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FEATURE COMMENT: Contracting In The Fog Of War

> War is the realm of uncertainty; three quarters of the factors on which action in war is based are wrapped in a fog of greater or lesser uncertainty.
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> —Carl von Clausewitz, *On War*

The fog of war has long been known to cast its pall over military operations, but contractors feel its effects as well. Providing supplies and services to the military in war-torn corners of the world involves a great deal of risk. Armed conflicts can expose contractors to changing security requirements, the closure of border crossings, restrictions on access to military installations, and other events that impact the company's bottom line.

Contractors seeking to recover from the Government for increased costs due to these and other war risks can face an uphill battle. As the mixed results in the case law show, contractors can pursue a variety of legal theories when seeking payment for these costs. However, the Government also has a number of tools at its disposal, most notably the sovereign acts doctrine. The following case studies demonstrate that a contractor's chances of recovery depend in large part on having the right factual situation—which can include making the right decisions as events unfold on the ground—and on selecting the appropriate legal strategy when it comes time to submit a claim.

The Changes Clause as a Basis for Recovery—*First Kuwaiti Trading & Contracting W.L.L., v. Dep't of State*, CBCA 3506, 19-1 BCA ¶ 37,214, illustrates the basic principle that contractors may succeed in recovering claims based on the Changes clause if the actions on which the claims are based do not constitute sovereign acts. First Kuwaiti Trading & Contracting W.L.L. (FKTC) contracted with the Department of State to build a U.S. embassy compound in Baghdad. Ultimately, FKTC submitted approximately 200 claims to State to recover the costs it incurred as a result of repeated attacks at the work site and heightened security threats in the region. When State denied its claims, FKTC took its case to the Civilian Board of Contract Appeals.

FKTC's contract contained a War Risks clause that states,

> 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 …, and agrees that the Contractor shall not be responsible for such loss, damage and/or destruction.

The contract also included security requirements and required the use of watchmen.

State moved for summary judgment on 13 of FKTC's claims, challenging FKTC's reliance on the War Risks clause, the superior knowledge doctrine, the Changes clause, and the implied duty of good faith and fair dealing. State also asserted that it should be relieved of any liability because the actions underlying FKTC's claims were sovereign acts. The 13 challenged claims concerned

- duck and cover alarms,
- rocket attacks,
- equipment repositioning,
- additional security requirements,
- retention bonuses and danger pay,
- air transport,
- sand and gravel handling,
- truck convoy delays and protection requirements, and
- superior knowledge claims.

State argued that the War Risks clause did not permit recovery on these claims because it was 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 site." As a result, State contended, claims for costs such as danger pay to employees or delayed Army convoys were not covered. State also argued that, despite the War Risks clause, FKTC had assumed the risk of working in a combat zone.

FKTC contended that the term "loss" should be read independently from the phrase "completed or partially completed work … and materials delivered to the site" because it was not set off by a comma or modified with the word "of." Therefore, FKTC argued, "loss" was not limited to work or materials and could include other types of losses incurred as a result of war risks.

The Board agreed with State and interpreted the clause narrowly to apply only to costs to repair or replace work or materials at the site. The Board explained that "[i]f the parties had intended State 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."

Furthermore, if there were any confusion about what the clause covered, it was a patent ambiguity, and FKTC had a duty to ask State about its interpretation. The Board stated that the "clause does not encompass all costs that a contractor might incur as the result of performing a contract in a wartime environment," and concluded that the War Risks clause did not provide for recovery on the 13 challenged claims. Therefore, the Board granted the Government's motion for summary judgment regarding the War Risks clause.

Second, the Board addressed whether FKTC provided a sufficient basis for its superior knowledge claim. FKTC asserted that State possessed superior knowledge regarding the deteriorating security conditions at the work site, and alleged that State knew or should have known that FKTC had not accounted for wartime costs in its bid. A contractor must demonstrate the following four elements to recover under the superior knowledge doctrine:

> (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.

State contended that FKTC failed to satisfy these elements.

The Board agreed with State. The Board explained that "[e]ven 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." Similarly, FKTC did not provide evidence that State knew or should have known that FKTC's bid failed to properly account for the increased costs of performing in a war area. Therefore, the Board granted State's motion for summary judgment regarding the superior knowledge claim.

The Board then addressed FKTC's Changes clause theory. Six of FKTC's claims sought recovery based on the Changes clause, including claims related to the alarm system, extra security requirements, and sand and gravel handling, as well as three claims relating to the Army convoy requirements. The Board explained that "[t]o 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.' " (Quoting *Agility Public Warehousing Co. KSCP v. Mattis*, 852 F.3d 1370, 1385 (Fed. Cir. 2017); 59 GC ¶ 112.) The Government argued that FKTC could not rely on the Changes clause because it could not establish that State had directed a change to the scope of work. However, the Board found that all six claims concerned disputed issues of material fact. Therefore, the CBCA denied State's motion for summary judgment on these claims.

The Board turned to the Government's assertion that it should not be liable for those claims by virtue of the sovereign acts doctrine. The sovereign acts doctrine allows the Government to avoid liability for a contractor's claims by showing that the actions underlying the claims are sovereign acts. The Board explained that "'the object of the sovereign acts defense is to place the Government as contractor on par with a private contractor in the same circumstances.'" (Quoting *U.S. v. Winstar Corp.*, 518 U.S. 839, 904 (1996); 38 GC ¶ 322.) When the sovereign acts defense applies, " '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.' " (Quoting *Horowitz v. U.S.*, 267 U.S. 458, 461 (1925).) However, the defense is not available if the Government action is not "public and general" in nature or is targeted at a single contractor or a specific group of contractors.

The Board denied State's motion for summary judgment under the sovereign acts doctrine because State failed to demonstrate that "the governmental actions were public and general acts that were merely incidental to the accomplishment of a broader governmental objective." The Board explained that "[w]hen 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." (Citing *Jazz Photo Corp. v. Int'l Trade Comm'n*, 264 F.3d 1094, 1102 (Fed. Cir. 2001).) Here, State had not provided evidence of a broader governmental objective to support its sovereign acts defense. As a result, the Board did not have an evidentiary basis upon which to evaluate State's asserted sovereign acts defense.

Finally, the Board considered FKTC's reliance on the implied duty of good faith and fair dealing to support its claim related to the alarm system. The Board explained that the duty of good faith and fair dealing is not limited to "avoid[ing] actions that unreasonably cause delay or hindrance to contract performance, but also to do whatever is necessary [within reasonable limits] to enable the other party to perform." (Quoting *Kiewit-Turner v. Dep't of Veterans Affairs*, CBCA 3450, 15-1 BCA ¶ 35,820 at 175,176.) The Board stated 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. … 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.

The Board thus denied State's motion for summary judgment on the claims based on the implied duty of good faith and fair dealing because there were disputed issues of fact regarding the reliability of the alarm system that caused the delays.

As *First Kuwaiti* demonstrates, even where the War Risks clause provides no basis for recovery, a contractor's claims may still succeed under theories based on the Changes clause and the duty of good faith and fair dealing. However, contractors should look carefully at how contract provisions allocate the risk of additional costs or delays caused by war. The Government may assume some of the risks, but contractors should not assume they will be compensated for all war-related risks and should seek clarification in advance if the risk-allocation contract clauses are ambiguous.

The Sovereign Acts Doctrine Is Not Always a Bar to Recovery—Changes in access routes are a continuing theme in war risks cases. *ANHAM FZCO, LLC,* ASBCA No. 58999, 2018 WL 6588212 (Nov. 13, 2018), involved a contractor's claim for the costs it incurred as a result of the closure of a border crossing between Kuwait and Iraq. The contractor prevailed this time even though its claim stemmed from the U.S. troop reduction in Iraq—a quintessentially sovereign act.

ANHAM FZCO LLC had a contract to supply and deliver perishable goods to U.S. forces in Iraq. The contract required ANHAM to move goods from its warehouses in Kuwait to Iraq in a convoy under military protection. At the time ANHAM entered into the contract, goods for U.S. military customers had to enter Iraq through the Khabari Crossing (K-Crossing). Contractors were not permitted to use the alternative Safwan commercial crossing. Therefore, ANHAM's proposal and pricing were based on the solicitation's mandated use of U.S. military convoys to enter and return from Iraq through the K-Crossing.

The Army's withdrawal of troops from Iraq led to the closure of the K-Crossing. As a result, the Defense Logics Agency directed ANHAM to use the Safwan commercial crossing. This change in performance operations required ANHAM to establish a new trucking operation in Iraq and establish new facilities near the Safwan crossing. "The government recognized that the new procedures were 'quite different from the concept of operations that ANHAM was currently performing,' " and that the change in delivery method would have a significant cost impact. ANHAM and DLA sought to negotiate a modification for the change in delivery method, but the parties could not reach an agreement on pricing. Therefore, ANHAM submitted a claim for the additional costs

it incurred because of the Government's direction to alter its delivery method.

A prior decision, *ANHAM FZCO, LLC,* ASBCA No. 59283, 17-1 BCA ¶ 36,817, concerned the same contract. In that case, ANHAM alleged that the Government misled it about the number of troops it would need to feed in Iraq. Based on that faulty information, ANHAM maintained unnecessary warehouse space in Kuwait to store food and other goods. After the Government withdrew troops from Iraq, ANHAM submitted a claim for the amount it incurred for leasing the warehouse space.

Although the Government did not challenge ANHAM's allegations that DLA had encouraged it to plan to support significantly higher troop levels in Iraq, the contracting officer nevertheless denied the claim. ANHAM appealed the denial to the Armed Services Board of Contract Appeals, alleging that DLA violated the duty of good faith and fair dealing when it provided misinformation about the determination to withdraw troops from Iraq. In response, DLA asserted that ANHAM's claim was barred by the sovereign acts doctrine.

The ASBCA concluded that the sovereign acts defense did not apply to ANHAM's fair dealing claim because the Government's liability was based on DLA's failure to disclose vital information to the contractor about the withdrawal of troops from Iraq, rather than on the sovereign act of withdrawal itself. The Board explained that the sovereign acts doctrine shields the Government from liability for a contractor's claim arising from a "public and general" sovereign act, and that "[t]he government is excused from performance under the sovereign acts defense only when the sovereign act renders the government's performance impossible." (Citing *Casitas Mun. Water Dist. v. U.S.*, 543 F.3d 1276, 1287 (Fed. Cir. 2008).) Here, however, there was no reason to believe "that it was impossible for DLA to cooperate with ANHAM's contract performance." Therefore, the ASBCA denied DLA's motion for summary judgment.

In the latest appeal, the Board held that "the government changed the terms of the contract by directing ANHAM to enter Iraq through the commercial entry point instead of the contractually-required U.S. military controlled crossing." ANHAM contracted to deliver food and other goods by a certain method—military escort. Requiring the goods to be delivered by other means changed the contract requirements and forced ANHAM to develop a new and more expensive means of transporting the goods into Iraq. Therefore, the Government's direction to discontinue military-supervised crossings at the K-Crossing and to use the Safwan commercial crossing instead was a material change to the scope of work and constituted a constructive change to the contract.

The Board concluded that "a change in how ANHAM would meet its contract requirements constitutes a 'change' pursuant to the Changes clause and, therefore, would require the government to make an equitable adjustment to account for the extra costs resulting from the change." The Board found it important that ANHAM's delivery contract contained specific requirements for how the deliveries had to be made. Therefore, changing the delivery method altered the terms of the contract and entitled ANHAM to an equitable adjustment.

Due to the discontinuance of military-supervised convoys, ANHAM also had to hire private security to protect its deliveries. DLA and ANHAM entered into a bilateral modification to compensate ANHAM for obtaining private security for its supply convoys when traveling within Iraq. The Government argued that this modification fully compensated ANHAM for the change in delivery method. However, the Board found that "[t]he government's modification of the contract to pay the costs of private security escorts once in Iraq did not compensate appellant for the new and additional costs of switching appellant's operations to the commercial crossing location."

While the withdrawal of troops from Iraq and the closing of the K-Crossing was a sovereign act, the Board concluded that exceptions to the sovereign acts doctrine applied in this case. The Board has recognized two exceptions to the doctrine: (1) when the Government has issued instructions to implement the sovereign act that exceed contract requirements and thus amount to a constructive change; and (2) when the Government expressly or impliedly agreed to pay the contractor for losses due to the sovereign acts.

In this case, both exceptions were satisfied. First, DLA's orders to ANHAM to change its delivery method and to use the commercial crossing were constructive contractual changes made in response to the Government's sovereign act. Second, the Government agreed to compensate ANHAM for the additional costs incurred as a result of the changes. Although the Government and ANHAM could not agree on price, "the government contemporaneously acknowledged that the new border crossing was a compensable change

to the contract and that it was willing to compensate ANHAM for the additional costs ANHAM incurred." Therefore, both exceptions applied to ANHAM's claim. The Board sustained ANHAM's appeal and directed the parties to resolve quantum.

Limits on a Constructive Change Theory—*ECC Int'l, LLC,* ASBCA No. 60484, 18-1 BCA ¶ 37,203, concerned a contractor's claims arising out of the Government's closure of a key access route to the contractor's construction site in Afghanistan. ECC International LLC (ECCI) had a construction contract with the U.S. Army Corps of Engineers in Afghanistan. ECCI had performed previous contracts in the region and had used the Friendship Gate to transport workers and materials. The contract contained a Security clause providing that "[a] detailed security plan … shall be approved by the Government before construction notice to proceed."

Before starting performance in 2011, ECCI submitted a security plan for the Government's review. The security plan stated ECCI's intent to use the Friendship Gate for moving workers and materials to the work site. The Government approved ECCI's plan, and ECCI began performance, using the Friendship Gate to gain access to the construction site. But in December 2012, the U.S. Marine Corps closed the Friendship Gate to nonmilitary personnel in response to deteriorating security conditions. As a result, ECCI and its subcontractors had to move workers, concrete and other materials using longer access routes.

ECCI submitted a request for equitable adjustment (REA) to USACE seeking compensation for 28 days of compensable delay for itself and its subcontractors as a result of the closure of the Friendship Gate, at a total cost of $1.7 million. USACE denied the REA. ECCI subsequently provided additional documentation in support of its REA, but USACE denied the claim again, explaining that "[t]he closure of [the Friendship Gate] was an act of the USMC/U.S. Government acting in its sovereign capacity."

In ECCI's appeal, there were four related issues before the Board: (1) whether the contract warranted continued access through the Friendship Gate, (2) whether ECCI's prior contracts gave rise to an implied warranty of continued access through the Friendship Gate, (3) whether the closure of the Friendship Gate was a constructive change, and (4) whether the sovereign acts doctrine applied to the USMC's closure of the Friendship Gate.

First, ECCI argued that by requiring ECCI to obtain Government approval of its security plan, the Government impliedly warranted access through the Friendship Gate. However, the security plan was not incorporated into the contract. Furthermore, the contract put ECCI on notice that it was operating in a combat environment and assigned ECCI responsibility for complying with applicable installation access procedures. The contract also warned ECCI that access procedures could change at any time. Therefore, the Board concluded that the Government did not provide an implied warranty of access through the Friendship Gate

Second, ECCI claimed that its use of the Friendship Gate in performing prior Government contracts in the region gave rise to an implied warranty of continued access through the gate. However, the Board found that ECCI failed to establish a prior course of dealing with respect to Friendship Gate access.

Third, ECCI contended that the closure of the Friendship Gate was a constructive change because there was no expectation that its approved security plan would require modification and because the security plan essentially became part of the contract when the Government approved it. The Government countered that the security plan was not a part of the contract, that the contract put ECCI on notice that access procedures could change in response to changing security threats, and that the language of the contract placed the risk that access procedures could change on ECCI. The Board concluded that the closure did not change any contractual terms and that, as a result, the closure of the Friendship Gate was not a constructive change to the contract.

Finally, the Board did "not reach the government's affirmative defense that the closure of the Friendship Gate was a sovereign act, because we have concluded that there is no express or implied contractual right of access through the Friendship Gate and that the closure of Friendship Gate was not a constructive change."

FOB Destination Clause May Shift the Risks of War to the Contractor—*Zafer Taahhut Insaat Ve Ticaret, A.S. v. U.S.,* 120 Fed. Cl. 604 (2015), is another case involving the closure of a border crossing. Zafer Taahhut Insaat Ve Ticaret A.S. had a firm fixed-price contract with USACE to construct a facility in Afghanistan. In an unfortunate example of the fog of war, the U.S. and North Atlantic Treaty Organization

accidentally bombed a Pakistani military facility. In response, the government of Pakistan closed the border between Pakistan and Afghanistan, causing the contractor to incur additional costs for transporting construction materials to its work site.

Zafer requested additional time and increased costs as a result of the border closing. The CO granted the contractor a time extension, but denied its request for increased costs. The contractor appealed the CO's decision to the U.S. Court of Federal Claims. A firm fixed-price contract typically allocates risks of unexpected costs to the contractor. See Federal Acquisition Regulation 16.202-1. Although delays caused by the unforeseen border closure entitled Zafer to a time extension, the risk of additional costs in transporting the materials to the construction site fell on the contractor.

Zafer nevertheless argued that the Government should be responsible for the increased costs caused by the border closure and that it was required to compensate Zafer for the increased transportation costs. The COFC held that the Government was not responsible for transportation delays caused by the Pakistani government's closure of the border because the contractor's fixed-price contract included an agreement to transport construction materials to the work site "FOB: Destination."

That clause means that the contractor was required to deliver the materials to the project site at no charge to the Government. The FAR explains that in fixed-price FOB destination contracts, "[t]he Government shall not be liable for any delivery, storage, demurrage, accessorial, or other charges involved before the actual delivery … of the supplies to the destination, unless the charges are caused by an act or order of the government acting in its contractual capacity." Citing FAR 47.303-6(a)(2). Therefore, the Court agreed with the Government that Zafer was not entitled to an equitable adjustment for its increased costs.

Zafer also asserted that the Government ordered a constructive change to the contract by directing it to proceed with contract performance when the contractor experienced an excusable delay. The Court found that Zafer did not have a valid claim for constructive acceleration because it had received a reasonable time extension for the border closure. The Court rejected Zafer's argument that the U.S. Government was responsible for the delays, because it was the Pakistani government that caused the closure. Similarly, the Court rejected Zafer's allegation that the Government's negotiations with Pakistan to reopen the border made the Government liable for the contractor's increased transportation costs.

Finally, Zafer alleged that the Government breached its duty to cooperate. However, the Court found that the Government did not breach its duty to cooperate with the contractor because the contract did not include a warranty against the actions of other governments, nor did it guarantee access to the work site through a particular entry point. Furthermore, the Government provided a reasonable time extension for the border closure. For these reasons, the Court granted the Government's motion for summary judgment.

The key difference between this case and *ANHAM* is that the Government directed ANHAM to change its method of performance. In *ANHAM*, the contractor was entitled to an adjustment because the contract called for delivery via military escort through a particular crossing, and the Government directed the contractor to change its delivery method. Zafer's contract, however, did not specify a shipping route, and the Government did not instruct the contractor to use a specific method of delivery. Instead, the contract allocated the risk of unexpected transportation costs to the contractor and allowed the contractor to use whatever delivery method would meet its contractual obligations. Therefore, the closure of the border only entitled Zafer to a time extension. Because the Government granted Zafer a reasonable time extension, no additional remedies were available to the contractor.

Constructive Acceleration as an Alternative Theory for Recovery—*IAP Worldwide Servs., Inc.,* ASBCA Nos. 59397 et al., 17-1 BCA ¶ 36,763, concerned delays caused by the same closure of the Pakistan border that was at issue in *Zafer*. IAP Worldwide Services, Inc. contracted with USACE to provide generators at military bases in Afghanistan. IAP had previously shipped equipment into Afghanistan by way of Pakistan.

After IAP received three delivery orders for generators to be delivered in Afghanistan, Pakistan closed its borders. While the border remained closed for seven months, the Government denied the contractor adequate extensions to deliver the generators. IAP asserted that circumstances on the ground, and the Government's response to those circumstances, constructively accelerated IAP's performance and

required an equitable adjustment of its contract price for the additional costs incurred to perform during the border closure.

The ASBCA held that "[t]he government accelerated performance when it failed to timely grant extensions to fully account for the delay." Accordingly, the ASBCA concluded that "IAP is entitled to an equitable adjustment reimbursing it for expenses actually and reasonably incurred in complying with the acceleration orders." The key aspect of the case was not the border closure itself, which might arguably have constituted a sovereign act, but rather how the contractor and Government dealt with the closure. And, unlike in *Zafer*, the contractor was careful to document how the Government forced it to accelerate its deliveries despite the excusable delay.

Increased Security Risks May Be a Cardinal Change—No one can accurately predict, let alone price, all of the risks involved in supporting and accompanying the military in combat zones around the world. *Planate Mgmt. Group, LLC v. U.S.,* 139 Fed. Cl. 61 (2018), a case currently before the COFC, is a good example. In *Planate*, a contractor providing support services in Afghanistan has asserted claims for the cost of arming its in-theater personnel when the security situation deteriorated.

In light of deteriorating security conditions in Afghanistan, including a fatal insider attack, the military issued a new security directive. To comply with that directive, Planate Management Group LLC purchased weapons to arm its in-theater personnel. Planate then submitted a claim to recover the costs of arming its personnel. The Government denied Planate's claim, and Planate filed suit at the COFC, alleging (among other things) that the changed security conditions amounted to a cardinal change. The Court denied the Government's motion to dismiss for lack of subject matter jurisdiction because the contractor had properly presented its claim for a cardinal change to the CO.

Although the court considered only whether it had jurisdiction to hear Planate's allegations and has not yet addressed the merits of Planate's cardinal change theory, the case offers an interesting and potentially promising approach for contractors to recover when they experience major changes to the circumstances under which they are performing. Planate's theory will test the extent to which a dramatic change in circumstances may constitute a cardinal change. A cardinal change occurs when a contractor is directed to perform additional work beyond the scope of the contract. A cardinal change is not a contract change and cannot lawfully be ordered by a CO under a contract's Changes clause. Instead, a cardinal change is commonly thought of as a remedy outside the four corners of the contract.

Planate has argued that the additional work created by the heightened security risks constituted a cardinal change because it resulted in work that was materially different from what was bargained for: namely, the contract was for support services and did not mention the provision of weapons, but, due to the increased security threats, the contractor was required to supply its personnel with weapons for self-defense. Depending on how the case evolves, it has the potential to broaden the application of cardinal change claims when the working conditions contemplated by the parties have drastically changed, as is often the case in overseas contingency contracts.

Conclusion—As these summaries illustrate, the case law on claims for costs due to war risks can be as cloudy as the fog of war itself. As *First Kuwaiti*, *ANHAM* and *IAP* demonstrate, claims based on a constructive change or constructive acceleration theory may succeed in the right circumstances, including both the contract terms and the facts on the ground. And *Planate* suggests that, if a war risk is truly outside the scope of the parties' agreement, a cardinal change theory might be available. On the other hand, *ECC* and *Zafer* illustrate the difficulty of asserting claims for war risks where the contract shows that the contractor accepted those risks.

Not only must the contractor base its claim on a viable legal theory, it may also be required to overcome a defense based on the sovereign acts doctrine. Yet, while the sovereign acts doctrine can serve as a powerful defense for the Government, *First Kuwaiti* and *ANHAM* show that it has its limits and that the COFC and the Boards of Contract Appeals may be willing to find that exceptions apply where the equities seem to point in the contractor's direction.

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