SOVEREIGN ACTS GENERALLY BAR RECOVERY, IMPOSE RISK

INTRODUCTION

Costs incurred as a result of Sovereign Acts of the Government are generally not compensable. The recent Armed Services Board of Appeals (ASBCA or Board) *Appeal of Garco Construction, Inc.*, ASBCA No. 57796, filed Sept. 22, 2015, involving restricted base access procedures, illustrated the potentially **dire impact** that sovereign acts can have on a contractor. *Garco* highlights the fact that it is not always easy to distinguish the line between an act that is general and public in nature and an act that is directed toward a particular contractor.

This post will discuss the *Garco* appeal, cite some examples of how sovereign acts can affect contracts, and contrast different Government acts that are – and are not – considered sovereign acts.

SOVEREIGN ACTS

Under the Sovereign Acts Doctrine, the Government is not liable for its actions that are considered Sovereign Acts. A Sovereign Act is an act by the Government that is public and general in nature, and not targeted toward a particular contractor. It is intended to improve public health or safety, is not intended to nullify or abridge rights under a particular contract, and provides no economic advantage to the Government under the contract. See *Garco*.

This doctrine flows from the legal distinction that the United States as a contractor cannot be held liable for the public acts of the United States as a sovereign, or lawmaker. See *Jones v. United States*, 1 Ct. Cl. 383 (1865).

APPEAL OF GARCO CONSTRUCTION, INC.

In *Garco*, the United States Air Force awarded a contract to Garco Construction, Inc. (Garco) to build housing units at Malmstrom Air Force Base in Montana. Garco subcontracted a portion of the work to James Talcott Construction, Inc. (Talcott), a subcontractor who had performed work at Malmstrom for many years. Talcott had historically employed pre-release convicts on its crews at Malmstrom.

After award of the prime contract and subcontract, the base commander at Malmstrom began enforcing a pre-existing policy that prohibited the presence of pre-release convicts on the base. The parties disagreed as to whether this was a new policy or the enforcement of an existing policy. Fourteen months later, the base commander issued a formal memorandum imposing this base access restriction.

Talcott complained that the base access restriction prevented it from using its typical labor force, which resulted in delays and increased labor costs. Garco sponsored Talcott's claim against the government to recover the resultant costs.

In its defense, the Air Force argued that the base access restriction was a Sovereign Act implemented to maintain adequate security at the government base, and that that the Act simply enforced a longstanding policy pertaining to convicted felons on the base.

Garco argued that the Air Force must have waived the policy, noting that the established policy had never been enforced in the past.

The Board decided that the base commander's formal memorandum barring pre-release convicts from the base was a Sovereign Act. The Board then focused its attention on the more difficult issue of the 14 month period between enforcement of the policy and issuance of the memorandum.

The Board then explained that although the Air Force had failed to consistently enforce the policy in the past, these enforcement decisions were made by lower level personnel, not the base commander. Because only the base commander had authority to waive the policy, there was no waiver by the Air Force. The Board did hypothesize, however, that had it been the base commander's decision to not enforce the policy, the result may have been different.

Finally, the Board held that because the policy barring pre-release convicts from the base was a Sovereign Act of the Government, there had been no waiver of the policy, and therefore there could be no recovery for delay, disruption, or increased labor costs that resulted from the enforcement of the policy.

IS THIS A SOVEREIGN ACT?

Again, Sovereign Acts are public and general in nature, and not targeted toward a particular contractor. The following are examples of government acts that were deemed Sovereign Acts, and thus the resulting costs not compensable to the contractor:

- The Government's awarding of other contracts, which allegedly diverted and/or diluted the local workforce and caused the contractor to incur additional expenses to maintain an adequate labor force. See *Wunderlich Contracting Co. v. United States*, 351 F.2d 956 (1965);
- OSHA issued a new excavation safety standard, the implementation of which caused the contractor to incur additional and uncontemplated costs. See *Hills Materials Co.*, ASBCA 42410, 92-1 BCA ¶24,636;
- The Department of Transportation denied an operating permit needed for a foreign contractor to proceed with its aerial photographic work, based on an existing policy on reciprocity with the foreign country in issuing similar permits. See *Inter-Mountain Photogrammetry*, Inc., AGBCA 90-125-1 91-2 BCA 23,941;
- The Environmental Protection Agency banned a pesticide that the contractor planned on using in its termite treatments and incurred additional costs in using an alternative pesticide. The contract did not call for a specific pesticide. The Board held that the Navy was not contractually responsible for the Sovereign Acts of the EPA. See *Broadmoor Corp.*, ASBCA 37028, 89-1 BCA ¶ 21,441.

Conversely, the following are examples of Government Acts that **did not** fall under the protection of the Sovereign Acts Doctrine because they were contractual in nature and/or targeted a specific contractor or class of contractors. In these cases, the Government was not protected by the Sovereign Acts defense:

- The Secretary of the Interior's denying offshore oil permits did not constitute Sovereign Acts because they "were not actions of public and general applicability, but were actions

directed principally and primarily at plaintiff's contractual right to install a platform on Tract 401 and to extract oil and gas therefrom." See *Sun Oil Co. v. United States*, 215 F.2d 786 (1978);

- The Government closing floodgates to permit another contractor to perform its work constituted a breach of an upstream contract. See *Volentine & Littleton Contractors v. United States*, 169 F. Supp. 263 (1959).

Notably, the Government cannot make a contractual agreement that it will not act in its Sovereign capacity. However, the Government may agree that if it does commit a Sovereign Act during performance of a contract, it will duly compensate the contractor for its costs incurred as a result. This type of clause or agreement typically allows for negotiations to determine the amount of recoverable costs.

Finally, the Government has a duty to act reasonably when implementing its Sovereign Acts. This implied duty of cooperation requires the Government to implement the Sovereign Act with the least amount of disturbance to the contract, meaning in the least restrictive or least costly manner. If the Government does not do so, the resultant costs may be recoverable.

CONCLUSION

Contractors should diligently check base access procedures, as well as other applicable procedures that affect their performance, to gauge the possible impacts that could result from Sovereign Acts of the Government.

And if the Government raises the Sovereign Acts defense – at any point before closeout – do not assume that the Government is or is not acting in its Sovereign capacity; consult with an expert who can clarify the gray line between public and contractual Government acts.

In the end, you will be glad you made the call; by the way, it's a FREE CALL.

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Author's note: The information contained in this article is for general informational purposes only. This information does not constitute legal advice, is not intended to constitute legal advice, nor should it be relied upon as legal advice for your specific factual pattern or situation. – Taylor Benson, Esq., Assistant General Counsel