

COVID-19 AND SOVEREIGN ACTS DOCTRINE

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Under the right set of circumstances, the government will not be liable for obstructions to the performance of contracts resulting from its public and general acts as the sovereign. *JE Dunn Const. Co*, ASBCA No. 62936, April 25, 2022. In this construction case, the Army changed the contract by requiring all of its personnel traveling to the contract site at Fort Drum, NY from more than 350 miles away to quarantine (because of COVID-19) for 14 days upon arrival. The contractor lost its \$68,000 claim because of the sovereign acts doctrine.

Dunn had a design build construction contract for heating, ventilation and air conditioning replacement services at Fort Drum. During the course of the contract, the Fort Drum Commander imposed a general order that applied to service members, their dependents and civilian personnel, outlining prevention and mitigation procedures to slow the spread of COVID-19. Two months later a New York Executive Order went into effect imposing a 14 day quarantine requirement on all persons traveling to New York from a state with a positive test rate higher than 10 per 100,000 residents or higher than a 10% positivity rate. Three weeks later, the Army informed Dunn that anyone arriving at Fort Drum from outside a 350 mile radius would be required to quarantine for 14 days before being permitted to enter the base.

Two employees of Dunn, and two employees of one of Dunn's subcontractor were required to quarantine, and Dunn requested an equitable increase in the contract price of \$68,000 associated with the quarantine. The Army denied the claim because the quarantine requirement was issued pursuant to the government's sovereign capacity. Dunn appealed.

The ASBCA noted that under the sovereign acts doctrine, a contractor is barred from monetary recovery for damages resulting from the government when it acts in its sovereign capacity. The sovereign acts doctrine provides that the government is not liable for obstructions to the performance of its contracts when they result from its "public and general acts as a sovereign." The doctrine is an affirmative defense that is an inherent part of every government contract.

The rule is that in order for the sovereign acts doctrine to apply (1) the government's act must be public and general (not directed, for example, at only one contractor) and (2) the act must render performance of the contract impossible. The courts look at whether an act is designed to nullify contract rights, and whether the act applies exclusively to the contractor or is broad so it includes other parties not in some kind of a contractual relationship to the government. Here the 14 day quarantine requirement applied to all visitors to the base from outside the 350 mile radius, and was not specifically aimed at Dunn. It had a broad governmental objective to control COVID-19 on the base, and wasn't directed at nullifying contract rights. Therefore it qualified as a public and general act, and the Sovereign Acts Doctrine applied. Dunn received no recovery.

Takeaway. If a governmental act is public and general, and delays or impedes a contractor, the government will be protected (and will not owe a claim for delay) by the Sovereign Acts Doctrine.

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