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ASBCA says Navy owes contractor $4.9 million for delay damages

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A recent decision by the Armed Services Board of Contract Appeals found the Navy liable to a commercial crane manufacturer for delay damages.

In *Konecranes Nuclear Equip. & Servs., LLC*,[1] the Board reiterated the age-old lesson — you have to read the contract — and provided guidance about how to calculate the delay damages. Beyond that, the Board found apparent inspiration for part of its holding in an unlikely source: a classic song by the Rolling Stones.

Case background

The Navy awarded Konecranes a $62 million contract to construct and deliver four 25-ton general purpose portal cranes for use at the Navy's Puget Sound Naval Shipyard.

The Board reiterated the age-old lesson — you have to read the contract — and provided guidance about how to calculate the delay damages.

The Navy needed the cranes to load food, maintenance parts, and other supplies into the Navy's nuclear submarines at the shipyard. But after an initial test of one of the cranes identified damage to a luffing drum (a component around which steel ropes are wound to raise or lower the boom), the Navy refused to accept delivery of the cranes.

Konecranes and the Navy offered opposing theories on both the ultimate cause of the damaged drum and the appropriate remedy. In attempting to resolve that issue, a parallel disagreement emerged regarding the contract specifications related to the overall operational life of the drum and its surrounding components.

Based upon its reading of the contract materials and incorporated ISO quality standards, Konecranes took the view that the "Navy's specification require[d] only 3,200 hours of operational life from the luffing hoist components." In contrast, the Navy asserted that the contract required a useful life closer to 15,000 hours.

But as the ASBCA later found, the Navy's preferred, heightened standard was not incorporated into the terms of the contract.

In fact, the Navy acknowledged in contemporaneous internal communications that it had not provided "any usage information or hourly information ... in the RFP" at all.

While the parties worked to resolve the specification issue, Konecranes completed its construction of the other three cranes using alternative materials.

The Board concluded that "Konecranes' four cranes met the contractual requirements" and that the Navy should have accepted delivery.

However, the Navy maintained its view that the luffing components were defective and nonconforming with the contract's specifications because they had not been designed with a useful life of 15,000 hours. Accordingly, the Navy refused to accept delivery of the completed cranes.

As a result, Konecranes incurred additional costs associated with a 17-month delay in the contract delivery schedule. Konecranes' claim for delay damages included excess transportation costs, space rental fees, and crane maintenance costs totaling around $4.9 million.

The ASBCA's holding

After a six-day hearing on entitlement and quantum, the ASBCA issued a decision that included at least two noteworthy components.

First, addressing the parties' contract dispute, the Board concluded that "Konecranes' four cranes met the contractual requirements" and that the Navy should have accepted delivery.

In so doing, the ASBCA rejected the Navy's "unreasonable" view that Konecranes was obligated to meet an ISO standard that was nowhere mentioned in the contract. As the Board explained, the contractor delivered products that met the minimum standards spelled out in the contract, and "satisfying a minimum requirement constitutes satisfying the requirement."

In a comment that brings to mind the Rolling Stones, the Board went on to note that:

> Ultimately, Konecranes built its cranes, including its luffing drums, to the ISO standard in the Contract's specifications. In retrospect, the Navy asserts it did not get what it wanted. But, it got what it contracted for.

Second, addressing Konecranes' damages, the Board ruled that Konecranes had proven its delay damages for a ~17-month period preceding the hearing, but Konecranes could not recover estimated future costs as part of its partial breach claim.

It is the actual language of the contract that governs — not what one of the parties believes the contract should *say.*

As noted in the decision, Konecranes' $4.9 million in actual damages fell into four categories: (1) transportation delays, (2) yard costs, (3) crane maintenance costs, and (4) long term storage preparation costs.

Konecranes also sought payment for "estimated future costs" for the period January 2022 through August 2023, which Konecranes had not expected to incur as of the date of the April 2022 hearing.

The Board denied recovery for these costs, commenting that they were speculative and "based on assumptions that have not yet come to pass."

As the Board noted, "Konecranes' president acknowledged that some of the figures for these future costs were 'purely my guesstimation' or 'guestimate[s]'." Accordingly, the Board declined to award Konecranes the "guestimate" damages amounts, but invited Konecranes to submit new claims in the future for costs "actually incurred."

Key takeaways

The ASBCA's decision serves as a useful reminder of two points.

First, it is the actual language of the contract that governs — not what one of the parties believes the contract *should* say.

When faced with attempts by the government to impose unstated, onerous requirements, contractors can and should object, and contractors should document their position based on the language in the contract.

If the government insists on extra-contractual obligations that cause delay and damages, contractors should carefully evaluate the potential to recover such damages.

Second, the Board can award a wide range of delay damages. However, to the extent contractors expect ongoing costs for future delays during the pendency of an appeal, contractors should make every effort to document and support such delay damages with objective data, while recognizing they may be required to submit new claims for those future costs after they are incurred.

Notes:

[1] ASBCA No. 62797, 2024 WL 2698011 (May 7, 2024), https://bit.ly/3Sdo0k4.

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