ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Kellogg Brown & Root Services, Inc.	)	ASBCA Nos. 59385, 59744
	)	
Under Contract No. N62470-13-D-3008	)	

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OPINION BY ADMINISTRATIVE JUDGE MELNICK PARTIALLY DISMISSING THE APPEALS AND GRANTING SUMMARY JUDGMENT FOR THE GOVERNMENT UPON THE REMAINDER

These appeals are about a base support contract in the African nation of Djibouti. Kellogg Brown & Root Services (KBR) seeks compensation for additional costs it incurred and invoice deductions applied to it while performing a military base support contract in that country. The Djiboutian government backed a labor strike against KBR to pressure it into retaining more local national employees at higher wages for the contract's performance. Similarly, the Djiboutian government restricted the entry into the country of third country nationals hired by KBR to force it to retain even more local workers. KBR complains that the United States Navy breached the support contract by not doing enough to assist it with these obstacles, breached an Access Agreement between the United States Government and Djibouti that KBR claims is for its benefit as a third party, or must compensate it under other contractual theories. The third party beneficiary claim is dismissed for lack of jurisdiction and summary judgment is granted to the government upon the remainder of the appeals.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

The following facts are not the subject of genuine dispute.

1. The Republic of Djibouti is an African nation that is slightly smaller than New Jersey. It is strategically located on the Horn of Africa at the intersection of the Red Sea and the Gulf of Aden. Djibouti hosts several thousand American military personnel at Camp Lemonnier (R4, tab 2 at 174).[1] *Djibouti*, THE WORLD FACTBOOK, https://www.cia.gov/library/publications/resources/the-world-factbook/geos/dj.html.

2. In 2003, the United States Government executed an international agreement with Djibouti (Access Agreement) in support of their defense relationship (app. supp. R4, tab 10). *See also* Agreement Between the Government of the United States and the Government of the Republic of Djibouti on Access to and Use of Facilities in the Republic of Djibouti, Djib.-U.S., Feb. 19, 2003, T.I.A.S. No. 03-219, https://permanent.access.gpo.gov/gpo35805/191488.pdf. The Access Agreement authorized unimpeded access to the government and its contractors to Camp Lemonnier (app. supp. R4, tab 10 at 627). Accordingly, the agreement stated that government contractor employees would be required to obtain passports to enter the country, but not visas (*id.* at 628).

3. The Access Agreement provided that "[a]ny dispute that may arise from [its] application, implementation, or interpretation . . . shall be resolved by consultation between the Parties or their Executive Agents, including, as necessary, through diplomatic channels, and will not be referred to any national or international tribunal or any third party for settlement" (*id.* at 632). It omitted any mechanism for binding enforcement.

4. On December 6, 2012, the Commander Naval Facilities Engineering Command Atlantic (NAVFAC, Navy, or government) awarded the contract identified above to KBR (R4, tab 1). The majority of the contract required recurring base operation support services at Camp Lemonnier for a firm-fixed price (R4, tab 1 at 132-37, 140).

5. KBR had been the Camp Lemonnier base support contractor between 2002 and 2007 (app. supp. R4, tab 76 at 1047-48; gov't mot., ex. 3). Based upon this earlier experience, KBR's proposal stressed its understanding of the challenges and staffing requirements, as well as its working relationships with local labor brokers (*id.* at 1047). KBR described its prior partnerships with the Djiboutian government, leading to its award of $11,000,000 in contracts with local labor brokers that enhanced

[1] The government submitted a Rule 4 file for each of the docketed appeals. Unless otherwise stated, all Rule 4 references are for ASBCA No. 59385.

the economy and created an effective, functional, and dependable national labor force (*id*. at 1048). KBR acknowledged the effect of its local hiring upon the Djiboutian economy (*id*. at 1084).

6. As was its previous practice at Camp Lemonnier, KBR's proposal identified three categories of contract labor. They were directly hired U.S. "expat[s]," directly hired foreign nationals or third country nationals (TCNs), and subcontracted host nationals (or local nationals). (App. supp. R4, tab 7 at 232, tab 9 at 620-25, tab 76 at 1084) As before, KBR retained a local subcontractor labor broker "for [host national] labor services" (app. supp. R4, tab 7 at 234, tab 76 at 1084). KBR generated a staffing plan that would employ approximately 500 host country nationals (compl. and am. answer ¶ 13; app. prop. finding and gov't resp. ¶ 12; R4, tab 5 at 188).[2]

7. Before award, KBR met with Djiboutian government representatives. The officials expressed frustration that more local nationals were not working on the existing contract and the desire that wages remain stable or increase (gov't mot., exs. 3-4). KBR knew about the risk of strikes in the event a low bid led to wage reductions and the Djiboutian government's concerns about wage rates (gov't mot., ex. 95 at 41, ex. 56). Nevertheless, KBR's proposal reduced the number of host country nationals from the total used by the incumbent contractor (compl. and am. answer ¶¶ 13, 20). The Navy found KBR's staffing plan reasonable and it was incorporated into the contract along with the rest of the proposal (app. prop. finding and gov't resp. ¶¶ 14, 17; am. answer ¶ 121; R4, tab 1 at 3).

[2] Unless otherwise stated, the cited complaint and amended answer are in ASBCA No. 59385. KBR's July 31, 2019, statement of undisputed facts cites to the government's original answer in ASBCA No. 59385, dated October 3, 2014. However, on June 20, 2018, the Board granted the government's May 18, 2018, request to amend the answers in both appeals. The government explained that the amendments simply added affirmative defenses. Accordingly, the Board will cite to the amended answer in ASBCA No. 59385, filed June 29, 2018.

The government also argues that statements it has made in its answer are not binding upon it for purposes of this motion, claiming that Board Rule 7(c) does not permit KBR to rely upon "averments" in an answer as evidence that certain facts are undisputed (gov't statement of gen. issue ¶ 3). The contention is rejected. The averments are binding judicial admissions. *Griffin Servs., Inc.*, ASBCA Nos. 54246, 54247, 04-2 BCA ¶ 32,710 at 161,822.

8. The first annex of the contract's Performance Work Statement contained an item entitled "Technical Proposal Certification." It stated:

> The Contractor warrants that its proposal . . . including . . . proposed approaches, staffing, methodology, or work plans, will meet the performance objectives set forth in this contract . . . . The Contractor is not excused from meeting such performance objectives in the event such proposal proves inadequate as conceived or executed to meet such performance objectives. The Contractor understands that it bears all of the cost and performance risk associated with adopting acceptable additional (and/or alternative) means or methods of meeting the performance objective.

(R4, tab 2 at 176)

9. The first annex also included an item entitled "Partnering Philosophy." It provided:

> The Navy views its contractors as partners and not just abstract service providers. The Navy wants its contractors to succeed because partners' success drives the Navy's successful mission completion. Within the bounds of acquisition policy, the Navy intends to work to find solutions that will be beneficial to both the Government and its partners.

(R4, tab 2 at 175) The second annex, pertaining to management and administration, contained more discussion about partnering, requiring cohesive partnering between the government, KBR, and subcontractors to achieve quality services (app. supp. R4, tab 3 at 115). KBR's proposal also stated that partnering is a tool for developing long term relationships to support project success (app. supp. R4, tab 76 at 1095). Finally, among other things, a partnering charter dated July 24, 2013, repeated the commitment to work toward success, consider the camp's best interests, address and solve problems, maintain trust, open and honest communications, a "win-win" relationship, seek integration, and maintain a culture of understanding and collaboration (gov't mot., ex. 85 at 87446).

I. The Djiboutian Government Supported Labor Strike

10. In May of 2013, KBR executed a subcontract with its labor broker to provide host country nationals for the contract (gov't mot., exs. 16-18). By mid-June 2013, KBR was aware that its broker had failed to retain the necessary workforce to

staff the camp (R4, tab 11; gov't mot., ex. 32). Between June 16 and 18, 2013, KBR's labor broker informed it that host country employees who had worked under the previous contractor's broker had attacked its office, demanding that they be paid their prior wage rates. The broker later reported that none of the former employees signed their employment contracts. (App. supp. R4, tab 21)

11. Between June and July of 2013, and with the Navy's knowledge, host country nationals engaged in a strike upon KBR (compl. and am. answer ¶ 23). Djiboutian government officials expressed support for the strike to KBR, noting the number of people who would be unemployed by KBR's staff reductions. Djibouti's Minister of Labor stated that KBR must hire 1,037 employees at the wages paid by the prior contractor. (App. supp. R4, tabs 23-24, 26, 29 at 726, 30, 38; gov't mot., ex. 64) In meetings with the Navy and U.S. Embassy, Djiboutian ministers declared it preferable to close the camp than leave 500 people unemployed (gov't mot., ex. 64).

12. On June 28, 2013, KBR notified the contracting officer (CO) that the Djiboutian government had deliberately interfered with its contract, causing the strike. KBR claimed the Djiboutian interference entitled it to schedule relief and compensation for its costs attempting to resolve the matter. (R4, tab 11) The CO's July 3 response stated that KBR's proposal represented that it understood the region's challenges, elaborated about how it would man the work, and that it was fully versed in Djiboutian labor requirements. She asserted that KBR could end the dispute at any time. She reiterated that KBR was responsible for performing the contract. (R4, tab 12)

13. In a July 9, 2013 meeting with KBR, NAVFAC acquisition officials repeated that KBR's labor issues in Djibouti were for KBR to solve. However, on July 10, the Commander of NAVFAC Atlantic informed KBR that the matter was being briefed at the level of the Secretary of the Navy and the Office of the Secretary of Defense (OSD). (Gov't mot., ex. 58) In the June and July time frame, the African Affairs section of OSD held interagency meetings with the Department of State about the strike (gov't mot., ex. 55). Also, U.S. Naval Forces Europe and Africa desired to engage with the Department of State to resolve the matter (gov't mot., ex. 59). A July 27 attempt by a DOD official to convince Djibouti to suspend the strike failed. He was told that the only solution was to rehire all of the former employees at the camp (gov't prop. finding ¶ 85; gov't mot., ex. 65). OSD's Director of Defense Procurement decided to obtain funding for additional labor on the contract in the interest of national security, stating an intent to direct NAVFAC to hire 1,037 local nationals through the existing contract (gov't mot., ex. 66).

14. On August 1, 2013, the Chief of Staff of the United States Africa Command (AFRICOM, the combatant command supported by the camp) issued a memorandum to NAVFAC stressing the importance of Camp Lemonnier. Declaring that Djibouti had established a socioeconomic policy requiring no reductions in the

retention of local nationals, he required the employment of 1037 Djiboutians on the contract. He requested that NAVFAC take all necessary actions to ensure compliance with Djibouti's policy. (R4, tab 14; app. mot., ex. 3 at 172)

15. On August 2, 2013, KBR and the government modified the contract to require a staff of 1,037 Djiboutians at the same skill level and pay rate established under the predecessor contract. KBR was to use a labor broker approved by the Djiboutian government. The parties agreed to $14,242,049 in additional payment. (R4, tabs 5-6) Neither party suggests that the strike continued.

II. The Djiboutian Restrictions Upon Third Country Nationals

16. In March of 2013, the Navy notified U.S. personnel and contractors that Djiboutian officials were requiring them to purchase visas for entry into the country, in contravention of the Access Agreement. It provided procedures to follow for reimbursement in case that continued. (App. supp. R4, tab 11) In April, the Navy forwarded to Djibouti two lists of KBR employees that were entitled to entry into the country without visas in accordance with the Access Agreement (app. supp. R4, tab 12). There is no evidence it was successful.

17. On July 9, 2013, KBR notified the Navy that seven TCNs were denied entry into Djibouti (app. supp. R4, tab 32). The Embassy, Navy and OSD acknowledged that denial of entry to TCNs or imposition of visa requirements violated the Access Agreement (compl. and answer ¶ 38; app. mot., ex. 2 at ex. 1, ex. 3 at exs. 24, 29).[3] The Embassy suggested that KBR draft an authorization letter for each worker to be signed by the Navy, but the Navy declined to do so (compl. and answer ¶¶ 38-39). Subsequently, the CO informed KBR that any issues regarding Djibouti's compliance with the Access Agreement were between that government and the Department of State. She said KBR was responsible for meeting its performance requirements. (App. supp. R4, tab 36)

18. The Djiboutian government's restrictions continued, with TCNs barred from entry and then deported. These actions forced KBR to suspend travel for new hires as well as the departure or return of existing employees on rest and relaxation and travel for family emergencies. Djiboutian officials told KBR that the Access Agreement was void. At various times they required KBR to submit lists of TCNs for approval. They also required the purchase of work permits and the acquisition of visas. (Compl. and am. answer ¶¶ 48, 50; R4, tab 16 at 353; app. supp. R4, tabs 40-43, 46-48, 54-55, 60-61, 65, 67-68, 72; app. mot., ex. 3 at ex. 24, ex. 4 at ex. 12, ex. 10 at ex. 17)

[3] These exhibits to the motion have internal exhibits.

19. Though the CO disclaimed responsibility to address the TCN issue, KBR was free to meet with the Djiboutian government. Other U.S. Government officials (including National Security staff, senior Navy personnel, OSD, and the United States Ambassador to Djibouti) focused upon the matter and engaged with KBR and Djibouti about solving it. (App. prop. finding and gov't resp. ¶ 70; app. mot., ex. 8; gov't mot., exs. 75-76, 87; app. supp. R4, tab 44 at 773) Thus, Djibouti's Minister of Labor explained in a meeting attended by U.S. military officials and the Ambassador that his government required lists of TCNs because it would only permit the entry of those possessing skills not available among local nationals. He also said that local nationals should be trained to perform the work of TCNs. (App. mot., ex. 8) In a meeting with Djibouti's foreign minister, also attended by military personnel that included the Navy's camp commander, the Ambassador discussed the stalemate arising from the TCN embargo, described its impairment upon camp operations, and sought the return to unrestricted TCN access in accordance with the Access Agreement. The foreign minister rejected that appeal, saying for political reasons Djibouti would not return to the previous entry regime for TCNs. He re-emphasized that under the new policy Djibouti would only allow in TCNs possessing skills unavailable in Djibouti. (App. mot., ex. 10 at ex. 17) Both the U.S. Embassy and the Navy chose not to participate in Djibouti's process for choosing which TCNs to permit in the country because it was inconsistent with the Access Agreement and placed the Navy in the position of picking winners and losers among contractors (app. mot., ex. 2 at ex.18 at 19880).

20. As the United States Embassy, coordinating with officials of the Department of Defense and the Navy (through a working group), engaged with Djibouti to resolve its violation of the Access Agreement, it considered a possible grand bargain that would achieve long-term stability associated with a series of short-term fixes (app. mot., ex. 3 at ex. 24 at 00479). The Navy recognized that what it had previously viewed as a KBR/Djibouti issue was a U.S Government/Djibouti matter (app. mot., ex. 4 at ex. 14 at 9260). OSD and the Navy understood that continuation of the embargo was adversely affecting Navy operations and finances (app. mot., ex. 3 at ex. 29 at 650, ex. 4 at ex. 19). Indeed, NAVFAC pressed AFRICOM (and by association the Department of State) to pursue a grand strategy that would lead to Djibouti's renewed adherence to the Access Agreement (app. mot., ex. 9 at 31442).

21. In January of 2014, Djibouti transmitted a diplomatic note to the U.S. Embassy, offering to permit access by TCNs for an interim period during which Djibouti and the United States would discuss the reinforcement of their partnership. However, it sought identifying information about the TCNs ahead of time so that they could obtain visas. (App. mot., ex. 2 at ex. 19) The embassy considered the visa proposal inconsistent with the Access Agreement (app. mot., ex. 4 at ex. 23). The responsive diplomatic note from the United States reminded Djibouti that visas were not required under the Access Agreement. It agreed in general to provide information about TCNs ahead of their arrival in recognition

of Djibouti's interest in verifying the TCN's identities, but stressed that visas should not be required and any entry verification must be free of cost to the United States. It sought Djibouti's agreement to these terms, noting that an initial list of TCNs was ready for delivery. (App. mot., ex. 12)

22. By February of 2014, KBR reported to the State Department that 200 employees had not been able to leave on R and R, or otherwise depart the work site for fear of not being able to return to their jobs. In addition, replacements for key personnel that resigned from the project could not enter the country. (App. supp. R4, tab 48)

23. On May 1, 2014, the United States executed an "Arrangement in Implementation of the" Access Agreement with Djibouti. This arrangement reset the countries' relationship by clarifying facility access rights. (App. supp. R4, tab 15) It committed Djibouti to "ensure that all United States contractor employees have unimpeded access to and use of those facilities and areas to which the United States has authorized them access." It obligated the United States "to require that its contractors provide information on their employees thirty . . . days in advance of their respective arrival . . . or as practicable." The requirement would "not affect the authorization, pursuant to the Access Agreement, for . . . contractor employees . . . to enter Djibouti" unless Djibouti barred the person on the basis of national security. (*Id.* at 646) There is no evidence the TCN restrictions continued after the new arrangement was executed.

III. Requests for Equitable Adjustment and Claims

24. On February 11, 2014, KBR resubmitted four Requests for Equitable Adjustment (REAs) that had been previously denied by the government, and added one more, packaging all of them as a new, single REA. The new REA sought $2,430,226.57 in costs incurred by KBR, and invoice deductions applied to it, due to the local national labor strike and Djibouti's refusal to allow TCNs into the country. (R4, tab 20) The CO denied the request on February 25 (R4, tab 21). On March 13, KBR submitted a certified claim to the CO for the amount sought in the REA, which was denied on May 27 (R4, tabs 22-23). KBR appealed that decision and it was docketed as ASBCA No. 59385.

25. On August 1, 2014, KBR submitted another REA to the CO for $519,021 in costs incurred obtaining work permits and visas required by Djibouti for its TCNs. That request was denied on September 24. On October 1, KBR submitted a certified claim for the requested amount to the CO, which was denied on December 10 (ASBCA No. 59744 (59744) R4, tabs 1-4). KBR's appeal from that decision was docketed as ASBCA No. 59744.

IV. The Complaints

26. The two appeals have been consolidated. We refer to the complaint in ASBCA No. 59385.

27. Counts I and IV generally claim breach of contract, and more specifically breach of the contract's implied duty of good faith and fair dealing. Count III contends that the government's refusal to relieve KBR of its contractual obligations, combined with its failure to assist KBR with the strike and embargo, constitutes a constructive change. Count V argues that KBR and the government were mutually mistaken about whether Djibouti would honor the Access Agreement. Count VI suggests the government knew that the Djiboutian government would adversely react to its plan to reduce staffing from the level used on the prior contract, leading to a strike and disregard of the Access Agreement. The government allegedly breached its duty to disclose this superior knowledge, causing KBR to incur unjustified costs. Count II alleges that Djibouti's promise in the Access Agreement to permit unimpeded contractor access to Camp Lemonnier conferred a benefit upon KBR, making it an intended third-party beneficiary of the Access Agreement. It claims the government's failure to enforce the agreement for KBR's benefit after Djibouti breached it is in turn a breach by the government.

DECISION

KBR seeks partial summary judgment on entitlement. The government moves to dismiss Count II for lack of jurisdiction and also seeks summary judgment upon all counts.

I. The Board's Lack of Jurisdiction To Entertain Count II's Third Party Beneficiary Claim

Before addressing the merits of summary judgment we first consider our jurisdiction to entertain Count II. As noted, KBR contends in Count II that it is a third party beneficiary of the Access Agreement. It argues that Djibouti's support for the strike and imposition of the embargo violated the promise it made in that agreement (compl. ¶ 116). KBR contends that the U.S. Government then failed to honor the Access Agreement by not invoking its provision for dispute resolution through governmental consultation with Djibouti (compl. ¶ 118-19). KBR claims the government's failure to enforce the Access Agreement through the disputes mechanism interfered with KBR's enjoyment of the benefit conferred upon it, causing KBR to incur costs arising from the strike and embargo (compl. ¶ 119).

The Board's jurisdiction typically arises from the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-09. *Latifi Shagiwall Constr. Co.*, ASBCA No. 58872, 15-1 BCA

¶ 35,937 at 175,633. The CDA is a waiver of sovereign immunity that must be strictly construed. *Winter v. Floorpro, Inc.*, 570 F.3d 1367, 1370 (Fed. Cir. 2009); *see also Franconia Assocs. v. United States*, 536 U.S. 129, 141 (2002) (observing that a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed") (quoting *United States v. King*, 395 U.S. 1, 4 (1969)). It is true that the substantive law of contracts recognizes a right of third-party beneficiaries to sue for breach of an agreement to which they are not parties when they show it was for their direct benefit. *See Pac. Gas and Elec. Co. v. United States*, 838 F.3d 1341, 1361-62 (Fed. Cir. 2016), *cert. dismissed*, 138 S. Ct. 2647 (2018). However, such actions do not fall within the scope of the CDA's waiver of sovereign immunity applicable to this Board. Here, only a contractor may bring an appeal on a contract. 41 U.S.C. § 7104(a). And a contractor is limited to a party to a government contract other than the government. 41 U.S.C. § 7101(7). KBR is not a party to the Access Agreement and therefore cannot bring an action here premised upon its terms. Its alleged status as an intended third-party beneficiary does not exempt it from this requirement. *Winter v. Floorpro*, 570 F.3d at 1369-72.

In an effort to avoid the limitations upon the Board's jurisdiction, KBR stresses that the claimant in *Floorpro* was a subcontractor seeking to enforce a government prime contract, while KBR is the prime contractor with the government on the support contract (app. mot at 20-21). But what matters is that KBR is not a party to the Access Agreement. Unlike other counts of the complaint that are premised upon KBR's contract with the Navy, Count II alleges that the Access Agreement bestows third party benefits upon KBR that have been impaired by the government's failure to enforce it. The alleged claims of third-party beneficiaries to contracts are not cognizable here under the CDA.

KBR's briefs attempt to retreat from the complaint's allegations, denying that Count II "is . . . seeking to enforce any contractual rights set forth in the Access Agreement" (app. mot. at 21). It suggests the count merely contends that "the Navy breached its [c]ontract with KBR by failing to partner with KBR to address the violations of the Access Agreement that robbed KBR of the 'benefit of the bargain' of its Contract" (*id.*). Thus, it suggests that Count II is really alleging that the prime contract promised KBR that the government would enforce the Access Agreement for its benefit. However, KBR then inconsistently repeats that it is an intended third-party beneficiary of the Access Agreement (*id.*). Count II does not accuse the Navy of "failing to partner" under its contract with the Navy. That is essentially the allegation of the other counts. Count II says the Navy's alleged refusal to engage the Djiboutian government under the Access Agreement's disputes mechanism denied KBR the benefit granted to it by the Access Agreement (compl. ¶ 118). Count II is a third-party beneficiary claim upon the Access Agreement which KBR may not pursue in this forum.

Even if the Board could otherwise entertain third-party beneficiary contract claims, the Access Agreement is not the type of contract subject to the Board's jurisdiction. The CDA's waiver of sovereign immunity only encompasses contracts made by an executive agency for the procurement of property other than real property; services; construction, alteration, repair, or maintenance of real property; or the disposal of personal property. 41 U.S.C. § 7102(a); *see Lee's Ford Dock, Inc. v. Sec. of the Army*, 865 F.3d 1361, 1366-67 (Fed. Cir. 2017). The Access Agreement was just that, an international agreement between the U.S. government and another nation granting the government and its contractors access to Camp Lemonnier and other facilities. It was not a procurement by an executive agency or a disposal of property.

For these reasons, Count II is dismissed for lack of jurisdiction.[4]

II. The Cross Motions For Summary Judgment Upon The Remaining Counts

The parties cross move for summary judgment upon each of the remaining counts. Summary judgment should be granted if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); FED. R. CIV. P. 56(a). In applying this standard, we must draw all justifiable inferences in the non-movant's favor. However, a non-movant seeking to defeat the suggestion that there are no genuine issues of material fact may not rest upon its pleadings, but "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986) (quoting *First Nat. Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288 (1968)). Furthermore, after an opportunity for discovery, summary judgment must be entered upon motion against a party "who fails to make a showing sufficient to

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[4] Even if KBR could pursue a third-party beneficiary claim based upon the Access Agreement, its claim is against the wrong party. KBR contends that it is a beneficiary of Djibouti's promise to permit it unimpeded access to Camp Lemonnier, which Djibouti violated by supporting the strike and imposing the embargo. Under these allegations it is Djibouti that breached the Access Agreement, not the government. At most under this claim, the government declined to enforce Djibouti's promises in the Access Agreement. That is not a breach of contract by the government. *See Sullivan v. United States*, 625 F.3d 1378, 1380-81 (Fed. Cir. 2010).

Finally as observed both in the Statement of Facts and below, in fact the U.S. government did diplomatically consult with Djibouti about its violation of the Access Agreement, which was its only recourse, achieving the May 1, 2014 arrangement that essentially eliminated Djibouti's restrictions on TCNs (SOF ¶¶ 19-20, 23).

establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322.

A. The Djiboutian Supported Labor Strike

1. KBR's Breach of Contract Theories

First, we consider whether either of KBR's breach theories contained in Counts I and IV entitle it to recover as a result of the strike. In general, "[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). Among every contract's terms is a covenant of good faith and fair dealing imposing a "duty not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party regarding the fruits of the contract." *Dobyns v. United States*, 915 F.3d 733, 739 (Fed. Cir. 2019) (quoting *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005)), *cert. denied*, 140 S. Ct. 1106 (2020). Any non-performance of an expressed contractual duty, as well as a failure to fulfill the covenant of good faith and fair dealing, is a breach. *Metcalf Constr. Co. v. United States*, 742 F.3d 984, 990 (Fed. Cir. 2014) (citing RESTATEMENT (SECOND) OF CONTRACTS § 235 (1981)).

a. Count IV's General Breach Claim

Count IV's general breach claim contends that the Navy's failure to take remedial action to address the strike was a breach (compl. ¶¶ 136-37; app. mot. at 28). However, the Navy did address the strike, funding a contract modification approximately one month after it started that required KBR to hire the 1,037 people demanded by the Djiboutian government, rather than the approximately 500 planned by KBR (SOF ¶ 15). By seeking the costs it allegedly incurred before the Navy modified the contract, KBR complains that the Navy did not act fast enough (tr. 18-20). KBR has not shown why that is so and the contract language dictates otherwise.

The contract made KBR, not the government, responsible for furnishing the labor necessary for performance. KBR's proposal stressed to the government its understanding of the challenges and staffing requirements, its prior partnerships with the Djiboutian government, and its awareness of the impact of local hiring upon the Djiboutian economy. These statements indicated that it could and would navigate the terrain necessary to retain its desired number of local workers through a subcontractor labor broker. (SOF ¶ 5) Inherent in that responsibility was fulfilling host nation governmental conditions to hiring. Prior to award, KBR knew Djibouti officials were concerned about wages (SOF ¶ 7). Nothing in the contract required the government to

perform any function related to the acquisition of labor, such as preventing or stopping Djiboutian labor strikes against KBR arising from reduced hiring and wages. Nor did the government warrant that KBR's desired number of local nationals would be available free of any strike, or without Djiboutian government involvement. *See Oman-Fischbach Int'l* (*JV*) *v. Pirie*, 276 F.3d 1380, 1383-84 (2002) (explaining that a warranty is an assurance by one party to an agreement of the existence of a fact that the other party may rely upon) (citing *Dale Constr. Co. v. United States*, 168 Ct. Cl. 692, 699 (1964)). Unless the U.S. government assumed the risk of a Djiboutian government supported labor strike against KBR in unmistakable terms, it is not liable for those third party acts. *Id.* at 1385; *see also Zafer Taahhut Insaat ve Ticaret A.S. v. United States*, 833 F.3d 1356, 1364 (Fed. Cir. 2016) (addressing Pakistan's closure of its border with Afghanistan, delaying the appellant's delivery of materials, and holding "the U.S. government is not responsible for the sovereign acts of a foreign nation"). There were no such risk shifting terms in this contract.

Contrary to KBR's suggestion, neither *J.E. McAmis, Inc.*, ASBCA No. 54455 *et al.*, 10-2 BCA ¶ 34,607, nor *Swinerton & Belvoir*, ASBCA No. 24022, 81-1 BCA ¶ 15,156, dictate a different outcome. *McAmis* considered *Oman-Fischbach* distinguishable when it found the government breached an implied warranty that haul routes would be free from restriction by a county government. In this case, the government did not unmistakably guarantee that KBR would be immunized from the effects of a third party labor strike. Here, *Oman-Fischbach* is indistinguishable. *Accord ECC Int'l Constructors, LLC*, ASBCA No. 59138, 19-1 BCA ¶ 37,252. Similarly, *Swinerton* found the government liable when its sovereign act delayed clearances for the entry of aliens into Guam beyond the 90-day time period stated in the contract. The Board held that the government contractually assumed the risk of its sovereign act. *See generally Hills Materials Co. v. Rice*, 982 F.2d 514, 516 n.2 (Fed. Cir. 1992) (noting that the sovereign acts doctrine does not prevent the government from affirmatively assuming responsibility for particular sovereign acts). Here, the government did not assume comparable liability for the acts of third parties.[5]

[5] KBR also cites *Yates-Desbuild Joint Venture v. Dep't of State*, CBCA No. 3350 *et al.*, 17-1 BCA ¶ 36,870. KBR says this non-binding decision of a sister board stands for the proposition that the government bears responsibility for costs caused by the interference of a third-party sovereign. KBR omits a pin cite to the portion of this 71-page opinion that supposedly supports that assertion. Without mining the ruling in detail for KBR, our review does not reveal support for the broad contention that the government is strictly responsible for the acts of other countries. Such a conclusion would be inconsistent with the court of appeals decisions cited above. We would not agree with it if it did hold as KBR suggests.

KBR primarily relies upon the contract's "Partnering Philosophy" provision to support its suggestion that the government did not do enough to satisfy its promises. There, the contract states:

> The Navy views its contractors as partners and not just abstract service providers. The Navy wants its contractors to succeed because partners' success drives the Navy's successful mission completion. Within the bounds of acquisition policy, the Navy intends to work to find solutions that will be beneficial to both the Government and its partners.

(SOF ¶ 9) To a minor degree, the contract's second annex flushed out the scope of partnering by requiring it to be cohesive to achieve quality services (*id.*). These aspirational declarations of a desire or goal for the "success" of both the Navy and its partners, and an intent to find abstract solutions "beneficial to all" within the bounds of an undefined "acquisition policy," are too amorphous to provide any basis to identify concrete obligations. They fail to establish a standard for what must be accomplished to find beneficial solutions or dictate consequences for noncompliance. The provision is not connected to any mandatory performance duties, but is merely precatory.[6] *See Muller v. Gov't Printing Office*, 809 F.3d 1375, 1380-81 (Fed. Cir. 2016) (concluding that contract language stating the parties will proceed expeditiously is precatory and not obligatory, favoring such a conclusion when the words only identify a general goal and trigger no consequences for noncompliance); *see also Telzrow v. United States*, 127 Fed. Cl. 115, 123 (2016) (holding language expressing a government intent to permit a landowner the opportunity to participate in restoration and management is precatory not obligatory); *Woodmere Acad. v. Steinberg*, 363 N.E.2d 1169, 1173 (N.Y. 1977) (finding a representation that a school will "wisely" manage its affairs is precatory in the absence of bad faith because its vagueness and subjective nature drains it of practical meaning). It does not constitute a contractual promise subject to a claim of breach.

Even if the contract's partnering language could be construed to impose some clear contractual requirement upon the Navy, KBR fails to tie it to an obligation to more timely remedy a labor strike against KBR. It is too much of a stretch to read a Navy statement of desire that its partner succeed, and intention to work to find beneficial solutions to problems, into an affirmative responsibility to intercede with, prevent or end a labor strike within some unstated time period that was simply faster than what occurred. KBR does not define exactly what actions the government should

[6] The July 24, 2013, partnering charter between the parties was similarly aspirational (SOF ¶ 9).

have taken to satisfy that purported obligation or how they flow from the partnering language (tr. 16, 18-19). Nor is the logic of that contention otherwise apparent.

b. Count I's Good Faith and Fair Dealing Claim

Count I's invocation of the duty of good faith and fair dealing serves KBR no better than its express breach claim. KBR's contentions about the breadth of the government's obligations to comply with the duty of good faith vary. At one point it stridently insists that, "given the importance of the Contract, the Navy had a duty under the contract to do everything in its sovereign power to take the reasonable steps that would enable KBR to perform the Contract and to prevent another sovereign nation from obstructing KBR's performance" (compl. ¶ 106; app. mot. at 18). At other times its motion is less extreme, accusing the government (similar to its express breach claim) of doing nothing to help KBR with the strike (app. mot. at 10).

The duty of good faith and fair dealing prohibits "interference with or failure to cooperate in the other party's performance." *Labatte v. United States*, 899 F.3d 1373, 1379 (Fed. Cir. 2018) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (1981)). Breach of the covenant of good faith and fair dealing does not require the violation of an express term of the contract, but the claim "cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions." *Laturner v. United States*, 933 F.3d 1354, 1365 n.8 (Fed. Cir. 2019) (quoting *Dobyns*, 915 F.3d at 739). "[A] specific promise must be undermined for the implied duty to be violated." *Dobyns*, 915 F.3d at 739. The duty "must be 'keyed to the obligations and opportunities established in the contract' so as to not fundamentally alter the parties' intended allocation of burdens and benefits associated with the contract." *Id.* (quoting *Lakeshore Eng'g Servs., Inc. v. United States*, 748 F.3d 1341, 1349 (Fed. Cir. 2014)).

As previously observed, the Navy did indeed assist with the strike's resolution by funding KBR's retention of more labor at the previous pay rates (SOF ¶ 15). So, as before, the real question presented is whether the duty of good faith and fair dealing required it to either prevent the strike or act more quickly to somehow remedy it. But the government made no commitment from which such a duty arises.[7] *See Bell/Heery*, 739 F.3d at 1335 (explaining that the implied duty of good faith and fair dealing does

[7] Moreover, it would have to be quite a contract promise that would be undermined by the government's failure to do everything in its sovereign power to prevent another nation from obstructing KBR's preferred method of performance. That the government, among many different possibilities, obligated itself to close the base, impose economic sanctions, sever diplomatic relations, or even launch a military strike to assure KBR's access to Djiboutian labor free of a strike is, to say the least, pretty incredible.

not form new contract terms). Instead, the contract made KBR responsible for procuring labor for itself through a subcontractor labor broker. The government assumed no responsibility to accomplish that task, compel the Djiboutian government to ensure labor was available on KBR's desired terms, or that it cease supporting the strike. The duty of good faith and fair dealing did not enlarge its obligations. *Id.* (holding that a third-party government's interference with contract performance is not a reappropriation of the contract's benefits by the U.S. government that could constitute breach of the duty of good faith and fair dealing); *see also Olympus Corp. v. United States*, 98 F.3d 1314, 1318 (Fed. Cir. 1996) ("While interference by the government with a contractor's access to the work site may constitute a breach of the government's duty to cooperate, the government is not responsible for third-party actions such as labor strikes that delay a contractor's performance, absent a specific contractual provision"). This fixed-price contract placed the risk upon KBR respecting the market prices of its inputs, including labor. *See Lakeshore Eng'g Servs.*, 748 F.3d at 1349.

KBR's emphasis upon the reasons the Navy was initially reluctant to intercede fails to reveal any basis for drawing a different conclusion. KBR says the Navy refused to assist it because it did not wish to establish a bad precedent. It is hardly surprising that the Navy disfavored signaling that a contractor such as KBR could expect relief from the risks it contractually assumed. Thus, the internal report of a Navy admiral that KBR relies upon considered labor disputes to be between KBR and Djibouti. It observed that KBR was no novice navigating Djibouti's political and labor impediments and that KBR should be held to its performance obligations. To do otherwise would establish an undesirable precedent. (App. mot., ex. 2 at ex. 7) KBR also contends the Navy should be faulted for its internal resistance (which eventually it abandoned) to the expenditure of its own funds to resolve KBR's labor problems. KBR makes much of the fact that the CO neither reviewed nor authorized a KBR proposed solution to the dispute with Djibouti that KBR shared with the Embassy (am. answer ¶ 29). But KBR does not explain why the Navy was required to provide that review and approval, why KBR needed the review, or how the absence of it impaired KBR's outreach to the embassy or whatever efforts it might have been making to resolve the matter with Djibouti. None of these observations evidences interference with KBR's performance or that the Navy undermined its own promises.

KBR also relies once again upon the contract's partnering language to supply the express promise that it claims was undermined by the CO's initial reaction to the strike. As already noted, the partnering language is precatory, not obligatory. Even if it was something more, the CO's initial refusal to affirmatively intercede with Djibouti about the strike did not reappropriate any of the benefits of a mere representation that the Navy desired its partner's success and that it intended to work to find solutions to problems. *See Dobyns*, 915 F.3d at 739-40 (relying upon the court's holding in *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 828-29 (Fed. Cir. 2010),

that "interference with the plaintiff's ability to harvest timber did not breach the implied duty in part because the government 'did not reappropriate any 'benefit' guaranteed by the contracts, since the contracts contained no guarantee' of uninterrupted performance"). The partnering language did not suggest that the Navy was assuming a duty to alter the behavior of third parties toward KBR. *See id.* at 740-41 (holding that to infer an implied duty "without a tether to the contract terms, would fundamentally alter the balance of risks and benefits associated with the . . . agreement and cannot be the basis of a claim for breach of the implied duty of good faith and fair dealing"). Moreover, though there is no basis for imposing a duty upon the Navy to resolve the strike, the Navy did so within approximately one month of the strike's commencement by executing the contract modification that funded more local nationals. KBR has simply not convinced us that these events constitute a breach of good faith and fair dealing.

Contrary to KBR's suggestion, *North American Landscaping, Construction and Dredge, Co.*, ASBCA No. 60235 *et al.*, 18-1 BCA ¶ 37,116 at 180,652-54, does not categorically hold that failure to successfully "partner" with a contractor is a breach of the duty of good faith. There, only one judge concluded that the government had breached the duty, and he hardly relied solely upon a belief that the government failed to fulfill a pledge to partner. Anyway, that one judge's opinion that the government breached the duty is not the Board's precedent because the other two participating members of the panel disagreed with him. 18-1 BCA ¶ 37,116 at 180,658. Only pronouncements explicitly adopted by three of the Board members participating in the appeal are precedential.[8] *See King Aerospace, Inc.*, ASBCA No. 60933, 19-1 BCA ¶ 37,316 at 181,500.

KBR also contends that, in response to the strike, the Navy unjustifiably threatened it with a termination for default, implying that is also a breach of the duty of good faith and fair dealing. Though the record shows the idea was raised in an internal Navy discussion, KBR presents no evidence that the government threatened KBR with termination for default (app. mot., ex. 4 at 30425).[9]

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[8] This policy is distinct from appeals that might be decided by the Board's Senior Deciding Group, which would be governed by a majority.

[9] KBR also relies upon a "White Paper" submitted to the Navy by its own counsel, alleging "the Navy has implied that KBR's inability to fully staff the Contract could be grounds for issuing a cure notice or show cause letter" (R4, tab 13 at 263). Counsel's unsworn statement does not provide or describe the alleged communication from which he claims to have drawn this inference, or its source, and does not claim it is based upon personal knowledge (tr. 54-57). *See Gemtron Corp. v. Saint-Gobain Corp.*, 572 F.3d 1371, 1380 (Fed. Cir. 2009) (Counsel's unsworn statements are not evidence); *see also* FED. R. CIV. P. 56(c)(4) (requiring that an affidavit or declaration used to support or oppose a

KBR additionally attempts to bolster its implied duty claim by proffering evidence that the Navy did not disclose prior to award that there had been an earlier "labor dispute" involving a Djibouti base support contract (app. prop. finding and gov't resp. ¶¶ 32, 39).[10] The government cannot breach the covenant of good faith and fair dealing before the contract is formed. *Scott Timber Co. v. United States*, 692 F.3d 1365, 1372 (Fed. Cir. 2012).

In a variation of its third-party beneficiary claim, KBR also contends that the government was obligated under the implied duty to consult with Djibouti to remedy the strike under the Access Agreement's disputes mechanism. But the government made no representations in KBR's contract about how it might administer the Access Agreement. Nor did Djibouti promise in the Access Agreement that labor would be available for U.S. contractors on the terms they dictated, free of any strikes. Given these factors, there was no basis for KBR to expect such action. Moreover, KBR has not produced any evidence that consultation under the disputes mechanism would have resolved the strike any sooner. In fact, the government did ask Djibouti officials to suspend the strike and was told that only KBR's retention of all of the former employees who worked on the base would end it (SOF ¶ 13). Thus, the government halted the strike within approximately one month of its beginning by providing additional funding to hire all the workers Djibouti demanded, not through further discussions.

Accordingly, the government is entitled to summary judgment as a matter of law upon the breach claims arising from the strike as alleged in Counts I and IV.

2. Count III's Constructive Change Claim

In addition to its breach claims, Count III of KBR's complaint contends that the government's expectation that KBR continue to perform the contract's requirements during the strike against it, along with its failure to assist KBR with its labor problems, constituted a constructive change to the contract.

"[T]he contracting officer may . . . *constructively* change the contract, 'either due to an informal order from, or through the fault of, the government.'" *Zafer Taahhut Insaat ve Ticaret A.S*, 833 F.3d at 1361 (quoting *NavCom Def. Elecs., Inc. v. England*,

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motion for summary judgment must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated). Even if considered, counsel's statement does not reflect an actual threat of default.

[10] KBR returns to this argument in support of its superior knowledge allegation in Count VI.

53 Fed. App'x 897, 900 (Fed. Cir. 2002)) (emphasis in original). Typically, demonstrating a constructive change requires the contractor to "show (1) that it performed work beyond the contract requirements, and (2) that the additional work was ordered, expressly or impliedly, by the government." *Bell/Heery*, 739 F.3d at 1335. KBR suggests that the inclusion of its proposal's staffing plan into the contract, with its mix of "expat," TCN and host nationals, established a particular manner and method of performance that it could rely upon. Expecting KBR to perform when it could not employ that mix of personnel was beyond the contract requirements and constituted a change.

The contract did not promise KBR that it need only perform if it could retain labor on its desired terms. KBR has not presented any evidence that the government expressly, impliedly, or otherwise required it to perform tasks beyond the contract's requirements. Also, the contract did not excuse KBR from meeting its performance objectives "in the event [its] proposal prove[d] inadequate as conceived or executed" (SOF ¶ 8). The government was not responsible for Djibouti's labor demands upon KBR so it is not at fault for a change to KBR's performance costs arising from them. *See Zafer Taahhut Insaat ve Ticaret A.S*, 833 F.3d at 1364 (rejecting the suggestion that another country's interference with performance could constitute a constructive change).

The government is entitled to summary judgment upon Count III's constructive change claim arising from the strike.

3. KBR's Mutual Mistake Claim

Count V contends that the parties committed a mutual mistake. If proven, a mutual mistake of fact might entitle a claimant to reformation of a contract. *See Atlas Corp. v. United States*, 895 F.2d 745, 749-50 (Fed. Cir. 1990). KBR does not explain how the contract should be reformed. Presumably, it seeks reformation that would impose the costs of the strike upon the government.

The following must be proven by clear and convincing evidence to obtain reformation based upon mutual mistake: (1) the parties were mistaken in their belief regarding a fact; (2) the mistaken belief constituted a basic assumption underlying the contract; (3) the mistake had a material effect on the bargain; (4) the contract did not put the risk of the mistake on the party seeking reformation. *Nat'l. Austl. Bank v. United States*, 452 F.3d 1321, 1329 (Fed. Cir. 2006).

KBR summarizes its mutual mistake argument by maintaining the parties mistakenly believed that Djibouti would comply with the terms of the Access Agreement. However, KBR's specific contentions about the strike are vague and seem to focus less upon the Access Agreement, which does not protect contractors from a

local strike, and more upon the fact that its staffing plan was incorporated into the contract and the Navy was unconcerned about a strike. From this, it claims an underlying assumption of the contract about which the parties were mistaken was that KBR would be able to use local nationals to perform.

KBR has not presented evidence that it was barred outright from using local labor; the record only shows that Djibouti supported a strike arising from KBR's decision to retain less people at less pay than were employed by the prior incumbent (SOF ¶ 11). Even if KBR is suggesting that the parties mistakenly believed that it would be permitted to retain local workers on its desired terms, such a contention would still fail to qualify under the mutual mistake doctrine. KBR is not premising its mistake claim upon an erroneous belief by the parties about a fact existing at the time of contracting, but upon their alleged prediction about the future availability of local labor during performance. Assumptions about future facts cannot establish a mutual mistake claim. *Dairyland Power Coop. v. United States*, 16 F.3d 1197, 1202-03 (Fed. Cir. 1994) ("A party's prediction or judgment as to events to occur in the future, even if erroneous, is not a 'mistake' as that word is defined [under the doctrine of mutual mistake of fact]") (citing RESTATEMENT (SECOND) OF CONTRACTS § 151 cmt. a (1981); *c.f.* RESTATEMENT (SECOND) OF CONTRACTS § 152 cmt. b ("[M]istakes as to market conditions . . . do not justify avoidance under the rules governing mistake"). KBR failed to explain why this precedent is not fatal to its argument (tr. 71).

Additionally, the record lacks any evidence that a basic assumption underlying the contract was that KBR could dictate the terms of its retention of labor. Certainly, Djibouti did not make such a guarantee in the Access Agreement. Nor is there anything to suggest that NAVFAC awarded the contract assuming that KBR possessed unfettered economic power over local labor. Furthermore, the record shows that KBR knew prior to award about the risk of strikes if its bid was too low (SOF ¶ 7). KBR also concedes that it is a sophisticated contractor that "expect[ed] to encounter labor issues . . . particularly where it proposed to reduce wages or staffing levels used by the incumbent contractor." It also recognizes that it was for "KBR . . . to work with laborers to obtain a mutually beneficial solution." (App. reply at 33) KBR's awareness of the potential for labor difficulties, combined with the fact that its bargain with NAVFAC was not premised upon the absence of labor strife, renders reformation due to mutual mistake inappropriate. *McNamara Constr. of Manitoba, Ltd. v. United States*, 509 F.2d 1166 (Ct. Cl. 1975). Ultimately, KBR assumed responsibility for acquiring labor for performance and the risks associated with its price. *See Patty Precision Prods. Co.*, ASBCA No. 24458, 83-1 BCA ¶ 16,261 at 80,815-16 (finding no mutual mistake when the risk of having an adequate workforce remained with the contractor).

Accordingly, the government is entitled to summary judgment upon Count V's mutual mistake claim arising from the strike.

4. KBR's Superior Knowledge Claim

Count VI of the complaint seeks recovery resulting from the strike under the theory that the government breached a duty to disclose superior knowledge. "The superior knowledge doctrine imposes upon a contracting agency an implied duty to disclose to a contractor otherwise unavailable information regarding some novel matter affecting the contract that is vital to its performance." *Scott Timber*, 692 F.3d at 1373 (quoting *Giesler v. United States*, 232 F.3d 864, 876 (Fed. Cir. 2000)). KBR complains that the Navy knew of the "possibility" or "risk" of a labor strike but failed to inform it of that prior to award. One of the elements of a superior knowledge claim is that the contractor undertook performance without vital knowledge of a fact affecting performance cost or duration. *Id.*

Here, KBR does not allege that it lacked knowledge of the "fact" of a strike prior to award. There was no strike at that time. Instead, it contends the government failed to inform it of the "possibility" of one. KBR has not shown that a superior knowledge claim can be premised upon the contractor's alleged ignorance of a possibility. Indeed, case law indicates the opposite. *See Northrup Grumman Corp. v. United States*, 47 Fed. Cl. 20, 90 (2000) (concluding that judgments or predictions are not facts subject to a superior knowledge claim).

Even if KBR's superior knowledge claim could be cognizable, it neither alleges nor provides any evidence that it lacked knowledge of the possibility of a strike. Instead, the record shows that KBR knew that a strike was possible depending upon its bid (SOF ¶ 7). Again, KBR admits that it is a sophisticated contractor. It previously performed a similar contract in Djibouti, stressed its experience working in the local labor market in its proposal for this fixed-price contract, and assumed responsibility for obtaining labor for the work (SOF ¶ 5). This is not a situation where the government failed to disclose otherwise unavailable information regarding some novel matter.

B. The Djiboutian Restrictions Upon Third Country Nationals

KBR's claims arising from Djibouti's TCN restrictions are based upon virtually the same legal theories as the strike and KBR's breach theories are rejected for similar reasons. The government made no promise or warranty in its contract with KBR that Djibouti would comply with the Access Agreement and freely permit TCNs into the country. The parties' inclusion of KBR's staffing plan into the contract, which contemplated the use of TCNs, did not transform the plan into a government promise or warranty that KBR could implement it without interference by Djibouti. The government's precatory declaration that it desired both its own and KBR's success, and expression of an intent to find beneficial solutions within the bounds of an

acquisition policy, do not evidence an obligation to make Djibouti (a sovereign nation) comply with the Access Agreement.

KBR complains about the Navy's decision at the outset of the embargo not to send authorization letters for each TCN to Djibouti (SOF ¶ 17). But it fails to show why the Navy was required by the contract to perform that task and we cannot identify such an obligation. Furthermore, though the embassy suggested that KBR ask the Navy for those letters, KBR has failed to present any evidence that such communications would have ended the embargo.

KBR refers to some internal Navy communications reflecting unhappiness with a vaguely described training proposal KBR says it submitted to Djibouti. KBR does not suggest those concerns led to the Navy prohibiting the submission, nor does it present evidence of its nature or significance. Notably, there is no evidence the proposal made a difference with Djibouti.

KBR's specific complaints ignore the fact that the government did indeed act to address the embargo through the Access Agreement mechanism. Although the CO disclaimed contractual responsibility for Djibouti's TCN restrictions (and KBR has not shown that to be incorrect), the government as a whole, with the involvement of the Navy and through the leadership of the United States Ambassador, consulted with Djibouti and secured its renewed cooperation for the benefit of all its contractors, leading to the May 1, 2014 "Arrangement in Implementation of the" Access Agreement. There, Djibouti essentially recommitted to permitting contractor employees access to the country and the camp. (SOF ¶¶ 19-21, 23) There is no evidence that the embargo persisted afterward. KBR criticizes these negotiations, objecting to a government strategy it believes was designed to address both the government's interests in its Djibouti military base and those of all of its contractors, instead of KBR's affairs alone. Logically, those concerns are intertwined. Regardless, KBR fails to cite any authority demonstrating the government was required to conduct international relations for KBR's sole benefit to the exclusion of all other matters. *See generally Zafer Taahhut Insaat ve Ticaret*, 833 F.3d 1364-65 (explaining U.S. Government negotiations with other nations are typically sovereign acts that are beyond claims of contractual obstruction when not specifically directed toward nullifying contract rights). The totality of the government's efforts and achievements belie the suggestion that the government undermined any specific contractual promise or failed to cooperate in breach of the contract's implied duty of good faith and fair dealing.

Similarly, Djibouti's refusal to permit TCNs into the country does not constitute a constructive change by the government. Djibouti's TCN restrictions did not arise from any government acts, the contract did not promise KBR that it would be able to employ TCNs in the numbers it wished, and the government did not order performance beyond the contract's requirements. Again, interference by a foreign government is not a constructive change. KBR's mutual mistake claim regarding Djibouti's refusal

to let in TCNs is meritless for the same reason as it is for the strike; KBR does not premise it upon existing facts but upon an alleged prediction about whether Djibouti would permit entry of TCNs in the future. Finally, nothing in the record shows the government possessed superior knowledge prior to contract award that Djibouti would not comply with the contractor access provisions of the Access Agreement.

CONCLUSION

Count II of the appeals is dismissed for lack of jurisdiction. KBR's partial motion for summary judgment on the remainder of the counts is denied and the government's motion for summary judgment is granted. The appeals are denied.

Dated: May 15, 2020

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

I concur

RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

OWEN C. WILSON
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 Nos. 59385, 59744, Appeals of Kellogg Brown & Root Services, Inc., rendered in conformance with the Board's Charter.

Dated: May 15, 2020

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