

SUSPENSION OF WORK AND PROTEST AFTER AWARD CLAUSES

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The Armed Services Board of Contract Appeals recently addressed a claim caused by a suspension of work in a construction contract where a bid protest had been filed.

Flatiron/Dragodos/Sukut JV, ASBCA Nos. 63019-20, April 4, 2023. The government moved to dismiss the case for failure to state a claim, but the Board concluded that a plausible claim had been stated and denied the motion.

The government issued Flatiron a contract for a dam safety modification project. The contract incorporated by reference two standard Federal Acquisition Regulation (“FAR”) clauses, with pertinent portions set forth below:

52.233-3 Protest after Award (a) Upon receipt of a notice of protest [] the Contracting Officer may, by written order to the Contractor, direct the Contractor to stop performance of the work called for by this contract. The order shall be specifically identified as a stop-work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage.

[]

(b) If a stop-work order issued under this clause is canceled either before or after a final decision in the protest, the Contractor shall resume work. The Contracting Officer shall make an equitable adjustment in the delivery schedule or contract price, or both, and the contract shall be modified, in writing, accordingly, if-

(1) The stop-work order results in an increase in the time required for, or in the Contractor’s cost properly allocable to, the performance of any part of this contract; and

52.242-14 Suspension of Work. (a) The Contracting Officer may order the Contractor, in writing, to suspend, delay, or interrupt all or any part of the work of this contract for the period of time that the Contracting Officer determines appropriate for the convenience of the Government.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the Contracting Officer in the administration of this contract, or (2) by the Contracting Officer’s failure to act within the time specified in this contract (or within a reasonable time if not specified), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an equitable adjustment is provided for or excluded under any other term or condition of this contract.[]

Flatiron submitted and attempted to negotiate a Request for Equitable adjustment after the contracting officer issued a suspension of performance (without identifying the relevant clause), and after it incurred cost increases. When the negotiation was unsuccessful, Flatiron filed a claim for \$8.4 million, most of which was denied by the contracting officer. Flatiron appealed,

stating its entitlement pursuant to the Protest After Award clause. The government argued that the government never issued a stop-work order, but instead issued a suspension under the Suspension of Work clause because Flatiron relied on the Protest After Award clause, which refers to stop-work orders, not suspensions

In considering this claim on a construction contract, the Board stated that it viewed “the distinction the government attempts to draw between suspension and stop-work orders, limiting construction contracts such as the one involved in the appeals to suspension and non-construction contracts to stop-work orders, as being meritless.” FAR 33.106(b) mandates the inclusion of the Protest After Award clause in all solicitations (including construction contracts) and provides the authority for the equitable adjustment. Even though the Protest After Award clause requires the suspension of work notice to be identified specifically as a stop-work order and not a suspension, the government ignored the reality that both the CO and contractor treated the suspension as having been made under the authority of the Protest After Award clause.

Takeaway. Most stop work orders or suspensions will be done under FAR 52.244-14, Protest After Award, and will permit an equitable adjustment.

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