ARMED SERVICES BOARD OF CONTRACT APPEALS

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

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OPINION BY ADMINISTRATIVE JUDGE YOUNGER

In performing its construction contract on a military base, appellant Conner Bros. Construction Company, Inc. (Conner) was denied access to the site for 41 days following the terrorist attacks of 11 September 2001. Conner sought additional time and money for 35 of those 41 days. While granting additional time, the contracting officer denied Conner's monetary claim. In denying liability in this appeal, respondent Corps of Engineers (the Corps) relies upon its affirmative defense that Conner's exclusion from the construction site was a sovereign act. By contrast, Conner contends chiefly that the exclusion order was not public and general in nature, citing evidence that other contractors were granted access during the exclusion period. We deny the appeal.

FINDINGS OF FACT

A. *The Contract*

1. By date of 21 April 2000, the Corps awarded Conner Contract No. DACA21-00-C-0021 for the construction of an Army Regimental Ranger Headquarters facility located within the 75th Ranger Regimental Compound (Ranger Compound or compound) within Fort Benning, GA (R4, tab 4A). The relevant units of the 75th Ranger Regiment comprise a "tenant activity" at Fort Benning, meaning that they reside on, and are given property and facilities by, the installation, but are not under the

direct operational control of Fort Benning's command structure. The Ranger compound is a segregated area under the control of the Regimental commander. He reports to the U.S. Army Special Operations Command, in Fort Bragg, NC, of which the Ranger Regiment is a subordinate unit. (Tr. 2/15, 3/10-11, 18) While other units are stationed elsewhere, the Regimental headquarters and the Regiment's Third Battalion are co-located in the compound in Fort Benning (tr. 2/11, 3/6).

2. The contract contained various standard clauses, including: FAR 52.242-14 SUSPENSION OF WORK (APR 1984); FAR 52.243-4 CHANGES (AUG 1987); and FAR 52.249-10 DEFAULT (FIXED PRICE CONSTRUCTION) (APR 1984) (R4, tab 4C at 00700-129-130, -134, -148).

3. The contract also contained specifications. Section 01500, CONSTRUCTION SCHEDULE RESTRAINTS – FORT BENNING, contained paragraph 1.16.1, OCCUPANCY, which provided:

> The work to be performed is to be accomplished in facilities which will be unoccupied and vacant during the course of construction. It is the intent of these provisions to provide for maximum coordination between construction activities pursuant to this contract and concurrent ongoing routine activities of base personnel. Interference with and inconvenience to the occupants or routine of the facility shall be held to an absolute minimum.

(R4, tab 13, § 01500 at 10) While Conner read this provision before bidding (tr. 1/186-87), we find no credible evidence that Conner raised with the Corps before bidding whether "facilities" in this clause denoted either site A or site B, or both. We further find no credible evidence that Conner interpreted "facilities" to mean either site A or B, or both, when bidding.

4. The contract was to be performed on two distinct construction sites which were located in the Ranger Compound (R4, tab 6). These two sites are shown on the contract drawings and designated there as "SITE A" and "SITE B," respectively, and their respective boundaries, topographies and layouts are specified (ex. A-39 at plates C-1A, C-2-C-6; tr. 1/41-46; *see* also ex. A-40; tr. 1/26-33). Sites A and B were physically separated. They were approximately 200 meters apart at their closest points (ex. A-40), and were connected by an access road that Conner used to move workers between the two sites (tr. 1/25, 29, 149). The scope of work under the contract included site preparation and development, the construction of four buildings, one of which was to serve as Ranger regimental headquarters, and three support buildings, as well as a training facility and associated roads, parking lots, sidewalks and paving (R4, tab 4C at 3;

tr. 1/25). Three of the buildings were to be constructed on site A, and one on site B (tr. 1/25-26). We find that, at the outset of construction, sites A and B were "open;" they did not contain any buildings (tr. 1/102-03, 186).

5. The contracting officer at award and during the relevant period was a Corps employee located in Savannah, GA (R4, tab 4C at 1; tr. 2/80, 87). She did not visit the Ranger Compound before, during or after construction (tr. 2/87-88), and had another Corps employee, Michael Graham, serving on site as her alternate administrative contracting officer and project engineer (ex. A-2 at 5; tr. 2/114-16).

6. On 18 May 2000, the parties held a preconstruction conference, which Mr. Graham conducted. According to the minutes, the discussion included the following topic:

> 3. Lines of Communication. The Corps . . . will handle all coordination with the Using Service [*i.e.*, the Rangers]. . . . The User[']s participation in the contract shall be limited to interaction only with the Contracting Officer. The Contractor shall not take or entertain any direction associated with this work directly from the User at any time.

(Ex. A-2 at 5, enclosure (encl.) 2 at 1-2)

7. The notice to proceed was issued on 23 May 2000 and was acknowledged by Conner the same day (R4, tab 4B). Conner thereafter began performance with its own workforce, supplemented by "[a]pproximately ten major subs, and several second- and third-tier subcontractors" (tr. 1/25, 158). It is undisputed that Conner was proceeding with contract work on 11 September 2001.

B. *Terrorist Attacks and Shutdown*

8. On the morning of 11 September 2001, contract work was approximately 70-75 percent completed. The three buildings under construction on site A were dried in, *i.e.*, the roofs were in place and the windows had been installed (tr. 1/77, 2/131-32). While the building on site B was dried in and bricked up, Conner's progress there was approximately 30 days behind its progress at site A (tr. 1/107-08, 129).

9. The record establishes that the terrorist attacks constituted an unprecedented "emergency crisis situation" for Fort Benning, the Ranger compound, and the Corps (tr. 2/106-07, 3/51).

10. Following broadcasts of the news regarding the terrorist attacks, two Rangers directed Conner's workforce, as well as Conner's subcontractors, to evacuate the site immediately, but the deadline was later extended to 2:00 PM (tr. 1/76-79). Conner's workforce and its subcontractors – from the mechanical, electrical, site work, building control, drywall, plumbing, and tile working and finishing trades – left Fort Benning by 2:00 PM (tr. 1/79-80, 127, 159, 2/183-84).

11. On 17 September 2001, Fort Benning as a whole lowered its force protection threat condition from Delta (*see* finding 31) to the lower force protection threat condition of Charlie (*see id*.) (tr. 1/85, 159-60, 2/15-17, 64-65, 3-24). Other contractors were working on Fort Benning on that date (tr. 1/87). Nonetheless, the Rangers continued to adhere to force protection threat condition Delta within the compound (tr. 2/65; ex. A-30 at 1).

12. At the time of the attacks, the 75th Ranger Regiment had a "forced entry capability," and its unclassified mission included conducting unconventional warfare through special operations in support of U.S. policies and objectives (tr. 3/12, 23). In the 30 to 35 days after 11 September 2001, the Regiment's entire Third Battalion, as well as 40 to 50 percent of the regimental headquarters staff, executed a "protracted low-level deployment," whereby they departed in small increments of one or two aircraft at a time "to minimize the visibility of that deployment" (tr. 2/20-21). The record contains no evidence that an alternative method of deployment was militarily feasible. The Rangers deployed to an "area of responsibility" preparatory to conducting combat operations (tr. 3/20). We find that the "area of responsibility" was Afghanistan and that the Rangers commenced operations there on or about 17 October 2001 (tr. 2/68-69, 3/61-62).

13. In preparing for deployment of these personnel, and in carrying out the deployment, the Rangers engaged in activities inside their compound that included: a "sand-table rehearsal" in one of the partially-completed buildings in site A (tr. 2/41-42), which rehearsal "involved all units and commanders associated with the mission that we were given in response to 9/11," as well as "a lot of subordinate level of rehearsal activities;" consolidation of equipment; preparation of equipment to be moved by air; and meetings among Ranger commanders and with Air Force and Army Aviation organizations supporting Ranger operations (tr. 2/41-42, 3/21).

14. While the Rangers were preparing for their deployment, and carrying out their deployment, Conner and its subcontractors were excluded from the site. The contracting officer did not direct Conner to remain away from the site, nor did she decide the duration of the exclusion, but instead confined herself to dealing with the applicability of the sovereign act doctrine to the closure of the compound (tr. 2/83-85, 95-97). She did not issue a suspension of work order. She had no direct contact with the Ranger regiment after the attacks (tr. 2/85) and the Rangers did not direct her to take any actions (tr. 2/84).

The contracting officer also did not direct Mr. Graham to order Conner to remain away from the site (tr. 2/83, 118-19). For his part, Mr. Graham did not direct Conner to leave the site (tr. 2/118), and he himself could not gain access to the compound (tr. 2/133). We find that, nonetheless, during the period that Conner was excluded from the site, Mr. Graham assisted Conner, obtaining whatever information he could glean from the Rangers regarding when sites A and B would again become available and forwarding Conner's proposals of either putting up a fence or employing an access roster that would allow Conner to go back to work (tr. 2/157-58, 167-68; exs. A-15, 16, 18, 20-25, 31, 32). Mr. Graham endorsed the roster proposal (tr. 2/157).

15. Conner's exclusion from the site was ordered by the commander of the 75th Ranger Regiment, General (then Colonel) Joseph L. Votel. He ordered that access to the Ranger compound be restricted to "mission-essential personnel," a term that he understood embraced "somebody who was significant [or necessary] to the accomplishment of the mission" (tr. 3-18; *see also* tr. 2/23-25). Before instituting these access restrictions, General Votel did not coordinate his actions with the Corps (tr. 3/39).

16. When he restricted access to "mission-essential personnel," General Votel took a further decision to deny access to Conner and its subcontractors (tr. 3/55). He testified that the decision to deny access to Conner and its subcontractors was separate and apart from the general implementation of access restrictions (*id*.). The decision was his alone and it was his "intention that we would keep [Conner and its subcontractors] out of there while we were going through these [deployment] activities" (tr. 3-22; *see also* tr. 3-54-55, 58-59). He explained that he:

> had no knowledge that anybody in Conner Brothers or any construction workers up there were going to leak information. The fact is that it was a risk that I was just not willing to take, and that is for someone to see what was going on within the confines of a fairly well known organization designed to do these type[s] of initial early entry operations here, and I think what might have happened was for people who we[r]e in there going about their normal responsibilities to observe other activities that could cause them to maybe leave and in the course of some social discussion or something downtown and say "Hey, listen, guess what I saw happening here at Fort Benning, we've got an organization that has a history of deploying early as kind of a forced-entry capability, and there's a whole bunch of activity going on right in their little headquarters area."

> So what I was trying to prevent was – –what I was trying to limit was any speculation on that taking place.

(Tr. 3/23; *see also* tr. 3-20) General Votel reasoned that, inasmuch as "one of the primary tasks of the Ranger regiment is to go do airfield seizures, which is in fact the mission that we did following this," and inasmuch as "there isn't much going on in Afghanistan," parties in that country, if they learned of the rehearsal and deployment activities would be able to deduce the Regiment's mission and objectives (tr. 3/61-62).

17. General Votel and his deputy commander testified, and we find, that under the orders issued for access restrictions, ordinary civilians, journalists, Department of the Army civilians, and contractors not concerned with the Rangers would have been denied access to the compound (tr. 2/37-38, 3/27-28).

18. Aside from Conner, other construction contractors were not admitted to the Ranger compound in the period immediately following 17 September 2001 (tr. 1/91). While there are suggestions in the record that one such contractor, ACC Construction (ACC), was allowed in the compound, we find that ACC was not working there, but was working across the road from the compound, approximately 500 yards from site B and separated by a large parking lot and an eight-foot high fence containing privacy slats (tr. 1/87, 2/74-76, 120-22; ex. A-40). We find no credible evidence that an observer on the roof of the facility on which ACC was working would have had visual access into the Ranger compound (tr. 1/142-44).

19. It is undisputed that Conner and its subcontractors were treated differently from non-construction contractors with respect to access to the Ranger compound in the period immediately following 17 September 2001 (tr. 2/94, 139). During that period, personnel employed by, respectively: a dining facility contractor; a custodial services contractor; a Coca-Cola vendor; and Time Warner Cable, were all admitted to the compound (tr. 1/91, 127, 2/39) General Votel and his deputy commander testified, and we find, that: (a) the dining facility contractor was mission-essential because the Rangers were restricted to the compound for much of the period in dispute and the food service personnel were confined to a limited area (tr. 2/39, 51, 3/28-30, 50); and (b) the custodial services personnel were mission-essential because "we've got six or seven hundred soldiers here producing litter all the time, so that's got to be taken care of" for health reasons (tr. 3/36; *see also* tr. 2/37-38, 3/50), and, because the custodial services personnel could be admitted with escorts (tr. 2/38-39). We also find that neither the Coca-Cola vendor personnel nor the Time Warner cable personnel were mission-essential, and the presence of at least the latter was contrary to orders (tr. 2/40, 56-57, 3/36-37).

20. We find that Conner and its subcontractors were qualitatively different from the dining facility and custodial services contractors, the Coca Cola vendor, and Time Warner Cable personnel (tr. 2/102). By contrast to these contractors:

(a) Conner and its multiple subcontractors, seven of which appear to have been working on 11 September 2001 (findings 7, 10), were "the biggest thing happening on the installation in this little compound" (tr. 2/55, 3/61; *see also* tr. 2/34);

(b) Conner and its subcontractors "were moving around a lot, . . . were running vehicles (tr. 3/30) and were traveling between two separate sites within the compound (tr. 3/57; *see* finding 4), precluding the feasibility of escorts (tr. 2/77-78), whereas other contractors did not require equivalent mobility and could be escorted (tr. 1/92, 2/38-39, 41, 3/29, 35-36, 48; ex. A-38 (last page));

(c) personnel from Conner and its subcontractors would have had the "visual capacity to see what was going on, what we were doing inside the barracks complex . . . preparations" (tr. 2/27-28), inasmuch as the barracks area constituted a "natural bowl" (2/159), permitting workers in the upper floors of buildings in site A to look down into the Ranger area (tr. 1/129, 2/36, 69, 126; SR4, tab 15(c)) and allowing workers in site B to "visually access" the Third Battalion area (tr. 1/129; *see also* 2/124-25, 181; SR4, tabs 15(a), 15(b)).

21. General Votel stressed that his decision to exclude Conner and its subcontractors "was all about reducing risk" (tr. 3/61-63; *see also* tr. 3/22) and preventing a "press spike" or other leakage (tr. 3/62) while deployment activities were underway. From his testimony, as well as the testimony of other witnesses, we find no persuasive evidence that less drastic measures than exclusion of Conner and its subcontractors would have reduced the risk of disclosure of deployment activities. Thus, while Conner adduced testimony that, after 17 September 2001, "if [a] fence had been erected . . . it would have allowed us to go back to work sooner" (tr. 1/90), we find it outweighed by the contrary testimony that the efficacy of a fence in preventing visibility of the Rangers' deployment activities was speculative (tr. 2/59, 76-77), as well as the testimony of Conner's former project superintendent and the Corps' project engineer that a fence simply would not have precluded visibility "due to the terrain and the height of the building" (tr. 1/112, 117-19, 2/129-31, 158-59). In addition, from the slender record about an access roster (tr. 1/109, 167, 169, 175-76, , 202, 2/49, 157, 3/48, 50), we find the evidence at most inconclusive regarding whether such a measure would have addressed the Rangers' concerns about reducing the risk of disclosure of deployment activities in the period before 15 October 2001. Finally, while escorts were feasible for contractors with small numbers of employees visiting the compound (*e.g.*, tr. 1/130-31, 2/18, 25, 38-39), the record contains credible testimony, and we find, that the number and

constant mobility of Conner's workers made escorts an unrealistic alternative (tr. 2/77-78; *see also* tr. 192, 2/34, 3/30, 57, 61).

22. When questioned at trial regarding his authority to assert control over the Ranger compound, General Votel testified that he considered it part of his "inherent responsibility" as commanding officer of a tenant organization on Fort Benning (*see* finding 1) "to take responsibility for the area in which soldiers assigned to my unit operated, lived and basically conducted their day-to-day activities" (tr. 3/9-10).

23. During the period that it was excluded from the construction site, Conner repeatedly communicated to Mr. Graham and other Corps representatives that the closure was adversely impacting appellant and its subcontractors (tr. 1/94-95, 171-72; exs. A-15, 18, 20, 23-25).

24. With respect to site A, by e-mail to Conner dated 27 September 2001, Mr. Graham advised of a telephone conversation with a noncommissioned officer in the 75th Ranger Regiment stating that:

> effective immediately we can return to work in the Ranger Compound WITH CERTAIN RESTRICTIONS.
>
> 1) We must barricade the street leading from the project site to the remainder of the compound AND
>
> 2) We are not yet allowed to return to work on Bldg 2933 [in Site B].

(Ex. A-28 (capitalization in original)) Mr. Graham directed appellant to inform its employees that "they are restricted to that part of the project designated as Site A on the contract plans" (*id.*).

25. On 28 September 2001, Conner returned to work on site A only, and had no further delays at that location (*id.*; tr. 1/107).

26. With respect to site B, by e-mail dated 10 October 2001, Mr. Graham advised Conner that he had been informed "that we will have full access to Bldg 2933 and the rest of site B effective Monday, October 15, 2001" (ex. A-31). Conner thereafter was permitted access to site B on 15 October 2001 (tr. 1/108, 2/33), but required additional time after that date to get back to full speed (tr. 1/207).

27. The Corps unilaterally extended the contract completion date by a total of 41 calendar days due to the closure of the Ranger compound. Thus, by date of

19 November 2001, the administrative contracting officer issued unilateral Modification No. P00027, extending the completion date under the DEFAULT clause by 34 calendar days, with no change in price, due to the closure from 11 September 2001 to 15 October 2001 (R4, tab 27 at 1-2). Then, by date of 2 May 2002, the administrative contracting officer issued unilateral Modification No. P00032 extending the contract by seven additional calendar days, to 22 October 2001, again under the DEFAULT clause and with no change in price, due to "additional delays that were incurred" by Conner because of the closure (R4, tab 32 at 1-2).

28. The project was substantially complete in May 2002 (tr. 1/22, 24-25, 219).

29. We find no credible evidence that the exclusion of Conner and its subcontractors from the construction site was the result of bad faith, or that it was directed principally or primarily at Conner's contractual rights. Instead, we find credible the testimony from: (a) General Votel that his decision to exclude Conner "was all about reducing risk" (finding 21) and that he was looking forward to moving into his new headquarters (tr. 3/61); (b) his deputy commander that the Rangers "wanted to get into the headquarters obviously as soon as we could" and that he recalled thinking "we've got to figure out a way to get [Conner] back on their site" (tr. 70-71); and (c) the project engineer that his own "efforts were to get [Conner] back to work, period" (tr. 2/177).

C. *Claim and Appeal*

30. By date of 11 September 2002, Conner submitted a certified claim to the contracting officer for $137,744, allegedly representing 35 days of delay damages attributable to the closure of the Ranger Compound to Conner from 17 September 2001, the date upon which other contractors were permitted to return to Ft. Benning, through 21 October 2001, the date upon which Conner returned to site B and remobilized there (R3, tab 3). The contracting officer thereafter issued a final decision denying the monetary claim (R4, tab 2), and Conner brought this timely appeal.

31. The record contains Army Regulation (AR) 525-13 (2002), ANTITERRORISM. It became effective on 4 January 2002 (R4, tab 18 at 1), and superseded the previous version of AR 525-13 dated 10 September 1998 (*id*.), which was entitled ANTITERRORISM FORCE PROTECTION (AT/FP): SECURITY OF PERSONNEL, INFORMATION AND CRITICAL RESOURCES. We find that the 1998 version of AR 525-13 was in effect both at the time of contract award and during the events in dispute. The statutory authority for both the 1998 versions and the 2002 was 10 U.S.C. § 3013, and both versions were substantially identical in the respects pertinent to this appeal. The 1998 version contained Chapter 1, INTRODUCTION AND POLICIES. Section 1-1, PURPOSE, provided that the regulation established the Army Antiterrorism Force Protection Program "for protecting personnel (soldiers, civilian employees, and family members)

against a wide spectrum of threats, including terrorism." The 1998 version of AR 525-13 also contained Appendix B, THREAT CONDITIONS (THREATCONS). Paragraph B-1, THE THREATCON SYSTEM, provided in the introductory overview, that "[w]hen producing plans [to implement the measures described], local commanders must further refine this guidance into more specific instructions in order to meet the unique requirements of the specific location." Subparagraph (a)(4) of paragraph B-1, provided that THREATCON CHARLIE "[a]pplies when an incident occurs or intelligence indicates some form of threat action against personnel and or facilities is imminent." Paragraph B-5, THREATCON CHARLIE, detailed various measures to be implemented for such imminent situations. In addition, subparagraph (5) of paragraph B-1 provided that THREATCON DELTA "[a]pplies in the immediate area where a threat attack has occurred, or when intelligence indicates terrorist action against a specific location is likely." While the 1998 version of AR 525-13 contained no time limitation within which a local commander was required to terminate THREATCON DELTA, subparagraph (5) of paragraph B-1 stated generally that "[i]mplementation of THREATCON DELTA normally occurs for only limited periods of time over specific, localized areas. Commands cannot sustain THREATCON DELTA for extended periods without causing significant hardships for personnel and substantial reductions in capacity to perform normal peacetime missions." Paragraph B-6, THREATCON DELTA, provided that "[t]he following measures will be implemented." They included "Measure 42," which called for augmentation of guard forces "to ensure absolute control over access to the installation." Paragraph B-6 also contained "Measure 45. Limit access to installations, facilities, and activities to those personnel with a legitimate and verifiable need to enter."

32. AR 530-1, OPERATIONAL SECURITY (OPSEC) (1995), provided "policy and procedures for operations security (OPSEC) in the Army." It stated in paragraph 2-1, ALL COMMANDERS AT BATTALION AND HIGHER ECHELONS, that:

> *a*. OPSEC is a command responsibility. Commanders and agency heads will ensure that their organizations plan and implement appropriate OPSEC measures to preserve essential secrecy in every phase of an operation, exercise, test, or activity.
>
> Note. For purposes or [sic] this regulation, an organization is at battalion or higher echelon when its head is a lieutenant colonel . . . .

(Supp. R4, tab 19 at 6, 7)

33. AR 600-20 (1999), ARMY COMMAND POLICY (1999), provided in paragraph 2-5, COMMAND OF INSTALLATIONS, ACTIVITIES, AND UNITS, that:

> The installation commander is normally the senior commander on the installation. In addition to mission functions, the installation commander has overall responsibility for all real estate, facilities, base support operations, and activities on the installation.

AR 600-20 further provided in paragraph b.(1) that "installation commanders will not exercise operational control over tenant organization missions" (*see* finding 1) where the senior commander is assigned to a tenant organization. (Supp. R4, tab 20 at 14)

34. The record contains testimony regarding a document generically identified as DD Form 1354, Transfer and Acceptance of Military Real Property, which is utilized by the Corps. With respect to this form, we find that: (a) no such form was executed for sites A and B until 2002, when General Votel issued his exclusion order (tr. 2/170-71); (b) the form is typically employed to transfer administrative control of "completed facilities" (tr. 2/168), to detail the nature of those facilities and to signify acceptability by the using government agency (tr. 2/104-05, 170); and (c) the form does not include any deed to real property, title to which remains with the government and is not vested in the contractor or the Corps (tr. 2/104, 170, 188-89).

DECISION

A. *Contentions of the Parties*

The central issue in this appeal is whether the closure of the Ranger Compound following the terrorist attacks of 11 September 2001 constituted a sovereign act, barring Conner's monetary claim for delay damages. While Conner was granted 41 days of additional time for the closure under paragraph (b)(1) of the DEFAULT clause (*see* findings 2, 27), it was not given additional compensation inasmuch as that clause only provides for an extension of the performance period. In its present monetary claim, Conner seeks compensation for 35 days, measured from "September 17, the date all other contractors on Ft. Benning were allowed back to work," to "October 22, or 7 days past the date Conner was allowed back to work at Site B." (Post-Hearing Brief of Appellant, Conner Bros. Construction Co., Inc. (app. br.) at 22) There is no dispute regarding government causation for the delay. (App. br. at 22-23, 25; Respondent's Reply to Appellant's Post-Hearing Brief (resp. br.) at 29)

In support of its claim for delay damages under the CHANGES clause (*see* finding 2), Conner contends that the closure order does not constitute a sovereign act for three broad reasons. First, Conner urges that the order was not public and general in nature, but instead, for the period to which the claim relates, applied only to Conner.

Second, Conner insists that the Rangers, who issued the order, lacked the legal authority to do so. Finally, Conner argues that the order was not reasonable under the circumstances because less drastic alternatives were available. (App. br. at 26)

By contrast, the Corps vigorously defends the closure order as a sovereign act, pointing to a variety of circumstances in the record that, according to the Corps, demonstrate that the purpose of the order was to serve national policy objectives, not to relieve the Corps of its contractual obligations. The Corps urges that many of these circumstances likewise demonstrate that the order was the type of act that would have affected a contract between two private parties in the same way that it affected Conner's contract. The Corps further insists that, once a sovereign act has been established, questions regarding the Rangers' authority to issue the closure order, as well as the reasonableness of the sovereign act itself, are irrelevant. Finally, while Conner asserts that it is may recover compensation "unless the government's Sovereign Act defense is valid" (app. br. at 25), the Corps rejoins that, in any event, Conner "has not met the express requirements . . . to sustain its claims for entitlement" under either the CHANGES clause or the SUSPENSION OF WORK clause (*see* finding 2) (resp. br. at 29).

After considering the testimonial and documentary evidence, as well as the briefs of the parties, we conclude that the Corps has established its sovereign act defense and hence that the appeal must be denied. We reach this conclusion for the reasons set forth below.

B. *Public and General Act*

We previously denied cross-motions for summary judgment in this appeal, concluding that the then-existing record presented triable issues regarding whether the closure order constituted a sovereign or a contractual act. *Connor Bros. Construction Co., Inc.*, ASBCA No. 54109, 04-2 BCA ¶ 32,784. Now, after trial, Conner insists that the exclusion order failed to satisfy the "public and general" requirement of the sovereign act doctrine chiefly because the order "was directed solely and exclusively at one contractor" and "[t]he only purpose of the order was to cause the shutdown of a government contractor." (App. br. at 29) Conner tells us that it was arbitrarily excluded from the worksite because food service contractors and suppliers, the refuse contractor, cable television repairmen, a Coca-Cola vendor and civilian employees were given access to the Ranger Compound during the period of closure. (*Id*. at 30) In contrast to these contentions, the Corps disputes Conner's characterization of the purpose of the exclusion order, dwelling instead on General Votel's testimony regarding the basis for his actions. (Respondent's Reply to Appellant's Reply to Respondent's Post Hearing Brief (reply br.) at 11-12) The Corps stresses that the exclusion order satisfies the "public and general" requirement when measured against three factors, *viz*., relation between the order and the government's stated national objective, General Votel's position, and

whether the act was intended to relieve the government of its contractual obligations. (Resp. br. at 31) The Corps also argues that the impact to a single contract is not determinative of the sovereign act defense. (Resp. br. at 32)

We reject Conner's argument that the exclusion order does not satisfy the "public and general" requirement for three principal reasons.

First, the power to exclude civilians from a military base stems from the war-making powers. *See* U.S. Const. art. I, § 8, cls. 1, 11, art. II, § 2; *Greer v. Spock*, 424 U.S. 828, 838 (1976) quoting *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 893-94 (1961). The war-making powers are surely included among the "ancient and fundamental indicia of sovereignty." *Orlando Helicopter Airways, Inc. v. Widnall*, 51 F.3d 258, 262 (Fed. Cir. 1995) (so categorizing the government's exercise of police powers in its law enforcement capacity). The sovereign act defense has been applied to exercises of the war-making powers. *See Gothwaite v. United States*, 102 Ct. Cl. 400, 401 (1944) (holding delay to construction contract allegedly caused by diversion of materials for war effort barred by sovereign acts defense because diversion represented "the exercise of sovereign powers in the defense of the nation"); *J.F. Barbour & Sons v. United States*, 104 Ct. Cl. 360 (1945) (following *Gothwaite*); *see also Nero and Associates, Inc*., ASBCA No. 30369, 86-1 BCA ¶ 18,579 at 93,296 (recognizing that orders issued by installation commander "under [access] regulations that are designed to foreclose the risk of loss of, or damage to, or compromise of equipment and information vital to the national security would also be sovereign acts").

Second, the exclusion order of Conner and its subcontractors from the Ranger compound was incidental to the accomplishment of a broader governmental objective. The plurality opinion in *United States v. Winstar Corp*., 518 U.S. 839, 898 (1996) holds that:

> governmental action will not be held against the Government . . . so long as the action's impact upon contracts is . . . merely incidental to the accomplishment of a broader governmental objective. . . . The greater the Government's self-interest, however, the more suspect becomes the claim that its private contracting partners ought to bear the financial burden of the Government's own improvidence, and where a substantial part of the impact of the Government's action rendering performance impossible falls on its own contractual obligations, the [sovereign acts] defense will be unavailable.

See also Carabetta Enterprises, Inc. v. United States, 482 F.3d 1360, 1365 (Fed Cir. 2007). The "existence of the sovereign act defense necessarily turns on the

nature and circumstances of each such act." *O'Neill v. United States*, 231 Ct. Cl. 823, 826 (1982). In *Horowitz v. United States*, 267 U.S. 459, 461 (1925), the court quoted with approval the formulation 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 thus 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.

In *Winstar*, *supra*, 518 U.S. at 896 n.40, the Supreme Court also quoted with approval the formulation in *O'Neill*, *supra*, 231 Ct. Cl. at 826, that the doctrine applies in situations where, "[w]ere those contracts exclusively between private parties, the party hurt by such governing action could not claim compensation from the other party for the governing action." *See also Jones*, *supra*, 1 Ct. Cl. at 385 (holding that "[w]herever the public and private acts of the government seem to commingle, a citizen or corporate body must by supposition be substituted in its place, and then the question be determined whether the action will lie against the supposed defendant.")

The original exclusion order on 11 September 2001 – which is not included in Conner's claim (*see* finding 30) – was undeniably caused by the "emergency crisis situation" resulting from the terrorist attacks (findings 9, 10). The subsequent restriction of the Ranger compound to "mission-essential personnel" from 17 September 2001, when Fort Benning lowered its threat condition (findings 11, 15) to 15 October 2001, when Conner was given access to site B (finding 26), was also directly related to the attacks. We have found that, during the exclusion period, the Rangers were preparing to deploy, and carrying out a "protracted low-level deployment," to conduct combat operations in Afghanistan (findings 12, 13). They commenced those operations on or about 17 October 2001, two days after Conner gained access to site B (findings 12, 26). Participation in the armed conflict in Afghanistan served national policy objectives. *See* S.J. Res. 23, 107th Cong., 115 Stat. 224 (resolving that attacks "pose[d] an unusual and extraordinary threat to the national security and foreign policy of the United States" and authorizing use of "all necessary and appropriate force" against responsible parties).

Third, the exclusion was not directed principally or primarily at Conner's contractual rights. The core of Conner's case is that it was treated differently from other contractors, revealing that the post-17 September exclusion order "was directed solely and exclusively" at Conner and that "[t]he only purpose of the order was to cause [Conner's] shutdown." (App. br. at 29) The record does not support this proposition.

The admission of other contractors to Fort Benning between 17 September and 15 October 2001 (finding 11) is irrelevant. The Rangers were a "tenant activity" on Fort Benning, under a separate command structure (finding 1) and, under AR 600-20 (finding 33; *see also* finding 22), the Fort Benning commander had no operational control over their missions. In addition, the admission of non-construction contractors to the Ranger compound after 17 September 2001 – the dining and custodial facilities contractors (finding 19) -- does not undercut the validity of the exclusion order. As we have found, they provided essential services to "six or seven hundred" soldiers in the compound and could be escorted (*id.*). While Conner makes much of the admission of the Coca-Cola vendor and Time Warner, the admission of these contractors does not vitiate the exclusion order, inasmuch as their presence was not consistent with that order but instead contravened it (*id.*). Conner was not akin to these contractors; the size of its workforce, their mobility, the duality of the worksites and the workers' visual access to ongoing deployment activities differentiated Conner and its subcontractors (finding 20). These considerations made Conner comparable to ordinary civilians, journalists, Department of the Army civilians, and contractors not concerned with the Rangers, all of whom were subject to the access restrictions (finding 17).

Because we conclude that the exclusion order was not aimed at Conner's contractual rights, we do not agree that this case resembles *Everett Plywood Corp. v. United States*, 651 F.2d 723 (Ct. Cl. 1981), or *Sun Oil Co. v. United States*, 572 F.2d 786 (Ct. Cl. 1978). In these "change of heart" cases, the government took action to the disadvantage of a contractor when officials deemed a previous policy unwise. Thus, in *Everett*, the court held that, "[f]rom the facts of this case it is obvious that the act in question was neither public nor general – the government unilaterally terminated one contract after deciding continued performance would have been unwise." *Everett*, *supra*, 651 F.2d at 731-32. In *Sun Oil*, the court rejected a sovereign act defense in a case in which two Secretaries of the Interior had denied permits to install drilling platforms on public lands which the contractors had leased. Looking to "the usual touchstone for sovereign act applicability," the court concluded that the secretaries' actions "were not actions of public and general applicability, but were actions directed principally and primarily at plaintiffs' contractual right to install a platform." *Sun Oil*, *supra*, 572 F.2d at 817.

Similarly, we are not dissuaded by cases cited by Conner in which the sovereign act defense was invoked pretextually. The record here does not admit of any other conclusion but that General Votel acted in good faith, motivated solely by concern for the safety of his troops (findings 16, 21). He and his deputy commander both desired completion of the new headquarters complex that Conner was building (finding 29). Thus, this case is not comparable to those in which the defense was employed as a *post hoc* rationalization for actions taken in bad faith or for spurious reasons, *e.g.*, *Ottinger v United States*, 116 Ct. Cl. 282, 284-85 (1950) (holding doctrine inapplicable to

unjustified refusal of government commission to certify workers for appellant's contract); *Home Entertainment, Inc.*, ASBCA No. 50791, 99-2 BCA ¶ 30,550 at 150,861 (rejecting defense because contractor's expulsion from military installations allegedly for posing security threat "was unpersuasive and was devised to terminate [appellant's] contract immediately"); *cf.*, *Orlando Helicopter*, *supra*, 51 F.3d at 262 (noting that, "[p]erhaps if the contracting officer initiated and directed [a criminal] investigation as part of contract administration then a contract claim might arise").

Finally, we recognize that the validity of a sovereign act "does not always turn on whether the action was undertaken by a contracting officer. . . . The focus of the inquiry is thus the nature of the conduct, not the identity of the Government agent responsible." *Orlando Helicopter*, *supra,* 51 F.3d at 262. Nonetheless, we cannot treat it as irrelevant here that the record demonstrates the complete exclusion of the contracting officer and her subordinates from decisions regarding Conner's access to sites A and B (*see* findings 5, 14, 15).

C. *General Votel's Authority*

Conner also urges that, before the Corps can establish that the closure order was a valid sovereign act, it must establish that General Votel had the authority to shut down a construction project that the Corps administered. Conner asserts that before issuance of a DD Form 1354 at substantial completion in 2002 (*see* findings 28, 34(b)), "Conner and the Corps had sole administrative control over [the] work sites," not the Rangers. (App. br. at 32) In addition, Conner cites *Nero & Associates, Inc.*, ASBCA No. 30369, 86-1 BCA ¶ 18,579 at 93,296 in arguing that, to establish a valid sovereign act, the Corps must demonstrate that an installation commander had the power to issue such orders and that "the actual exercise of that power was within the parameters of the authority granted to him." Conner tells us that neither AR 525-13 (*see* finding 31), nor AR 530-1 (*see* finding 32), vested that authority in General Votel or other Rangers. (App. br. at 31-35)

In rejoinder, the Corps asserts that Conner is wrong about DD Form 1354, and dismisses the specific authority argument as irrelevant. Alternatively, the Corps urges that any required specific authority may be found in AR 600-20 (*see* finding 33), AR 525-13 and AR 530-1, as well as in General Votel's inherent authority as commander of the 75th Ranger Regiment. (Resp. reply br. at 15-17)

We reject Conner's argument regarding DD Form 1354, which we regard as no more than an internal government housekeeping document, the presence or absence of which creates no rights in favor of third parties such as Conner. *See Hannelore Brown*, ASBCA Nos. 23492, 23498, 83-1 BCA ¶ 16,305 at 81,038 (finding that DD Form 1354 "contains a printed note which states that the form was designed and issued for use in

connection with the transfer of military real property between military departments and to and from other government agencies"). In any event, the record reflects that the form is used for "completed facilities" (finding 34), in contrast to those on sites A and B, which were only partially completed at the time of the attacks (*see* finding 8). Moreover, the government, not Conner or the Corps, owned sites A and B throughout contract performance (finding 34(c)), and there is no warrant for concluding that the validity of a sovereign act turns upon punctilious execution of the form in an "emergency crisis situation" (*see* finding 9).

We also reject the argument that the exclusion order otherwise lacked legal foundation. We assume, *arguendo*, that "[i]t is critical that the governing acts themselves be legal for the [sovereign act] doctrine to apply." *O'Neill*, *supra*, 231 Ct. Cl. at 826, citing *Ottinger v. United States*, 116 Ct. Cl. 282, 285 (1950). In so doing, we view the issue in light of "'the historically unquestioned power of [a] commanding officer summarily to exclude civilians from the area of his command.'" *Greer*, *supra*, 424 U.S. at 838 quoting *Cafeteria and Restaurant Workers*, *supra*, 367 U.S. at 893-94. While this recognized power may itself justify General Votel's action, we think that AR 600-20, AR 525-13, and AR 530-1 provide regulatory justification as well. Thus, AR 600-20 authorized him to exercise operational control over the Ranger compound, which was a tenant activity within Fort Benning (*see* findings 1, 22). In considering AR 525-13, we rely upon the 1998 version, which was in effect both at the time of contract award and during the events in dispute (finding 31). *E.g. Lengerich v. Department of the Interior*, 454 F.3d 1367, 1371 (Fed. Cir. 2006) (looking to "regulations in effect at the time of [disputed] oral discussions"). AR 525-13 provided guidance to protect personnel "against a wide spectrum of threats, including terrorism." Aside from a general cautionary note about the impact of a protracted THREATCON DELTA on military personnel and their "capacity to perform normal peacetime missions," AR 525-13 did not prescribe the length of time that such a threat condition would remain in force (finding 31). AR 530-1 clarifies that operational security was more than the "vague references" disparaged by Conner (app. br. at 34). AR 530-1 made it General Votel's "command responsibility" to "implement appropriate . . . measures to preserve [the] essential secrecy" of the Rangers' forthcoming combat operations (finding 32).

We cannot accept Conner's main regulatory argument, which appears to be that the antiterrorism program set forth in AR 525-13 "does not provide for or authorize the unilateral exclusion of the very personnel (i.e., Government contractors) the program is supposed to protect." (App. br. at 33) In truth, the scheme of AR 525-13 is not devoted to protecting contractors. The first category among the protected class is "soldiers" (finding 31), whose exposure to greater risk in combat was paramount to General Votel's decision (*see* findings 15, 16, 21, 22, 29(a)). Moreover, we do not read AR 525-13 as narrowly as a tax regulation. By its terms, AR 525-13 provided guidance, directing local commanders to "further refine this guidance into more specific instructions in order to

meet the unique requirements of the specific location" (finding 31). General Votel's exclusion of Conner and its subcontractors, as well as other categories of potential entrants whom he judged not to be mission essential (*see* findings 15-17), comported with this guidance.

We also do not agree with Conner that *Nero* sheds light on General Votel's authority. *Nero* had nothing to do with a terrorist attack or with deployment for combat. Contrary to Conner, we did not hold in *Nero* that "the government failed to prove the installation commander's specific authority or that he followed the correct procedures." (App. br. at 33) Rather, we decided that, in the face of a conclusory showing on summary judgment, genuine issues of material fact remained regarding whether the claimed costs "were incurred incidentally to a sovereign act of Lt. Col. Crosby in exercising his authority and responsibility as base commander or . . . as the result of a direction to appellant related to the performance of the contract." *Nero, supra*, 86-1 BCA at 93,297.

D. *Less Drastic Alternatives*

Conner insists that it is entitled to a monetary award because less drastic alternatives were available, instead of complete exclusion during the delay period. Conner relies chiefly upon *Home Entertainment* and *Nero* for the proposition that the government "cannot plead a sovereign act when there was a reasonable way to implement its policy without violating contractual rights." (App. br. at 35) Conner urges that either a fence or a control roster would have been reasonable, less drastic alternatives.

We reject Conner's argument. We do not accept "this *tour d'horizon* approach to the sovereign acts doctrine," *Klamath Irrigation District v. United States*, 75 Fed. Cl. 677, 688 (2007), conditioning the validity of a sovereign act on the reasonableness of alternatives. *See Nero, supra*, 86-1 BCA at 93,297 (noting that, if after trial, there were evidence that exclusion of firefighters from the installation was within the commander's authority under applicable regulation, "it is conceivable that such action would have been deemed a sovereign act precluding recovery"). Nonetheless, even assuming that the Corps must demonstrate that less drastic alternatives were unavailable, it has done so here. As we have found, the record does not support the conclusion that any of the proffered alternatives -- either a fence, a control roster, or escorts -- would have been feasible in the circumstances to reduce the risk of disclosure of deployment activities (finding 21). There is no evidence that there was any militarily feasible alternative to the Rangers' "protracted low-level deployment" (*id*.).

E. *Other Theories of Recovery*

1. *CHANGES Clause*

Conner argues that it is entitled to relief under the contract's CHANGES clause (*see* finding 2). Conner contends that additional time under the DEFAULT clause (*see id*.) is not its exclusive remedy. According to Conner, the closure of the site constituted an express change of the promise in paragraph 1.16.1 that the contract work would "be accomplished in facilities which will be unoccupied and vacant" during construction (*see* finding 3). Conner also says that the closure constituted a constructive change arising out of respondent's implied duty not to interfere with performance. (App. br. at 23-24; Reply Brief of Appellant, Conner Bros. Construction Co., Inc. (app. reply) at 15-16) For its part, the Corps rejoins that the term "facilities" in paragraph 1.16.1 cannot be equated to the overall "project" or construction "site," that there were no buildings on sites A and B at the outset of contract performance, and that, in any event, Conner's reading of the paragraph cannot be harmonized with the terms "sites" and "areas" elsewhere in the contract. (App. br. at 47-48)

Conner's reading of paragraph 1.16.1 is not tenable. In *Pacific Architects and Engineers, Inc.*, ASBCA No. 21168, 79-2 BCA ¶ 14,019, *aff'd*, 230 Ct. Cl. 1024 (1982), we recognized that "the Changes clause does not cover sovereign acts" and that "an *express* contractual commitment to assume responsibility for sovereign acts is required" to bind the government. *Id*., 79-2 BCA at 68,867 (emphasis in original). Paragraph 1.16.1 is not such a commitment.

In any event, we agree that the term "facilities" in paragraph 1.16.1 cannot be read to mean sites A and B. The contract drawings employ the designations "SITE A" and "SITE B," and specify their respective boundaries, topographies and layouts (finding 4). The drawings do not refer to the sites as "facilities," and neither party has pointed us to a definition of the term at any other point in the record. The relevant dictionary definition of "facility" is "something (as a hospital, machinery, plumbing) that is built, constructed, installed or established to perform some particular function or to serve or facilitate some particular end." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986) at 812-13. This definition comports with our understanding of "facilities," and cannot be harmonized with sites A and B.

If paragraph 1.16.1 were to be treated as creating a patent ambiguity, then Conner must have raised the matter with the Corps before bidding, but if it were to be treated as latently ambiguous, then Conner must establish that it relied upon its current interpretation in bidding. *E.g., Servicios Profesionales de Mantenimiento, S.A.*, ASBCA No. 52631, 03-2 BCA ¶ 32,276 at 159,680-81. On the record before us, Conner has not established that it did either (finding 3).

B. *SUSPENSION OF WORK Clause*

In count one of its complaint, Conner seeks recovery under the contract's SUSPENSION OF WORK clause (*see* finding 2). (Comp., ¶¶ 1-22) While count one was the subject of the Corps' unsuccessful motion for partial summary judgment, *Conner Bros.*, *supra*, 04-2 BCA at 162,143-44, Conner does not appear to press the theory seriously in its present briefs. We nonetheless address entitlement under the clause in view of the ambiguous state of the record.

We conclude that Conner is not entitled to recover. In *Empire Gas Engineering Co.*, ASBCA No. 7190, 1962 BCA ¶ 3323, *recon. denied*, 1962 ASBCA LEXIS 1031 at *1 (A.S.B.C.A. Jun. 27, 1962), the contracting officer ordered a contractor to suspend work at a military base because of a military emergency. We looked to whether the suspension order was that of the contracting agency and concluded that:

> [t]he fact that the suspension of work order was in writing addressed to the contractor by name, referring to the contract by number, and signed by the contracting officer as contracting officer is almost conclusive proof that such order was (1) an act of the Government in its contractual capacity and (2) issued in exercise of the Government's right to suspend work under the Suspension of Work clause.

Empire Gas, *supra*, 1962 BCA at 17,128. The "conclusive proof" goes in the opposite direction here. There is no evidence of a suspension order (finding 14). The contracting officer, who did not visit the site before, during or after construction (finding 5), had no involvement in the decision-making process regarding Conner's exclusion (finding 14). Her relevant subordinate on site – the Corps' project engineer – did not direct Conner to leave the site and was not told to do so by the contracting officer (*id.*). Neither he nor the contracting officer decided when Conner could return to the site (*id.*). His efforts during closure were devoted to advocating Conner's case to the Rangers (*id.*) in an effort "to get [Conner] back to work, period" (finding 29).

3. *Breach of Contract*

In count two of its complaint, Conner alleges that respondent breached the contractual duty of good faith and fair dealing. Conner incorporates the previous allegations of the complaint (compl. ¶ 23) and further alleges that the breach lay in the Corps' failure to "initiate any action which would address realistic security needs and mitigate the damages" from the closure, and instead "merely accepted the access restrictions" imposed by the Rangers. (*Id.*, ¶ 25)

Breach of contract recovery will not lie. Count two is essentially a reformulation of allegations regarding less drastic alternatives under a breach rubric. We have already concluded that the closure of the compound constituted a sovereign act; such acts "'cannot be deemed specially to alter, modify, obstruct, or violate the particular contracts'" into which [the government] enters with private persons.'" *Horowitz*, *supra*, 267 U.S. at 461 quoting *Jones*, *supra*, 1 Ct. Cl. at 384. In addition, we have found that the asserted less drastic alternatives were not feasible in the circumstances (finding 21).

CONCLUSION

The appeal is denied.

Dated: 11 October 2007

ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

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