clauses have generally been enforced in public contracts, except where the government has engaged in egregious behavior. Ozark Dam Constructors v. United States, 127 F. Supp. 187, 1991 (Ct. Cl. 1955) (clause not enforceable where government engaged in willful neglect); George J. Grant Constr. Co. v.

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[13] Also, the AOC is not liable for the first 16 days per calendar year of interruptions, as discussed in the immediately preceding section of this decision.

[14] Although the board in Clark allowed the recovery of several types of direct damages, it was not presented with the issue here: whether idle labor and inefficiency costs are recoverable under the no damages for delay clause.

United States, 109 F. Supp. 245, 246 (Ct. Cl. 1953) (clause enforceable absent fraud or malicious or arbitrary conduct).

Thus, while other jurisdictions such as those cited by Grunley may carve out exceptions to enforceability to avoid the potentially harsh effects of the clause between private contractors, we do not find that these same exceptions necessarily apply to government contractors. In this case here, Grunley is a sophisticated government contractor, who was described by its attorney as "probably the best historical restoration contractor of government buildings in the country . . . . They [Grunley] don't make decisions that are stupid." Tr. at 134. The clause at issue very specifically and thoughtfully identifies what damages are and are not recoverable, and was agreed to by both Grunley and the AOC. The actions of the government that Grunley complains of are not so egregious so as to overcome the plain language of the contract clause, and do not require that this Board relieve Grunley from the terms to which it agreed. Under the circumstances, we see no reason not to enforce the no damages for delay clause here.

In sum, Grunley is entitled to recover the night shift differential that was necessarily incurred and was not for work otherwise required to be performed at night, so long as the conditions of the suspension of work clause are met. Grunley's claim for idle labor and inefficiencies is barred by the no damages for delay clause.

Sovereign Acts Defense

The AOC argues that Grunley cannot recover any portion of its claim because the Marshal's memoranda were the result of a sovereign act that insulates the government from liability. We disagree.

The sovereign acts doctrine provides that "the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign." Horowitz v. United States, 267 U.S. 458, 461 (1925); Conner Bros. Constr. Co., Inc. v. Geren, 550 F.3d 1368, 1372 (Fed. Cir. 2008). A sovereign act is one that is "public and general" in nature and not one that is "specifically directed at nullifying contract rights." Conner Bros. Constr. Co, Inc. v. Geren, supra, at 1373-74; see also Stockton East Water District et. al. v. United States, 583 F.3d 1344, 1367 (Fed. Cir. 2009). Relevant to whether an act is "public and general" is the extent to which the government action was directed to relieving the government of its contractual obligations, and whether the government action applies exclusively to the contractor or more broadly includes other parties not in a contractual relationship with the government. Conner Bros. Constr. Co, Inc. v. Geren, supra, at 1374-75. The sovereign acts defense is unavailable "where a substantial part of the impact of the [g]overnment's action rendering performance impossible falls on its own contractual obligations," but it is available where the action's impact upon public contracts is "merely incidental to the accomplishment of a broader government objective." United States v. Winstar, 518 U.S. 839, 898 (1996).

In Conner Bros. Constr. Co., Inc. v. Geren, supra, a case relied on by the AOC, the Federal Circuit held that the sovereign acts defense barred recovery for delay damages as a result of government-imposed access restrictions to the site where a government contract was being performed. In that case, a military base was shut down by order of

the base commander in response to the terrorist attacks against the United States on September 11, 2001. All but mission-essential personnel were excluded from the base, including Conner, who was a construction contractor doing work at a Ranger compound within the base for the Army Corps of Engineers. At some point, contractors were permitted access to the base, but the Ranger compound remained closed and Conner was denied access to the compound. Conner sought delay damages associated with the access restrictions.

The Federal Circuit held that the sovereign acts defense barred recovery, because the government act complained of--excluding Conner from the Ranger compound--was found to be a public and general act. The base commander restricted access to the compound as a matter of operational security to permit the Rangers to prepare for deployment without risking informational leaks. Conner was excluded from the compound because its activities on the compound presented risks and impediments to the military's training objectives that were unrelated to the parties' obligations under the contract; that is, the government's act of excluding Conner from the compound was not directed principally at Conner's contract rights. Although Conner was the only contractor impacted at the Ranger compound, the exclusion order was not limited to only Conner's activities and was directed to other contractors and the public. In sum, the court held, the case was not one where the government had a "change of heart" after the government decided performance was unwise, but was instead related to a sovereign act of the government. As such, the sovereign acts defense precluded Conner from recovering money damages.[15] Conner Bros. Constr. Co, Inc. v. Geren, supra, at 1375-77.

We find the case distinguishable. In Grunley's appeal, the government acts complained of--the Marshal's memoranda restricting access to the Supreme Court--were not public and general acts. The Marshal's memoranda were addressed only to the AOC project manager overseeing Grunley's contract, and the memoranda do not suggest an incidental impact on Grunley's contract relating to a broader governmental objective. Rather, the memoranda appear to be specifically aimed at redefining the working hours specified in Grunley's contract.

In this regard, the Marshal's first memorandum, issued on September 29, 2004, announced quiet hour restrictions that were consistent with the contract's terms. Then, in February 23, 2005, the Marshal issued a memorandum that, for the first time,

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[15] Similarly, in Robertson & Penn, Inc., ASBCA No. 55325 (2008), 08-2 BCA ¶ 33,951, the Armed Services Board of Contract Appeals held that the sovereign acts defense precluded recovery for a reduction of workload in a laundry services contract as a result of troop deployment to Iraq. The workload reduction was determined to be the result of military deployment and was not directed at nullifying contract rights. Id. at 167,984 However, in Stockton East Water District, et al. v. United States, supra, the Federal Circuit found that the sovereign acts defense was unavailable where the government's reclamation actions denied water rights to certain districts. The districts were the only users affected negatively by the government's action, and the government's action was found to be directly aimed at nullifying contract rights of the districts to receive water. Id. at 1367.

prohibited construction during certain hours.[16] This 2005 memorandum stated that the restrictions were being imposed because "the construction project is now beginning work within the Court building." Rule 4, Tab 15, at R0355. The AOC affirms that the "circumstances that prompted the Marshal's memorandum" were "the fact that [Grunley's] work had moved inside the building." AOC's Opposition to Grunley's Motion for Summary Judgment at 7. Unlike the base commander in Conner Bros. Constr. Co., Inc. v. Geren, supra, whose exclusion order was in response to the September 11 attacks and the broader governmental purpose of readying the military, the Marshal's memorandum appears to reflect only a change in heart as to the appropriate work hours inside the building for the construction project.

The AOC contends that the Marshal's actions were not a change of heart, but served an "independent legitimate governmental interest, operational security" of the Supreme Court. AOC's Opposition to Grunley's Motion for Summary Judgment at 12; Tr. at 141. As the AOC notes, the Marshal issued the memoranda pursuant his authority, under 40 U.S.C. § 6102 and the implementing regulations of the Supreme Court, to "maintain suitable order and decorum within the Supreme Court Building and grounds." Rule 4, Tab 2, at R0031. However, the test for whether a governmental action gives rise to a sovereign acts defense is not whether the government is executing a legitimate interest; that would result in nearly every act of the government giving rise to the defense, even those directly aimed at nullifying contract rights. The test is whether the governmental action is public and general in nature. United States v. Winstar, supra, at 897-98; Horowitz v. United States, supra, at 461. As discussed above, the work restrictions imposed on Grunley are not public and general acts. The fact that the Marshal was executing his authority under the law when imposing these work restrictions does not alter the nature of the acts.

In sum, given that the Marshal's memoranda were not acts of a public and general nature, we find that the sovereign acts defense is not available here. Stockton East Water District, et al. v. United States, supra, at 1367.

CONCLUSION

For the reasons set forth above, Grunley is entitled to recover the night shift differential that was necessarily incurred and was not for work otherwise required to be performed at night, from October 2005 through December 31, 2006, so long as the conditions of the suspension of work clause are satisfied. Grunley's claim for idle labor and inefficiencies is barred by the no damages for delay clause. Grunley's motion for summary judgment is granted in part and denied in part. The AOC's motion for summary judgment is similarly granted in part and denied in part.

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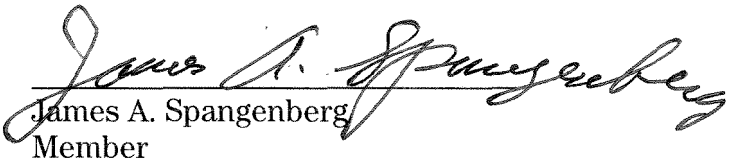
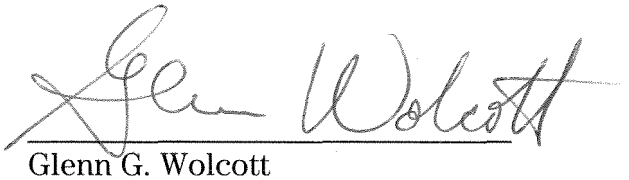
[16] In subsequent memoranda, the restrictions were increased and have continued throughout Grunley's performance on the contract.

Sharon L. Larkin
Presiding Member



James A. Spangenberg
Member



Glenn G. Wolcott
Member

Dated: June 16, 2010