ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --	)	
	)	
Garco Construction, Inc.	)	ASBCA Nos. 57796, 57888
	)	
Under Contract No. W912DW-06-C-0019	)	

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OPINION BY ADMINISTRATIVE JUDGE CLARKE ON
APPELLANT'S MOTION FOR SPOLIATION SANCTIONS

This appeal arises from a contract with Garco Construction, Inc. (Garco) for the construction of housing on Malmstrom Air Force Base (MAFB). Garco moves for spoliation sanctions in the form of various adverse inferences against the U.S. Army Corps of Engineers (COE) for destroying documents. The COE opposes the motion and both parties filed briefs. We have jurisdiction pursuant to the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109. We deny Garco's motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 3 August 2006 the COE awarded Contract No.W912DW-06-C-0019 (0019) to Garco to replace family housing, phase VI, at MAFB (R4, tab D at 10-2, -3). The contract included FAR 52.243-4, CHANGES (AUG 1987) clause (R4, tab D at 113), and FAR 52.222-3, CONVICT LABOR (JUN 2003) clause (*id.* at 46).

2. A pre-construction conference was held on 12 September 2006 that was documented in a 27 September 2006 set of minutes (R4, tab E, subtab 101 at 1-3). Representatives of Garco and its subcontractor James Talcott Construction, Inc. (JTC) attended (gov't opp'n, ex. B at 2). The minutes included, "[n]o one with outstanding warrants, felony convictions, or on probation will be allowed on base" (R4, tab E, subtab 101 at 2).

3. On 8 May 2007 JTC wrote Garco requesting "the opportunity to use Pre-Release Center individuals" on JTC's work as a subcontractor performing work on Contract No. 0019 (R4, tab E, subtab 102 at 2). The letter included:

> Per FAR 52-222-3 Convict Labor, this clause allows for the employment of persons on parole or probation. However, JTC does not understand why these individuals are continually being denied base access/passes. The unemployment rate in Montana is at a historical low. The construction industry is in need of qualified employees and these individuals should not be denied access to our jobsites. This issue is impacting and delaying JTC's performance of this contract.

(*Id.*) On 9 May 2007 Garco forwarded JTC's letter to the COE stating that Garco agreed with JTC's request and that Garco was also concerned about the limited labor pool available in the Great Falls area (*id.* at 1).

4. On 25 May 2007 a Background Paper concerning the request from Garco/JTC for base access for "convict labor" was prepared for the wing commander (gov't opp'n, ex. F). The paper presented three options from maintaining the status quo to relaxing the restrictions to allow "first offense non-violent offenders" access to MAFB (*id.* at 2). The paper concluded:

> Conclusion: Reducing security access requirements for contractors creates a reward/risk situation. The reward is to facilitate the timely and cost effective completion of Malmstrom contracts. However, this benefit is not without the potential risk of offenses committed on base that may affect the good and discipline and safety of Malmstrom.

(*Id.*)

5. On 10 September 2007 the COE sent JTC an email stating:

> All: fyi regarding Parollee labor Base access
>
> I've received an email from Nancy Sinclair of the JAG office. A new policy is being worked on. The Wing Commandeer has been briefed on the issue. Until the new policy is finalized, the Base has no further news to offer regarding the issue. Wish I could offer more insight on this. I can tell you that I was at a meeting in the June timeframe with COL Finan

> regarding this issue, and I tried to stress to her just how tight the labor pool is right now. She was willing to readjust her policy, but she is concerned how the change would be implemented so that it is applied fairly to all Base contractors.

(Gov't opp'n, ex. G)

6. On 30 October 2007, Col Sandra E. Finan issued a policy memorandum regarding installation access for contractor personnel (R4, tab E, subtab 103). The policy included the following:

> c. The 911 Dispatch Center will input all listed employees' name and data into the National Criminal Information Center (NCIC) database for a background check in accordance with Air Force directives. Unfavorable results from the background check will result in individuals being denied access to the installation, including, but not limited to, individuals that are determined to fall into one or more of the following categories: those having outstanding wants or warrants, sex offenders, violent offenders, those who are on probation, and those who are in a pre-release program.

(*Id.*) Persons passing the background check would be issued passes granting access to MAFB (*id.*)

7. On 13 November 2007 Garco forwarded a 25 October 2007 Request for Equitable Adjustment (REA) from JTC wherein JTC requested an adjustment of $454,266.44 based on MAFB's refusal to allow ex-convicts and pre-release individuals access to the base (R4, tab E, subtab 104). The REA included the following:

> FAR 52.222-3 CONVICT LABOR (JUN 2003) specifically states that we are allowed to hire and employ individuals convicted of an offense for this contract. This FAR has been in previous contracts, and we planned on and used these individuals for other contracts. Because it is also in this contract, we based our cost estimates for Phase VI on our ability to use these same individuals or pool of individuals. There is a nationwide shortage of experienced construction workers. It is well documented that the problem is even more acute in Montana with our very low unemployment rate.

(*Id.*) The REA did not contain a CDA claims certification (*id.*).

8. By letter dated 18 December 2007 the COE contracting officer (CO) denied the REA (R4, tab E, subtab 106). The letter included reference to TS 01001 that is part of the contract (R4, tab D at 01001-1, -2):

> Your attention is directed to TS 01001-1.6. Paragraph (a) states that "the Contractor shall be responsible for compliance with all regulations and orders of the Commanding Officer of the Military Installation, respecting identification of employees, movements on installation, parking, truck entry and all other military regulations which affect the work." Paragraph (b) states that "The work under this Contract is to be performed at an operating Military Installation with consequent restrictions on entry and movement of nonmilitary personnel and equipment."

(R4, tab E, subtab 106)

9. By letter dated 21 February 2008, Garco reiterated its argument that JTC's REA should be allowed by the COE and requested reconsideration of the CO's denial (R4, tab E, subtab 107).

10. By letter dated 1 April 2008 the CO again denied Garco's REA and included the following:

> We researched the base security restrictions and according to Malmstrom Air Force Base personnel and documentation dated before March 2006, the security restrictions for certain types of convict labor were in effect before the August 2006 award of the aforementioned contract. The October 2007 policy was a reissue of the same restrictions as those implemented shortly after September 11, 2001. We have no information that indicates the base access policy has changed since September 2001.

(R4, tab E, subtab 109) The letter ended with "[s]hould you disagree with this finding, you have the right to pursue remedy through the Disputes clause, FAR 52.233-1, of this contract" (*id.*).

11. By letter dated 22 July 2008, Col Michael E. Fortney, Commander 341st Missile Wing, MAFB, responded to a 15 July letter from U.S. Representative Denny Rehberg inquiring about JTC's concerns with base access for employees (R4, tab E, subtab 112 at 5). The letter includes the following:

> Mr. Brad Talcott's letter to you, dated June 24, 2008, infers that the inclusion of Federal Acquisition Regulation clause 52.222-3, Convict Labor, specifically allows contractors *working on military installations* to employ persons on parole, probation, or an approved prison work training program. The FAR clause in question, however, only states that a contractor is not prohibited from employing such persons. It does not state that such employees must be permitted to work on a military installation or that a contractor should anticipate being able to use such employees on a military installation. The military permits JTC to employee [sic] such individuals in support of government contract actions, but it does not necessarily permit all such individuals the ability to perform their work on a military installation. Malmstrom has taken no actions to prohibit JTC from employing persons on parole, probation, or an approved prison work training program, but instead has only limited base access to certain JTC employees who do not meet the base's security requirements.

(*Id.*)

12. By letter dated 3 September 2008 to U.S. Senator Max Baucus, the COE responded to a 14 August 2008 inquiry relating to JTC's concerns over access to MAFB (R4, tab E, subtab 112 at 1-2). The letter includes the following:

> It is our understanding that the issue involves a request to allow these contractors to obtain Base access for certain convict laborers, as part of this contract. The Corps is administering this contract at Malmstrom AFB (Base); and the contract includes Federal Acquisition Regulations clause 52.222.3, Convict Labor, and language that requires all contractor employees to comply with all restrictions, regulations and orders of the Commanding Officer of the Military Installation. It is our understanding that the current Base security restrictions, although reissued last year, were in effect before this August 2006 contract award. Actual copies of the written policy are controlled by the Base. The Corps

> Resident Office located at the Base does coordinate access applications between the contractor and the Base, but that is an administrative role not a policy role. The Base determines who is authorized access. I regret that the contractor is experiencing any monetary impact.

(*Id.*)

13. By letter from Garco to the COE stamped "RECEIVED SEP 9 2008" but dated 25 June 2008, Garco forwarded a 12 June 2008 letter from JTC, informing the COE that "James Talcott Construction intends to pursue a claim per the Disputes Clause if we can not [sic] reach a resolution to the REA concerning denial by base security to allow pre-release convict labor access to work on Malmstrom AFB" (R4, tab E, subtab 111; gov't opp'n, ex. H). The attached letter from JTC disputes the COE's contention that the security restrictions had been in place since 2001 and asserts that, "[i]n fact, the kinds of workers now denied entry to MAFB have been among our employees for at least the past 20 years. They have worked for us on numerous projects at MAFB until the new edict was issued in the fall of 2007." (*Id.*) Copies of JTC's letter were sent to Senator Baucus, Senator Jon Tester and Representative Rehberg (*id.*).

14. By letter dated 12 September 2008 to Garco, the COE responded to Garco's request for a CO's final decision stating in part:

> Prior to your September 8, 2008 email from Hollis Barnett to Brad Bradley, the Government had no record of your requesting a Contracting Officer's Decision in Serial Letter H-006, dated June 25th, 2008. Now that we have a copy (attached to Mr. Barnett's message), we must advise you that your request does not qualify as a claim per Contract Clause 52.233-1, Disputes. To qualify as a claim, Garco as the prime contractor must submit a sum certain using certification language stipulated by the clause.

(R4, tab E, subtab 113) The COE attached the letters to Senator Baucus and Representative Rehberg for Garco's consideration (*id.*).

15. JTC completed all work on its subcontracts on 28 November 2008 (gov't mot. for summ. J. at 11, ¶ 28; app. opp'n to mot. for summ. J., ex. 5, decl. of Brad Talcott).

16. The record includes three emails sent on 9 December 2008. Mr. Brad Talcott, JTC, emailed Mr. Hollis Barnett, Garco, asking:

> Are you going to confirm our claim to the COE or should we go a different route? After going back and reviewing in more detail (after your call requiring confirmation) we realize claim is probably on the light side.

(Gov't opp'n, ex. I) Mr. Barnett responded:

> Yes, I will need to make a thorough review of your claim. This will involve a complete review of your cost and accounting of your labor productivity.
>
> The first thing I would like to see is JTC's convict labor employment history for 2003, 2004, 2005, 2006, 2007 and 2008.
>
> I would like to see the total number of employment hours for each year for all field employees and what percentage of those hours were convict labor (both pre-release and ex-convict).
>
> I would also like to see a similar, but separate breakdown for all of JTC's self performed work at Malmstrom Air Force Base for 2003, 2004, 2005, 2006, 2007 and 2008.

(*Id.*) Mr. Barnett forwarded these two emails to Ms. Eileen Gallagher, MAFB Records Manager (gov't opp'n, ex. CC) stating the following:

> As you can see, Talcott is still pursing [sic] this claim and is willing to certify it is legitimate. However, we as Garco do not have the information necessary to make such a certification, but we are asking JTC to provide it to us.

(Gov't opp'n, ex. I)

17. On 23 March 2009 Garco wrote JTC reminding JTC that Garco had requested supporting data in order to justify Garco's certification of JTC's claim (gov't opp'n, ex. K). The letter included the following:

> I also requested to see JTC's convict labor employment history for 2003, 2004, 2005, 2006, 2007 and 2008 and the total number of employment hours for each year for all field employees and what percentage of those hours were convict labor (both pre-release and ex-convict). I also requested a

> similar, but separate breakdown for all of JTC's self performed work at Malmstrom Air Force Base for 2003, 2004, 2005, 2006, 2007 and 2008.
>
> In mid-December, 2008, both you and John Engerbretson advised me that the above requested data did not exist. You also asked me why it was necessary. I explained that I needed the supporting data in order to review the claim and certify that the claim is made in good faith and that the data is accurate and complete and that the amount requested is accurate in accordance with FAR 52.233-1.
>
> ....
>
> Please note, Garco has still not received any supporting data concerning JTC's convict labor claim and therefore can not [sic] certify the claim for submission to the government

(*Id.*) JTC never provided Garco the requested data for years 2003 to 2008 (gov't opp'n, ex. L, dep. of Hollis Barnett at 36, line 20).

18. On 24 July 2009 the COE accepted the construction for Phase VI housing at MAFB (gov't opp'n, ex. M).

19. On 24 May 2011, Garco submitted a certified pass-through claim (R4, tab A, ex. 7). The certification read:

> Based on the information JTC provided to Garco Construction in the attached claim report prepared by Hainline & Associates, I hereby certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which Garco Construction believes the Government is liable; and that I am duly authorized to certify the claim on behalf of Garco Construction.

(*Id.*) The certification was signed by Hollis Barnett, Vice President. Attached to the pass-through claim was an REA dated 16 May 2011. (*Id.*)

20. The CO denied the pass-through claim in a 23 November 2011 final decision (R4, tab B)[1] The denial was appealed to the Board and docketed as ASBCA No. 57796 on 29 September 2011.[2]

21. In response to Garco's numerous document requests, the government repeatedly stated, "[p]revious or non-current versions of the listed items were destroyed pursuant to the Air Force Records Disposition Schedule" or words to that effect (app. mot., ex. 1).

DECISION

To support a motion for adverse inference based on spoliation, the requesting party must prove the following three elements:

> (1) [T]he party having control over the evidence had an obligation to preserve it when it was destroyed or altered; (2) the destruction or loss was accompanied by a "culpable state of mind;" and (3) the evidence that was destroyed or altered was "relevant" to the claims or defenses of the party that sought the discovery of the spoliated evidence, to the extent that a reasonable factfinder could conclude that the lost evidence would have supported the claims or defenses of the party that sought it.

Ensign-Bickford Aerospace & Defense Co., ASBCA No. 57929, 13 BCA ¶ 35,322 at 173,382. As can be seen from these three elements, destruction of evidence is assumed. In this case the government acknowledged such destruction (SOF ¶ 21). The burden of proof of spoliation is on the party seeking to use the evidence destroyed, in this case Garco. *Id.* at 173,383.

Obligation to Preserve

As to the first element "obligation to preserve," the duty attaches "when litigation is pending or reasonably foreseeable; from that point on, a party is obliged to preserve, for another's use, property within its control." *Ensign-Bickford*, 13 BCA ¶ 35,322 at 173,383. "When litigation is 'reasonably foreseeable' is a flexible fact-specific standard that allows a district court to exercise the discretion necessary to confront the myriad factual situations inherent in the spoliation inquiry." *Micron Technology, Inc. v. Rambus*

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[1] Amended on 5 December 2011 (R4, tab B at 1)

[2] ASBCA No. 57888 was a "protective appeal related to ASBCA No. 57796" docketed on 16 December 2011 and later consolidated with 57796.

Inc., 645 F.3d 1311, 1320 (Fed. Cir. 2011) (citations omitted). The same is true for this Board.

Garco contends that in this case the obligation arose when the uncertified pass-through REA was first submitted on 13 November 2007 (app. mot. at 19; SOF ¶ 7).[3] The government counters that the obligation to preserve did not arise until a properly certified pass-through claim was submitted on 24 May 2011 (gov't opp'n at 21; SOF ¶ 19). The obligation to preserve attaches when "litigation is pending or reasonably foreseeable." *Ensign-Bickford*, 13 BCA ¶ 35,322 at 173,383. We consider litigation to be "pending" when a case is docketed at a court or board. The government does not contend that its obligation should commence when Garco's appeal was docketed by the ASBCA on 29 September 2011. Therefore, both parties agree that the government's obligation to preserve arose before litigation was "pending." Thus the question here is when litigation was "reasonable foreseeable," something that depends on the facts of each case. In *Ensign-Bickford* it was the contractor that was accused of spoliation. Ensign-Bickford disposed of "spent detonators" from in-house testing after it had been notified that the government rejected lots 11 to 14. The government complained that the destruction prevented it from inspecting the spent detonators to possibly help prove that its rejection of the lots based on "venting" was proper. The destruction occurred three and one half months from submission of a certified claim. The Board held destruction of the spent detonators occurred "at a time when instigation of the instant litigation was solely within the contractor's control" and therefore Ensign-Bickford "knew or reasonably should have known of the potential litigation value of these functioned detonators and failed in its duty to preserve evidence." *Ensign-Bickford*, 13 BCA ¶ 35,322 at 173,383. In our case it is the government that is accused of spoliation and, since the government did not instigate this litigation, we cannot apply the logic of *Ensign-Bickford* to arrive at a conclusion. However, *Ensign-Bickford* illustrates the factual analysis required to determine when the obligation arises.

In this case, three years and ten months passed between the submission of the uncertified REA and the certified claim, unlike the three and one half months in *Ensign-Bickford*. The CO denied the 13 November 2007 REA almost immediately on 18 December 2007 (SOF ¶ 8). On 21 February 2008 Garco requested reconsideration (SOF ¶ 9). The CO affirmed the denial of the REA on 1 April 2008 and referred Garco to the disputes clause, FAR 52.233-1 (SOF ¶ 10). On 28 November 2008, JTC completed its work on the contract (SOF ¶ 15). Also in 2008, the government responded to congressional inquiries (SOF ¶¶ 11, 12), pointed out to Garco the uncertified REA did

[3] Garco relies upon *AAB Joint Venture v. United States*, 75 Fed. Cl. 432, 442 (2007) for the proposition that the obligation arises when an REA is submitted (app. mot. at 18); however, in *AAB Joint Venture* the government did not contest that the obligation arose when the REA was submitted, unlike the case here.

qualify as a claim (SOF ¶ 14), and learned[4] that Garco attempted, unsuccessfully, to obtain support for the claim from JTC in the form of employment records for 2003 to 2008 in order for it to certify JTC's pass-through claim (SOF ¶¶ 16-17). The project was accepted on 24 July 2009 (SOF ¶ 18). After the project was complete and accepted, 607 days passed before a certified claim was submitted to the government.

While under the right circumstances, the 13 November 2007 REA could create an obligation on the part of the government to preserve evidence, the right circumstances do not exist in this case. In December 2007 and April 2008 the government timely rejected both the REA and the request for reconsideration respectively. Although reminded about the disputes process, Garco/JTC did not then submit a certified claim. In 2008 Garco, by providing a copy of the December 2008 emails (SOF ¶ 16), informed the government that JTC had not provided employment records supporting its claim and that Garco declined to provide pass-through certification. This was over six months from contract completion. A year and a half then passed between contract completion and the submission of the certified claim. Given this record, we cannot conclude that the litigation was reasonably foreseeable on 13 November 2007. Rather, we agree with the government that due to Garco's/JTC's delay, the obligation to preserve documents arose on 24 May 2011 when a certified claim was finally submitted to the government.

Culpable State of Mind

Case law establishes that the required "culpable state of mind" may be bad faith or something less. In *Ensign-Bickford* the Board's standard was "that appellant acted in bad faith or to disadvantage the government." *Ensign-Bickford*, 13 BCA ¶ 35,322 at 173,383. In *Sean Gerlich v. United States Department of Justice*, 711 F.3d 161 (D.C. Cir. 2013), the court found that future litigation was reasonably foreseeable and that records were "intentionally destroyed" and destruction was "neither accidental nor simply a matter of utilizing the Department's record destruction schedule." *Id.* at 171. From this, we conclude that the court would not find the requisite "culpable state of mind" if records were destroyed accidentally or in accordance with a destruction schedule. In *United Medical Supply Co. v. United States*, 77 Fed. Cl. 257 (2007) the court discussed both "gross negligence" (*id.* at 271), and "reckless disregard of its duty to preserve relevant evidence." *Id.* at 274.

Garco's argument concerning culpable state of mind is found on pages 21 through 25 of its motion. In pages 21 through 23 Garco summarizes case law in this area. Its substantive argument is found on one and a half pages from 24 to 25. Garco relies on the government's response to Garco's Request for Admission No. 8. The request reads, "Admit that the Corps did not issue a Litigation Hold for records concerning the

[4] Garco provided a copy of its request to JTC for substantiation to the government (SOF ¶ 16).

Malmstrom AFB Phase 6 Housing project until April 26, 2012" (app. mot., ex. 7 at 3). The government agreed that it issued a written litigation hold on 26 April 2012, but denied the request for admission. The response reads:

> **ANSWER:** Objection mischaracterizes facts and therefore deny. The Corps issued a written litigation hold on 26 April 2012 for easier distribution to parties. After receipt of the 24 May 2011 request for contracting officer decision (COD), the Corps verbally contacted the Corps Malmstrom Field office, the Corps Construction Division, the Corps Contracting Division, and Malmstrom Air Force Base General Counsel regarding the request for a COD and the potential for litigation. This was during the gathering of information and development of the COD to respond to the 24 May 2011 request for a COD. It is standard practice that employees produce all relative [sic] information to the Corps' Office of Counsel and Contracting Division for development of a COD, and it is standard practice that employees retain information related to the request for a COD. Malmstrom Air Force Base counsel verbally informed all Malmstrom agencies that may have relevant information, including, but not limited to, Malmstrom Security Force Group, Malmstrom Contracting Division, and Malmstrom Base Records Manager of the potential litigation and requirement to retain all information related to the contract. Additionally, it was the Malmstrom counsel's practice to forward the email litigation hold received from the Army Corp of Engineers to all Malmstrom agencies that may have relevant documents.

(*Id.*) Garco challenges the verbal notifications as "unsubstantiated" and complains that the government did not identify who made the verbal notification and when they were made. Garco also complains that MAFB's counsel, Ms. Sinclair, refused to testify at her deposition. (App. mot. at 21-25) Garco does not provide any additional argument relative to culpable mental state in its brief in reply to the government's opposition. By relying solely on the government's response to Request for Admission No. 8, Garco leaves us with a "sparse" record regarding its "culpable state of mind" argument. *See ADT Construction Group, Inc.*, ASBCA No. 55358, 13 BCA ¶ 35,307. To the extent documents were destroyed after 24 May 2011 (when the obligation to preserve documents arose), they were destroyed pursuant to MAFB's disposition schedule. Nothing in Garco's discussion of the government's response supports a finding that the government "intentionally destroyed" evidence, destroyed evidence to "disadvantage" appellant, or acted in "reckless disregard" of its duty to preserve evidence. Therefore, we

conclude that Garco has failed to prove the second element of proof required for spoliation – culpable mental state.

Evidence Destroyed was Relevant & Supportive of the Claim

Garco's initial argument on this element of proof is contained on half of page 25 and page 26. On page 25 Garco discusses legal precedents. On page 26, Garco first states, "[h]ere, as the discussion and factual summary above has shown, Appellant has been prejudiced because the destroyed evidence goes to critical issues and the remaining evidence at hand is conflicting." Garco leaves it to the Board to figure out what "discussion" and "factual summary" it refers to and how it proves prejudice. Garco's statement, "[f]or instance, and not surprisingly, the Government has never asserted that Col. Finan's destroyed emails and other correspondence would not have contained responsive material" appears to shift the burden of proof to the government. We give this argument no weight. Likewise, in the remaining argument on page 26, Garco fails to refer the Board to any of the facts in its Relevant Facts section on pages 10 to 17. In its reply to the government's opposition, Garco supplements its relevance argument (app. reply br. at 23-25), but Garco's argument remains tied to its discovery requests, in particular RFP #8 (*id.* at 24). Considering Garco's reply brief, we remain unable to definitively conclude that the documents destroyed in accordance with Air Force rules were relevant to Garco's case.

Adverse Inferences Sought

Finally we consider the remedy Garco seeks. Garco states that it "seeks sanctions on the lesser end of the spectrum and does not seek a harsh, case-dispositive sanction" (app. mot. at 27). We do not agree with Garco's characterization of its desired sanctions. Garco's first request for a sanction reads, "**Adverse factual inference that the Government's base access restrictions during the Project were a change to the contract (contrary to the Government's contention that there was no change to the policy or contract after the award)**" (app. mot. at 27). We disagree that this request involves a "factual inference." Whether there is a change to the contract is a question of law. *M.A. Mortenson Co.*, ASBCA No. 53346, 05-2 BCA ¶ 33,014 at 163,614 ("Whether there has been a change to the contract requirements is a question of law"). Additionally, inferring that there was a change is a dispositive inference because the Changes clause, FAR 52.243-4, entitles a contractor to an "equitable adjustment" for increased costs caused by the change. Imposing this inference would effectively determine that Garco is entitled to compensation leaving only quantum to be determined. A finding of bad faith is, however, required for the imposition of such dispositive sanctions:

> A determination of bad faith is normally a prerequisite to the imposition of dispositive sanctions for spoliation under the district court's inherent power, and must be made with

> caution. In determining that a spoliator acted in bad faith, a district court must do more than state the conclusion of spoliation and note that the document destruction was intentional. *See Mathis v. John Morden Buick, Inc.*, 136 F.3d 1153, 1155 (7th Cir. 1998) ("That the documents were destroyed *intentionally* no one can doubt, but 'bad faith' means destruction for the purpose of hiding adverse information.") (emphasis added).

Micron Technology, 645 F.3d at 1327. There is no evidence of bad faith on the part of the government and therefore Garco would not be entitled to its first requested adverse inference.

The other three[5] adverse inferences that Garco requests relate to the government's sovereign act defense. In essence Garco asks that the Board impose an inference that there was no sovereign act. Again, this is a question of law not fact and is dispositive as to the affirmative defense. As such, these requests likewise require a showing of bad faith that has not been made.

CONCLUSION

For the reasons stated above, Garco's motion for spoliation sanctions is denied.

Dated: 16 October 2013

CRAIG S. CLARKE
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

PETER D. TING
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

ELIZABETH M. GRANT
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

[5] Garco withdrew its request for monetary sanctions (app. reply br. at 27).

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. 57796, 57888, Appeals of Garco Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals