



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: April 30, 2024

CBCA 7759

LUSK MECHANICAL CONTRACTORS, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Thomas E. Roma, Jr. of Manion Stigger LLP, Louisville, KY, counsel for Appellant.

James Scott, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **GOODMAN**, and **KULLBERG**.

BEARDSLEY, Board Judge.

This appeal arose from a contract between the appellant, Lusk Mechanical Contractors, Inc. (Lusk), and the General Services Administration (GSA) for a construction project in St. Croix, United States Virgin Islands (USVI). Lusk avers that it is entitled to an \$839,616 equitable adjustment under the Federal Acquisition Regulation (FAR) Suspension of Work clause. 48 CFR 54.242-14 (2023) (FAR 54.242-14). We deny the appeal.

Background

In December 2019, the parties entered into a contract for \$13,330,334 (later increased to \$13,959,314) for “construction services to repair, replace, and/or modernize site/building elements and building systems” at the Almeric L. Christian Federal Building and United States Courthouse (the project) in St. Croix. Appeal File, Exhibit 1 at 19.¹ The contract work required Lusk to

provid[e] all labor, materials, tools and equipment necessary to replace all exterior lighting, replace the roof skylight, replace the roof gutter, modernize all elevators, replace all exterior windows, window shutters and interior glass and wood doors, upgrade the security fence, replace a full load generator and increase fuel tank capacity, replace chilled water piping insulation, and install a new well and domestic water filtration/treatment plant as well as associated work in mechanical, electrical and plumbing, as indicated on the drawings including all phasing and sequencing, as noted in the general and supplemental general conditions and general project requirements of Division 1.

Id. The construction services were to be completed “while maintaining continuous operation of the existing building.” *Id.* The contract included Lusk’s contract pricing form, which included a \$9600 “Daily Rate for Compensable Project Delay (Work Day),” *id.* at 7, and called for substantial completion of some tasks 199 days from the issuance of the notice to proceed and for other tasks 541 days from the issuance of the notice to proceed. *Id.* at 21.

Among other provisions, the contract incorporated FAR clause 52.242-14, Suspension of Work (APR 1984). Exhibit 1 at 67. The clause, in relevant part, reads as follows:

(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 . . . by an act of the Contracting Officer . . . an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by the unreasonable suspension. . . . However, no adjustment shall be made under

¹ All exhibits are found in the appeal file, unless otherwise noted.

this clause for any suspension . . . to the extent that performance would have been so suspended . . . by any other cause.

FAR 54.242-14. The contract also incorporated FAR 52.249-10, Default (Fixed-Price Construction) (APR 1984), Exhibit 1 at 68, which states in relevant part:

(a) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work (or the separable part of the work) that has been delayed.

....

(b) The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause, if-

(1) The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include-

(i) acts of God or of the public enemy,

....

(vi) epidemics,

....

(2) The Contractor, within 10 days from the beginning of any delay (unless extended by the Contracting Officer), notifies the Contracting Officer in writing of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of delay. If, in the judgment of the Contracting Officer, the findings of fact warrant such action, the time for completing the work shall be extended. The findings of the Contracting Officer shall be final and conclusive on the parties, but subject to appeal under the Disputes clause.

FAR 52.249-10.

GSA issued its notice to proceed on January 6, 2020, instructing Lusk to begin performance the next day. Exhibit 2 at 1. Consequently, Lusk mobilized to St. Croix by transporting its equipment to the island and securing lodging for its crews on the island. Exhibit 47 (Affidavit of Eric Goodman (Oct. 2023)) ¶¶ 6, 9. On March 13, 2020, the President declared an ongoing COVID-19 national emergency for all states, tribes, and territories pursuant to Section 501(b) of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. § 5121–5207 (2018). Exhibit 3 at 1. On March 13, 2020, the Governor of the USVI declared a state of emergency due to the “COVID-19 – Coronavirus Pandemic.” *Id.* The Governor issued a stay-at-home order, effective on March 25, 2020, that directed the public to stay at home and non-essential businesses to “cease in-person business operations.” *Id.* at 3. The order, however, included a list of “Stay-at-Home Exemptions.” *Id.* These exemptions included:

c. Core life services:

....

Refineries, utilities, distilleries, construction sites, plumbers, electricians, custodial/janitorial workers, handyman services, funeral home workers and morticians, carpenters, landscapers, gardeners, property managers, private security personnel, and other service providers who provide services to maintain the safety, sanitation, and essential operation to properties and other essential businesses.

Id. at 4. The order also prohibited mass gatherings except for “operations for standard essential services and infrastructure.” *Id.* at 3. This prohibition did “not include . . . construction sites, grocery stores . . . or other retail establishments that provide essential services and are large enough to accommodate for the practice of social distancing of six feet or more between persons.” *Id.*

GSA sent Lusk a suspension of work notice on March 27, 2020, instructing Lusk to “suspend work, for two (2) weeks as a result of the coronavirus pandemic.” Exhibit 6 at 1. The notice cited FAR 52.249-10, the Suspension of Work clause, as the contracting officer’s authority for the suspension. *Id.* The notice stated that “[a]ll other administrative work may continue, which does not involve on-site activity involving physical work in close proximity, including but not limited to, [requests for information], document submissions, project meetings, and invoice processing. The government reserves the right to extend this suspension of work as necessary to preserve life and safety.” *Id.* GSA extended the suspension three more times—on April 10, April 24, and May 8, 2020, each for a two-week period. Exhibits 9, 11, 14. According to Lusk, “it was impractical for Lusk to remove [its]

equipment from the island” during the periods of suspension. Exhibit 47 ¶ 8. Lusk also “kept its housing arrangements in place during the period work was suspended.” *Id.* ¶ 10.

On April 29, 2020, the Governor of the USVI issued an executive order “sunsetting” the March 23, 2020, stay-at-home order, as amended and extended, as of May 4, 2020, for the public and non-essential businesses and replaced it with a “Stay Safer at Home” order. Exhibit 12 at 2-3 (“The Stay at Home and Mass Gathering restrictions and dates contained within the Executive Orders issued in response to the COVID-19 State of Emergency in the Territory of the Virgin Islands are amended and extended as follows.”). The stay-safer-at-home order advised the public only to leave as necessary and recommended that non-essential personnel of private business offices stay home. *Id.* at 3. It also required facial coverings, recommended certain safety protocols, recommended social distancing, and set limits for the numbers of individuals that could go to church at one time, among other things. *Id.* at 3-5. The prohibition against mass gatherings of more than ten persons remained in full force and effect as did the restriction to essential services for government operations. *Id.* at 5. On May 30, 2020, the Governor proclaimed that an “Open Doors Phase” of the state of emergency would begin on June 1, 2020. Exhibit 16 at 1. The “Open Doors Phase” permitted certain businesses to allow gatherings of more than ten people as long as they followed certain COVID-19 guidelines.² *Id.* at 2.

GSA informed Lusk on May 22, 2020, that the suspension of work order expired as of that date and that the agency did not intend to extend the suspension period again. Exhibit 15. GSA stated that “[c]ompliance with all [Centers for Disease Control (CDC)] and [Occupational Safety and Health Administration (OSHA)] COVID-19 safety and health requirements is required for returning to the construction site.” *Id.* Lusk had submitted a COVID-19 plan to GSA for approval on April 8, 2020, and updates to the plan on May 20, 2020. *Id.* GSA stated that “Lusk should be prepared to resume work as directed by GSA immediately after receiving GSA’s written approval of that plan.” *Id.*

On May 20, 2020, GSA provided Lusk with a “list of comments that need[ed] to be addressed in [Lusk’s] protection plan.” Exhibit 43. On May 21, 2020, Lusk returned to GSA a safety plan addressing GSA’s comments. *Id.* After additional revisions by Lusk, GSA approved Lusk’s safety plan dated May 27, 2020, Exhibits 36, 44, and allowed Lusk to resume work on the exterior of the building on June 1, 2020, as long as CDC and OSHA

² This order did not explicitly lift the prohibition on mass gatherings of more than ten people. Exhibit 16 at 2. However, attached to the order were memos that contained guidance on the reopening of restaurants, bars, nightclubs, gyms and fitness centers, and houses of worship. *Id.* Notably, each of the memos permitted gatherings of more than ten people if proper Centers for Disease Control safety measures were followed.

COVID-19 safety and health requirements were followed. Exhibit 17. Lusk was not permitted to resume interior work until July 20, 2020. Exhibit 31. The USVI state of emergency remained in effect until September 9, 2020. Exhibit 21 at 3.

On July 20, 2020, Lusk submitted a request to the Government for a contract modification for delay caused by the suspension of work. Exhibit 31. Lusk provided a breakdown of the interior (46%) and exterior work (54%) on the project and calculated the delay impact accordingly:

100% site shutdown	64 days X \$9,600.00 = \$614,400.00
46% Interior shutdown	51 days X \$4,416.00 = <u>\$225,216.00</u>
Delay Impact Total	\$839,616.00

Id. at 2. By letter dated September 9, 2020, the contracting officer responded to Lusk’s July 20 letter, stating:

Pursuant to FAR Clause 52.249-10 “Default (Fixed-Price Construction)”, epidemics and quarantine restrictions represent unforeseeable conditions which, if they cannot be mitigated and if they impact the contract’s critical path, may entitle the contractor to a no-cost time extension. GSA has reviewed Lusk’s request and will grant a sixty-six (66) calendar day time extension due to COVID-19.

Exhibit 37. Lusk responded on September 9, 2020, stating:

The Lusk Group is in receipt of GSA’s letter dated September 9, 2020, Delay Response COVID. We find it confusing that paragraph two of your letter references a request for time extension by Lusk that was not requested, and grants sixty-six (66) calendar days extension due to COVID-19 that has no basis in factual impact. We do not accept your no-cost unvalidated time extension on this matter and will take whatever action necessary for a fair and equitable resolution for all parties, for both cost and time impact.

Exhibit 38. Lusk requested a contracting officer’s final decision by letter dated October 17, 2022, certifying its claim for \$839,616 for “damages resulting from the Government’s suspension of work between March 27 and July 20, 2020.” Exhibit 31. Lusk asserted that “it could have safely and efficiently performed the required work during the period [a]ffected by the Contracting Officer’s suspension notices.” *Id.* The contracting officer failed to issue a final decision, and Lusk appealed the deemed denial to the Board, seeking an equitable adjustment in the amount of \$839,616, pursuant to FAR 52.242-14.

Discussion

The parties have submitted this dispute for decision on the written record pursuant to CBCA Rule 19 (48 CFR 6101.19), under which:

the parties can include in the written record “(1) any relevant documents or other tangible things they want the Board to admit into evidence; (2) affidavits, depositions, and other discovery materials that set forth relevant evidence; and (3) briefs or memoranda of law that explain each party’s positions and defenses.” *1-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913, at 175,551 (citing Rule 19). “Based on the parties’ submissions, the Board is authorized to make findings of fact, even if such findings require ‘credibility determinations on a cold [paper] record, without the benefit of questioning the persons involved,’ and can decide issues of law based on those factual findings.” *Sylvan B. Orr v. Department of Agriculture*, CBCA 5299, 17-1 BCA ¶ 36,863, at 179,613 (quoting *Bryant Co.*, GSBCA 6299, 83-1 BCA ¶ 16,487, at 81,967).

Adventus Technologies, Inc. v. Department of Agriculture, CBCA 7283, 23-1 BCA ¶ 38,392, at 186,541.

Lusk claims that it is entitled to \$839,616 in delay damages after it was ordered to suspend its work and leave the project site as a result of the COVID-19 pandemic. Lusk contends that the “successive suspensions of work by the Contracting Officer were unreasonable” and it “was damaged as a result thereof.” Appellant’s Brief at 1.

It is “well-established that ‘a contractor with a fixed price contract assumes the risk of unexpected costs not attributable to the Government.’” *Matrix Business Solutions, Inc. v. Department of Homeland Security*, CBCA 3438, 15-1 BCA ¶ 35,844 (2014) (quoting *IAP World Services, Inc. v. Department of the Treasury*, CBCA 2633, 12-2 BCA ¶ 35,119); *see also Fluor Intercontinental, Inc. v. Department of State*, CBCA 1559, 13 BCA ¶ 35,334.

Pernix Serka Joint Venture v. Department of State, CBCA 5683, 20-1 BCA ¶ 37,589, at 182,522-23. Absent a special adjustment clause, this Board has held that an unforeseen pandemic does not shift the risk to the Government for any unexpected costs incurred under a firm, fixed-price contract. *Id.*; *NUES Inc. v. Department of Health & Human Services*, CBCA 7165, 22-1 BCA ¶ 38,014, at 184,619 (2021); *see FAR 52.249-10* (an epidemic is an unforeseeable cause of delay). Here, there is no such adjustment clause in the contract. “FAR clause 52.249-10 explicitly addresses how acts of God, epidemics, and quarantine restrictions are to be treated. A contractor is entitled to additional time but not additional

costs.” *Pernix*, 20-1 BCA at 182,523. Accordingly, Lusk assumed the risk of the unexpected costs arising from the COVID-19 pandemic.

Lusk attempts to shift the risks of increased costs of performance to GSA under a suspension of work theory. Under FAR 52.242-14, a contractor may recover an equitable adjustment from the Government if the contractor shows that “(1) contract performance was delayed; (2) the Government directly caused the delay; (3) the delay was for an unreasonable period of time; and (4) the delay injured the contractor in the form of additional expense or loss.” *BCPeabody Construction Services, Inc. v. Department of Veterans Affairs*, CBCA 5410, 18-1 BCA ¶ 37,013 (citing *Triax-Pacific v. Stone*, 958 F.2d 351, 354 (Fed. Cir. 1992)). Lusk has not established that GSA’s successive suspensions were the sole cause of the delay or that the work was delayed for an unreasonable period of time.

GSA suspended Lusk’s construction on the exterior and interior portions of the project from March 27 to June 1, 2020, for a total of sixty-six days. Lusk contends that GSA’s suspension of work directives were the sole cause of the delay. We disagree. The executive orders issued by the Governor, at least in part, caused GSA to suspend Lusk’s work.

A contractor may only recover under the Suspension of Work clause “when the Government’s actions are the *sole* proximate cause for the contractor’s additional loss, and the contractor would not have been delayed for any other reason during that period.” *Tidewater Contractors, Inc. v. Department of Transportation*, CBCA 50, 07-1 BCA ¶ 33,525, at 166,103 (citing *Triax-Pacific*, 958 F.2d at 354); *see* FAR 52.242-14. The stay-at-home order issued by the Governor of the USVI in March 2020 equally interfered with Lusk’s performance of the work because there was no stay-at-home exemption for construction work that was not a “core life service” or maintained “the safety, sanitation, and essential operation to properties and other essential businesses.”

Relying on the rule of the last antecedent, a canon of statutory construction, Lusk challenges this interpretation of the Governor’s order, arguing that the limiting phrase “to provide services to maintain the safety, sanitation, and essential operation to properties and other essential businesses” should be read as modifying only “other service providers,” the phrase that it immediately follows. Appellant’s Response Brief at 3-5; *see Lockhart v. United States*, 577 U.S. 347, 351 (2016) (citing *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). However, “[t]he rule of the last antecedent ‘is not an absolute and can assuredly be overcome by other indicia of meaning.’” *Lockhart*, 577 U.S. at 352 (quoting *Barnhart*, 540 U.S. at 26). The United States Supreme Court “has long acknowledged that structural or contextual evidence may ‘rebut the last antecedent inference.’” *Id.* at 355 (citing *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 344 n.4). Furthermore, “sometimes context weighs against the application of the rule of the last antecedent.” *Id.* (citing *Barnhart*, 540 U.S. at 26).

Here, the context and other indicia in the Governor's order defeats Lusk's interpretation and the application of the rule of the last antecedent. The rule is not applicable because the limiting phrase is as "applicable as much to the first [words] as to the last words in [the] list," the "set of items form a 'single, integrated list,'" and "the application of the rule would require acceptance of an 'unlikely premise.'" *Lockhart*, 577 U.S. at 355-56. The stay-at-home exemptions applied to "core life services." "Construction sites, plumbers, [and] electricians," however, are not "core life services" unless they are necessary to maintain safety, sanitation, and essential operation to properties or business entities. Lusk's work and construction site consisted of renovation and new construction, which were not necessary for safety, sanitation, or essential operation. Other sections of the order support this interpretation by allowing only businesses that provide essential services to continue in-person operations and hold mass gatherings. This construction site and work was non-essential and was not exempt from the stay-at-home order. "[T]he general terms of a document are limited by the specific terms." *First Kuwaiti Trading & Contracting W.L.L. v. Department of State*, 19-1 BCA ¶ 37,214, at 181,160 (2018) (citing *Bromley Contracting Co.*, DOTCAB 78-1, 81-2 BCA ¶ 15,191, at 75,201; *MW Builders, Inc. v. United States*, 134 Fed. Cl. 469, 498 (2017); *Nicholson v. United States*, 29 Fed. Cl. 180, 196-97 (1993)). Since no specific exemption in the stay-at-home order applied to Lusk's construction work or this project, the order prevented Lusk from continuing to work on the project.

Even had GSA been the sole cause of delay, the length of the suspension period was reasonable, precluding recovery by Lusk. "[P]ursuant to FAR 52.242-14, a contractor is only entitled to an equitable adjustment when the government suspends work for an unreasonable period of time, thereby delaying work." *Granite Construction Co.*, ASBCA 62281, 23-1 BCA ¶ 38,459, at 186,934 ("The clause implements FAR 42.1302, which states that '[a] suspension of work under a construction . . . contract may be ordered by the contracting officer for a reasonable period of time."). As such, we will "award delay damages only for the unreasonable portion of a government-caused delay." *P.R. Burke Corp. v. United States*, 277 F.3d 1346, 1360 (Fed. Cir. 2002) (quoting *Mega Construction Co. v. United States*, 29 Fed. Cl. 396, 425 (1993)).

Lusk contends that it was an unreasonable delay because it had already mobilized its equipment and personnel to the site, which included arranging lodging for its workforce, and the suspensions required Lusk to maintain its equipment on St. Croix in a state of readiness and prevented the transfer of its crews and equipment to the mainland. However, the word "unreasonable," as used in the Suspension of Work clause, "refers to the duration of the suspension and the delay in the work caused thereby and does not refer to the Government's motivation or purpose in ordering the suspension." *BCPeabody Construction Services, Inc.*, 18-1 BCA at 180,256 (quoting *T.C. Bateson Construction Co.*, ASBCA 5492, 60-2 BCA ¶ 2815, at 14,545); see *P.R. Burke Corp.*, 277 F.3d at 1360 ("[C]ontractors can recover delay damages against the government only if there is government-caused delay and it was

unnecessary or unreasonable in duration.”). Given the prevailing uncertainty in March, April, and May of 2020 as to the effect and danger of COVID-19, the Governor’s restrictions that were not lifted until May 4, and the reasonable requirement that the contractor comply with CDC and OSHA COVID-19 provisions and not restart work until the COVID-19 health and safety plan was approved, the suspension by the contracting officer for sixty-six days (from March 27 to June 1, 2020) was not unreasonable. Accordingly, Lusk is not entitled to delay costs for the sixty-six days that the work was suspended.

The project’s interior work was suspended for forty-nine additional days for a total of 116 days, but this suspension was also not unreasonable. Because Lusk resumed work on the exterior portion of the project much earlier and the administrative work was never suspended, Lusk had to prove that the interior work was on the critical path of the project during the additional suspension period. Lusk, however, has not established, or even asserted, that the interior work was on the critical path of the project. When establishing a Government-caused delay, the contractor bears the burden of proving that the delay affected the critical path of the project. *George Sollitt Construction Co. v. United States*, 64 Fed. Cl. 229, 240 (2005) (citing *Kinetic Builder’s Inc. v. Peters*, 226 F.3d 1307, 1317 (Fed. Cir. 2000)). ““The reason that the determination of the critical path is crucial to the calculation of delay damages is that only construction work on the critical path had an impact upon the time in which the project was completed.”” *Id.* (quoting *Wilner v. United States*, 24 F.3d 1397, 1399 n.5 (Fed. Cir. 1994) (en banc) (quoting *G.M. Shupe, Inc. v. United States*, 5 Cl. Ct. 662, 728 (1984))). Here, Lusk provides no proof that the interior work was on the project’s critical path. Therefore, Lusk is not eligible for delay damages for the suspension of the interior work through July 20, 2020.

Decision

We **DENY** the appeal.

Erica S. Beardsley

ERICA S. BEARDSLEY
Board Judge

We concur:

Allan H. Goodman

ALLAN H. GOODMAN
Board Judge

H. Chuck Kullberg

H. CHUCK KULLBERG
Board Judge