UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR PARTIAL SUMMARY JUDGMENT GRANTED IN PART:
December 3, 2018

CBCA 3506, 6167

FIRST KUWAITI TRADING & CONTRACTING W.L.L.,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Grant H. Willis, Peter F. Garvin, III, Ryan P. McGovern, Alexander M. Yabroff, and Robin A. Overby of Jones Day, Washington, DC, counsel for Appellant.

Thomas D. Dinackus, John C. Sawyer, Erin M. Kriynovich, and Randal W. Wax, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Washington, DC, counsel for Respondent.

Before Board Judges **HYATT**, **DRUMMOND,** and **SULLIVAN**.

SULLIVAN, Board Judge.

First Kuwaiti Trading & Contracting, W.L.L. (FKTC) appealed the denial of its claims by the Department of State (DOS) arising from the construction of the embassy compound in Baghdad, Iraq. FKTC presented approximately 200 cost claims that totaled $270 million. DOS moved for summary judgment on thirteen of those cost claims, challenging FKTC's reliance upon the War Risks clause, the superior knowledge doctrine, the Changes clause, and the implied duty of good faith and fair dealing as the basis for these claims. DOS also

asserts that actions underlying FKTC's changes claims constitute sovereign acts, precluding liability pursuant to the sovereign acts doctrine.

We grant DOS's motion regarding the scope of the War Risks clause and superior knowledge doctrine, thereby denying seven of FKTC's claims that are premised solely upon these bases. We deny DOS's motion regarding the claims that are also based upon the Changes clause or the implied duty of good faith and fair dealing, finding that there are disputed issues of fact. We also deny DOS's motion regarding the sovereign acts doctrine, finding that DOS has not established the applicability of that doctrine on the current record. Six of the thirteen claims subject to the motion survive DOS's challenge on this basis.

Statement of Facts

I. Contracts and Their Relevant Terms

In 2005, DOS and FKTC entered into five contracts for the construction of facilities at the new embassy compound (NEC) in Baghdad, Iraq. The contracts required FKTC to undertake site preparation and construct infrastructure, housing, support facilities, and a new office building (NOB). Exhibits 1, 313, 637, 959, 1825.[1]

A. Contract Price and Provisions Allowing for Adjustment of Contract Price:

The contract price for each contract included all labor and materials necessary to complete the work:

> B.1 Pricing
>
> B.1.1. The Contract Price includes all labor, materials, equipment and services necessary to accomplish the design and construction required by the Contract Documents, including applicable customs duties, transportation to the site, storage, premiums for insurance required by the Solicitation Documents and/or items called for by the contract or otherwise necessary for performance of the

[1] All exhibits are found in the appeal file, unless otherwise noted. FKTC presents only one claim in these appeals arising from the contract dealing with site preparation (Exhibit 1825), and that claim is not among the thirteen that DOS challenges in its motion. Appellant's Statement of Genuine Issues at 30 n.9. The citations for the contract terms are to the infrastructure contract. With the exception of the site preparation contract, the relevant terms for all the contracts are the same.

> contract. The Contract Price may be adjusted only be a written Contract modification signed by the Contracting Officer.

Exhibit 1 at 14. Each of these contracts was a firm, fixed-price contract:

> B.3 Type of Contract
>
> This contract is Firm Fixed-Price payable entirely in the currency indicated on the SF [Standard Form] 1442. No additional sums will be payable on account of any escalation in the cost of materials, equipment or labor, or because of the contractor's failure to properly estimate or accurately predict the cost or difficulty of achieving the results required by this contract. Nor will the contract price be adjusted on account of fluctuations in currency exchange rates. Changes in the contract price or time to complete will be made only due to changes made by the Government in the work to be performed, or by delays caused by the Government.

Id. at 17. The contracts also required FKTC to bear all the costs of transportation of materials to the site:

> H.45 Imported Materials, Equipment, and Personnel
>
> H.45.1 Costs to be borne by Contractor. The Contractor is responsible for paying all charges, whatsoever, except customs duties as provided herein, incurred in obtaining materials that must be imported for the project and in transporting the materials from their place of origin to the construction site. Moving costs shall include, but not necessarily be limited to, packing, handling, cartage, overland freight, ocean freight, transshipment, port, unloading, customs clearance and duties (other than customs duties as provided herein), unpacking, storage, and all other charges including administrative costs in connection with obtaining and transporting the materials from their source to the project site.

Id. at 53.

FKTC could obtain time extensions, but not money, for excusable delays:

> F.9 Excusable Delays
>
> F.9.1 The Contractor will be allowed time, not money, for excusable delays as defined in FAR [Federal Acquisition Regulation] 52.249-10, Default [48 CFR 52.249-10 (2005)]. Examples of such cases include (1) acts of God or of the public enemy, (2) acts of the United States Government in either its sovereign or contractual capacity, (3) acts of the government of the host country in its sovereign capacity, (4) acts of another contractor in the performance of a contract with the Government, (5) fires, (6) floods, (7) epidemics, (8) quarantine restrictions, (9) strikes, (10) freight embargoes, (11) delays in delivery of Government furnished equipment and (12) unusually severe weather.

Exhibit 1 at 32. But the contracts permitted an adjustment to the contract price if there were changes to the scope of work as defined in the contract:

> H.31.1 Bases for Equitable Adjustments. Any circumstance for which the contract provides an equitable adjustment, that causes a change within the meaning of paragraph (a) of the "Changes" clause shall be treated as a change under that clause; provided, that the Contractor gives the Contracting Officer prompt written notice within a limit of 20 calendar days stating (a) the date, circumstances, and applicable contract clause authorizing an equitable adjustment and (b) that the Contractor regards the event as a changed condition for which an equitable adjustment is allowed under the contract.

Id. at 57. The contracts also incorporated by reference two Changes clauses. One requires compensation for any additional work performed by the contractor at the direction of the contracting officer. *Id*. at 81 (incorporating FAR 52.243-4). The other provides that any written or oral order from the contracting officer that causes a change shall be treated as a change under the clause:

> (b) Any other written or oral order (which, as used in this paragraph (b) includes direction, instruction, interpretation, or determination) from the Contracting Officer that causes a change shall be treated as a change order under this clause; Provided, that the Contractor give the Contracting Officer written notice stating (1) the date, circumstances, and source of the order; and (2) that the Contractor regards the order as a change order.

. . . .

> (d) If any change under this clause causes an increase or decrease in the Contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any such order, the Contracting Officer shall make an equitable adjustment and modify the contract in writing. However, except for an adjustment based on defective specifications, no adjustment for any change under paragraph (b) of this clause shall be made for any costs incurred more than 20 days before the Contractor gives written notice as required.

Id. at 81 (FAR 52.243-4). The contracts also incorporated by reference the Suspension of Work clause that requires compensation for any unreasonable delays or suspensions by the contracting officer. *Id*. at 83 (incorporating FAR 52.242-14).

B. War Risks Clause

The contracts also contained a War Risks clause upon which FKTC relies as the basis for twenty-two of its claims, including the thirteen claims at issue in this decision. Because the parties dispute the meaning of this clause, we recite it here in its entirety without characterization and leave to the discussion our interpretation of the clause:

> H.21 War Risks
>
> H.21.1 Notwithstanding any other provision of this contract to the contrary, and except as set forth in paragraph H.21.6 below: The Government assumes the risk of loss or damage to and/or destruction of, completed or partially completed work performed under this contract, and materials delivered to site, where such loss, damage, and/or destruction occurs by, or as a result of war risks such as civil commotion, riot, sabotage, insurrection, rebellion, revolution, or hostile or warlike action, including action in hindering, combating, or defending against an actual impending or expected attack by any government or sovereign power (de jure or de facto) or by any authority using military, naval or air forces, and agrees that the Contractor shall not be responsible for such loss, damage and/or destruction. If directed in writing by the Contracting Officer, the Contractor shall proceed to replace and/or repair such part of the completed work as may have been lost, damaged, and/or destroyed as herein set forth, and in such event, an equitable adjustment shall be made in accordance with existing procedures.

H.21.2 The Contractor agrees that if it carries any insurance which is deemed by the Contracting Officer to cover any of the risks assumed by the Government under this clause, to make demand against the insurer in the amount recoverable, and to reduce its claim hereunder by the amount recovered from the insurer or, at the option of the Contracting Officer, to assign to the Government its rights against the insurer for the risks covered by this clause and, upon the request of the Contracting Officer, to furnish to the Government, and at the Government's expense, all reasonable assistance and cooperation (including the prosecution of suit and the execution of instruments of assignment or subrogation in favor of the Government) in obtaining recovery. Any indemnification or other coverage of such risks under the laws or regulations of the countries in which the work is performed or from other source shall be treated in the same manner as above in this paragraph. If the total amount of compensation from the above sources exceeds the amount of the allowable claim, such excess shall be paid to the Government.

H.21.3 The Contractor shall give the Contracting Officer prompt notice of any loss of, damage to, and/or destruction of, property for which the Government has assumed the risk under this clause, and shall furnish evidence or proof of such loss, damage, and/or destruction in such manner or form as may be required by the Contracting Officer.

H.21.4 The Government is not obliged to replace or repair the work that has been lost, destroyed, or damaged. Except for payments by the Government, if the Contractor is in any way compensated for any loss or destruction to the work, the Contractor, as directed by the Contracting Officer shall:

H.21.4.1 Use the proceeds to repair, renovate, or replace the work involved; or

H.21.4.2 Pay such proceeds to the Government.

H.21.5 The Contractor shall indemnify and save harmless the Government from and against all claims, damages, losses and expenses, direct, indirect or consequential arising out of or resulting from any act or omission of the Contractor, its agents, employees, or any subcontractor, in the execution or protection of the work. The Contractor's assumption of liability continues independent of the insurance policies.

> H.21.6 Failure to agree to any adjustment contemplated under this provision shall be a dispute within the meaning of the Disputes Clause. However, nothing in this clause shall excuse the Contractor from proceeding with the work, including the repair and/or replacement as herein provided.

Id. at 53–54.

C. Security Requirements and Warnings:

The contracts directed that FKTC "use only established site entrances and roadways" for vehicular access, Exhibit 1 at 59, and to employ watchmen to provide security for the construction site, transit, and storage site:

> H.43 Watchmen
>
> The Contractor shall provide sufficient personnel and materials to provide adequate protection of property at the site, in transit and storage including but not limited to measures specifically required by the Contract Documents and any security requirements under this contract.

Id. at 63. DOS was to provide perimeter security and protection from attacks by insurgents. *See, e.g.*, Exhibit 44 at 6–7.

The contracts warned that the contractor could face danger in performance of the contracts and that it was responsible for providing support for all of its personnel on the contract:

> H.51 Contractor personnel performing under Department of State Contracts outside the United States
>
> H.51.2 General. Performance of this contract may require that contractor personnel work at locations outside the United States in support of one or more United States diplomatic or consular missions. Contract performance in support of such missions may be inherently dangerous.
>
> H.51.3 Support
>
> H.51.3.1 Unless specified elsewhere in the contract or as provided in paragraph (c)(2) of this clause, the Contractor is responsible for all

> administrative, logistical, and security support required for contractor personnel engaged in this contract.
>
> H.51.3.2 The Government may authorize or may require the use of certain Government-provided administrative, logistical, security, or in-country support.

Exhibit 1 at 69–70.

II. FKTC's Claims Challenged by DOS

The contracts required FKTC to build the embassy compound in a war zone. DOS highlights evidence of dangerous attacks and increasing violence before the contracts were awarded; FKTC highlights evidence of dangerous attacks and increasing violence during the period of contract performance. Appellant's Statement of Genuine Issues (ASGI) ¶¶ 105–130. With its claims, FKTC seeks to recover the costs that it incurred as a result of these attacks and dangerous conditions. DOS seeks a ruling that thirteen of FKTC's claims have no proper legal basis. We set forth here the facts underlying the challenged claims before we analyze the legal support for those claims.

A. Duck and Cover Alarms

DOS installed at the NEC site an alarm system that would sound if there was an incoming attack of rockets, mortars, or small arms fire. Exhibit 3851 at 17. When the alarm sounded, personnel at the site would stop work, move to a secure location, and wait for the signal that the attack was over. Complaint ¶¶ 102–104. The contract does not mention the use of this alarm system; it appears that the system was installed after performance of the contract started. Exhibit 3851. The alarms were sounded by the DOS regional security officer (RSO). Respondent's Statement of Uncontested Facts (RSUF) ¶ 150; Exhibit 3851 at 16.

Apparently, the system did not perform as well as DOS would have liked; there were false alarms and delays waiting for the all-clear signal to be sounded. Exhibits 5177 at 133–37; 5473 at 84. The parties dispute whether FKTC and its personnel were directed to comply with the alerts or whether FKTC personnel took cover when an alarm sounded as a safety precaution. ASGI ¶¶ 177–178 (citing conflicting evidence).

B. Rocket Attacks—Three claims

With its claims, FKTC seeks costs attributable to five rocket attacks on the NEC. Complaint ¶¶ 53–81. In its motion, DOS challenges FKTC's entitlement to the costs of lost worker and equipment time attributable to three of the five rocket attacks on the site. RSUF ¶ 167.

C. Equipment Repositioning

At the end of each work day, after the local Iraqi personnel had left the site, FKTC scattered its construction equipment and supplies among several camps so that the material would be safer in case of an insurgent attack. FKTC then returned the equipment to the construction site each morning. Complaint ¶¶ 118–119. FKTC personnel suggested that it undertake this repositioning effort and DOS personnel agreed that it was a good practice. Exhibit 3901 at 130–31.

D. Extra Security

As noted above, the contract assigned FKTC responsibility for providing security for its personnel, equipment, and supplies, and DOS responsibility for providing perimeter security. FKTC provides evidence of instances when it was assigned additional security tasks during the course of contract performance. For example, in November 2005, DOS sent an email advising of a new policy for escorting third-country nationals. Exhibit 3842. Although DOS asserts that the new policy was instituted by the United States Army or at the direction of the Army, the policy itself currently is not included in the record. In March and April 2006, DOS personnel sent emails advising that FKTC was to assume greater responsibility for the access to and interior security of the NEC site. Exhibits 3841, 3866. In August 2006, FKTC was directed to provide additional security for escorts onto the site because the usual access gate was closed due to road construction. Exhibit 3850. FKTC also asserts that additional security was needed to usher employees to secure locations when the duck and cover alerts sounded. *See* Exhibits 3202, 4044 at 174.

E. Retention Bonuses and Danger Pay

FKTC was required to pay retention bonuses and danger pay to recruit and retain its employees in the face of the increasing violence in and around the project. Complaint ¶¶ 140, 141. FKTC notified DOS that it was required to make these payments. Exhibits 3516. DOS employees on the project received retention bonuses and danger pay. *See, e.g.*, Exhibits 3808, 4467 at 198.

F. Air Transport—Labor Hours

In July 2005, FKTC purchased an airplane to transport employees and cargo from Kuwait to Bagdad. Exhibit 4042 at 182–85. In its motion, DOS challenges FKTC's entitlement to the labor hours included in the air transport claims. RSUF at 62 n.21. DOS personnel also traveled by air to reach Baghdad. Exhibit 3856.

G. Sand and Gravel Double-Handling

FKTC obtained sand and gravel needed to make the cement for the project from local Iraqi vendors. As hostilities increased, local vendors refused to deliver materials directly to the site for fear of retaliation. Respondent's Appendix (Resp. App.), Exhibit 27 at 23–26; Complaint ¶ 176. Instead, local vendors delivered the materials to another site and FKTC used its personnel and equipment to deliver the material to the work site. Complaint ¶ 177. FKTC's double-handling procedure also reduced the risk of hidden explosives and allowed the movement through checkpoints at the site, a security precaution that FKTC identified in its proposal. *See* Exhibit 1832 at 174–75. DOS contends that FKTC developed this double-handling system on its own without the involvement or assistance of DOS. Resp. App., Exhibit 27 at 27. FKTC counters that DOS directed FKTC to undertake this arrangement to address security concerns. *See* Exhibits 3820 at 2, 5176 at 272–73.

H. Truck Convoy Delays, Truck and Driver Protection Requirements, and Truck Convoy Support Requirements

FKTC brought materials needed for the project from Kuwait in convoys operated by the Army. FKTC experienced delays while waiting for space in the convoys to become available. Complaint ¶ 188. FKTC contends that DOS directed FKTC to travel in Army convoys. Exhibits 2457 at 1; 3878. DOS counters that it only facilitated FKTC's participation in the convoys and that FKTC had no other safe way to bring the needed materials to the project. Resp. App., Exhibit 12 at 8–12; Exhibit 5177 at 46–47.

The Army imposed requirements for truck and driver protection upon those entities that participated in the convoys. Complaint ¶¶ 213–214. These requirements included items such as helmets and bullet proof vests for all drivers and tow bars for trucks. Exhibit 4773 at 19–201. The Army also imposed requirements for convoy support to ensure that vehicles did not become disabled or, if they did, they could be repaired quickly. RSUF ¶¶ 264–265 (citing Complaint ¶ 224).

I. Superior Knowledge Claims

As support for its superior knowledge claims, FKTC relies upon two primary contentions regarding DOS's knowledge about the security situation and FKTC's failure to include certain costs in its bids. We recite the evidence that underlies those contentions here and discuss the contentions below.

FKTC contends that, because DOS had a close working relationship with the Army, it knew more about the security situation than FKTC could have known. To show this close working relationship, FKTC relies upon a memorandum of agreement (MOA) between DOS and the Department of Defense (DOD) that provides how DOD will provide support for DOS personnel in Iraq. Exhibits 3232, 3862. FKTC also notes that the DOS security chief met regularly with the "security and intelligence" community. Exhibit 2422 at 1. FKTC also cites a January 2005 DOS cable regarding the difficult and dangerous security situation and the difficulty in retaining foreign national workers and local contractors. Exhibit 5547 at 2. FKTC highlights the deposition testimony of a DOS employee who declined to testify about classified threat lists, Exhibit 4891 at 64–65. DOS issued travel alerts in 2004 and 2005 that warned of the dangerous situation in Iraq. Exhibits 1493, 1932.

FKTC also asserts that DOS knew or should have known that FKTC had not included wartime costs in its bid. FKTC cites to two documents that show the embassy compound in Baghdad was less expensive on a square meter basis than the compound in Beijing. Exhibits 3847, 3898. FKTC's contracts for the NEC project did not include any classified spaces. *See* Exhibit 959. Also, one of the documents shows that the embassy in Kabul, Afghanistan, which was also built in a war zone, cost less per square meter than the Baghdad compound. Exhibit 3847. DOS has included in the record the bid evaluation documents for the contracts, none of which reflect DOS's concerns about costs that may or may not have been included. Exhibits 2016, 2099, 2200.

Discussion

I. War Risks Clause Does Not Provide for Recovery on the Thirteen Challenged Claims

DOS seeks a ruling that the War Risks clause does not permit recovery on the thirteen challenged claims because it is limited to claims arising from the "loss or damage to and/or destruction of, completed or partially completed work performed under this contract, and materials delivered to the site." Claims for danger pay to employees or delays encountered in truck convoys are not, DOS argues, among the items recoverable under this clause. Given the fixed-price nature of the contracts and the narrow transfer of war risks in this clause,

DOS asserts that FKTC bears the risk and resultant costs of operating in a wartime environment.

FKTC counters that the clause should be read broadly to encompass all costs arising from the dangerous conditions that existed or arose during contract performance. Because the word "loss" is not connected to "work" and "materials" in the limiting phrase "completed or partially completed work," FKTC argues that "loss" is not limited to work or materials and can include costs incurred as the result of other war risks.

In interpreting a contract, the Board must apply an objective test and determine what a "similarly situated, reasonably prudent contractor would have understood the contract language to mean." *KMS Fusion, Inc. v. United States*, 36 Fed. Cl. 68, 77 (1996) (citing *City of Oxnard v. United States*, 851 F.2d 344, 347 (Fed. Cir. 1988)). "Where a contract is amenable to only one reasonable construction, it should be enforced according to its tenor as a whole." *Dana Corp. v. United States*, 470 F.2d 1032, 1043 (Ct. Cl. 1972). Applying these maxims, we hold that DOS's interpretation, as applied to the thirteen claims that it challenges, is correct based upon the plain meaning of the clause. The clause shifts to DOS liability for the costs to repair or replace any completed or partially completed work or any materials at the site. Given that these contracts were fixed-price contracts, it is reasonable to shift the liability for physical damage caused by actual acts of war to DOS. If a rocket attack destroys a portion of a building already constructed or materials delivered to the site, it makes DOS responsible for the costs to repair or replace that building or materials. However, the War Risks clause does not encompass all costs that a contractor might incur as the result of performing a contract in a wartime environment.

The premise for FKTC's interpretation is that the term "loss," because it is not set off by a comma or modified with the word "of," should be read independently from the phrase "completed or partially completed work or materials delivered to the site." FKTC urges its interpretation based upon the rule of the "last antecedent," which "provides that [r]eferential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent, which consists of 'the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence for purposes of statutory construction.'" *Ozdemir v. United States*, 89 Fed. Cl. 631, 636 (2009) (quoting *Anhydrides & Chemicals, Inc. v. United States*, 130 F.3d 1481, 1483 (Fed. Cir.1997)). "In contrast, '[w]hen a modifier is set off from a series of antecedents by a comma, the modifier should be read to apply to each of those antecedents.' " *Finisar Corp. v. DirecTV Group, Inc*., 523 F.3d 1323, 1336 (Fed. Cir. 2008) (quoting *Kahn Lucas Lancaster, Inc. v. Lark International Ltd.*, 186 F.3d 210, 215 (2d Cir. 1999)). The Court of Appeals for the Federal Circuit has noted that this rule and "its corollary, the rule of punctuation, are more guidelines than absolute rules." *Id.*, at 1336. We are also mindful of the Supreme Court's caution that "a purported

plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning." *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc*., 508 U.S. 439, 454 (1993).

The answer to FKTC's contention is found in the Federal Circuit's recitation of the rule of the last antecedent "where no contrary intention appears." The phrase "loss, damage and/or destruction" appears three times in the first sentence of the clause. Only in the first instance is the term "loss" not set off by a comma. In the subsequent phrases,"loss" is connected to "damage to and/or destruction" with commas and further modified by "such," indicating that the phrase is to be read together and tied to "completed or partially completed work." The Board also "must interpret the contract in a manner that gives meaning to all of its provisions and makes sense." *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996). "[I]f the 'provisions are clear and unambiguous, they must be given their plain and ordinary meaning,' and the [Board] may not resort to extrinsic evidence to interpret them." *Id*. (citations omitted). We cannot find that "loss" has a broader meaning in the first instance that it does in the remainder of the clause. *See Dobyns v. United States*, 118 Fed. Cl. 289, 314–15 (2014) (declining to find same word in contractual provision had two different meanings).

FKTC's interpretation, that loss should be read independently from "completed or partially completed work," also creates a conflict with other clauses in the contract and is not in keeping with the tenor of the contract. The standard rules of interpretation require us to give "a reasonable meaning to all parts of the contract," instead of "one that leaves portions of the contract meaningless." *Fortec Constructors v. United States*, 760 F.2d 1288, 1292 (Fed. Cir.1985). "An agreement should be read as a whole so as to avoid conflicts between provisions within the contract." *City of Tacoma v. United States*, 38 Fed. Cl. 582, 588 (1997) (citing *Reliance Insurance Co. v. United States*, 931 F.2d 863, 865 (Fed.Cir.1991)). FKTC's interpretation conflicts with other terms of the contracts such as the Price clause, which clearly states the contracts are fixed-price, and the Excusable Delays clause, which provides that FKTC may receive a schedule extension for delays attributable to acts of war. Other clauses make FKTC responsible for all transportation costs and logistics costs for its employees. A narrow reading, that the clause only shifts risk for damage to work completed under the contract, gives meaning to all of these other clauses.

FKTC's answer to the conflict created with these other provisions is that the clause begins with the phrase "notwithstanding any other provision of this contract to the contrary." Rather than burden this phrase with the entirety of FKTC's interpretation, we interpret the war risks clause in concert with these provisions. "'The fact that an improvident interpretation placed by a contractor upon the specifications may even be considered conceivable, is not a sufficient basis alone for construction of the contract against the author

of the language, if not reasonable when the contract is considered as a whole and in light of the purpose of the contract.'" *Dana Corp.*, 470 F.2d at 1043 (quoting *Bishop Engineering Co. v. United States*, 180 Ct. Cl. 411, 416 (1967)).

In reaching this conclusion, we can apply another canon of interpretation—"*expressio unius est exclusio alterius,* which states that the general terms of a document are limited by the specific terms." *Bromley Contracting Co.*, DOT CAB 78-1, 81-2 BCA ¶ 15,191, at 75,201; *see MW Builders, Inc. v. United States*, 134 Fed. Cl. 469, 495 (2017); *Nicholson v. United States*, 29 Fed. Cl. 180, 196–97 (1993) ("Where certain things are specified in detail in a contract, other things of the same general character relating to the same matter are generally held to be excluded by implication."). If the parties had intended DOS to compensate FKTC for all its losses attributable to wartime conditions, that intention would have been clearly stated in the contract, rather than implied in the lack of a comma and modifier "of" within the clause. *See, e.g.*, *TGS International, Ltd.*, ASBCA 35295, 90-2 BCA ¶ 22,891, at 114,955 (War Risks clause specifically mentioned "increase[s] in the cost of performance" incurred as the result of "hostilities or threat of hostilities."), *aff'd in part, rev'd in part, remanded*, 949 F.2d 402 (Fed. Cir. 1991). The Board declines to rewrite the terms of the war risks clause to expand DOS's liability for costs incurred in performance of the contract.

FKTC further argues that the clause is, at least, ambiguous and that ambiguity is latent. Because FKTC's interpretation is reasonable and DOS drafted the clause, FKTC asserts that its interpretation is sufficient, pursuant to the doctrine of contra proferentum, to overcome DOS's motion for summary judgment.

If one accepts that the failure to set off the first instance of the term "loss" with a comma or modifier "of" creates an ambiguity, we find that it is a patent ambiguity. A patent ambiguity is one that is "so 'patent and glaring' that it is unreasonable for a contractor not to discover and inquire about them. *Triax Pacific, Inc. v. West*, 130 F.3d 1469, 1475 (Fed. Cir. 1997). Here, the lack of a comma in one use of the word loss and not in the other two uses was apparent on the face of the clause. If FKTC believed that it could ascribe as much meaning as it has to this apparent discrepancy, it had the duty to inquire regarding its interpretation to avoid the dispute that is before the Board. *Id.*; *C.W. Over & Sons, Inc. v. United States*, 44 Fed. Cl. 18, 30 (1999) ("facial inconsistency" in contract provisions based upon contractor's interpretation triggered duty to inquire). FKTC's status as a first-time general contractor does not eliminate the duty to inquire because the duty is not tied to FKTC's actual knowledge. *Triax Pacific, Inc.*, 130 F.3d at 1475; *HRH Construction Corp. v. United States*, 428 F.2d 1267, 1272 (Ct. Cl. 1970).

II. FKTC Has Failed To Identify a Sufficient Basis for Its Superior Knowledge Claim

As an alternative to the War Risks clause as the basis for its claims, FKTC also relies upon the superior knowledge doctrine, asserting that DOS possessed superior knowledge regarding the security situation and its interpretation of the contract terms that DOS should have conveyed to FKTC prior to the submission of its bid. DOS moves for summary judgment, arguing that FKTC cannot show any of the required elements of the superior knowledge doctrine.

To recover under the superior knowledge doctrine, a contractor must show four elements:

> The doctrine of superior knowledge is generally applied to situations where (1) a contractor undertakes 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.

Scott Timber Co. v. United States, 692 F.3d 1365, 1373 (Fed. Cir. 2012) (quoting *Hercules, Inc. v. United States*, 24 F.3d 188, 196 (Fed. Cir. 1994)). The doctrine "only requires disclosure of 'the vital and essential information' that a contractor needs, as it develops its proposal or bid, to understand the performance or cost risks that it would be undertaking if awarded the contract in question." *Yates-Desbuild Joint Venture v. Department of State*, CBCA 3350, et al., 17-1 BCA ¶ 36,870, at 179,688.

FKTC has failed to adduce evidence sufficient to overcome DOS's motion for summary judgment. "A contractor asserting that the Government withheld vital information bears the burden of establishing by 'specific evidence' each element of its superior knowledge claim." *Yates-Desbuild*, 17-1 BCA at 179,688. To preclude summary judgment, FKTC "must make a showing sufficient to establish the existence of every element essential to [its] case, and on which [FKTC] has the burden of proof at trial." *Charles M. Pate*, CBCA 1038, 08-2 BCA ¶ 33,973, at 168,047–48 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986)). FKTC must "set forth specific facts showing there is a genuine issue" for hearing. *Id.* at 168,048.

In response to DOS's motion, FKTC alleges that DOS knew more about the security situation due to its close working relationship with the Army. This allegation is based upon MOAs between DOS and the Army as well as other evidence regarding the close working

relationship between DOS security and Army personnel. None of this evidence shows DOS possessed knowledge about specific threats to FKTC's performance of the contracts. Even assuming that DOS did possess information about the security situation that FKTC did not have, FKTC has failed to allege what "specific and vital" information DOS learned from the Army about the security situation, a difficult challenge given the wartime environment in which FKTC agreed to perform. *Fluor Intercontinental, Inc., v. Department of State*, CBCA 1559, 13 BCA ¶ 35,334, at 173,430. FKTC also asserts that the security situation became worse during contract performance. But, this allegation does not support a superior knowledge claim where the focus of the Board's inquiry is the Government's knowledge at the time of contracting. *Yates-Desbuild*, 17-1 BCA at 179,688.

FKTC also contends that DOS knew or should have known that FKTC failed to account for wartime costs in its bid. As support for this contention, FKTC only cites white papers showing a difference in construction costs between the embassies built in Baghdad and Beijing. This evidence is summary in nature and does not provide a sufficient basis to compare these construction costs, including security, design, and other factors that may have made the embassy in Beijing more expensive on a per-square-meter basis. This evidence does not show that DOS knew or should have known that FKTC had failed to properly account in its bid for the increased costs of performing in a war zone. Moreover, the bid evaluation record shows that FKTC's bid, for each of the contracts except the NOB contract, was the highest of the bids submitted. Nothing in these proposal evaluation materials shows DOS knew anything about whether FKTC had properly accounted for the costs of the project undertaken in a wartime environment. Without more, this evidence would not establish that DOS knew or should have known that FKTC had failed to incorporate wartime risk costs into its proposal.

FKTC's other cited evidence similarly fails. FKTC contends that DOS possessed superior knowledge about the duck and cover alarm system because DOS operated it. But FKTC does not identify the specific knowledge that DOS possessed about the system that it needed to know prior to contract award about that system. FKTC contends that DOS should have notified it that it paid its employees bonus pay and danger pay and that it transported its employees by air, but fails to explain how DOS knew that FKTC needed to know this information. Finally, FKTC asserts that DOS knew or should have known that it would require FKTC to travel exclusively in Army convoys. The evidence, however, indicates that the decision to use only Army convoys came after contract award. While FKTC may assert a claim based upon the Changes clause, it has not provided evidence to support recovery based upon the superior knowledge doctrine.

III. Disputed Issues of Fact Preclude Summary Judgment on FKTC's Changes Claims

A. FKTC Has Shown Disputed Issues of Fact with Regard to Changes Clause on Six Claims

In addition to asserting a right to recover based upon the War Risks clause or the superior knowledge doctrine, FKTC also seeks to recover under the Changes clause on six of the challenged claims, those related to the "duck and cover" alarm system, extra security requirements, sand and gravel double-handling, and three tied to Army convoy requirements. DOS challenges FKTC's reliance upon the Changes clause, arguing that FKTC cannot establish that the scope of work changed as the result of direction by DOS.

"The government constructively changes a contract to which it is a party when 'a contractor performs work beyond the contract requirements without a formal order, either by an informal order or due to the fault of the Government.'" *Agility Public Warehousing Co. KSCP v. Mattis*, 852 F.3d 1370, 1385 (Fed. Cir. 2017) (quoting *International Data Products Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007)). "To demonstrate that the government has constructively changed the terms of a contract, 'a plaintiff must show (1) that it performed work beyond the contract requirements, and (2) that the additional work was ordered, expressly or impliedly, by the government.'" *Id*. (quoting *Bell/Heery v. United States*, 739 F.3d 1324, 1335 (Fed. Cir. 2014)).

To evaluate FKTC's claims based upon the Changes clause, "we must first determine what the contract actually required and then determine whether the work actually performed was 'in addition to or different from that required.'" *VSE Corp. v. Department of Justice*, CBCA 5116, 18-1 BCA ¶ 36,928, at 179,911 (quoting *Miller Elevator Co. v. United States*, 30 Fed. Cl. 662, 678, *appeal dismissed*, 36 F.3d 1111 (Fed. Cir. 1994)). "If the Government was merely exercising its 'right to insist on performance in strict compliance with the contract specifications,' as properly interpreted, there is no 'change' upon which to build a constructive change claim." *Id.* (quoting *NavCom Defense Electronics, Inc. v. England*, 53 F. App'x 897, 900 (Fed. Cir. 2002)). We examine each of FKTC's claims challenged by DOS based upon these precepts.

Duck and Cover Alarms. The duck and cover alarms were installed after contract performance began pursuant to DOS's responsibility for protecting the site from insurgent attacks. FKTC has provided evidence in support of its allegation that the alarms were faulty and delayed its work on the contracts. The parties dispute whether DOS required FKTC to direct its personnel to comply with these alarms.

DOS also asserts that FKTC's claim for delays arising from the operation of the duck and cover system should be evaluated under the Suspension of Work clause rather than the Delays clause because it involves delays in performance of an existing requirement rather than imposition of a new requirement. *Triax-Pacific v. Stone*, 958 F.2d 351, 354 (Fed. Cir. 1992). The Suspension of Work clause permits a contractor to recover costs incurred as the result of unreasonable delays in performance of the contract. *Id*. Such delays can include actions or inactions by the contracting officer in administration of the contract. *Tidewater Contractors, Inc. v. Department of Transportation*, CBCA 50, 07-1 BCA ¶ 33,525, at 166,103. DOS asserts that FKTC cannot recover under this clause because it cannot show that the delays FKTC attributes to the duck and cover alert system were the "*sole* proximate cause" for the costs incurred. *Triax-Pacific*, 958 F2d. at 354 (citing *Merritt-Chapman & Scott Corp. v. United States*, 528 F.2d 1392, 1397 (Ct. Cl. 1976)). If there are other reasons that performance of the contract was delayed or the costs were incurred, the contractor cannot recover the costs. FAR 52.212-12 ("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"). The contractor bears the burden to establish that the Government was solely responsible for the alleged delays. *Tidewater Contractors*, 07-1 BCA at 166,103.

DOS contends that FKTC cannot show the absence of concurrent delays attributable to the duck and cover alarms. It appears that this contention is answered by the nature of the delay itself. As described by the parties, it appears that work stopped when the alert sounded as people were directed to shelter and remained there until the all-clear signal was given. FKTC has shown sufficient evidence to survive DOS's challenge on summary judgment under either the Changes or the Suspension of Work clauses.

Extra Security Requirements. FKTC was responsible for providing security for its personnel and equipment on the site. In response to DOS's motion, FKTC has adduced evidence showing that it was required to perform security tasks over and above those required in the contract. This evidence is sufficient to create a disputed issue of material fact to be decided after a hearing on the merits.

Sand and Gravel Double-Handling. FKTC was required to arrange for the transport of all the materials necessary for performance to the site. Local vendors were unwilling or unable to deliver the materials to the site, thereby necessitating FKTC to arrange for delivery by local vendors elsewhere and use its own trucks and personnel to deliver the sand and gravel to the batch plant. DOS contends that local vendors refused to deliver the materials directly to the site. FKTC has adduced evidence that DOS (or the Army) restricted deliveries by local vendors to the site and imposed other security requirements. The Board is unable to resolve this dispute on DOS's motion.

Truck Convoy Delays, Protection Requirement, and Support Requirements. Again, the contracts required FKTC to transport all materials to the site. FKTC contends that DOS required FKTC to travel in Army convoys. DOS counters that it merely facilitated FKTC's participation in Army convoys because there was no other safe route on which FKTC could transport materials. The parties do not dispute that the Army imposed truck and driver protection requirements, but DOS contests FKTC's allegation that the Army required FKTC to maintain support facilities at Army convoy checkpoints. Because the protection and support requirements flow from FKTC's participation in the convoys, we will decide all of these disputes after the hearing in this matter.

B. DOS Has Not Provided Evidence to Support a Sovereign Acts Defense

In addition to challenging FKTC's reliance on the Changes clause, DOS asserts that it should not be held liable for its actions underlying these six claims by operation of the sovereign acts doctrine.

The sovereign acts doctrine "is an affirmative defense that is an inherent part of every government contract." *Conner Brothers Construction Co. v. Geren*, 550 F.3d 1368, 1371 (Fed. Cir. 2008). "[T]he object of the sovereign acts defense is to place the Government as contractor on par with a private contractor in the same circumstances." *United States v. Winstar Corp.*, 518 U.S. 839, 904 (1996). Therefore, "whatever acts the government may do, be they legislative or executive, so long as they be public and general, cannot be deemed specially to alter, modify, obstruct or violate the particular contracts into which it enters with private persons." *Horowitz v. United States*, 267 U.S. 458, 461 (1925) (quoting *Jones v. United States*, 1 Ct. Cl. 383, 384 (1865)).

A governmental action will qualify as "public and general," for the purpose of the defense, "so long as the action's impact upon public contracts is . . . merely incidental to the accomplishment of a broader governmental objective." *Winstar*, 518 U.S. at 897–98 (analyzing the scope of public and general acts in the context of an impossibility defense for the Government's breach of contract); *see also Conner Brothers*, 550 F.3d at 1371–75 (applying the *Winstar* standard for the scope of public and general acts in the context of the Government's obstruction of a contractor's performance).[2] "The sovereign act inquiry does

[2] Under the two-part test established by the Supreme Court in the *Winstar* plurality, first, the Government must establish that its relevant act is not "properly attributable to the Government as [a] contractor," because it qualifies as a public and general act. 518 U.S. at 896. Second, the Government must show that the act would "otherwise release the Government from liability under ordinary contract principles." *Id.* In light of the

not rest on a mechanical determination of how many contractors are affected, but rather focuses on the nature and scope of the governmental action." *Conner Brothers*, 550 F.3d at 1377. When pleading a sovereign acts defense in a motion for summary judgment, the Government bears the burden of proving that the governmental action was public and general. *See Jazz Photo Corp. v. International Trade Commission*, 264 F.3d 1094, 1102 (Fed. Cir. 2001) ("The burden of establishing an affirmative defense is on the party raising the defense."), *abrogated on other grounds by Impression Products, Inc. v. Lexmark International, Inc.*, 137 S. Ct. 1523 (2017).

DOS asserts the sovereign acts defense in briefing but fails to support its assertion with evidence that shows the broader governmental objective or how the governmental actions were public and general acts that were merely incidental to the accomplishment of a broader governmental objective. *See, e.g., Weaver Construction Co.*, DOT BCA 2034, 91-2 BCA ¶ 23,800, at 119,183 (Government failed to provide evidence that governmental actions were protected sovereign acts). None of DOS's proposed findings go to these elements. *See* RSUF; Transcript at 46 (Oct. 1, 2018) (counsel's acknowledgment at oral argument that no evidence is currently in the record). Counsel for DOS explained that the absence of evidence was due in part to poor record keeping by the Army during the Iraq war. Transcript at 47. Regardless of the cause, DOS has not yet provided a basis upon which to evaluate DOS's sovereign acts defense.

IV. Disputed Issues of Fact Preclude Summary Judgment on FKTC's Implied Duty of Good Faith and Fair Dealing Claim

DOS challenges FKTC's reliance on the implied duty of good faith and fair dealing in support of its claims related to the duck and cover alarms. The "implied duty of good faith and fair dealing exists in government contracts and applies to the government just as it does to private parties." *Agility Public Warehousing*, 852 F.3d at 1383–84. Failing to fulfill the duty of good faith and fair dealing is as much of a breach of contract as failing to fulfill an

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Government's failure to perform under the contract, the *Winstar* Court focused its analysis on the common-law doctrine of impossibility. *See id*. at 904. Following *Winstar*, the Federal Circuit has used the two-prong test for cases in which the Government asserts a sovereign acts defense for its failure to perform. *See, e.g.*, *Klamath Irrigation District v. United States*, 635 F.3d 505, 521–22 (Fed. Cir. 2011). However, unlike cases involving the Government's failure to perform, the appeal presently before the Board involves the Government's interference with the contractor's performance. Therefore, we do not need to consider whether performance was impossible, but rather only whether the governmental action was public and general in nature.

express contractual promise. *See Metcalf Construction Co. v. United States*, 742 F.3d 984, 990 (Fed. Cir. 2014). The "implied duty [of good faith and fair dealing] exists because it is rarely possible to anticipate in contract language every possible action or omission by a party that undermines the bargain." *Id.* at 991.

Within the scope of the duty of good faith and fair dealing is the requirement to "not only . . . avoid actions that unreasonably cause delay or hindrance to contract performance, but also to do whatever is necessary to enable the other party to perform." *Kiewit-Turner v. Department of Veteran Affairs*, CBCA 3450, 15-1 BCA ¶ 35,820, at 175,176. However, the level of diligence and cooperation required of a contracting party is not without limit. *See Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 831 (Fed. Cir. 2010) ("The implied duty of good faith and fair dealing cannot expand a party's contractual duties beyond those in the express contract or create duties inconsistent with the contract's provisions."). Rather, "[w]hat is promised or disclaimed in a contract helps define what constitutes 'lack of diligence and interference with or failure to cooperate in the other party's performance.'" *Metcalf*, 742 F.3d at 991 (quoting *Malone v. United States*, 849 F.2d 1441, 1445 (Fed. Cir. 1988)). The Federal Circuit's decision in *Metcalf* outlined the scope of the duty by explaining that "an act will not be found to violate the duty . . . if such a finding would be at odds with the terms of the original bargain, whether by altering the contract's discernible allocation of risks and benefits or by conflicting with a contract provision." *Id.* "To show a violation of the duty of good faith and fair dealing, a party need not prove that the other party to a contract acted in bad faith." *Kiewit-Turner*, 15-1 BCA at 175,176–77.

DOS contends that when "evaluated holistically, there is no reason to believe that the duck and cover alarm system hindered FKTC's performance of its contracts." Respondent's Reply to Appellant's Opposition at 56. DOS also argues that, "although some production time was lost during the alarms, the system protected FKTC personnel and helped prevent a catastrophic loss of productivity." *Id.* We agree that if the time lost due to the alarms resulted solely from rocket attacks, and not from DOS's missteps, the resulting delays could not be used to show a breach of the duty. *See, e.g., Scott Timber,* 692 F.3d at 1375 (delay in performance caused by court order and, later, "to prevent serious environmental degradation or resource damage"); *Precision Pine*, 596 F.3d at 828 (delay in performance caused by court order). But, FKTC has brought forth evidence which indicates that the duck and cover alarm system had failings that may have contributed to its delays in performing the contract. Given these disputed issues, we deny DOS's motion for summary judgment on this allegation.

V. Purported Lack of Contemporaneous Documentation is not Grounds for Summary Judgment

Finally, DOS urges the Board to grant summary judgment on FKTC's claims because, DOS contends, FKTC cannot show that it contemporaneously complained about many of the issues underlying the claims. As established in the cases cited by DOS, the absence of contemporaneous evidence can be a factor in weighing the evidence, *see, e.g.*, *Fisk Building & Investments*, GSBCA 7480, 85-1 BCA ¶ 17,888, at 89,593, or judging the credibility of the witnesses. *See, e.g.*, *Mil-Pak Co.*, GSBCA 6222, 83-1 BCA ¶ 16,486, at 81,965–66. However, the lack of contemporaneous evidence does not provide a legal ground upon which the Board can grant summary judgment. Therefore, we leave for the final decision on the merits the evaluation of the lack of any contemporaneous complaints by FKTC.

Decision

Respondent's motion for partial summary judgment is **GRANTED IN PART.** Appellant's claims based solely upon the War Risks clause and the superior knowledge doctrine challenged by Respondent are denied. The hearing in this matter will commence on January 22, 2019.

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge

We concur:

Catherine B. Hyatt
CATHERINE B. HYATT
Board Judge

Jerome M. Drummond
JEROME M. DRUMMOND
Board Judge