BOARDS OF CONTRACT APPEALS CANNOT ISSUE INJUNCTIVE RELIEF, BUT MAY ISSUE DECLARATORY RELIEF

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In an interesting case, the Armed Service Board of Contract Appeals ("Board") ruled that it did not possess jurisdiction to issue injunctive relief, but does possess jurisdiction to issue declaratory relief when there is a material breach by the government. *Bryan Ashush JV,* ASBCA No. 64037, October 1, 2025.

Here is the timeline of the actions on appeal:

- August 2, 2023. Ashush was awarded a contract by the Army Corps of Engineers ("Army") for construction of a life support area in Israel.
- September 12, 2023. The Army issued an administrative notice to proceed ("NTP") on, and planned to issue a construction NTP on Oct. 15, 2023.
- Oct. 7, 2023. Before the construction NTP was issued, a war between Hamas and Israel began.
- Nov. 7, 2023. The Army issued a suspension of work but lifted it on November 7, 2023.
- June 5, 2024 The Army finally issued a construction NTP.
- August 1, 2023. Ashush filed a claim with the contracting officer requesting that it be excused from further performance, asserting that the Army's failure to issue the construction NTP until 10 months after award constituted a material breach, a cardinal change and rendered performance impracticable.
- December 13, 2024. Ashush filed its appeal at the Board, deeming its claim denied because the Contracting officer never responded to its claim.

Bashush's claim requested for relief that "the Board (1) find that [its] performance obligations under the contract are excused and (2) direct the Government to terminate the contract for convenience."

The Board held that it did not possess jurisdiction to direct the government to terminate the contract for convenience, because it is injunctive relief. However, citing *Philips Lighting N. Am. Corp,* ASBCA No. 61669, 2024 WL 5038837 (Nov. 15, 2024), the Board does have jurisdiction to determine whether there was a material breach, a cardinal change and impossibility which would excuse Bashush's performance obligations under the contract because it is declaratory relief, not injunctive relief. The Board held that the government's material breach, a cardinal change, and impossibility excused Bashush's performance obligations under the contract.

Takeaway. Although the Board could not direct the Army to issue a termination for convenience (injunctive relief), it could grant its motion for declaratory relief, finding material breach by the government, and excusing Bashush from further performance under the contract. The material breach finding could permit the contractor to at least file a claim for its costs incurred under the contract.

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