ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Conner Bros. Construction Company, Inc.	)	ASBCA No. 54109
	)	
Under Contract No. DACA21-00-C-0021	)	

APPEARANCE FOR THE APPELLANT: Joseph C. Staak, Esq.
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APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
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OPINION BY ADMINISTRATIVE JUDGE YOUNGER

In performing its construction contract on a military base, appellant was denied access to the site for several weeks following the terrorist attacks of 11 September 2001. While granting additional time, the contracting officer denied appellant's monetary claim, asserting that the denial of access was a sovereign act of the government and hence not compensable. In this appeal, both parties have cross-moved for partial summary judgment regarding respondent's affirmative defense of sovereign acts. We deny both motions.

FINDINGS OF FACT FOR PURPOSES OF THE MOTIONS

1. By date of 21 April 2000, respondent awarded appellant Contract No. DACA21-00-C-0021 for the construction of an Army Ranger Regimental Headquarters facility located within the 75th Ranger Regimental Compound at Fort Benning, Georgia (R4, tab 4A).

2. The contract contained various standard clauses, including FAR 52.242-14, SUSPENSION OF WORK (APR 1984) (R4, tab 4C at 00700-129 to -130).

3. The contract work was to be performed on two construction sites, designated as sites A and B, located in the Ranger Compound at Fort Benning, GA (R4, tab 6) The Ranger Compound lay within Fort Benning, was fenced off when contract performance began, and had controlled access (Gov't Mot. for Partial Summary Judgment (resp't

mot.), tab C, affidavit of Mark L. Ritter (Ritter aff.), ¶ 4; tab K, affidavit of Michael L. Graham (Graham aff.), ¶ 3; App's Br. in Opp. to the Gov't Mot. for Partial Summ. J. and Br. in Support of App.'s Mot. for Summ. J. on the Gov't Sovereign Act Affirmative Defense (app. br.), affidavit of J. Ab Conner (Conner aff.), ¶ 7).

4. The notice to proceed was issued on 23 May 2000 and acknowledged by appellant the same day (R4, tab 4B). It is undisputed that appellant thereafter began performance and was proceeding with contract work on 11 September 2001.

5. On 11 September 2001, shortly after the terrorist attacks, appellant was verbally directed by a representative of the Rangers "to shutdown its activities and leave its work sites" (app. br., affidavit of Tim R. Adams (Adams aff.), ¶ 3). It appears that the commander of the 75th Ranger Regiment, which was in the Ranger Compound, had directed that all "non-mission essential personnel [including appellant's employees] be cleared from and denied access to the Ranger Compound until further notice" (resp't mot., Ritter aff., ¶ 3, *see also* ¶ 5). The contracting officer, an employee of the Corps of Engineers, has submitted an affidavit attesting that she "did not direct [appellant] to vacate the Ranger Regimental Compound on 11 September 2001, nor did [she] have input into that decision" (resp't mot., tab J, affidavit of Colleen J. O'Keefe (O'Keefe aff.), ¶ 5). She also denies that she directed appellant "to remain away from the worksites within the Ranger Regimental Compound at anytime" (*id*., ¶ 6).

6. It is undisputed that, on or about 17 September 2001, the Fort Benning installation command reduced the security level for the installation as a whole, thereby permitting some contractors to return to work. However, the access restrictions imposed on appellant remained unchanged. (Compl., ¶ 15; answer, ¶ 15; resp't mot., Ritter aff., ¶ 5, affidavit of Joseph L. Votel, tab D, (Votel aff.), ¶ 6)

7. By memorandum to the Corps of Engineers dated 27 September 2001, the deputy commander of the 75th Ranger Regiment advised that the Regiment would remove access restrictions to Site A in the Ranger Compound, but that access restrictions would be continued for Site B. The Corps notified appellant the same day. (Resp't mot., tab M, Graham aff., ¶ 5, Ritter aff., ¶ 8, Votel aff., ¶ 8; app. br., Adams aff., ¶ 6, ex. B)

8. On 1 October 2001, appellant was permitted to enter Site A (compl., ¶ 17; answer, ¶ 17). Thereafter, on 14 October 2001, the 75th Ranger Regiment notified the Corps that appellant would be granted access to Site B on 15 October 2001, and the Corps so notified appellant on 15 October (compl., ¶ 18; answer, ¶ 18; resp't mot., Graham aff., ¶ 6, Ritter aff., ¶ 9, Votel aff., ¶ 8).

9. By date of 19 November 2001, the administrative contracting officer issued unilateral Modification No. P00027 extending the contract's completion date by 34 calendar days, with no change in price, due to the closure of the Ranger Compound from

11 September 2001 to 15 October 2001 (R4, tab 27 at 1-2). Thereafter, by date of 2 May 2002, the administrative contracting officer issued unilateral Modification No. P00032 extending the contract by seven additional calendar days, with no change in price, due to the closure of the Ranger Compound (R4, tab 32 at 2-3).

10. By date of 11 September 2002, appellant submitted a certified claim to the contracting officer for $137,744 in delay damages allegedly attributable to the closure of the Ranger Compound (R4, tab 3). The contracting officer thereafter issued a final decision denying the claim (R4, tab 2), and appellant brought this timely appeal.

11. Respondent has supported its motion with the affidavit of the commander of the 75th Ranger Regiment attesting that he:

> . . . [D]etermined and directed that access to the Ranger Compound including . . . construction Sites A and B be restricted to only those persons necessary to support the Rangers' mission planning and execution. Specifically, it was my intent to minimize the intentional or inadvertent disclosure of information about activities within the Ranger Regimental compound. Moreover, it was my intent to minimize any speculation about what the Rangers were doing or planning for. To effect my intent, it was my assessment that the continued exclusion of non-mission related persons from the Ranger compound was required during mission planning, rehearsal, marshalling and protracted low visibility deployment of Ranger elements from Fort Benning.

(Resp't mot., Votel aff., ¶ 7) In addition, respondent has submitted the affidavit of the deputy commander of the 75th Ranger Regiment, attesting that:

> . . . In order to minimize the signature of the Ranger planning and deployment efforts, . . . [appellant] and other non-mission related personnel, including personnel from [Fort Benning] and from the Corps of Engineers not involved in Ranger mission planning or execution, were completely excluded from the Ranger Compound from 11 September 2001 through 27 September 2001.

(Resp't mot., Ritter aff., ¶ 6) He added that, after 27 September, "access restrictions to Site B needed to be maintained for operational security reasons" (*id.*, ¶ 8).

12. Respondent's motion papers include its answers to appellant's third supplemental interrogatories to respondent. The answers are unsworn and signed by

respondent's counsel. They state in part that "[g]enerally, previously cleared civilian food service providers who worked in the Ranger 3rd Battalion dining facility within the Ranger Compound were the only contractor personnel allowed to enter the compound after their names were checked against an access roster at the entry point" (resp't mot., tab F at 1-2).

13. After the filing of the motion and cross-motion, appellant submitted a reply with documents obtained under the Freedom of Information Act, 5 U.S.C. § 552. These documents consist of: (a) work orders and related documents reflecting that Time Warner Cable Company made 42 installation or service calls in the Ranger Compound during the period 11 September 2001 through 15 October 2001; (b) delivery orders and DD Forms 250 reflecting refuse collections by Mark Dunning Industries, Inc. in the Ranger Compound for September and October 2001; and (c) a memorandum from one Paul Webb of Mark Dunning Industries, Inc. stating that after 11 September 2001, a guard rode with its truck while it serviced refuse containers in the Ranger Compound. (App.'s Reply to the Gov't Br. in Opp. to App.'s Mot. for Partial Summ. J., exs. 1, 2, 3)

DECISION

Respondent has moved for partial summary judgment on count I of the complaint, in which appellant seeks $137,744 under the Suspension of Work clause (*see* finding 2) for its exclusion from the Ranger Compound from 11 September 2001 to 15 October 2001. Respondent argues that undisputed material facts establish that the delay encountered by appellant was due to a sovereign act of the government, and is not compensable. (Resp't mot. at 12-17) Respondent chiefly contends that the closure of the Ranger compound on 11 September 2001, and thereafter, indisputably satisfies the elements of a sovereign act because it was public and general in nature. As such, respondent tells us, the closure "was instituted for force protection and operational security reasons associated with the United States[']first response to the 9/11 terrorist attacks and applied to ***all*** persons not having business in the compound ***essential*** to the execution of the Ranger's [sic] vital mission. . . ." (*Id*. at 16) (Emphasis in original)

Appellant has opposed the motion and cross-moved for partial summary judgment, insisting that the closure resulted from a contractual act, not a sovereign act. Appellant principally argues that respondent has not met the burden of proof for a sovereign act. In particular, appellant urges that the closure was neither public nor general because "[t]here is no evidence that any other contractor or entity received a similar order in the same timeframe" and hence the closure "applied solely to Connor Bros." (App. br. at 17, 18) Appellant also contends that there is no showing that the Ranger Regimental commander had the authority to take the action, or that the closure was reasonable (*id*. at 19-25).

In evaluating these contentions, we are guided by the familiar principles that "[t]he fact that both parties have moved for summary judgment does not mean that

[we] must grant judgment as a matter of law for one side or the other; summary judgment in favor of either party is not proper if disputes remain as to material facts." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987). "Our task is not to resolve factual disputes, but to ascertain whether material disputes of fact—triable issues—are present." *John C. Grimberg Co.*, ASBCA No. 51693, 99-2 BCA ¶ 30,572 at 150,969. A material fact is one that may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

After considering the motion papers, the pleadings and the other documents in the record, *see* FED. R. CIV. P. 56(c), we conclude that both parties' motions should be denied because there is a triable issue regarding whether the exclusion order was public and general in nature.

The sovereign act doctrine is an affirmative defense, *Orlando Helicopter Airways, Inc. v. Widnall*, 51 F.3d 258, 261 (Fed. Cir. 1995), and respondent has pleaded it as such (answer at 5). Hence, respondent bears the burden of proof on the issue, *Home Entertainment, Inc.*, ASBCA No. 50791, 99-2 BCA ¶ 30,550 at 150,860. In *Horowitz v. United States*, 267 U.S. 458, 461-62 (1925), the Supreme Court quoted with approval the formulation of the doctrine in *Jones v. United* States, 1 Ct. Cl. 383, 384 (1865) that:

> The two characters which the government possesses as a contractor and as a sovereign cannot be . . . fused; nor can the United States while sued in the one character be made liable in damages for their acts done in the other. Whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons.

See also United States v. Winstar Corp., 518 U.S. 839, 891-94 (1996) (plurality opinion) (holding that "a governmental act will not be public and general if it has the substantial effect of releasing the Government from its contractual obligations"); *Orlando Helicopter, supra*, 51 F.3d at 262 (reciting that a "sovereign act is public and general in nature, not private and contractual"); *Sun Oil Co. v. United States*, 572 F.2d 786, 817 (Ct. Cl. 1978) (rejecting sovereign acts defense because governmental actions "were not actions of public and general applicability, but were actions directed principally and primarily at plaintiffs' contractual right").

The existing record presents a triable issue regarding the public and general nature of the closure order. The principal affidavits accompanying respondent's motion support the premise that exclusion from the Ranger Compound was public and general because it was due to operational security considerations, which dictated the "exclusion of non-mission related persons" (finding 11). Hence, appellant "and other non-mission

related personnel . . . were completely excluded from the Ranger Compound from 11 September 2001 through 27 September 2001," with appellant's further exclusion from Site B until 15 October 2001 also required for "operational security reasons" (*id*.). However, this premise is undercut by other documents in the record, reflecting that food service workers, cable television service personnel and refuse collectors were also frequently in the Compound during the period that appellant was excluded (findings 12, 13). On summary judgment, "the inferences to be drawn from the underlying facts contained in [documents submitted] must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc*., 369 U.S. 654, 655 (1962). Viewing the facts in that light raises the inference that appellant's exclusion from the Compound was selective. *See Nero and Associates, Inc*., ASBCA No. 30369, 86-1 BCA ¶ 18,579 at 93,297 (denying government's motion for summary judgment on sovereign acts defense because of "indications" that exclusion of contractor firefighters from military base "focused on appellant's employees uniquely"). Hence, we must deny respondent's motion.

At the same time, we must deny appellant's cross-motion, which we consider separately and independently from respondent's motion. As we did with the motion, we resolve all inferences in favor of the party opposing the motion, *Diebold, supra*, 369 U.S. at 655, which on the cross-motion is respondent. Despite the premise of the cross-motion that the closure was a contractual act, the record contains the affidavit of the contracting officer unequivocally denying that she either directed appellant to vacate the Ranger Compound, or to remain away from Sites A and B (finding 5). In addition, the record contains the affidavits of the commander and the deputy commander of the 75th Ranger Regiment that appellant's exclusion was prompted by considerations of national defense (finding 11). Considering these three affidavits, we conclude that "a reasonable [trier of fact] could return a verdict for the nonmoving party." *Anderson, supra*, 477 U.S. at 248. Hence, we deny the cross-motion.

Accordingly, respondent's motion for partial summary judgment, and appellant's cross-motion for partial summary judgment, are both denied.

Dated: 22 October 2004

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
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. 54109, Appeal of Conner Bros. Construction Company, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals