War Zone and Contingency Contractors Face an Uphill Battle in Recovering Costs for Stolen, Lost, and Abandoned Equipment: How Facts Matter in Any Recovery

Litigation Alert
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Last month, the Armed Services Board of Contract Appeals (ASBCA) issued a decision illustrating some of the challenges in recovering costs under contracts performed in a war zone. In *Omran, Inc.*, ASBCA No. 63414 (Apr. 22, 2024), the contractor was unable to avoid summary judgment because it failed to show how equipment lost to the Taliban were damages foreseeable at the time of contract award or were not a direct consequence of a sovereign act. Contractors should seek legal advice before strategizing and investing resources in filing any claim because the facts matter and are different in every case.

Background

In March 2019, the U.S. Army Corps of Engineers (USACE) awarded Omran Holding Group (Omran) a contract for the design and construction of aviation enhancements required by the Afghan National Army (ANA) at the Mazar-e-Sharif International airport in Afghanistan. The contract included several provisions commonly incorporated into contracts performed in a war zone — all of which shifted liability to the contractor. Under the contract, Omran accepted the risks associated with performance in "dangerous and austere conditions," and was responsible for demobilizing all of its personnel and equipment from the work site and for "the security of [its] equipment."

During performance, two problems arose. First, the government alleged quality issues with the taxiway constructed by Omran, requiring the company to submit corrective action plans (CAPs) in October 2020 and May 2021. While Omran awaited further instruction from the government on the CAPs, it maintained its concrete equipment, vehicles, and supplies at the airfield. Second, due to compatibility issues with the "electrical tie-ins" to the commercial power source required under the contract, Omran procured and used generators during performance.

On August 14, 2021, Omran was directed by the ANA to evacuate the project site due to the Taliban takeover of Afghanistan. Omran was unable to remove its equipment from the work site, a process they claimed would have taken up to 14 days and exposed Omran personnel to significant risk. Two days later, on August 16, USACE issued a suspension of work order to Omran. Omran's equipment was lost to the Taliban.

Omran submitted a certified claim for $1,488,491.50 for additional work performed and the lost equipment left on site, including the concrete equipment and generators. The contracting officer issued a final decision denying Omran's claim for the lost equipment. Omran appealed the final decision to the ASBCA.

Parties' Arguments

On appeal, Omran alleged that the government failed "to make a timely decision or take contractual action concerning the taxiway pavement and the electrical tie-ins which would have enabled Omran to demobilize the associated equipment and material" and that the government's untimely decision-making was the direct and proximate cause of the equipment loss. The government moved to dismiss for failure to state a claim on the basis that the government was not liable for the acts of a third party — the Taliban — or the acts of a sovereign that caused Omran's damages, which the ASBCA treated as a motion for summary judgment. In subsequent briefing, the government also argued that the loss of Omran's equipment by the Taliban was not foreseeable at the time of contract formation.

In response, Omran argued that the third-party defense is only available absent fault or negligence, and here, USACE's fault or

negligence was the reason for the loss of equipment, not the Taliban invasion. Specifically, the government did not provide Omran with direction on the repairs necessary under the CAP and the generators were lost due the government's inability to provide the power source agreed to in the contract. Omran did not address the government's foreseeability or sovereign act arguments.

Summary of Decision

Although the ASBCA stated that Omran had pointed to evidence that "gave credence to its allegations that the government did not properly administer the contract," the decision focused on one element necessary to the claim, "that the damages Omran sustained (the Taliban seizing appellant's equipment, machinery, and power generators) — were foreseeable at the time of contract award in the event the government 'breached' the contract by failing to timely respond to certain contractor requests for information." In its appeal, Omran alleged that the government should have known of the impending Taliban takeover in the months leading up to August 2021. Omran did not, however, present evidence or even allege that it was foreseeable by the government at the time of contract award that its breach would result in the Taliban seizing Omran's equipment. Given this, the ASBCA granted the government's motion for summary judgment.

Key Takeaways

Setting aside the obvious — that Omran should have alleged that the damages were foreseeable at the time of contract award — what else should Omran and similarly situated contractors do to increase their chances of recovery?

- **Contractual Language**: Although the ASBCA did not need to address the issue, there may have been another potentially fatal flaw in Omran's appeal. Specifically, the government argued the contractor failed "to point to a single contractual provision or requirement that the Government breached" and that Omran even admitted in its briefing that it raised "no specific contract provisions related to its claim." While the ASBCA posited that Omran may have provided enough evidence as the non-movant at the summary judgment stage, the failure to tie the government's alleged breach to a contractual requirement may not have fared so well on the merits. Contractors seeking to recover costs for contract breach should always endeavor to ground the government's alleged breach in an obligation or requirement expressly provided for in the contract's terms.

- **Contractual Act**: In defending claims brought under battlefield contracts, the government is keen to raise two defenses: (1) third party acts, *see Oman-Fischbach International (JV) v. Pirie*, 276 F.3d 1380, 1385 (Fed. Cir. 2002) ("absent fault or negligence or an unqualified warranty on the part of its representatives, the Government is not liable for damages resulting from the action of third parties"), and (2) sovereign acts, *see Conner Bros. Const. Co. v. Geren*, 550 F.3d 1368, 1371 (Fed. Cir. 2008) ("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"). And in cases involving equipment loss, like Omran, the sovereign acts defense has been used successfully fairly often. *See Altanmia Com. Mktg. Co*., ASBCA No. 55393 (Feb. 12, 2009) (denying claim for constructive change claim upon finding that destruction of disabled trucks under fuel transportation contract was sovereign act), *Alfajer, Ltd*., ASBCA No. 62125 (Oct. 20, 2023) (denying claim for equipment that government ordered to be removed from work site and subsequently hijacked by Taliban en route because the order to close base and remove equipment was sovereign act), and *Int'l Oil Trade Ctr.*, ASBCA No. 55377 (July 16, 2008) (denying claim for abandoned trucks upon finding that directives to abandon the vehicles was a sovereign act). The government's repeated use of these defenses stresses the importance of demonstrating that the alleged damages were the result of actions taken by the government and in the government's contractual capacity when seeking to recover costs. For its part, Omran rightly framed the alleged breach as "contractual action" taken by the government that was the "direct and proximate cause" of its loss. Had the contracting officer instructed Omran to follow all ANA direction in any prior contract communications, Omran's claim may have seen more success.

- **Alternative Theories of Recovery**: Aside from the issues previously discussed, Omran may have also been hampered by relying on a single breach of contract theory — that the government improperly administered the contract. When the facts allow, contractors seeking recovery should strategically consider additional, plausible, and supportable theories of recovery. For example, in *Omran*, additional claims for breach of the implied duty of good faith and fair dealing or a superior knowledge claim may have increased chances of recovery. The latter, which "imposes upon a contracting agency an implied duty to disclose to a contractor

otherwise unavailable information regarding some novel matter affecting the contract that is vital to its performance," can prove especially relevant in battlefield contracts where information gaps between the government and contractor often exist. *See Giesler v. United States*, 232 F.3d 864, 876 (Fed. Cir. 2000) ("The doctrine of superior knowledge is generally applied to situations where: (1) a contractor undertook to perform without vital knowledge of a fact that affects performance costs or duration; (2) the government was aware the contractor had no knowledge of and had no reason to obtain such information; (3) any contract specification supplied misled the contractor or did not put it on notice to inquire; and (4) the government failed to provide the relevant information").

- **Distinguishing Risks Assumed**: As discussed, war zone contracts typically incorporate risk and security provisions that shift liability to the contractor and ultimately serve as an obstacle to recovery. *See Tawazuh Com. & Constr. Co. Ltd*., ASBCA No. 55656 (June 13, 2011) (denying claim for equipment destroyed by Taliban during work suspension period because contract deemed contractor responsible for equipment, stated that U.S. military would not provide security, and contractor was required to carry insurance for damage from hostile acts). However, contractors have recovered when they are able to distinguish the risk that caused their damages with the risk assumed under the contract. *See, e.g., Anham FZCO, LLC*, ASBCA No. 58999, 20-1 BCA ¶ 37,745 (Nov. 13, 2018) (rejecting affirmative defense that contractor assumed the risk of increased costs resulting from government constructive changes), *Anham FZCO, LLC*, ASBCA No. 59283, 17-1 BCA ¶ 36,817 (Jul. 20, 2017) (rejecting affirmative defense that contractor assumed the risk of increased costs resulting from government misrepresentations), and *Barry L. Miller Eng'g. Inc*., ASBCA No. 24590, 85-1 BCA ¶ 17,722, 1984 ASBCA LEXIS 401 at 47 (denying defense where there was no evidence the contractor had knowledge of or voluntarily assumed the risk of commercial impracticability).

- **Another Route of Recovery at COFC?** While it may be true that, in some cases, the government does not waive sovereign immunity — as a matter of contract — for losses attributable to the acts of third parties, an action under the Takings Clause of the Fifth Amendment to the U.S. Constitution may still be viable at the U.S. Court of Federal Claims (COFC). That is because, under established precedent, the U.S. government *can be liable* for the taking or loss of a contractor's property, even when "the final act of expropriation" is done by a foreign third party. *See Langenegger v. United States*, 756 F.2d 1565, 1571 (Fed. Cir. 1985) and *Erosion Victims of Lake Superior Regulation v. United States* , 833 F.2d 297, 299 (Fed. Cir. 1987). "When considering a possible taking [in such circumstances], the focus is not on the acts of others, but on whether sufficient direct and substantial United States involvement exists." *Langenegger*, 756 F.2d at 1571. The court examines "the nature of the United States involvement and [ ] the benefit secured." *Id*. For example, in *Global Freight Systems v. United States* , COFC found that the U.S. government could be liable for an alleged taking of a contractor's property by a foreign government, where the plaintiff-contractor plausibly alleged that the U.S. government facilitated the taking for its own benefit. *See* 130 Fed. Cl. 780, 788 (2017).

- **Preventative Measures**: The ultimate recourse for contractors that are contemplating a contract opportunity that presents significant and unquantifiable risk is to not submit an offer at all. A less drastic option is to protest the terms and conditions in the solicitation that expose contractors to unwarranted risk. In doing so, a potential offeror can argue that the solicitation is ambiguous, unduly restrictive, and/or presents unreasonable and excessive risk for offerors. Alternatively, a contractor may argue why a cost contract is more appropriate for the requirement than a firm-fixed priced contract and that the acquisition planning that led to the solicitation was unreasonable and/or a violated procurement statute or regulation. *See NOVAD Mgmt. Consulting, LLC*, B-419194.5, July 1, 2021, 2021 CPD ¶ 267. Finally, protesting and/or submitting a written question to the agency about risks and responsibilities detailed in the solicitation could provide a record in the event of a later dispute about the foreseeability of an event. There is no indication Omran protested the terms of the USACE's solicitation.

Aside from the lessons *Omran* teaches, the decision is also noteworthy for the ASBCA's approach — finding the failure to plead the foreseeability of damages as determinative at the summary judgment stage could be seen as overly harsh, especially given the uphill battle war zone contractors already often face. At the outset of its analysis, the ASBCA curiously noted that the "first problem" for Omran is that it accepted the risks of operating in a dangerous environment and the risk of securing its equipment. Without a doubt, as previously noted, these risk shifting provisions have barred contractor recovery in dozens of cases and could have done so if the *Omran* case advanced past summary judgment. However, the provisions arguably undermine the ASBCA's conclusion. On one hand, the ASBCA acknowledged that Omran assumed the risk of losing property to the Taliban because the contract, as

awarded, generally warned that performance would occur in a "dangerous and austere" environment. Yet, at the same time, the ASBCA seemingly endorsed the government's argument that "Omran does not — and cannot — argue that its alleged damages (unrecoverable equipment and materials following the Taliban takeover in August 2021) were foreseeable at the time of contract formation in March 2019." If, at the time of contract award, the parties can foresee and contract around the risks of operating in a dangerous environment, why doesn't the same hold true for the foreseeability of damages caused by government action or inaction under those dangerous conditions during contract performance?

Contract performance in a contingency or hostile environment can be fraught with risk for contractors. Each contract and set of facts require legal analysis to determine whether cost recovery is possible and the best path for achieving any recovery. Additionally, protesting and/or asking questions before the submission of an offer may establish a written record for the parties in any future dispute about a loss. If you have any questions about the *Omran* decision or a potential contract claim, please contact one of the Miller & Chevalier attorneys below:

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