Lessons From the Pandemic

Recent decisions provide insights on how coronavirus pandemic claims are likely to be resolved.

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The COVID-19 pandemic has had a significant impact on the performance of government contracts. Over the last three years, contractors have navigated unprecedented supply chain challenges, inflation, staffing disruptions, and changes to contract execution plans, among other difficulties.

As the pandemic took hold, contractors began searching for ways to obtain relief from the impact of COVID-19. Some contractors turned to the Paycheck Protection Program (PPP) and other forms of public assistance to blunt the impact of the pandemic. But these initiatives, while helpful, were often insufficient to fully address the increased costs and schedule delays experienced by contractors.

Not surprisingly, contractors began to submit claims in an effort to obtain relief. In 2022, we began to see the first decisions involving these COVID-19-related claims.

These decisions illustrate the difficulty contractors face in obtaining monetary relief for COVID-19 impacts, particularly under fixed-price contracts. Moreover, the cases show that schedule delays will not be excused unless the contractor establishes that the delays were actually caused by the pandemic *and* unforeseeable prior to contract award.

Over the next several years, we are likely to see the Boards of Contract Appeals and the U.S. Court of Federal Claims resolve more cases involving COVID-19-related claims. The decisions discussed below offer some important lessons for contractors and agencies regarding how these claims are likely to be resolved. Also presented are the strategies contractors should follow to increase their chances of success.

Proving "Excusable Delays"

When the pandemic began, contractors and agencies began to scrutinize the *force majeure* provisions in their contracts that govern "excusable delays." Those provisions in government contracts generally provide that the contractor will not be in default if a delay is caused by certain *force majeure* events beyond their control including "epidemics" and "quarantine restrictions."[1]

But the mere occurrence of the pandemic during contract performance is not enough to establish that delays are excusable. As the contractor in the *Appeal of Central Company*[2] learned, a general assertion that performance was impacted by COVID is not adequate to prove that delays were attributable to a *force majeure* event.

That case involved the default termination of a contract to design and construct a storage building and yard for the Air Force. The contract was awarded prior to the pandemic in September 2019 and required all work to be completed in May 2020.

After the completion date passed, the Air Force terminated the contract due to the contractor's failure to make progress.

The contractor argued that its lack of progress was excused by COVID. But the Armed Services Board of Contract Appeals (ASBCA) disagreed and held that the Air Force's termination was justified because the contractor failed to meet its burden to prove that its performance problems were caused by COVID.

The evidence showed that, even prior to the pandemic, the contractor failed to make progress on various preconstruction submittals during the first several months of performance. Moreover, the contractor did not establish that COVID actually impacted its performance once the pandemic began to significantly affect the United States in March 2020.

Instead, the contractor generally alleged that the pandemic was causing "very serious damages to our business" and claimed that "our subcontractor's employee tested positive" and "the supplier had to shut down the factory."[3] The ASBCA rejected the contractor's arguments because it "did not provide any detail or evidence that this purported supply problem actually affected [the contractor's] work."[4] Moreover, the contractor failed to "demonstrate that those problems actually delayed [its] pre-construction work – which appear[ed] to have been almost irretrievably behind schedule prior to COVID anyway."[5]

The ASBCA's decision underscores the need "to contemporaneously demonstrate when the delays occurred and their real effect upon" the contractor's work to establish an excusable delay.[6] When defending a default termination or seeking contract extensions for COVID-related delays, contractors must offer specific evidence that COVID impacted their work and that those impacts delayed the project's "critical path" to completion.

"Foreseeable" Impacts Are Not Excusable

After the pandemic began, agencies continued to enter into contracts that included the *FAR's* standard *force majeure* provisions. Despite what some contractors may have assumed, however, those clauses do not automatically excuse COVID-19-related delays that were foreseeable prior to award.

In *Orsa Technologies, LLC v. Department of Veterans Affairs*, the Department of Veterans Affairs (VA) awarded a contract to Orsa in January 2021 for a "surge supply" of 50 million nitrile gloves for hospital staff to respond to the pandemic.[7] The contract required the gloves to be "on hand" and delivered to the VA within 45 days. The VA ultimately terminated the contract for cause because Orsa failed to meet the required delivery date.

Orsa argued that the termination was invalid because its inability to deliver was caused by difficulties attributable to COVID-19. Orsa claimed that "[a]fter contract award, the nitrile glove market significantly deteriorated due to the COVID-19 pandemic."[8] Orsa asserted the impact of COVID-19 "permeated throughout the glove market supply" and caused the world's largest glove supplier to shut down.[9]

The Civilian Board of Contract Appeals (CBCA) denied Orsa's excusable delay claim for three primary reasons. First, the CBCA found that Orsa "misstated its compliance with contract requirements" that required the gloves to be "on hand" when the contract was awarded.[10]

Second, the CBCA determined that "the majority of the difficulties about which Orsa complains occurred or began *after* Orsa submitted a quote for and was awarded the contract at issue here."[11] Orsa's delay was not excusable because COVID was an entirely "foreseeable" event that was ongoing prior to award.

Finally, similar to the ASBCA in *Central Company*, the CBCA's decision emphasized that "[t]he mere existence of a pandemic does not mean that [it will] simply assume, without evidence, that the pandemic actually affected the contractor's ability to perform."[12] *Orsa* again underscores that, to prove an excusable delay, contactors must offer specific evidence that links COVID-related impacts to the delays at issue.

Fixed Means Fixed

The *force majeure* clauses discussed here provide a basis for contractors to obtain additional time but not money. Under a firm-fixed price contract, contractors generally bear the risks associated with increased costs due to COVID or any other *force majeure* event.

This basic principle of risk allocation doomed the contractor's claim in the *Appeal of Ace Electronics*

Defense Systems.[13] The contractor alleged that its suppliers significantly increased the price of certain components Ace was required to deliver under its fixed price contract for parts associated with cruise missiles.

In support of its claim, the contractor cited a memo from the Office of the Undersecretary for Defense for Acquisition and Sustainment (OSD A&S). The memo recognized the impacts of COVID-19 and stated that contracting officers were "granted discretion" to modify contracts to address COVID impacts, subject to the availability of funding.

The ASBCA dismissed the contractor's claim because it sought to improperly "shift the risk" of COVID-19-related cost impacts to the government.[14] The ASBCA also agreed with the government that the OSD A&S memo did not impose a contractual obligation and recognized contractors generally bear the risk of cost increases due to COVID-19 impacts under firm-fixed price contracts.

The same fundamental principle was applied to deny the contractor's claim in *OWL, Inc. v. Department of Veterans Affairs*.[15] The contractor was required to provide transportation services to VA beneficiaries under a firm-fixed price indefinite delivery, indefinite quantity (IDIQ) contract.

After the pandemic began, the VA reduced the number of trips ordered as patients used more telehealth appointments. The CBCA denied the contractor's claim because the VA had exceeded the IDIQ minimum guaranteed amount and, thus, it was not obligated to order more trips.

The contractor's notice of appeal also alleged that the VA breached the contract for other reasons including by permitting only one patient per trip and by requiring COVID screening for drivers. The CBCA did not consider these issues, however, because they were not properly raised in the claim submitted to the contracting officer.

Although the CBCA did not address these issues for procedural reasons, those claims could present a more colorable basis for cost recovery. Indeed, if the VA directed the contractor to change its method of performance or to conduct COVID-19 screenings that were not required under the original contract, such direction may be considered a "constructive change" that is compensable under the Changes clause.

"Sovereign Acts" Costs Not Recoverable

The sovereign acts doctrine is a powerful defense the government can assert to bar contractor claims that arise from the government acting in its sovereign capacity. That doctrine applies to acts that are (1) "public and general" and (2) "render performance of the contract impossible."[16] Thus far, the ASBCA has issued two decisions that illustrate how this defense can preclude certain COVID-19-related claims.

The *Appeal of JE Dunn Construction Co*. involved a contract for design-build construction work at Fort Drum, New York, for the U.S. Army Corps of Engineers. At the outbreak of the pandemic, the Fort Drum commander imposed a 14-day quarantine requirement for anyone arriving at the base from outside a 350-mile radius. The commander's order was in line with a similar quarantine order issued by New York State. New York subsequently relaxed its quarantine requirement to three days with proof of a negative COVID test, but the commander's 14-day quarantine requirement remained until March 2021.

The contractor submitted a claim seeking expenses it incurred to quarantine four of its employees. According to the contractor, the Corps of Engineers constructively changed the contract by requiring the employees to comply with the quarantine requirement.

The ASBCA held, however, that the contractor's claim was barred by the sovereign acts doctrine. The ASBCA explained that the commander's quarantine order was "public and general" because it "was not aimed specifically at" the contractor but, rather, it "was implemented to serve a broader governmental objective of controlling the spread of COVID-19 on the base."[17] Moreover, the order made it impossible for the government and the contractor to perform.

The ASBCA similarly found that the sovereign acts doctrine barred the contractor's claim in the *Appeal of APTIM Federal Services, LLC*.[18] That case involved a construction contractor's claim for costs it incurred as a result of the Arnold Air Force Base commander's order to close the base to "all non-operationally urgent personnel" for a two-month period.[19] The contractor sought compensation under the contract's Suspension of Work clause, but the ASBCA denied the claim because the base shutdown

order satisfied both prongs of the sovereign acts test.

Conclusion

The Contract Disputes Act allows a claim to be filed with the contracting officer as long as six years after it accrues. Government contracts cases can take years more to litigate to a conclusion. As a result, it is likely there are many more COVID-19 claims in the pipeline that have not been resolved. The insights that can be gleaned from the cases decided in 2022 should inform contractors and agencies as they prepare and respond to claims arising from the pandemic. CM

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ENDNOTES

1 See, e.g., FAR § 52.249-10(b)(1); FAR § 52.249-14(a); FAR 52.212-4(f).
2 Appeal of Central Company, ASBCA No. 62624, 22-1 BCA ¶ 38057.
3 Id. at 184,789
4 Id. at 184,790
5 Id.
6 Id.
7 Orsa Technologies, LLC v. Department of Veterans Affairs, CBCA No. 7141, 22-1 BCA ¶ 38,025.
8 Id. at 184,658.
9 Id.
10 Id. at 184,659.
11 Id.
12 Id. at 184,660. The CBCA denied another appeal involving a different contract with Orsa for nitrile gloves that was also terminated for cause. See Orsa Technologies, LLC v. Department of Veterans Affairs, CBCA No. 7142, 22-1 BCA ¶ 38,042. In that case, the CBCA rejected Orsa's excusable delay claim for similar reasons. See also Servant Health, LLC v. United States, 161 Fed. Cl. 210 (2022) (upholding decisions to terminate nitrile glove supply contracts for default and rejecting the contractors' excusable delay claim).
13 Appeal of Ace Electronics Defense Systems, ASBCA No. 63224, 22-1 BCA ¶ 38,213.
14 Id. at 184,568
15 OWL, Inc v. Department of Veterans Affairs, CBCA No. 7208, 22-1 BCA ¶ 38,023.
16 Appeal of JE Dunn Construction Co., ASBCA No. 62936, 22-1 BCA ¶ 38123 at 185,192.
17 Id.
18 Appeal of APTIM Federal Services, LLC, ASBCA No. 62982, 22-1 BCA ¶ 38127.
19 Id. at 185,217.