

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -)
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Cardinal Contracting Co., LLC) ASBCA No. 62872
)
Under Contract No. FA4484-14-D-0004)

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OPINION BY ADMINISTRATIVE JUDGE HERZFELD

Cardinal Contracting Company, LLC (Cardinal) asserts the Department of the Air Force (Air Force) (1) breached their contract by failing to allow Cardinal to retrieve its equipment when the Air Force limited base access to mission-essential services and (2) unreasonably delayed Cardinal's performance after the Air Force deemed the contractor mission-essential. The Board conducted a hearing regarding entitlement only. For the reasons discussed below, we find that Cardinal has failed to prove entitlement for breach but has demonstrated entitlement for the Air Force's unreasonable delays from May 21, 2020, through June 12, 2020. The Board remands to the parties to determine the extent of damages.

FINDINGS OF FACT

In September 2014, Cardinal and the Air Force entered an indefinite delivery/indefinite quantity contract for Cardinal to construct and repair asphalt, including milling and paving (R4, tab 1 at 1-2; tr. 11-13; *see also* R4, tabs 2-8 (exercising contract options and other modifications). On September 30, 2019, the Air Force issued a task order to Cardinal to repave two parking lots at Joint Base McGuire-Dix-Lakehurst, New Jersey with a one-year period of performance through September 29, 2020 (R4, tab 9 at 1, 3, 7; tr. at 13-14).

Six months into performance on March 17, 2020, the installation commander issued a declaration of a public health emergency based on the “public health situation on our installation involving COVID-19” (R4, tab 21 at 3; *see also* tabs 32-33 (extending the public health emergency restrictions through August 13, 2020)). The installation commander explained that the “base remains open for essential personnel reporting for duty” and directed that commanders and supervisors “must determine ‘essential personnel’” (R4, tab 21 at 1). The base commander noted, “The state of New Jersey and Burlington County, including other various counties throughout the state, are in similar states of emergency” (*id.*).

The next day (on March 18, 2020), the contracting officer suspended Cardinal’s performance, informing Cardinal that the contractor was “non-mission essential” and to “refrain from being physically present on base until notified otherwise by either the Contracting Officer or Contracting Officer Representative” (R4, tab 10; tr. 24). While the agency stated that it would “continue to assess which contracts are considered essential” and would contact Cardinal if the contractor’s services became mission essential, the contracting officer concluded that the “installation is hereby closed to your company and its employees until the installation commander re-authorizes base access and/or the public health emergency has ended” (R4, tab 10; tr. 24-25).

At the time of the suspension notice, Cardinal had been performing and had mobilized its paving equipment including one Vogeleson Vision paver, one Roadtech miller, one John Deere 710 backhoe, one John Deere mini excavator, one skid steer, three asphalt rollers, and one tri axle (R4, tab 17 at 12; tr. 21). Given the lack of advance warning, Cardinal could not retrieve its equipment before the Air Force suspended performance (tr. 23, 53).

Even though Cardinal could not access the base to perform work, the director of the installation’s Emergency Operation Center stated that the center’s staff would have permitted Cardinal to retrieve its idle paving equipment had Cardinal requested base access for that purpose based on an emergency access policy (R4, tab 31 at 3; tr. 128). The director of the Emergency Operation Center was also the commander of the civil engineering department; the contracting officer’s representative was also in the civil engineering department (tr. 178-79; R4, tab 31 at 1). Yet, neither the contracting officer nor the contracting officer’s representative knew about the emergency access policy that would have allowed Cardinal to access the base to retrieve its idle paving equipment (tr. 121-22, 130, 149 (contracting officer); tr. 198 (contracting officer’s representative)).

Several weeks after the suspension, Cardinal’s president had a telephone conversation with his main government point-of-contact – the contracting officer’s representative – to inquire whether Cardinal could access the base to retrieve its idle equipment (tr. 26-27, 29, 39, 45). Cardinal’s president stated that the contracting

officer's representative "implied that [Cardinal] would be able to retrieve [Cardinal's] equipment" (tr. 45). The contracting officer's representative, somewhat evasively, eventually acknowledged on cross-examination that he did not recall whether he spoke to Cardinal's president during this time period, although he remained adamant that he never spoke to Cardinal's president about accessing the base during this period to retrieve the idle equipment (tr. 186-87).¹ Notwithstanding anything that might have been said during this conversation, both Cardinal's president and the Air Force's contracting officer's representative agreed that Cardinal still needed to make a request to the contracting officer before access could be granted (explained below) (tr. 14-15, 18, 22-23, 27, 33 (Cardinal president noting that submitting an entry authority list to the contracting officer "was the only way to get access to the base"); tr. 174, 176-77 (contracting officer's representative))).

Cardinal submitted an entry authority list to the contracting officer on April 7, 2020 (tr. 27-28; R4, tab 20). The contract stated, "The contractor shall submit a written request on company letterhead to the contracting officer listing the following: contract number, location of work site, start and stop dates, and names of employees

¹ During cross-examination of Cardinal's president, the Air Force questioned him regarding Cardinal's failure to produce third-party telephone records during discovery as a basis to impeach and undermine the president's testimony that he and the contracting officer's representative spoke during this time-period (tr. 45-46). Cardinal had objected to the document request but stated that it would seek telephone records from its wireless provider and would provide the records if it obtained them, which the contractor apparently was unable to do (Cardinal's Resp. to First Supp. Req. for Prod. of Docs. No. 19). Yet, the Board will not draw an adverse inference from Cardinal's failure to produce third-party documents that were not in the contractor's possession, custody, or control. See *Meyer Corp. v. United States*, 123 F.4th 1306, 1312-13 (Fed. Cir. 2024) (vacating trial court that applied an adverse inference regarding documents that were not in party's possession, custody, or control; the opposing party never filed a motion to compel; and the trial court had other evidence it should have weighed to resolve the issue); *PCL Civil Constructors, Inc.*, ASBCA No. 42108, 92-1 BCA ¶ 24,637 at 122,941 n.3 (applying the possession, custody, or control standard in assessing a party's failure to produce documents). Also, we find unconvincing the Air Force's attempt to undermine the testimony of Cardinal's president about this conversation due to the absence of contemporaneous, corroborating written notes or memoranda (tr. 46). Neither the contracting officer's representative nor Cardinal's president regularly kept contemporaneous notes of their conversations, so the absence of any contemporaneous notes regarding this conversation does not help the fact finder (tr. 46 (Cardinal's president); tr. 187 (contracting officer's representative))).

and subcontractor employees needing access to the base” and also the “purpose of contract” (R4, tab 1 at 25, 145; tr. 15, 81). The contract explained the process: “The contractor will provide an initial Entry Authority List (EAL) . . . to the administrative contracting office” (R4, tab 1 at 123-24; tr. 16). The contracting office “will” then “authenticate and forward the EAL to the 87th SFS Welcome Center, **NLT 72 hours prior** to contract start date” (R4, tab 1 at 124 (emphasis in original); tr. 17-18). As to an entry authority list, the contract stated that “[t]he contracting office will maintain any required documentation until the contract has been completed or terminated for any reason” (R4, tab 1 at 124). The contract warned that if an entry authority list was “not accurate or contain[ed] fraudulent information, contractor identification badges would not be issued” but permitted “pen and ink changes” to delete personnel but not to add personnel, which “must be made by initiating a new [entry authority list]” (*id.* at 124-25). The contract also provided an example that the contractor could use to prepare the entry authority list submission on the company’s letterhead (R4, tab 1 at 145-46).

Cardinal’s accounting representative, not the president, emailed the April 7 entry authority list submission to the contracting officer (although the president signed the attached submission) and did not copy the contracting officer’s representative (R4, tab 20; tr. 27-28, 100). The email stated, “See attached for EAL, so we can renew our passes on base” (R4, tab 20 at 1; tr. 54). The attached entry authority list submission repeated the language from prior requests, which followed the standard format set forth in the contract to provide the “purpose of the contract” that “[b]ase access required through 20 Dec 2020” to perform the contract (R4, tab 20 at 2; tr. 17, 55, 84, 100-01). Nothing in the submission indicated that Cardinal was seeking access to the base to retrieve its idle equipment (R4, tab 20; tr. 55-56, 100-01).

Nor did Cardinal’s president (or anyone at Cardinal) speak or otherwise communicate with the contracting officer to explain that Cardinal only wanted access to the base to remove its idle equipment (tr. 56-57, 101). Cardinal’s president was relying on his conversation with the contracting officer’s representative about accessing the base to retrieve the idle equipment (tr. 56). Cardinal’s president was “pretty sure” the contracting officer’s representative “and contracting officer were communicating with each other” so she would know the reason Cardinal wanted to enter the base (tr. 29). But the contracting officer’s representative never communicated with the contracting officer about this (tr. 101-02). Both the contracting officer and contracting officer’s representative were working remotely, because they were “sent home” during this period (tr. 150-51 (contracting officer); tr. 185-86 (contracting officer’s representative)).

The contracting officer responded to Cardinal’s request the same day: “Since your contract is not mission essential you will have to wait to renew your EAL. Just continue to be patient and be safe” (R4, tab 11; tr. 102, 118). Because Cardinal had

not informed the contracting officer that it was seeking access to retrieve its idle equipment, the contracting officer had no reason to take it “up [the] chain” to see if the contractor would be allowed on base for this limited purpose (tr. 128-29). Cardinal did not immediately respond to the contracting officer to clarify that it was seeking to remove its idle equipment (tr. 103).

After more than a month, Cardinal submitted a “claim” on May 12, seeking reimbursement for the costs of its idle equipment and explaining that Cardinal’s “inability to access equipment” from the base had resulted in costs and an inability “to secure other work for these pieces of equipment” (R4, tab 12 at 1; tab 15 at 4; tr. 30-31, 82, 141-42). Cardinal sought its costs from the day the Air Force deemed it non-mission essential (March 18), not from when it submitted its entry authority list request to the contracting officer (April 7) (R4, tab 12 at 2). The contracting officer did not understand this “claim” to be a request to access the idle equipment on the base (tr. 154). Indeed, the next day an Air Force contract specialist emailed Cardinal with questions from another contracting officer asking, among other things, “After you received the non-mission essential letter, was a request ever made to gain access to and remove the equipment?” (R4, tab 15 at 3; tr. 32). Cardinal responded, “Yes, we filed an EAL update on 4/7/2020, which was declined by the Military base on the same date” (R4, tab 15 at 2).

After Cardinal submitted its idle equipment “claim,” the Air Force’s contracting officer notified Cardinal on May 21 that “you have been deemed to be essential personnel; therefore, you are required to continue performing your services until notified otherwise from your contracting officer” (R4, tab 13; tr. 34-35, 67-68, 78-79, 98, 105, 131). Despite the notice, the contracting officer did not approve Cardinal’s April 7 entry authority list because she believed that it was “dead” and Cardinal needed to “submit a new one with the new date” despite her testimony that the contract did not require it (tr. 134-37). Nor did the contracting officer advise Cardinal that it needed to submit a new entry authority list (tr. 35, 139). Cardinal’s president “went to the base several times personally” but was unable to gain access (tr. 69, 72).

Two weeks later on June 3, Cardinal stated it still could not access the base and its equipment despite the April 7 entry authority list, and submitted a new entry authority list (R4, tab 14; tab 15 at 3; tr. 35). Cardinal requested that the Air Force “[k]indly inform us when we can send our employees and managers to obtain their entry passes to the Military base, in order for us to gain access to our equipment on the Military base, and when we can resume our contractual work” (R4, tab 15 at 3).

Receiving no response, Cardinal followed up with the Air Force on June 12, reminding the contracting office that it had been deemed mission essential but “as of today . . . we are still unable to continue our services or access our equipment on base” (R4, tab 16 at 1; tr. 35-36). Cardinal only knew that its entry authority list was

“currently processing in the Visitors Center,” not that it had been granted access (R4, tab 16 at 1). On the same day, the Air Force responded and Cardinal learned for the “first time” that the entry authority list request had been processed and “[y]ou currently do have access to the work site, materials, and equipment” (R4, tab 16 at 1; tr. 36).

The following week, Cardinal explained to the contracting officer’s representative that the company was “in the process of getting entry passes” for Cardinal employees (R4, tab 22; tr. 71). Even still, Cardinal could not restart performance immediately because it needed to service the idled equipment, including “drain fuel tanks, put new fuel in it,” “change batteries, get the equipment started, service the equipment, change tires” (tr. 37). Cardinal resumed work thereafter, completing work on September 15, 2020, within the original 365-day completion period in the task order and without needing a time extension to complete the work (tr. 73-74, 110, 169).

On November 19, 2020, Cardinal filed a Contract Disputes Act (CDA) certified claim with the contracting officer, seeking \$1,151,919.27 primarily based on the contract’s Suspension of Work clause (R4, tab 17 at 4; tab 1 at 9-10 (incorporating Federal Acquisition Regulation (FAR) 52.242-14 (APR 1984))). Cardinal alleged that the Air Force unreasonably denied Cardinal access to retrieve its idle equipment and unreasonably delayed Cardinal from restarting performance after Cardinal was deemed non-mission essential (R4, tab 17 at 3). Cardinal relied on the Suspension of Work clause and, alternatively, that the Air Force was “liable for its acts of interference and failure to provide access” (*id.*). On January 7, 2021, the contracting officer denied the CDA claim, concluding that Cardinal “has failed to demonstrate that the government is liable to the contractor for the consequences of the government’s sovereign act in response to a health crisis” regarding COVID-19 (R4, tab 19).

On March 29, 2021, Cardinal timely appealed the contracting officer’s final decision to this Board. Cardinal’s May 6, 2021 complaint sought (1) its idle equipment costs, characterizing this cause of action as a tort of “conversion,” and (2) its delay costs based on the Suspension of Work clause (compl. ¶¶ 39-53). On the same day, “out of an abundance of caution and to the extent that the Government will contest . . . jurisdiction” over Cardinal’s conversion cause of action at the Board, Cardinal submitted notice of a claim under the Federal Tort Claims Act, 28 U.S.C. § 2401(b) (R4, tab 34 at 2). The Air Force’s Tort’s Branch responded, concluding that Cardinal’s “conversion claim sounds in contract” and “[w]here an action is essentially for breach of a contractual undertaking, the action cannot be under the Federal Tort Claims Act” (R4, tab 35).

DECISION

Cardinal's post-trial briefs assert that the Air Force is liable for the conversion of Cardinal's idle equipment after April 7 (unlike in its claim and complaint, where it sought idle equipment costs from the March suspension notice) (*compare* app. reply br. at 7-8, *with* compl. ¶¶ 39-44, *and* R4, tab 17 at 3, 21, 23). Cardinal separately asserts that the Air Force is liable for delay under the Suspension of Work clause from when Cardinal was deemed mission essential on May 21 (unlike in its claim and complaint, where it asserted any delay began with the March suspension notice) (*compare* app. reply br. at 10-14, *with* compl. ¶¶ 45-53, *and* R4, tab 17 at 3, 21, 23). Cardinal thereby has reduced the amount of time for which it alleges Air Force liability, which it may do on appeal without it becoming a "new claim" because "the nature of the claim and basic operative facts are essentially the same" despite the reduction in damages sought. *Anthony & Gordon Constr. Co.*, ASBCA No. 61916, 21-1 BCA ¶ 37,887 at 184,002 (quoting *Raytheon Co.*, ASBCA No. 57743 *et al.*, 17-1 BCA ¶ 36,724 at 178,847, *aff'd*, 940 F.3d 1310 (Fed. Cir. 2019)).

The Air Force contends that Cardinal may not recover on either cause of action, asserting that the sovereign acts defense bars Cardinal's recovery and, alternatively, that Cardinal has failed to prove liability (gov't br. at 20-25; gov't reply br. at 12-15). Even if the sovereign acts defense does not apply, the Air Force asserts that Cardinal has failed to prove government liability (gov't br. at 5-20; gov't reply br. at 6-12). And, as to the conversion cause of action, the Air Force asserts Cardinal could only recover for a breach under contract law, not conversion under tort law (gov't br. at 5-8; gov't reply br. at 1-6).

For the reasons discussed below, the sovereign acts defense does not bar Cardinal's claim, Cardinal has failed to prove a breach to recover for idle equipment costs before it was deemed mission essential, and Cardinal has proved entitlement for some days of delay after it was deemed mission essential.

I. Standard of Review

Under the CDA and Board Rule 10, the Board proceeds *de novo* and weighs evidence based on the written and testimonial record from a hearing, unbound by any findings of a contracting officer's final decision. *Dep't of Transp. v. Eagle Peak Rock & Paving, Inc.*, 69 F.4th 1367, 1374-76 (Fed. Cir. 2023); 41 U.S.C. § 7103(e); ASBCA Rule 10(c), (d). Cardinal, as the proponent of the claims, bears the burden of proof by a preponderance of the evidence. *FlightSafety Int'l, Inc.*, ASBCA No. 62659, 23-1 BCA ¶ 38,245 at 185,709, *aff'd*, 130 F.4th 926 (Fed. Cir. 2025). The Air Force bears the burden of proving its sovereign acts affirmative defense. *Conner Bros. Constr. Co. v. Geren*, 550 F.3d 1368, 1371 (Fed. Cir. 2008) (stating that the sovereign acts "doctrine is an affirmative defense that is an inherent part of every government

contract”); *Frazier Invs., Inc.*, ASBCA No. 63001, 23-1 BCA ¶ 38,313 at 186,042 (“As the proponent of any affirmative defense, the [government] bears the burden of proof.”).

II. The Sovereign Acts Doctrine Does Not Bar Cardinal’s Claim

“The sovereign acts doctrine provides that ‘the United States when sued as a contractor cannot be held liable for an obstruction to the performance of the particular contract resulting from its public and general acts as a sovereign.’” *Conner Bros.*, 550 F.3d at 1371 (quoting *Horowitz v. United States*, 267 U.S. 458, 461 (1925)). When the government contracts with a private party, the sovereign acts doctrine balances the government’s “rights and duties” as governed by the “law applicable to contracts between private individuals” with the government’s “need for freedom to legislate” or regulate. *United States v. Winstar Corp.*, 518 U.S. 839, 895-96 (1996) (quoting *Lynch v. United States*, 292 U.S. 571, 579 (1934)).²

To invoke the sovereign acts doctrine as an affirmative defense, the government must prove two things: (1) a public and general government act; and (2) the act renders the government’s contractual performance commercially impracticable or impossible. *Winstar*, 518 U.S. at 891-910; *Klamath Irrigation Dist. v. United States*, 635 F.3d 505, 520-22 (Fed. Cir. 2011); *StructSure Projects, Inc.*, ASBCA No. 62927, 23-1 BCA ¶ 38,416 at 186,680, *aff’d*, No. 2024-1251, 2025 WL 2860720 (Fed. Cir. Oct. 9, 2025); *Al Ghanim Combined Grp. W.L.L.*, ASBCA Nos. 62321, 62984, 26-1 BCA ¶ 39,058 at 190,254.

The Air Force asserts that the commander’s declaration of a public health emergency regarding COVID-19 shields the government from liability based on the sovereign acts defense (gov’t br. at 20-25; gov’t reply br. at 12-15). Cardinal asserts that the declaration of a public health emergency did not render it impossible or commercially impracticable for the Air Force to allow Cardinal to retrieve its idle equipment or admit Cardinal on-base after it had been deemed mission essential (app. br. at 22-24; app. reply br. at 14-15). As Cardinal points out, the Air Force’s actions (or inaction) were not the result of the commander’s declaration, because there was an emergency access policy that would have permitted Cardinal to retrieve its idle equipment despite the base closure order (app. reply br. at 14). Nor did the base closure order have any application once the Air Force determined Cardinal was mission essential. Cardinal only seeks delay damages after the Air Force deemed it mission essential. As explained below, these considerations doom the Air Force’s

² Although Justice Souter’s *Winstar* decision commanded only the support of a plurality of justices, the Federal Circuit “has treated that opinion as setting forth the core principles underlying the sovereign acts doctrine.” *Conner Bros.*, 550 F.3d at 1374.

arguments that the commander's declaration, which was a public and general act, rendered the Air Force's contractual performance impossible or commercially impracticable.

A. The COVID Base Restrictions Were A Public & General Act

To assess the public and general nature of an act, we look at whether (1) the government's act was specifically directed at nullifying contract rights or relieving the government of its contractual obligations, and (2) the impact on public contracts (whether direct or indirect) is incidental to a broader governmental objective. *Winstar*, 518 U.S. at 898; *Conner Bros.*, 550 F.3d at 1374-75; *Al Ghanim*, 26-1 BCA ¶ 39,058 at 190,254. We have previously found declarations of a public health emergency related to the COVID-19 pandemic that restricted military base access to have constituted a public and general act under the sovereign acts doctrine. *Haskell Co.*, ASBCA Nos. 63332, 63586, 25-1 BCA ¶ 38,928 at 189,462; *StructSure*, 23-1 BCA ¶ 38,416 at 186,680; *APTIM Fed. Servs., LLC*, ASBCA No. 62982, 22-1 BCA ¶ 38,127 at 185,219.

Like our prior decisions, the commander's declaration of a public health emergency on this base was not unique to the base or contractors, given that the state of New Jersey (where the base is located) and surrounding counties had also declared a state of public health emergency (R4, tab 21 at 1). The base closure to non-mission essential personnel was not specifically targeted at Cardinal or contractors; even the government's contracting personnel were "sent home" (tr. 150-51, 185-86). The base closure to non-mission essential personnel was incidental to a broader governmental objective of protecting public health. Thus, we conclude the commander's declaration constituted a public and general act.

B. The Base Restrictions Did Not Render the Government's Contract Performance Impracticable As to Retrieval of Equipment or Mission-Essential Performance

Cardinal argues that the commander's declaration closing the base did not render it impossible or commercially impracticable for the Air Force to allow Cardinal to retrieve its idle equipment or resume performance when designated mission essential (app. br. at 23-24; app. reply br. at 14-15). We agree. As noted above, the Air Force implemented policies that would have allowed access to retrieve Cardinal's idle equipment despite the commander's declaration. Also, once declared mission essential, Cardinal was specifically directed to return to continue performance. The Air Force cannot prove impossibility or commercial impracticability.

To establish impossibility, the Air Force must prove "(1) a supervening event that made performance impossible or commercially impracticable, (2) the contract

assumed the non-occurrence of the supervening event, (3) the government as contractor, was not at fault for the occurrence of the supervening event, and (4) the government did not assume the risk of the occurrence.” *Al Ghanim*, 26-1 BCA ¶ 39,058 at 190,256; *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1294-95 (Fed. Cir. 2002); *see also Winstar*, 518 U.S. at 904-10.

The Air Force has established the first two elements of impossibility or commercial impracticability. The COVID-19 pandemic and the resulting declaration of a public health emergency (1) was a supervening event and (2) the contract assumed the non-occurrence of this global pandemic. *APTIM*, 22-1 BCA ¶ 38,127 at 185,219; *see also Al Ghanim*, 26-1 BCA ¶ 39,058 at 190,256 (“A supervening event occurs *after* the parties enter into a contract.”).

As to the third element, however, the Air Force acting in its contractual capacity bears fault for its implementation of the public and general act. *Al Ghanim*, 26-1 BCA ¶ 39,058 at 190,256 (“Although not the only way to assess fault, we have sometimes analyzed this factor by looking at whether the government issued instructions or orders implementing the public and general act”); *ANHAM FZCO*, ASBCA No. 58999, 20-1 BCA ¶ 37,745 at 183,189; *Home Ent., Inc.*, ASBCA No. 50791, 99-2 BCA ¶ 30,550 at 150,861. As noted above, the Air Force (acting as sovereign) had an emergency access policy that would have allowed Cardinal to access the base for the limited purpose of retrieving its idle equipment, so the sovereign was not blocking the Air Force (in its contractual capacity) from allowing Cardinal to access its idle equipment even prior to being deemed mission essential (R4, tab 31 at 3).³ Also, the commander’s declaration only barred non-mission essential personnel from accessing the base during the pandemic (R4, tab 21 at 1, tabs 32-33). However, once the Air Force deemed Cardinal mission essential on May 21 and directed the company to re-start performance, the declaration no longer barred Cardinal’s access to the base (R4, tab 13; tr. 34-35, 67-68, 78-79, 98, 105, 131). Cardinal only seeks delay damages for the period after it was deemed essential (app. reply br. at 10-14).

Ultimately, the Air Force may not rely on the sovereign acts defense because the public and general act did not prevent the Air Force (in its contractual capacity) from (1) allowing Cardinal to access the base to retrieve its idle equipment or (2) beginning performance after Cardinal was deemed mission essential. Cardinal may recover if it can prove the Air Force’s liability.

³ The Air Force attempts to use the contracting officer’s ignorance of the policy to buttress its defense (gov’t reply br. at 14). But the contracting officer acknowledged that she might have run the request up the chain and learned about the policy had she understood Cardinal’s request was limited to accessing its idle equipment (tr. 128-29).

III. The Air Force Did Not Breach Its Duty Not to Interfere with Cardinal's Right to Access its Idle Equipment

Cardinal's claim asserts that the Air Force improperly administered the contract by unreasonably denying Cardinal access to the base for the "limited purpose of removing the Idle equipment" and by "its acts of interference and failure to provide access" (R4, tab 17 at 3; app. br. at 3). On appeal, Cardinal frames this as a failure of contract administration that resulted in conversion of its property subject to New Jersey state tort law (app. br. at 15-16; compl. ¶¶ 39-44). The Air Force counters that (1) this cause of action really alleges a tortious breach of contract subject to federal contract law, (2) Cardinal failed to inform the Air Force's contracting officer why Cardinal sought access, and (3) the Air Force breached no contractual duty (gov't br. at 5-15; gov't reply br. at 1-10). We agree with the Air Force.

Federal contract law applies here, not state tort law. As to a "wrongful conversion claim, we possess jurisdiction to entertain claims of tortious breach of contract as opposed to independent torts." *AECOM Tech. Servs., Inc.*, ASBCA No. 62800, 21-1 BCA ¶ 38,009 at 184,595; *Brooke Enters.*, ASBCA No. 53993, 04-2 BCA ¶ 32,785 at 162,150-51 (where party alleged conversion the Board treated it as a breach claim). The Board can hear a "tortious" breach claim with "a sufficient nexus between the alleged tort and some express or implied obligation of the government" from the contract. *Qatar Int'l Trading Co.*, ASBCA No. 55533, 08-1 BCA ¶ 33,829 at 167,428. Tortious conduct that meets this nexus is "merely another way of asserting that a breach of contract occurred" subject to adjudication under contract principles. *Olin Jones Sand Co. v. United States*, 225 Ct. Cl. 741, 745 (1980). Also, the contract states that "United States law will apply to resolve any claim of breach of this contract." FAR 52.233-4, APPLICABLE LAW FOR BREACH OF CONTRACT CLAIM (OCT 2004) (incorporated by reference in the contract, R4, tab 1 at 18); see also *Boyle v. United Tech. Corp.*, 487 U.S. 500, 504 (1988) ("[O]bligations to and rights of the United States under its contracts are governed exclusively by federal law."); *Higbie v. United States*, 778 F.3d 990, 995 (Fed. Cir. 2015) ("It is well-settled that state law generally does not govern disputes involving contracts to which the Government is a party."). Thus, we treat Cardinal's first cause of action as alleging a breach of contract subject to federal contract law.

Cardinal maintains that it still may recover its idle equipment costs regardless of whether its claim is characterized as a conversion or a breach of contract (app. reply br. at 7-10).⁴ "To recover for a breach of contract, a party must allege and establish:

⁴ Like a reduction in damages (discussed above), Cardinal's use of a new legal theory of recovery regarding its idle equipment costs is permissible and not a "new claim," because the nature of its legal theory has not materially changed and it relies on the same operative facts. *K-Con Bldg. Sys., Inc. v. United States*,

(1) a valid contract between the parties, (2) an obligation or duty arising out of the contract, (3) a breach of that duty, and (4) damages caused by the breach.” *Mutakaber v. Sec’y of State*, 162 F.4th 1141, 1146 (Fed. Cir. 2025) (internal citations and quotations omitted).

First, the parties had a valid contract (R4, tab 1).

Second, Cardinal asserts that the Air Force had an implied duty, in administering the contract, not to interfere with Cardinal and to provide access to its idle equipment (R4, tab 17 at 3; app. br. at 3, 24; app. reply br. at 7-10;); *Blinderman Constr. Co. v. United States*, 695 F.2d 552, 557 (Fed. Cir. 1982) (noting the agency “was under an implied obligation to provide such access so that the contractor could complete the contract”). Denial of access through improper or unreasonable contract administration can breach the duty not to hinder or interfere with the other party’s performance or reasonable expectations of the fruits of the contract, which is a constituent duty of the implied duty of good faith and fair dealing. *Dobyns v. United States*, 915 F.3d 733, 739 (Fed. Cir. 2019) (“A party breaches the contract when it fails to abide by this implied duty, which includes the 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.” (internal citations and quotations omitted)); *see also Selva Constr. & Rental Equip. Corp.*, PSBCA No. 5039, 11-1 BCA ¶ 34,635 at 170,681 (“Improper or unreasonable contract administration can breach the implied duty not to hinder or delay . . .”), *aff’d*, 464 F. App’x 879 (Fed. Cir. 2012). An implied duty of good faith and fair dealing exists in all contracts, including government contracts, and applies to both the government and private parties. *Agility Pub. Warehousing Co. KSCP v. Mattis*, 852 F.3d 1370, 1383-84 (Fed. Cir. 2017); *Konecranes Nuclear Equip. & Servs., LLC*, ASBCA Nos. 62797, 62827, 24-1 BCA ¶ 38,586 at 187,560.

Third, Cardinal has failed to prove that the Air Force breached the implied duty by unreasonably denying it access to the installation because Cardinal cannot show that it (1) requested access to the base from the appropriate official and (2) stated it needed access for the limited purpose of retrieving its idle equipment.⁵ The contract required Cardinal to make a request to the *contracting officer* (not the contracting officer’s representative) to enter the base (R4, tab 1 at 25, 123-24, 145-46). Cardinal

778 F.3d 1000, 1006 (Fed. Cir. 2015); *Anthony & Gordon*, 21-1 BCA ¶ 37,887 at 184,001.

⁵ The contract did not necessarily require Cardinal to submit a new entry authority list unless it intended to add contractor personnel needing base access (R4, tab 1 at 125). The contract only required Cardinal to submit an initial entry authority list, which the contracting office was required to keep until the contract had been completed (or terminated) (R4, tab 1 at 123-24).

submitted an entry authority list to the contracting officer but repeated its standard statement that it wanted to renew its passes to continue working on the contract (R4, tab 20 at 1-2; tr. 17, 55, 84, 100-01). At the time, Cardinal was not mission essential and was barred from entering the base to continue performance (R4, tab 10; tr. 24-25). Cardinal's submission did not state that it sought access to retrieve its idle equipment, so the contracting officer had no reason to run the request up the chain of command and follow the standard process in the contract to forward it to the appropriate authority for approval (R4, tab 20; R4, tab 1 at 124; tr. 129). Indeed, the Air Force's contracting officials did not understand that Cardinal had sought access to the base on April 7 for the limited purpose of retrieving its idle equipment until Cardinal clarified this several months later (R4, tab 15; tr. 154).

Cardinal's president incorrectly believed that his conversation with the contracting officer's representative about retrieving Cardinal's equipment sufficed to provide notice of the reason Cardinal wanted to access the base (tr. 29). Yet, the contracting officer and contracting officer's representative never spoke about this issue because both were working remotely due to the pandemic (tr. 101-02, 150-51, 185-86). And Cardinal's president acknowledged that, despite his conversation with the contracting officer's representative, Cardinal could only access the base by making a request to the contracting officer (tr. 14-15, 18, 22-23, 27, 33). Indeed, the contracting officer is normally the government representative lodged with contract administration authority. *Sheffield Barbers, LLC*, ASBCA No. 62367, 25-1 BCA ¶ 38,795 at 188,679 ("A government representative must have actual authority to bind the government, and the Federal government generally lodges that authority with the contracting officer." (internal quotation and citation omitted)); FAR 1.602-1(a) ("Contracting officers have authority to enter into, administer, or terminate contracts and make related determinations and findings."). Here, the contract echoes this by requiring Cardinal to submit the entry authority list to the contracting officer before she sends it to the Welcome Center for approval (R4, tab 1 at 123-24).

Cardinal nevertheless argues that the contracting officer's representative had independent authority to grant Cardinal access to the installation based on the suspension notice (app. br. at 17; app. reply br. at 9). That notice directs Cardinal to "refrain from being physically present on base until notified otherwise by either the Contracting Officer or Contracting Officer's Representative" (R4, tab 10). But that provision did not give the contracting officer's representative authority to grant access to the base, just to notify when Cardinal had been authorized by the appropriate Air Force official. As the suspension notice states, the base was closed to Cardinal "until the *installation commander* re-authorizes base access" (R4, tab 10 (emphasis added)).

Ultimately, Cardinal failed to inform the appropriate official – the contracting officer – that Cardinal wanted to access the base for the limited purpose of retrieving

its equipment. Had Cardinal informed the contracting officer, she would have had reason to send the request up the chain of command and would have learned about the emergency access policy. Thus, the Air Force's contracting staff properly administered the contract on this point and there was no breach of the implied duty.

IV. The Air Force Unreasonably Delayed Cardinal from Restarting Performance When Cardinal Was Deemed Mission Essential

Cardinal contends that the Air Force unreasonably delayed Cardinal's performance after the agency deemed Cardinal mission essential and failed to immediately admit the contractor back on base (app. br. at 20-22; app. reply br. at 10-14). The Air Force asserts that it is not liable for any delay, asserting that Cardinal caused the delays by failing to file a new entry authority list with the contracting officer and not beginning performance once it was approved for access (gov't br. at 15-20; gov't reply br. at 11-12). As discussed below, Cardinal has proved the Air Force's liability for some of the alleged delay, demonstrating entitlement to compensable delay from May 21, 2020, through June 12, 2020.

The contract included the Suspension of Work clause, which permits a contractor to recover for ordered and constructive suspensions that result in unreasonable delays. FAR 52.242-14 (incorporated by reference in the contract, R4, tab 1 at 9-10); *Merritt-Chapman & Scott Corp. v. United States*, 528 F.2d 1392, 1400 (Ct. Cl. 1976) ("A constructive suspension has the same effect and consequences as an actual suspension and relief should be granted as if an actual suspension order had been issued."). "Constructive suspension occurs when work is stopped absent an express order by the contracting officer and the government is found to be responsible for the work stoppage." *P.R. Burke Corp. v. United States*, 277 F.3d 1346, 1359 (Fed. Cir. 2002).

As with an ordered suspension, a contractor may demonstrate entitlement for a constructive suspension if it proves (1) the contracting officer's actions or "failure to act within the time specified in this contract (or within a reasonable time if not specified)" (2) caused a suspension, delay, or interruption of performance for an "unreasonable amount of time," (3) that was not due to "any other cause, including the fault or negligence of the Contractor[.]" FAR 52.242-14(b); *Sherman R. Smoot Corp.*, ASBCA No. 52173, 03-1 BCA ¶ 32,212 at 159,318 (applying three-part test to determine entitlement for delays under Suspension of Work clause), *aff'd*, 96 F. App'x 718 (Fed. Cir. 2004). Where the contract does not specify it, "[w]hat is a reasonable period of time for the government to do a particular act under the contract is entirely dependent upon the circumstances of the particular case." *Tri-Cor, Inc. v. United States*, 458 F.2d 112, 131 (Ct. Cl. 1972).

The Air Force constructively suspended Cardinal by unreasonably delaying Cardinal's access to the base after the agency deemed the contractor mission essential. On May 21, 2020, the Air Force's contracting officer notified Cardinal that it had been deemed mission essential and was "required to continue performing your services" (R4, tab 13; tr. 34-35, 67-68, 78-79, 98, 105, 131). At that point, Cardinal should have been able to access the base because it had submitted a valid entry authority list permitting base access. Cardinal's president, nevertheless, was denied access to the base (tr. 69, 72; R4, tab 15 at 2 (noting on June 3 that Cardinal was still not "able to access our equipment")).

The April 7 entry authority list was valid and should have been used by the contracting officer to give Cardinal access to the base when the contracting officer ordered Cardinal to restart performance on May 21. Once Cardinal submitted an entry authority list, the contract required the contracting office to forward that documentation to the Welcome Center for approval not less than 72 hours prior to the contract start date (R4, tab 1 at 123-24). While the 72-hour contractual requirement applied at the "start" of the contract, we conclude that the 72-hour period is also a "reasonable amount of time" for assessing the timeliness of approval after contract performance restarted. *See G. Bliudzius Contractors, Inc.*, ASBCA No. 37707, 90-2 BCA ¶ 22,835 at 114,661 (assessing reasonableness even where "contract did not prescribe a period for Government approval" and concluding the government had unreasonably delayed); *see also Tri-Cor*, 458 F.2d at 131; FAR 52.242-14(b). Applying that 72-hour contractual requirement to restarting Cardinal's performance, the Air Force should have submitted the April 7 entry authority list to the Welcome Center on May 18 (72 hours prior to the restart of performance) to assure that Cardinal could begin performance when the government ordered it on May 21.

The Air Force contends that the April 7 entry authority list was no longer valid. At the hearing, the contracting officer could not identify a contractual provision that justified her conclusion that the April 7 entry authority list was "dead" (tr. 134-37). The Air Force's post-hearing brief attempts to fill that void by inaccurately asserting the 72-hour requirement applied to the contractor, not the contracting officer (gov't br. at 18). As Cardinal argues (and we note above), the contract states the "*administrative contracting office . . . will authenticate and forward the [entry authority list] to the 87th SFS Welcome Center, **NLT 72 hours prior** to contract start date*" (R4, tab 1 at 124 (initial emphasis added, second emphasis in original); app. reply br. at 11-12). This contract provision identifies an obligation of the contracting officer, not the contractor.

The Air Force also argues that Cardinal's June 3 entry authority list proves that the April 7 request was no longer valid and that the passage of time justified the contracting officer's inaction (gov't br. at 18-19; gov't reply br. at 11-12). In the June 3 entry authority list, Cardinal added an additional person to the list of personnel it sought to have access to the base (*compare* R4, tabs 14 and 20; tr. 137). The Air Force

now asserts that this later modification justified ignoring the April 7 request because the contracting officer could presume that there would be changes to the personnel needing access to the base given the passage of time (gov't reply br. at 11-12). This runs counter to the contract. The contract only required Cardinal to submit an initial entry authority list, which the contracting office was required to keep until the contract had been completed (or terminated) (R4, tab 1 at 123-24). The contract did not require Cardinal to submit a new entry authority list unless it intended to add contractor personnel needing base access (R4, tab 1 at 125). Thus, the April 7 entry authority list remained valid under the contract until Cardinal submitted a new entry authority list (just as the initial entry authority list was valid until Cardinal submitted the April 7 request).

Finally, the Air Force asserts that Cardinal has failed to prove that the delay from May 21 through June 26, 2020, was entirely caused by the Air Force (gov't br. at 19-20; gov't reply br. at 12). We agree. "[A] contractor cannot recover 'where the delays are 'concurrent or intertwined' and the contractor has not met its burden of separating its delays from those chargeable to the Government.'" *Essex Electro Eng'rs, Inc. v. Danzig*, 224 F.3d 1283, 1292 (Fed. Cir. 2000) (quoting *Blinderman*, 695 F.2d at 559); *see also Triax-Pac., JV v. Stone*, 958 F.2d 351, 353-54 (Fed. Cir. 1992) (preventing recovery based on "any other cause" than the government). "Nevertheless, if 'there is in the proof a clear apportionment of the delay and the expense attributable to each party,' then the government will be liable for its delays." *Essex*, 224 F.3d at 1292 (quoting *Coath & Goss, Inc. v. United States*, 101 Ct. Cl. 702, 714-15 (1944)).

As of June 12, Cardinal knew its entry authority list had been granted and it could access the base once it showed up to get its passes (R4, tab 16 at 1; tr. 36). Cardinal did not restart performance for another 10 business days – until June 26 (tr. 37-38). Cardinal blames the Air Force for its inability to quickly restart because of the Air Force's earlier refusal to allow Cardinal to access its idle equipment, which it asserts would not have required the same amount of maintenance and service had the equipment not sat idle for several months (tr. 37-38; app. reply br. at 13-14). But Cardinal relies on its unproven assertion that it should have been granted access to its idle equipment on April 7, which we rejected above. The period after June 12 constitutes a concurrent delay for which Cardinal cannot recover. Thus, Cardinal has demonstrated the Air Force's liability for only part of the delay, entitling Cardinal to any proven delay damages from May 21, 2020, through June 12, 2020.⁶

⁶ In a footnote, the Air Force also asserts that Cardinal cannot recover its costs because Cardinal finished performance before the original completion date of September 29, 2020 (gov't br. at 15-16 n.7). However, this question goes to damages as part of the quantum phase. *Compare Monterey Mech. Co.*, ASBCA No. 51450, 01-1 BCA ¶ 31,380 at 154,957 (addressing as part of entitlement

CONCLUSION

For the foregoing reasons, we sustain the appeal as to the Air Force's liability for delay from May 21, 2020, through June 12, 2020, as part of this entitlement phase of this appeal. The Board remands to the parties for determination of quantum.

Dated: July 30, 2026



DANIEL S. HERZFELD
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

only the three-part test requiring proof of (1) delay, (2) for an unreasonable period of time, and (3) solely caused by the government, and remanding to parties for determination of quantum), *and G. Bliudzius*, 90-2 BCA ¶ 22,835 at 114,657, 114,662 (remanding to the parties regarding “the extent of the delay and damages resulting therefrom” after finding entitlement), *with U.A. Anderson Constr. Co.*, ASBCA No. 48087, 99-1 BCA ¶ 30,347 at 150,082 (addressing injury “in the form of additional expense or loss” in addition to the three entitlement elements of a delay when the Board considered both entitlement and quantum). At the request of the parties, the Board bifurcated this appeal and considered only entitlement during the hearing. *See* Corrected Scheduling Order at 2 (Oct. 19, 2022) (“THE HEARING WILL ADDRESS ONLY ENTITLEMENT.”). Moreover, merely completing performance on time or early does not necessarily bar recovery for delays. *Fru-Con Constr. Corp.*, ASBCA No. 53794, 05-2 BCA ¶ 33,082 at 163,985-86 (“[W]e look to whether a contractor completing the contract work early may nevertheless be entitled to compensable delay caused by the government” and “have concluded that in appropriate circumstances such contractors are entitled to recover additional costs incurred.”); *Oneida Constr., Inc./David Boland, Inc., J.V.*, ASBCA No. 44194, 94-3 BCA ¶ 27,237 at 135,727 (“Where the contractor can show that the Government actions prevent a contractor from finishing earlier than the scheduled completion date, the contractor can recover for delay damages.”).

I concur



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

I concur



MICHAEL N. O'CONNELL
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 62872, Appeal of Cardinal Contracting Co., LLC, rendered in conformance with the Board's Charter.

Dated: July 30, 2026



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