

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -)
)
Central Environmental, Inc.) ASBCA No. 62628
)
Under Contract No. W9I2DY-15-D-0072)

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OPINION BY ADMINISTRATIVE JUDGE MELNICK

Central Environmental, Inc. (CEI) is a demolition contractor that eliminated unneeded concrete weapons targets at the White Sands Missile Range (WSMR) in accordance with a task order issued under a Multiple Award Task Order Contract (MATOC). During performance, it was often blocked from accessing the worksite or evacuated because of missile testing on the range. It claims the government breached the MATOC by not notifying it that it would encounter these restrictions. We decide entitlement only and conclude the government breached the MATOC.

FINDINGS OF FACT

1. The United States Army Corps of Engineers’ (“Corps”) Facilities Reduction Program (“FRP”), operating from Huntsville, Alabama, eliminates unneeded government structures around the country. Through FRP, the Corps awards MATOCs to a pool of demolition contractors who compete for task orders to perform specific projects. (Tr. 2/123-25, 3/7-8) In 2015, CEI was most recently awarded one of the Corps’ FRP MATOCs for firm-fixed price demolition services at various facilities, including WSMR (R4, tab 34 at 932-37, 1035). Section 7 of the MATOC, entitled “Government-Furnished Information,” says the following:

The Government shall furnish site-specific information which may include . . . installation policies and procedures

affecting the work. The documents may include items such as . . . site limitations for working hours, travel routes All such items, when and where available shall be provided with the respective task order RFP.

(R4, tab 34 at 1023)

2. WSMR, located in south-central New Mexico, is the largest military installation in the country. Its boundaries extend almost 100 miles north to south and 40 miles east to west, totaling nearly 3,200 square miles. (R4, tab 65 at 2256) Although it is part of the Army Test and Evaluation Command (ATEC), WSMR is a tri-service facility used, among others, by the Army, Navy, and Air Force. It is the largest open-air land range in the Department of Defense for testing, research, and assessment of weapons systems and commercial products. (*Id.* at 2213) Public roads lead to WSMR, and then non-public internal roads, called range roads, traverse the base (R4, tab 65 at 2256; tr. 1/63). The Air Force and Corps have personnel permanently located at WSMR (R4, tab 65 at 2216, 2248-50; tr. 3/82, 4/6-7, 35).

3. In 2017, the Air Force office at WSMR responsible for research and development testing contacted the Corps to obtain the demolition of weapons target structures and associated cleanup at two different locations within the base. One set of targets was at the Slick City Test Area, which is approximately a one-hour drive through the base from the cantonment area. The other set was at the Burris Wells Test Area, which is about a half-hour drive further away. (R4, tab 17 at 806-07; tr. 3/8-10, 12, 82, 4/36-37) The Air Force developed a scope of work and definition of requirements (R4, tab 36; tr. 4/37, 45-46). Through these engagements, the Corps assumed responsibility to act for the benefit of the Air Force, with the Air Force then reimbursing the Corps for its labor and costs associated with a resulting contract (app. prop. finding ¶ 8; gov't resp to app. prop. findings ¶ 1; tr. 3/82-83).

4. Upon receipt of the Air Force inquiry for demolition of its targets, the Corps sent an FRP engineer to WSMR to perform a scoping visit, which involved observing and making site notes, drafting a performance work statement (PWS) to be used in a MATOC task order, and developing an independent cost estimate to enable the Air Force to know how much money it would require. (Tr. 3/9-13, 95-101) The PWS was reviewed by both the WSMR Corps and Air Force offices for their input (tr. 4/11, 98).

5. Missile testing is the primary and regular mission at WSMR, making it a highly dynamic environment, unique among military installations for the frequency of its public and range road closures by ATEC and evacuations of personnel. Projects on the range are interrupted daily for such events. Indeed, the Slick City Test site is one of the range's primary weapons impact sites, with weapons fired there on a weekly basis. Contractors cannot be present during these tests for their protection. These

regular activities were well known to both Air Force and Corps personnel stationed at the site and predictable to anyone familiar with range operations. (Gov't prop. finding ¶ 51; tr. 3/79-80, 133-34, 4/10, 39, 42, 49, 56, 64, 75-77, 79) The government prepares a written weekly roadblock itinerary that is unavailable to the public (tr. 4/63, 110). Though the Air Force considered the Corps responsible for advising contractors about site restrictions and evacuations arising from range testing, it did not note the absence of such a warning in the PWS and suggest any such language (tr. 4/98-101). The standard procedure of the Corps office at WSMR is to include an advisement in its own contracts, or during pre-proposal site visits, that contractors should expect to encounter roadblocks due to missile testing five days per month (tr. 4/16-17, 26-27). Nevertheless, the WSMR Corps office failed to suggest that this PWS should mention potential site restrictions (tr. 3/72). FRP's program manager knew there would be site restrictions at the time of the solicitation. However, she did not act to add any discussion of that in the PWS. (Tr. 3/6, 71-72)

6. During the relevant period, WSMR's website contained a section entitled "WSMR Road Block Schedule." It informed visitors to the base that the range often set roadblocks on public roads leading to WSMR. It provided a phone number for a pre-recorded message, typically giving daily information. It also purported to provide more detailed information to WSMR employees with access to Army computers. (App. supp. R4, p 259, tr. 3/76-77). Though this portion of the website did not describe the normal duration of the public roadblocks, the range's February 2018 customer handbook, also provided on the website, stated that roadblocks on those highways could only last one hour unless the commanding general approved an additional 20 minutes (R4, tab 65 at 2225; <https://www.wsmr.army.mil/g5sc.html>). The website said nothing about restrictions on internal range roads or purport to advise contractors working on the base.

7. There are no signs on the public roads around WSMR warning about range road closures (tr. 3/146). Similarly, nothing on the range roads alerts travelers that they are subject to closure for missile testing (tr. 2/90-91).

8. On August 7, 2018, the Corps' FRP contracting officer issued the task order Request for Proposal (RFP) to MATOC contractors for the performance of the WSMR demolition in accordance with the PWS (R4, tab 27). The cover letter expressly prohibited the contractors from "engag[ing] [in] any form of contact with installation personnel/or installation [Public Works] personnel regarding this requirement prior to submission of proposal." After stressing that only the contracting officer could be contacted regarding the RFP's requirements, it warned that "[d]iscussions or information obtained via other sources could make you ineligible for award if deemed a Conflict of Interest or a Violation of Procurement Integrity Act." (*Id.* at 876) Previously, the FRP contracting officer had strictly enforced that restriction when CEI had tried to make inquiries of local personnel about facilities on other task orders

(tr. 1/33-38, 2/14-17, 86-88). All questions and comments regarding the RFP, including uncertainties about potential obstacles or challenges, were to be submitted to a web portal called ProjNet between August 13 and 17, 2018. Those questions and the responses were available for all bidders to see. (R4, tab 27 at 880; tr. 2/141-43)

9. The RFP's PWS provided the coordinates of the targets to be demolished and range road directions to them (R4, tab 17 at 806-07). Bidders were also provided aerial photos and maps of the roads and target locations (gov't prop. finding ¶ 17; R4, tab 23; tr. 1/58-60, 3/16). The PWS identified the forms and procedures required to access the range gate, and it advised that trucks or four-wheel drive vehicles might be necessary to reach the target areas because the worksites were only accessible through unimproved roads and dry wash basins (R4, tab 27 at 890, 906). The PWS did not notify bidders that missile testing on the range generated roadblocks on the range roads and evacuation orders restricting access to the worksites. The contracting officer, who had not previously awarded a contract involving WSMR or visited it, did not know at the time she prepared the solicitation that there would be road closures and test missions restricting the contractor's performance because neither her client the Air Force, her participating Corps colleagues at WSMR, or even her own program manager, told her. Had she been so informed, she would have amended the solicitation to provide that notification to bidders as well. (Tr. 2/165-66) Similarly, she did not know about the WSMR website's discussion about public road closures and did not direct bidders to it (tr. 2/167-68).

10. CEI is an experienced government contractor that has performed dozens of projects at missile and shooting ranges, though none at WSMR (tr. 1/9-13, 2/19, 64-65). Usually, its prior contracts on facilities with active missions, including with FRP, had notified it of access restrictions in the scope of work, specifications, scheduling section, or site notes so that it could account for them in its pricing when necessary (tr.1/14-18, 28-29, 2/65-68). It had no prior knowledge of WSMR operations (tr. 2/19). When CEI reviewed the WSMR RFP, the absence of such notifications did not concern it because the contract was for removal of spent targets that were no longer active. The base is huge, and CEI did not expect to work in an area where current testing would affect it. (Tr. 1/31-32)

11. CEI's MATOC advised it to attend a pre-proposal site conference and site investigation to preview a project site prior to submitting a task order proposal. It explained that CEI would be provided information such as transportation routes, hours of operation, special conditions, limitations/restrictions, and additional specifications. The MATOC continued that CEI was to be aware of and verify all general and specific technical project terms, conditions, and circumstances before proposing any task orders. During the visit, CEI was to take reasonable steps to ascertain the nature and location of the work and ensure it had investigated the general and local conditions that could affect the work or its cost. CEI was to satisfy itself as to the character,

quality, and quantity of obstacles to be encountered insofar as the information was reasonably ascertainable from an inspection of the site. (R4, tab 34 at 1004) FAR 52.236-3, SITE INVESTIGATION AND CONDITIONS AFFECTING THE WORK (APR 1984), which was incorporated by reference, contained similar language (R4, tab 34 at 971).

12. CEI was not required to attend the pre-proposal site visit. Any information provided by the government during the visit was also supposed to be given to contractors who did not attend. (R4, tab 27 at 879; tr. 2/130) In fact, notwithstanding the MATOC's site visit advisements and warnings, the government did not consider anything said by its personnel during the visit to be official or binding unless it was also placed in ProjNet for all bidders to see whether or not they attended. The contracting officer reiterated this fact regularly at FRP pre-proposal site visits. (Tr. 1/33-34, 38-39, 69-71, 2/148-50)

13. CEI assigned Mr. Mike Waddell, who was deceased at the time of the hearing of this appeal, to attend the August 14, 2018, pre-proposal site visit at WSMR for the target demolition task order (gov't prop. findings ¶¶ 15-16, 19; app. supp. R4, p. 183; tr. 1/39-40, 42). Mr. Waddell possessed 30 years of experience in demolition and construction and had attended numerous pre-proposal visits for CEI and other employers (tr. 1/43-44, 46, 2/74). Among the other attendees at the site visit were Mr. Shawn Evans and Lt. William Sousa from the WSMR Air Force office and a representative from Bhate Environmental, which was another FRP MATOC contractor (gov't prop. finding ¶ 20; app. supp. R4, p. 183; tr. 4/35, 57, 118, 122-23, 5/6-8). At the start, the contracting officer provided the standard caution that nothing said by government personnel was binding on the government (tr. 2/148). The contracting officer was absent when government representatives took the contractors to the demolition sites (tr. 2/149-50). Mr. Waddell spent three days at WSMR at the time of the visit. In addition to the actual meeting, he scoped the site locations and roads. He reported back to CEI management each night about what he had experienced. (Tr. 1/46) There is no evidence Mr. Waddell called the WSMR website's pre-recorded message.

14. Upon his return to CEI, Mr. Waddell assisted with preparing CEI's bid (tr. 1/42-43, 78). He discussed the site locations and travel time to them, roads, access points, and gate procedures with CEI management. He also discussed the possibility of obtaining helicopter access. Among other things, he addressed the state of the roads, their maintenance, the need for four-wheel drive vehicles, whether the roads were passable in the rain, where trucks could access the base, and how gate entry worked. (Tr. 1/55-56, 67-68, 2/79-82) Mr. Waddell reported that public roads could close, but that would not pose a problem for CEI because the base gates it would enter were before the closure points (tr. 1/64). CEI's management did not conclude that the prospect of public road closures necessarily meant that the range roads used by facility

personnel and contractors would also be restricted. Contractors have different authorizations than the public, and CEI believed the government would notify it if it was going to be in any unsafe locations on the base. (Tr. 2/20-21) Mr. Waddell did not report that the government said anything about range road closures at the pre-proposal site visit (tr. 1/64-65, 2/82).

15. Based upon Mr. Waddell's comments, CEI inquired through ProjNet whether the base gates would be locked and, if so, whether the government would open them for its trucks. It also asked whether WSMR maintained the dirt road leading to the sites. Mr. Waddell indicated satisfaction with the government's answers. (Gov't Prop. Finding ¶ 27; R4, tab 29 at 917, tab 62 at 1718-19; tr. 1/71-75) Had Mr. Waddell expressed any concerns about range road closures preventing access to the site, CEI would have asked about that in ProjNet to ensure all bidders were estimating based on the same scenario (tr. 1/79).

16. Indeed, the contracting officer and the FRP program manager would have expected an inquiry in ProjNet about range road closures had government personnel told the FRP MATOC contractors to expect them during the pre-proposal site visit, and the contracting officer would have considered amending the solicitation (tr. 2/174-75, 3/90, 4/108). However, none of the contractors asked about range road closures in ProjNet, and nothing in the government's responses indicated there would be any (R4, tab 62 at 1718-23; tr. 2/174-75, 3/90). Nor did anyone associated with the government tell the contracting officer that such warnings were given to the contractors while visiting the sites (tr. 2/173-74).

17. CEI's proposal did not account for any cost impact from missile testing interruptions (tr. 2/22). The government awarded CEI the firm-fixed price WSMR demolition task order in the amount of \$3,471,000 under its MATOC effective December 10, 2018, though the parties signed it on December 31 (R4, tab 17). The "terms, conditions, specifications, requirements, and guidance" contained in CEI's MATOC "appl[ied] to [the] task order" (R4, tab 17 at 788).

18. CEI and the government held a pre-construction meeting at WSMR on January 28, 2019. Among CEI's attendees were Mr. Waddell, its Chief Operating Officer, Mr. Shane Durand, and its President, Mr. Stuart Jacques. Government personnel included Mr. Evans, Lt. Sousa, the Corps' project manager Mr. Robert Corralles, and Mr. Dan Hartell of the Corps' WSMR office. (App. supp. R4, p. 185; tr. 1/7, 83-84, 2/62, 88-89, 3/118, 123) Mr. Corralles was surprised that nothing in ProjNet or other documents had addressed site closures so he inquired about them of the Air Force. Either Lt. Sousa or Mr. Hartell responded there would be closures and that CEI would average five lost days per month. (App. supp. R4, p. 185; tr. 1/91-92, 2/91, 3/123-24) The CEI representatives, including Mr. Waddell, expressed surprise, stating they had not been told about site restrictions earlier (tr. 1/91-92, 95-96, 2/91-95,

3/124). There is no evidence that Mr. Evans, Lt. Sousa, or anyone else from the government, responded that they had told the FRP MATOC contractors about that possibility at the pre-proposal site visit.

19. For CEI, even a partial day of restriction could result in a full day lost because of the travel time to and from the worksites (app. supp. R4, p. 195; tr. 1/93). CEI memorialized its position in a subsequent Request for Information (RFI) to the government. There, it reiterated that neither the PWS nor pre-proposal site visit discussions had indicated there would be restrictions on its work. It only learned after award, during the pre-construction visit, that it would have to leave the worksites during range missions. The government eventually instructed CEI to submit a Request for Equitable Adjustment (REA) and a request to work seven days a week to mitigate the effect of the closures. The government did not deny the RFI's premise that CEI was never warned about access restrictions before the award. (App. supp. R4, p. 187; tr. 1/96-103)

20. On May 1, 2019, the day before CEI was to start work on the project, CEI and the government held a kickoff meeting at WSMR (app. supp. R4, p. 201; tr. 1/104-07). CEI had been coordinating its mobilization with Mr. Corralles for weeks ahead of this time (tr. 1/106, 112). Among the government participants were Mr. Evans, Lt. Sousa, Mr. Corralles, and Mr. Hartell, with the contracting officer and program manager participating by phone. CEI's attendees included Mr. Durand. (App. supp. R4, p. 201) During the meeting, Lt. Sousa stated for the first time that CEI could encounter restrictions requiring its evacuation every day, not just five days per month. CEI was given two phone numbers to call and obtain information daily about restrictions. One was the number on the website, which provided a recording, and the other, not available to the public, was range control manned by a live person. (App. supp. R4, p. 201; tr. 1/105-08, 3/130-32) CEI then called one of the numbers and learned that the range roads would be closed the very next day, the first day for it to work. This was another shock to CEI, and it expressed its displeasure about the costs associated with such delays. The contracting officer's response to CEI's protests was that it should submit an REA and that it would be paid for its costs. (App. supp. R4, p. 194-95; tr. 1/105-06, 108-12, 127-30) Nobody responded that CEI had been previously notified about such frequent range closures or that it would have to inquire about them (tr. 1/110). Moreover, the Corps project manager, Mr. Corralles, who had frequent meetings with the Air Force during the project, has no recollection that anyone from the government ever suggested to CEI that it had been told prior to award of the task order about site restrictions, or that it otherwise should have known about them (tr. 3/132).

21. Mr. Durand subsequently discussed the restrictions with Mr. Evans, who again never suggested that CEI should have known there would be closures (tr. 1/113-14). In time, the Air Force implemented a procedure where Lt. Sousa or a designee sent emails on

a weekly or biweekly basis to CEI with information about roadblocks expected in the coming days. CEI would also call one of the supplied phone numbers. Nevertheless, CEI experienced days when no indication of a roadblock had been given, yet it arrived to find one, as well as days when it was unexpectedly ordered off a site after traveling to it. Lt. Sousa's information was roughly fifty percent accurate. (Tr. 1/117-18, 120-21, 4/131-32) On some roadblock days, CEI could use alternate routes that lengthened its trip to the sites by an hour but mitigated some of its resulting costs. On other days, it had to wait, or it could not work. (Tr. 1/119) Overall, CEI experienced a significant number of days where its site access was delayed or prevented due to installation missile testing, causing additional costs. Most of the delays were of the type that was typically within Mr. Evans' general experience at WSMR. (Gov't prop. finding ¶ 50; R4, tabs 56, 63; app. supp. R4, p. 203-28, 231-40; tr. 1/121-31, 136, 2/45, 3/56, 4/22, 82-83) The impacts arose from range road closures or evacuations, not public road closures (tr. 1/137, 147-48). Nevertheless, CEI completed performance of the task order (tr. 1/135).

22. At the hearing, Mr. Evans and Lt. Sousa testified they announced to the group of MATOC contractors while visiting the demolition locations during the pre-proposal site visit that testing on the range would lead to regular roadblocks or evacuations impacting the project (tr. 4/59-64, 70, 72-73, 112, 123-127). The government also provided testimony from Bhate Environmental's pre-proposal site visit representative, who said he heard warnings that the awardee could experience delays due to missile testing (tr. 5/15-17, 19-21). The government relies on this evidence to show it complied with the MATOC's notice requirements. Without opining whether that would be correct, we find that these statements are not accurate.

23. Nothing in writing indicates any warnings about roadblocks or evacuations were made during the site visit. There is no evidence that Mr. Evans or Lt. Souza contemporaneously memorialized their alleged comments or reported making them to either the contracting officer or anyone else. This is despite the fact they were warned by the contracting officer at the start of the pre-proposal site visit, along with the MATOC contractors, that nothing said during the visit by government personnel was official. As we have found, none of the MATOC contractors attending the visit submitted a question to ProjNet inquiring about the potential for these significant impediments to the project. The fact that oral statements were not official should have caused someone to seek to confirm them with the contracting officer to ensure that all bidders, whether they attended the pre-proposal site visit or not, were officially apprised of these potential costs for the purpose of bidding. The government would have expected such inquiries if the alleged warnings had been given. Similarly, the Bhate representative claimed to know from previous WSMR experience that testing delays would be numerous. He indicated that he asked about them at the visit not to educate himself but for the benefit of other contractors to ensure their bidding was fully informed. (Tr. 5/12-13, 16-23) However, Bhate did not submit any questions about testing delays in ProjNet despite acknowledging that would be the appropriate

next step. When asked why it did not, the representative inconsistently stated that Bhate was already experienced with WSMR so it did not need to make such an inquiry, though he had just admitted that was not his purpose for asking about them at the visit. (Tr. 5/24-25).

24. Mr. Waddell's actions are inconsistent with his being informed about range road closures or evacuations. As already observed, he was very experienced in demolition contracting. Upon returning to CEI from the visit, he focused intently on access issues, discussing the fact that public roads could close, as well as studying the state of the range roads, their maintenance, the effect of rain, truck entry points, and gate procedures. He also researched obtaining helicopter access. These concerns led to CEI submitting ProjNet questions on some of those topics. Given his conduct, we find that had Mr. Waddell been told about range road closures and evacuations, he would have mentioned them.

25. Finally, as we have also noted, Mr. Evans and Lt. Souza attended both the pre-construction and kickoff meetings with CEI, where they raised the topic of range road closures, and CEI denied knowing anything about them, expressing surprise, shock, and displeasure. Yet, in contrast to their testimony that they had previously warned the MATOC contractors about this possibility, they failed to respond to CEI's protests with any such assertions. Nor did they explain why they did not during their testimony. Indeed, before CEI filed this appeal, the government never claimed that it had warned CEI about site restrictions at the pre-proposal site visit (tr. 1/149, 2/100). Given all the surrounding evidence, we find that no announcements were made at the pre-proposal site visit that the MATOC contractors should expect range road closures or evacuations due to missile testing.

26. On March 4, 2020, CEI submitted an REA to the contracting officer for costs associated with the access limitations in the amount of \$699,477.75 (app. supp. R4, p. 255). The government denied the REA, while recognizing that CEI experienced ten days of delay (R4, tabs 30A, 31A). On June 11, 2020, CEI submitted a certified claim to the contracting officer seeking \$708,866.70 (R4, tab 2). On July 1, 2020, the contracting officer, though again recognizing the ten days of delay, denied the claim (R4, tab 16). CEI appeals.

DECISION

CEI advances several theories in support of its appeal. We agree with it that the government breached the MATOC.¹

¹ Because we hold that the government breached the MATOC, we do not address CEI's other entitlement theories.

“A breach of contract claim requires two components: (1) an obligation or duty arising out of the contract and (2) factual allegations sufficient to support the conclusion that there has been a breach of the identified contractual duty.” *Bell/Heery v. United States*, 739 F.3d 1324, 1330 (Fed. Cir. 2014). When the language of the contract is clear and unambiguous, it must be given its plain and ordinary meaning. *Id.* at 1331. The contract must be construed as a whole and “in a manner that gives meaning to all its provisions and makes sense.” *Id.* Failure by the promisor to perform an obligation at the appointed time establishes a breach. *Franconia Assocs. v. United States*, 536 U.S. 129, 142-43 (2002) (citing RESTATEMENT (SECOND) OF CONTRACTS § 235(2)(1979)).

The government suggests that FAR 16.202-1’s placement upon the contractor of maximum cost risk for firm-fixed price contracts such as this excuses its monetary liability for breach of this contract. There is no merit to that contention. Though that provision prohibits a price adjustment based upon the contractor’s experience performing its promises, it does not negate the government’s own performance responsibilities and remedial obligations in the event it fails to carry them out. The government’s theory would make government promises under firm-fixed price contracts illusory.

Section 7 of the MATOC promised that the government “shall furnish site-specific information which may include . . . installation policies and procedures affecting the work.” It continued that “[t]he documents may include items such as . . . site limitations for working hours, travel routes,” and it required “[a]ll such items, when and where available shall be provided with the respective task order RFP.” (Finding 1) The sensible reading of this government commitment is that it would communicate any policies or procedures taking place on the installation that affected the work of the contract, including site limitations, with the task order RFP when available. The government implies using the words “may include” means disclosure was optional. Such an interpretation would give the language no effect. Reading Section 7 in context, its initial mandate that the government “shall furnish site-specific information,” followed by the explanation that the notice “may include” more specific items, is an acknowledgment that the existence of any of the additional details may vary by installation and project. It is not to enable the government to withhold information at its choosing. The closing requirement that “[a]ll such items, when and where available shall be provided” confirms this intent. *See Bell/Heery*, 739 F.3d at 1331 (requiring the contract to be construed as a whole, giving meaning to all its provisions); *Pac. Gas & Elec. Co. v. United States*, 536 F.3d 1282, 1287-88 (Fed. Cir. 2008) (citing RESTATEMENT (SECOND) OF CONTRACTS § 203(a)) (holding we should avoid any meaning that renders some part of the contract inoperative).

Nor is the requirement limited only to policies and procedures documented in writing by the time of the RFP’s issuance, as the government implies. The import of

Section 7 was to improve the accuracy of bids by assuring that the government conveyed to all the MATOC contractors the site-specific information it knew would affect the work. It did not exclude information known but not previously recorded. As CEI observes, the requirement was to furnish information, not simply documents. Moreover, CEI correctly notes that the government's premise that no writings recognized that range roadblocks occur is false. The WSMR Corps office, which participated in this matter, regularly advised contractors of that fact in its contracts (findings 4-5). Also, the government prepared written weekly roadblock itineraries for its own use at WSMR (finding 5).

Missile testing is the primary mission at WSMR, and the government frequently interrupts projects on the base for such events. The relevant Air Force and Corps personnel at WSMR, and the FRP program manager, knew from the outset that these regular procedures would cause range roadblocks and site evacuations for this contractor. (Finding 5) Obviously, gaining access to the worksite was critical to performing this project's demolition work, and information pertinent to site access was highly relevant for the contractor. The government recognized as much by providing aerial photos and maps of the roads and target locations, as well as advising in the RFP about forms and procedures required to access the range gate and that trucks or four-wheel drive vehicles might be required to reach the target areas (finding 9). Equally important would be notice of government procedures that regularly interfered with site access. In fact, the government readily concedes that it could have notified the MATOC contractors that roadblocks and site evacuations were common (gov't. br. at 21). Had the contracting officer known about such restrictions she would have included information about them in the RFP along with its other access information, as her Corps colleagues at WSMR regularly did (findings 5, 9). However, the government did not disclose that information with this RFP or otherwise tell the MATOC contractors about it prior to bidding. The government's attempt to avoid liability simply because it did not possess a precise schedule of future tests is also meritless. What it did know and did not convey was that tests occurred regularly, often leading to range roadblocks and evacuations (finding 5). Clearly, the government failed to furnish with the RFP known site-specific information about installation procedures affecting the work, which also pertained to the hours that work could be performed onsite and access to travel routes. Thus, it did not comply with Section 7 of the MATOC.

The government contends that it was excused from providing CEI with any information within the scope of Section 7 that was reasonably available to CEI from other sources. Nothing in Section 7 limits its application in that manner. The government cites no authority holding that a contracting party can escape liability for breaching a specific obligation to communicate certain information so long as the other party could find it elsewhere. Such a holding would undermine Section 7's purpose of permitting contractors to rely upon the government to supply this

information. Not surprisingly, the cases the government purports to support its argument are not breach cases focusing upon the government's compliance with express contractual duties. They are superior knowledge cases. While that doctrine independently imposes an implied obligation on the government to disclose to all contractors otherwise unavailable novel information vital to contract performance, it is not necessary to its purpose that it extend to information that can reasonably be obtained from other sources. See *Giesler v. United States*, 232 F.3d 864, 876 (Fed. Cir. 2000); *Petrofsky v. United States*, 616 F.2d 494, 497 (Ct. Cl. 1980); *Ambrose-Augusterfer Corp. v. United States*, 394 F.2d 536, 547-48 (Ct. Cl. 1968); *Lovering-Johnson, Inc.*, ASBCA No. 53902, 06-1 BCA ¶ 33,126 at 164,171; *Johnson Controls World Servs., Inc.*, ASBCA Nos. 40233, 47885, 96-2 BCA ¶ 28,458 at 142,140-41. Contrary to the government's suggestion, the superior knowledge doctrine does not relieve it from keeping its express promises.

Even if the availability elsewhere of information subject to Section 7 could relieve the government of its obligations, the government has not persuaded us that CEI should have learned about range roadblocks and evacuations on its own. Previously, the government, including FRP, had usually provided notice of such restrictions in its contracts with CEI (finding 10). With no warnings given about range roadblocks and evacuations in either the RFP, during the pre-proposal site visit, or on the surrounding roads, it was reasonable for CEI to conclude there would not be such restrictions upon its performance (findings 7, 9, 22-25). The government stresses that WSMR's public website advertised that roads were often closed due to testing and provided a phone number with a recorded message. The RFP did not direct the MATOC contractors to that website (finding 9). Anyway, the site only referred to the public roads leading to the base, not the range roads that span it. The absence of any reference to the range roads was revealing, juxtaposed as it was against the discussion of the public roads. Also, elsewhere the website stated that most public road closures only lasted an hour, with the remainder taking an additional 20 minutes. (Finding 6) The government's suggestion that the website provided notice of anything like the lengthy range roadblocks and evacuations CEI encountered is simply incorrect. Moreover, the public roadblocks were placed beyond CEI's access point to the base so they did not impede it (finding 14). Given that the phone number provided by the website was associated with its discussion about public roadblocks, it is hardly surprising if CEI did not call it prior to bidding (findings 6, 13). CEI was otherwise forbidden from inquiring of WSMR personnel about activities at the facility (finding 8). For this reason, the government has also failed to demonstrate that CEI did not reasonably ascertain the nature of the work under the MATOC's site investigation provisions.

The government also implies it can disclaim responsibility for informing the MATOC contractors about the potential for range roadblocks and evacuations because the contracting entity was the Corps' FRP component in Huntsville, whose contracting officer did not know about them, while the WSMR roadblocks were managed by the

Army through ATEC. FRP acted for the benefit of the Air Force, and essentially as its agent (finding 3). The Air Force, FRP's Corps colleagues at WSMR, and even the FRP program manager, were aware while participating in developing the PWS that these restrictions regularly occur (finding 5). Indeed, the Corps at WSMR usually placed a warning about site restrictions in its own solicitations, and the range roadblocks and evacuations imposed upon CEI were within the general experience of Mr. Evans of the Air Force (findings 5, 21). That they failed to provide that information to the contracting officer, preventing her from disclosing it in the RFP as she would have had she known, does not relieve the government from its Section 7 obligations. See *J.A. Jones Constr. Co. v. United States*, 390 F.2d 886, 892-93 (Ct. Cl. 1968) (holding that, as a fellow Department of Defense entity employing the Corps as a contracting agent, the Air Force was also responsible for the contract's disclosure obligations and the government was liable for their breach); *Raytheon Missile Sys.*, ASBCA No. 58011, 13 BCA ¶ 35,241 at 173,017-18 (concluding the government cannot avoid the consequences of its inaction by insulating the contracting officer from relevant information).

The government's additional contention that it is shielded from liability for closing the range roads and requiring evacuations because they were sovereign acts is irrelevant. It is true that under the sovereign acts doctrine the government is not liable for obstructions to the performance of its contracts resulting from its public and general acts as a sovereign that only incidentally fall upon the contract. Along with demonstrating its act was public and general, to invoke that defense the government must prove its act otherwise qualified to release it from liability for non-performance under ordinary impossibility or impracticability principles of contract law. See *Am. Gen. Trading & Contracting, WLL*, ASBCA No. 56758, 12-1 BCA ¶ 34,905 at 171,637. That might or might not be the case if CEI was arguing that the closures and evacuations for missile testing themselves were a breach. But it is not. CEI claims the government breached the MATOC by not complying with Section 7's requirement to furnish CEI notice of those regular procedures with the task order RFP. The government has not identified any public and general act that made compliance with that obligation impossible under ordinary contract principles. Indeed, as previously observed, instead of showing that a sovereign act prohibited it from disclosing the access restrictions at WSMR, the government admits it could have given that notice to the MATOC contractors (gov't br. at 21).² The only reason the contracting officer did not notify the MATOC contractors about the regular range roadblocks and evacuations was that nobody bothered to tell her about them (finding 9). See also *Anham, FZCO, LLC*, ASBCA No. 59283, 17-1 BCA

² Additionally, it maintains that Mr. Evans and Lt. Souza did so. However, we have rejected that contention as a factual matter (findings 22-25).

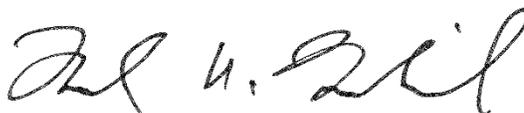
¶ 36,817 at 179,442 (finding that simply because the information the government was obligated to provide pertained to sovereign acts did not insulate the government from liability).

Finally, the government strays from discussing entitlement by contending that CEI voluntarily accelerated performance of the task order without its approval by working overtime in violation of the contract's terms, leading to CEI finishing ahead of schedule. It denies responsibility for any costs associated with the early completion. The government does not explain how these allegations, if correct, permit it to escape its breach of the MATOC's disclosure mandate. For instance, it does not suggest, nor can it, that this alleged violation might constitute a prior material breach. If CEI accelerated performance, it did so after the government disregarded the MATOC's requirement to furnish information with the task order RFP. Nor do the government's allegations dictate that CEI could not have suffered any monetary damages caused by the government's inaction. For its part, CEI denies that it is advancing a claim for acceleration. Finding no relevance in these allegations to our determination of CEI's entitlement, we make no further factual or legal findings about them here.

CONCLUSION

The government breached the MATOC. The appeal is sustained on entitlement and returned to the parties for a quantum determination.

Dated: December 28, 2023



MARK A. MELNICK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



OWEN C. WILSON
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

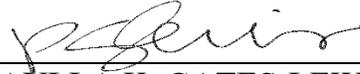
I concur



J. REID PROUTY
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 62628, Appeal of Central Environmental, Inc., rendered in conformance with the Board's Charter.

Dated: December 28, 2023



PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals