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ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -	)	
	)	
Sand Point Services, LLC	)	ASBCA Nos. 61819, 61820
	)	
Under Contract No. NNG14WA50C	)	

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OPINION BY ADMINISTRATIVE JUDGE MCILMAIL

Appellant, Sand Point Services, LLC, (Sand Point) brings claims of contract change, economic waste, and differing site condition, arising from its work on an aircraft parking apron and taxiway. We deny the appeals because Sand Point released the differing site condition claim in a bilateral contract modification (not under duress), and that rather than the government having changed the contract or directed Sand Point to perform economically wasteful “punch list” work, Sand Point agreed to perform that work pursuant to another bilateral modification, as contract work.

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STATEMENT OF FACTS

In 2014, the National Aeronautics and Space Administration (NASA) contracted with Sand Point for the removal and replacement of an aircraft parking apron at the NASA/Goddard Space Flight Center Wallops Flight Facility in Virginia, for \$1,878,673.34.<sup>1</sup> The contract includes Federal Acquisition Regulation (FAR) 52.249-10(a) DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984)<sup>2</sup>, which provides, at paragraph (a):

If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed.

The contract also includes the following provisions:

52.246-12 INSPECTION OF CONSTRUCTION  
(AUG 1996)

...

Government inspections and tests are for the sole benefit of the Government and do not . . . Constitute or imply acceptance . . . . The presence or absence of a Government inspector does not relieve the Contractor from any contract requirement, nor is the inspector authorized to change any term or condition of the specification without the Contracting Officer's written authorization.<sup>3</sup>

1852.242.70 TECHNICAL DIRECTION (SEP 1993)

...

(b) The [Contracting Officer's Representative] (COR) does not have authority to, and shall not, issue any instruction purporting to be technical direction that-- . . .

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<sup>1</sup> R4, tab 1 at 8-10.

<sup>2</sup> R4, tab 1 at 52.

<sup>3</sup> *Id.*

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(4) Changes any of the expressed terms, conditions, or specifications of the contract . . . .”<sup>4</sup>

H.10 SPECIAL INSTRUCTIONS AND INFORMATION  
FOR CONSTRUCTION CONTRACTORS

. . .

2. No Inspector or any other Government employee is authorized to waive or change any provisions of this contract or the specification without written authorization from the Contracting Officer . . . .<sup>5</sup>

On September 16, 2015, the parties entered into Modification No. 2 to the contract.<sup>6</sup> Modification No. 2 provides changes to the contract work to address an alleged differing site condition.<sup>7</sup> The modification also provides:

the Contractor hereby releases the Government from any and all liability under this Contract for further equitable adjustments attributable to such facts or circumstances giving rise to the items described herein.<sup>8</sup>

In the lead up to Modification No. 2, NASA informed Sand Point that it was considering terminating the contract, because – in NASA’s view, at least – Sand Point had “failed to perform [the contract] within the time required by its terms.”<sup>9</sup> The parties negotiated the terms of the modification with NASA (Sand Point with the assistance of counsel<sup>10</sup>), which negotiations included Sand Point proposing terms that it described as “a solution that is in the best interest of all parties.”<sup>11</sup> On October 27, 2017, Sand Point raised – for the first time – its claim that it entered into Modification No. 2 under duress.<sup>12</sup>

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<sup>4</sup> R4, tab 1 at 19.

<sup>5</sup> R4, tab 1 at 32.

<sup>6</sup> R4, tab 28 at 734.

<sup>7</sup> See app. br. at 6, 26; Appellant’s Proposed Findings of Facts (APFOF) at 3 ¶ 16; gov’t br. at 1.

<sup>8</sup> R4, tab 28 at 736.

<sup>9</sup> R4, tab 19 at 690.

<sup>10</sup> See tr. 3/10-13, in particular, page 13, lines 19-23.

<sup>11</sup> Tr. 4/65-78; R4, tab 20 at 692.

<sup>12</sup> R4, tab 66 at 1546, 1555-56.

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In December 2016, the parties entered into bilateral Modification No. 5 to the contract, which modification itemizes certain “punch list work.”<sup>13</sup> (A punch list is a document that lists the final work items remaining before a construction project is considered complete.<sup>14</sup>) Modification No. 5 provides that, pursuant to the authority of the “Basic Contract” (emphasis added):

The contractor shall perform punch list work *as required in the contract drawings and specifications*. All work in the submittal entitled “Punch List Work Plan Revision 2 Wallops Flight Facility November 8, 2016” shall be performed *in accordance with the contract requirements as detailed in the contract drawings and specifications*.

Work is authorized to commence after the Contractor has submitted and the Government has approved the Quality Control Plan, Accident Prevention Plan, and Personnel per contract requirements.

This modification extends the contract completion date from November 19, 2015 to May 2, 2017.<sup>15</sup>

The November 8, 2016 Punch Work Plan referenced in Modification No. 5 is referenced in, and attached to, Sand Point’s January 2018 Request for Equitable Adjustment; that punch list work plan identifies the work that is at issue here: namely, mooring eye replacement, concrete panel replacement, and taxiway repair.<sup>16</sup>

Finally, the November 8, 2016 Punch List Work Plan includes an index that references a “SPS Punch List Summary table.”<sup>17</sup> That table is, evidently, a November 8, 2016, Sand Point-created document entitled “PUNCH LSIT (sic) SUMMARY TABLE,” that includes a column labeled “NASA Directed Method of Correction” listing work including that at issue here.<sup>18</sup>

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<sup>13</sup> R4, tab S-352 at 21090.

<sup>14</sup> See tr. 2/25.

<sup>15</sup> R4, tab S-352 at 21090.

<sup>16</sup> *Id.*; app. reply br. at 3, 11; (APFOF) at 2, ¶ 5 (citing R4, tab 188), ¶¶ 7-10; R4, tab 188 at 8401, 8407 (citing “Exhibit 33”), 8955-56, 8959-66.

<sup>17</sup> R4, tab 188 at 8960.

<sup>18</sup> R4, tab 188 at 8969-70.

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DECISION

*ASBCA No. 61819: Modification No. 5, Contract Change, and Economic Waste*

Sand Point says that it is entitled, pursuant to the economic waste doctrine and as a contract change, to additional compensation for the punch list work at issue in ASBCA No. 61819.<sup>19</sup> However, to prove economic waste, the government—here, in the person of the contracting officer, as required by the contract provisions recited above—must have *directed* the contractor to correct work that substantially complies with the contract, even though the cost of correction is economically wasteful, or must have directed corrective work that otherwise constitutes a constructive change to the contract. *See Buck Town Contractors & Co.*, ASBCA No. 60939 *et al.*, 20-1 BCA ¶ 37,486 at 182,086; *Granite; EM Sys., Inc.*, ASBCA No. 46247, 96-1 BCA ¶ 28,091 at 140,229; *ANA-CA Const. Corp.*, ASBCA No. 44375, 94-3 BCA ¶ 27,032 at 134,730. But, as NASA points out,<sup>20</sup> Sand Point *agreed*, through Modification No. 5, to perform the punch list work *as contract work*; that is, as work “required in the contract drawings and specifications.” And as NASA also points out,<sup>21</sup> Modification No. 5 cites the “Basic Contract,” and not, for example, Federal Acquisition Regulation (FAR) 52.243-4, CHANGES, as its authority, evidencing that rather than the government having directed the work at issue, or having unilaterally changed the contract, Sand Point agreed to perform that work, as contract work.

Sand Point relies upon several items in the record in support of its position that the government directed the work at issue; we find none of those references persuasive.<sup>22</sup> For example, Sand Point states that it “returned to the site in April 2017 to complete the corrective work dictated by NASA,” but cites in support of that statement only a daily report that does not show that the government directed any work.<sup>23</sup> Sand Point also says that “[a]s part of the work plan, NASA directed [Sand Point] to mill down and then re-surface essentially the entire taxiway,” but Sand Point follows that statement with citations of cost tabulations, not of evidence

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<sup>19</sup> App. br. at 32-35.

<sup>20</sup> Government Proposed Findings of Fact (GPFOF) at 29, ¶ 51 (citing R4, tab 352).

<sup>21</sup> GPFOF at 28-29, ¶¶ 50-51.

<sup>22</sup> Some of Sand Point’s references to alleged government “direction” (or similar phrasing) are without record citation: *e.g.*, “directing” (app. br. at 18), “[i]nsisting upon compliance” (*id.* at 33), “[r]equiring” [Sand Point] . . . to return to [the] job site” (*id.* at 37), “[Sand Point] being forced” (*id.*), “[b]lindly insisting” (*id.* at 41), “NASA’s directive” (*id.*), “NASA’s directive to replace” (*id.*), “[r]equiring replacement” (*id.* at 43), “strictly enforcing the specifications” (*id.*), “costs [NASA] was imposing upon a contractor” (*id.* at 45), “NASA directed” (*id.*), “NASA’s direction” (*id.*).

<sup>23</sup> APFOF at 56 ¶ 242 (citing R4, tab 318 at 13412).

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that the government directed any work.<sup>24</sup> Finally, Sand Point says that “NASA also directed the replacement of 33 concrete panels,” but cites the following hearing testimony of the senior project manager of Atlantic Contracting and Materials, Sand Point’s subcontractor,<sup>25</sup> which testimony does not establish that the government directed that work:

[Q:] And what work were you directed to perform?

[A:] My recollection, I think we removed 33 concrete panels and replaced them, and I believe it was 130 or 132 mooring eyes?

[Q:] Okay. Was that work set out in a final work plan?

[A:] Yes, it was.

[Q:] Okay. Did you draft that work plan?

[A:] No, we did not.<sup>26</sup>

Sand Point does not claim that the November 8, 2016 punch list constitutes or includes government (that is, contracting officer) direction that Sand Point perform the work at issue here. Indeed, in its opening post-trial brief, Sand Point states that “NASA finally accepted [Sand Point’s] *third* revised work plan on November 18, 2016”;<sup>27</sup> an apparent concession that, after a series of back-and-forth discussions between the parties, Sand Point agreed—however reluctantly—with what would become the final punch list work items that are at issue in this appeal. Nor do we find in that November 8, 2016 punch list any direction by the government that Sand Point perform any work, even taking into account that one of the columns of the Sand Point created and title-misspelled “PUNCH LSIT SUMMARY TABLE” is labeled “NASA Directed Method of Correction.” Indeed, Sand Point points to nothing in the record like the type of evidence of government direction found in other cases involving claims of economic waste. *Cf. Sauer, Inc.*, ASBCA No. 61847, 21-1 BCA ¶ 37,939 at 184,265 (in email from the contracting officer, the contractor was “directed . . . to provide cast iron hub and spigot or hubless pipe and fittings with rubber compression gasket joints for above ground installation,” resulting in the contractor

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<sup>24</sup> APFOF at 67 ¶ 280 (citing R4, tab S123 at 2087; R4, tab 67 at 1947) (alterations added).

<sup>25</sup> APFOF at 63 ¶ 267 (citing tr. 5/272); tr. 1/12, 5/98, 133, 136.

<sup>26</sup> Tr. 5/272 (alterations added).

<sup>27</sup> App. br. at 18 (emphasis in original).

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having “to remove 80 percent of the installed PVC pipe”); *Buck Town Contractors & Co.*, 20-1 BCA ¶ 37,486 at 182,080 (in letter to contractor, contracting officer “directed the contractor to degrade approximately 1,400 feet of levee to four feet and install geotextile consistent with the specifications”); *Valenzuela Eng’g, Inc.*, ASBCA Nos. 53608, 53936, 04-1 BCA ¶ 32,517 at 160,850 (government letter “directed [contractor] to provide a plan of action by 6 June 2000 for correcting [] spliced rails”).

Rather, we agree with NASA<sup>28</sup> that, in Modification No. 5, Sand Point agreed to perform the work at issue here, as contract work, in evident exchange for (at least) a nearly six-month extension of the contract completion date.

To be sure, as Sand Point asserts,<sup>29</sup> Modification No. 5 does not release any claims against the government arising from or related to the punch list work; indeed, we do not understand the government to be asserting the affirmative defense of release. But that is beside the point. The punch list work claim that Sand Point asserts is for additional compensation for work that, in Modification No. 5, Sand Point agreed to perform as contract work; work for which Sand Point has, presumably, already been paid in full by having received the contract price, and by the extension of the contract completion date that presumably eliminated or at least reduced any liability Sand Point might have faced for liquidated damages for late completion. It is not that Sand Point released the claims of economic waste and contract change asserted in this appeal (we see no evidence of such a release), but that the terms of Modification No. 5 defeat those claims.

Perhaps anticipating this conclusion, Sand Point, in its discussion of notice pursuant to FAR 52.243-4, alludes to the content of email traffic leading up to the signing of the modification.<sup>30</sup> However, we find in Modification No. 5 no ambiguity that might cause us to resort to such parol evidence to interpret the modification. *See Avant Assessment, LLC*, ASBCA No. 58867, 15-1 BCA ¶ 36,137 at 176,384. Nor can Sand Point rely on extrinsic evidence to create an ambiguity where none exists. *Philips Lighting N. Am. Corp.*, ASBCA No. 61769 *et al.*, 21-1 BCA ¶ 37,821 at 183,648. And because we conclude that Sand Point agreed in Modification No. 5 to perform the punch list work at issue as contract work, we also find unavailing Sand Point’s alternative arguments, such as that NASA had previously accepted that work,<sup>31</sup> and that NASA waived its right to demand strict compliance with the contract.<sup>32</sup> Finally, regarding the contention that NASA breached the duty of good faith and fair dealing with respect to punch list work, we see nothing among what Sand Point points

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<sup>28</sup> See gov’t br. at 28, 43; (GPFOF) at 28-29, ¶¶ 50-51.

<sup>29</sup> App. reply br. at 11.

<sup>30</sup> *Id.* at 3 (citing R4, tab 352).

<sup>31</sup> App. br. at 8-11, 15; app. reply br. at 9-11.

<sup>32</sup> App. br. at 32-34; app. reply br. at 11.

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to<sup>33</sup> – much less in what we see elsewhere in the record – that overcomes the presumption that NASA officials acted in good faith. *SIA Constr., Inc.*, ASBCA No. 57693, 14-1 BCA ¶ 35,762 at 174,986-87. Accordingly, ASBCA No. 61819 is denied.

*ASBCA No. 61820: Modification No. 2 and Duress*

In ASBCA No. 61820, Sand Point asserts a differing site condition claim that the government says is released by Modification No. 2. There is no dispute that, if enforceable, Modification No. 2 releases NASA from the differing site condition claim; the question is whether Sand Point entered into the modification under duress.<sup>34</sup> Sand Point must prove that it agreed to the modification as a result of a wrongful act on the part of NASA; that is, something that was (1) illegal, (2) a breach of an express provision of the contract without a good-faith belief that the action was permissible under the contract, or (3) a breach of the implied covenant of good faith and fair dealing. *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1330 (Fed. Cir.), *adhered to on denial of reh'g*, 346 F.3d 1359 (Fed. Cir. 2003). Sand Point fails to do so; rather, it argues that “not signing would have meant termination for default and disqualification from future federal contracts, spelling economic ruin” for Sand Point.<sup>35</sup> Indeed, NASA informed Sand Point that it might terminate the contract for untimely performance,<sup>36</sup> however, the contract provides for such termination.<sup>37</sup> Moreover, economic pressure and even the threat of considerable financial loss are not duress. *Rumsfeld*, 329 F.3d at 1330; *Exceed Res., Inc.*, ASBCA No. 61652, 20-1 BCA ¶ 37,634 at 182,721-22. And Sand Point *negotiated* the terms of the modification, with the assistance of counsel, evidence that it entered into the modification voluntarily. *See Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002) (affirming summary judgment; holding that contractor failed to create a genuine factual issue regarding whether release was product of duress: contractor failed to claim duress until six years after the alleged coercion, contractor’s attorney participated in drafting of release).

In addition, one who relies upon duress to avoid his contract must repudiate that contract promptly or at least within a reasonable time after he ceases to be vulnerable to the alleged duress. *See Drake-Merritt-Roe, Joint Venture*, ASBCA No. 15119, 72-2 BCA ¶ 9,732 at 45,481 (citing *Silliman v. United States*, 101 U.S. 465 (1879); *John Arborio, Inc. v. United States*, 110 Ct. Cl. 432 (1948); *Mid-State Prods. Co. v. Commodity Credit Corp.*, 196 F.2d 416 (7th Cir. 1952)). Sand Point waited

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<sup>33</sup> App. br. at 31-32, 48.

<sup>34</sup> See app. br. at 26-27; gov’t br. at 1.

<sup>35</sup> App. br. at 26-28.

<sup>36</sup> R4, tab 19 at 690.

<sup>37</sup> R4, tab 1 at 52.



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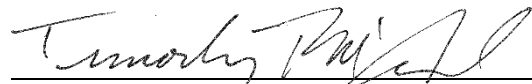
772 days—from September 16, 2015, to October 27, 2017—after signing Modification No. 2 to claim that it signed under duress. That more-than-two years of silence and inaction constitute clear proof negating duress. See *Drake-Merritt-Roe*, 72-2 BCA ¶ 9,732 at 45,481 (rejecting duress claim first raised more than 3 ½ years after the execution of the release: “[i]n our opinion, [contractor’s] silence and inaction constitutes clear proof negating duress.”).

Finally, regarding Sand Point’s contention that NASA breached the duty of good faith and fair dealing with respect to Modification No. 2,<sup>38</sup> Sand Point fails to overcome the presumption that NASA officials acted in good faith, *SIA Constr.*, 14-1 BCA ¶ 35,762 at 174,986-87, particularly because Sand Point negotiated the terms of the modification. Because Modification No. 2 releases NASA from the differing site condition claim set forth in this appeal, ASBCA No. 61820 is denied.

CONCLUSION

We have considered the parties’ other arguments and find them unnecessary to address. The appeals are denied.

Dated: January 3, 2024



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TIMOTHY P. MCILMAIL  
Administrative Judge  
Armed Services Board  
of Contract Appeals

I concur



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

I concur



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

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<sup>38</sup> App. br. at 28, 31-32, 48.

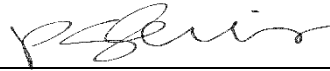
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I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 61819, 61820, Appeals of Sand Point Services, LLC, rendered in conformance with the Board's Charter.

Dated: January 4, 2024



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