

PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 7

NUMBER 9

September 2021

Editor's Note: Cybersecurity Victoria Prussen Spears	279
President Biden Issues Executive Order to Overhaul Cyber and Software Supply Chain Security and Expand Incident Reporting for Contractors Natasha G. Kohne, Michael J. Vernick, Scott M. Heimberg, Molly E. Whitman, Michelle A. Reed, Angela B. Styles, and Chris Chamberlain	281
Federal Court Permits Government's Forfeiture of Contractor's Right to Keep Unit Pricing Confidential Under FOIA Dismas Locaria, James Y. Boland, and Christopher Griesedieck, Jr.	292
How to Maximize Contractor Recoveries for Public Health-Related Claims: Lessons from <i>Pernix Serka</i> and the Ebola Crisis Justin A. Chiarodo and Stephanie M. Harden	296
ASBCA Confirms the "Goldilocks Principle" in Government Contract Appeals Kevin J. Slattum and Aaron S. Ralph	299
New Climate and ESG Disclosures Are Likely: Are Federal Grant and Loan Recipients the Next Targets? Douglas Benevento, Christopher B. Berendt, Elizabeth A. Diffley, Elizabeth K. Lange, James R. Spaanstra, and Jessica C. Abrahams	303
From the Courts: False Claims Act Allegation That Surgeons Let Residents and PAs Obtain Patient Consent for Procedures Fails Materiality Test Pablo J. Davis	307

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Heidi A. Litman at 516-771-2169
Email: heidi.a.litman@lexisnexis.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

ISSN: 2688-7290

Cite this publication as:

[author name], [article title], [vol. no.] PRATT'S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt).

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT'S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. Originally published in: 2015

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

MARY BETH BOSCO

Partner, Holland & Knight LLP

PABLO J. DAVIS

Of Counsel, Dinsmore & Shohl LLP

MERLE M. DELANCEY JR.

Partner, Blank Rome LLP

J. ANDREW HOWARD

Partner, Alston & Bird LLP

KYLE R. JEFCOAT

Counsel, Latham & Watkins LLP

JOHN E. JENSEN

Partner, Pillsbury Winthrop Shaw Pittman LLP

DISMAS LOCARIA

Partner, Venable LLP

MARCIA G. MADSEN

Partner, Mayer Brown LLP

KEVIN P. MULLEN

Partner, Morrison & Foerster LLP

VINCENT J. NAPOLEON

Partner, Nixon Peabody LLP

STUART W. TURNER

Counsel, Arnold & Porter

ERIC WHYTSELL

Partner, Stinson Leonard Street LLP

WALTER A.I. WILSON

Partner Of Counsel, Dinsmore & Shohl LLP

Pratt's Government Contracting Law Report is published 12 times a year by Matthew Bender & Company, Inc. Copyright © 2021 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

How to Maximize Contractor Recoveries for Public Health-Related Claims: Lessons from *Pernix Serka* and the Ebola Crisis

*By Justin A. Chiarodo and Stephanie M. Harden**

The authors provide a roadmap for contractors to consider to recoup costs stemming from the COVID-19 pandemic.

Does the mere existence of a deadly epidemic entitle a contractor to monetary relief when it experiences cost increases stemming from that epidemic? Not without government direction, ruled the U.S. Court of Appeals for the Federal Circuit in affirming a decision of the Civilian Board of Contract Appeals (“CBCA”) in *Pernix Serka JV*.

The facts of *Pernix Serka* are striking: A contractor repeatedly requests guidance for dealing with a major health crisis, the government refuses to provide guidance, and the contractor is unable to recoup the additional costs it incurs in order to proceed with performance because the government provided no guidance.

This timely ruling sheds light on strategies contractors should consider for recouping costs stemming from the COVID-19 pandemic. This article provides a roadmap for navigating these issues in light of *Pernix Serka JV*.

THE 2014 EBOLA CRISIS

Pernix Serka was in the midst of performing a contract in Sierra Leone when a deadly Ebola outbreak struck the country in 2014. *Pernix Serka* diligently sought guidance from the contracting officer on its State Department (“DOS”) contract, but the government refused to weigh in on whether it should temporarily shut down its work on the contract.

Ultimately, *Pernix Serka* decided to temporarily withdraw its personnel, which the government then characterized as *Pernix Serka*’s “unilateral” decision. When *Pernix Serka* sought advice on whether and when to resume work, the government went so far as to say that “DOS will not provide any instructions or directions” regarding whether and when to return to the work site. The

* Justin A. Chiarodo, a partner in Blank Rome LLP, focuses his practice on all aspects of federal, state, and local procurement law. Stephanie M. Harden, a partner in the firm, has extensive experience representing government contractors in a wide array of litigation and counseling matters. Resident in the firm’s office in Washington, D.C., the authors may be contacted at jchiarodo@blankrome.com and sharden@blankrome.com, respectively.

contractor ultimately decided to resume performance, but incurred additional costs when it decided to contract for medical facilities and services on the project site.

DENIAL OF PERNIX SERKA'S CLAIM

The CBCA upheld the contracting officer's denial of Pernix Serka's resulting \$1.25-million claim, rejecting Pernix Serka's arguments that there had been a cardinal change or constructive change. The crux of the CBCA's reasoning was that the government never directed Pernix Serka to make a change. For example, the government "never changed the description of work it expected from the contractor" and refused to provide direction to Pernix Serka on how to respond to the conditions on the ground, telling Pernix Serka that how to deal with the outbreak was up to its business judgment. As such, the CBCA found that "[a]ny changes in conditions surrounding performance of the contract arose from the Ebola outbreak and the host country's reaction to the outbreak," rather than the government.

The CBCA also noted that the Excusable Delays clause (which expressly references "epidemics") provides for additional time, but not money.

The Federal Circuit upheld the CBCA's ruling without issuing an opinion.

IMPLICATIONS FOR COVID-19 CLAIMS

Does *Pernix Serka* Change the Legal Landscape for COVID-19-Related Requests for Equitable Adjustment ("REAs") and Claims?

No, the case merely features what has always been a critical requirement: that there be a government-directed "change" to the contract. But the CBCA's decision makes clear that the mere existence of a health crisis and/or "host country" directives will not be enough to establish such a change (that is, the change must come from the U.S. government itself).

What Types of Changes Should Contractors Look for in the Context of COVID-19 Claims?

The strongest examples will be ones issued in written form, ideally issued by the contracting officer or at least the contracting agency: quarantine orders, movement or site access restrictions, capacity limits, COVID-19 testing requirements, cleaning directives, etc. Note that in *Pernix Serka* the government did not direct the contractor to comply with World Health Organization ("WHO") guidance; however, in the context of the COVID-19 pandemic, we believe a mandate to comply with Centers for Disease Control and Prevention guidance may validly form the predicate of an REA or claim, so long as there was a clear (preferably written) government directive to comply with the guidance.

What About Broadly-Issued Directives, Such as Travel Restrictions?

Our view is that any directive that impacts the contract may suffice as the basis of an REA or claim if it was issued by the U.S. government, or, if it was issued by another authority and the contracting officer directs the contractor to continue performance on the same schedule, despite the new hurdle. So, if the closure of an international border by the U.S. government led to increased costs, those costs should be compensable, regardless of whether the contracting officer ever issued a more specific directive to the contractor itself. Or, if a border was closed by a foreign government, and the contracting officer insisted that the contractor maintain its original performance schedule despite border crossings being essential to its performance, this, too, could form the predicate of an REA or claim. Of course, if the contracting officer expressly excuses performance due to this type of changed condition, there can be no valid claim for increased costs thereafter.

What Else Can Contractors Do to Protect Against Business Disruption Claims?

Given the potential limits on recoveries under the FAR, contractors operating in high-risk locations or fields should consider evaluating their insurance coverage (e.g., business interruption insurance), including evaluating additional endorsements for losses caused by disruption to business operations due to quarantines or similar events.