

# Board of Contract Appeals

General Services Administration  
Washington, D.C. 20405

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DENIED: February 21, 2001

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GSBCA 15081

TRATAROS CONSTRUCTION, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Robert J. Sciaroni of Bell, Boyd & Lloyd, Washington, DC, counsel for Appellant.

Jeremy Becker-Welts, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **NEILL** and **DeGRAFF**.

**DeGRAFF**, Board Judge.

Trataros Construction, Inc. and the General Services Administration (GSA) entered into a contract that required Trataros to perform construction work. In this appeal, Trataros claims that during the course of the contract, GSA changed its requirement for roof repairs and other miscellaneous work, and that these changes resulted in increased costs. Trataros elected to use the Board's accelerated procedure in order to resolve this case, *see* Rule 203 (48 CFR 6102.3 (1999)), and a hearing was held. Because the costs that Trataros claims are, it asserts, the result of a hurricane the contract does not provide that GSA will bear the monetary risk of an act of God, we deny the claim.

## Findings of Fact

On September 26, 1996, the parties entered into contract GS-02P-DTC-0033(N) for renovations and alterations to the United States Post Office and Courthouse Building in Old San Juan, Puerto Rico. The building had been constructed in two phases, referred to as the 1914 building and the 1940 building. Exhibit 1.

Section 07320 of the contract's statement of work contained the specifications related to tile roofing, and required Trataros to repair and replace Spanish design clay tiles on the 1914 building and mission design clay tiles on the 1940 building. For both buildings, the specifications provided that the extent of the work was shown on the contract drawings. Exhibit 1 at 0814. According to the contract's architectural drawings, Trataros was required to repair the existing Spanish tile in certain areas, allowing for either an eight percent or a five percent replacement rate and also allowing for thirty ridge tiles, and to repair the existing mission tile in certain areas, allowing for either a five percent or a thirty percent replacement rate. Exhibit 1 (drawings 3-4, 3-6, 3-9). On June 18, 1998, C&H Contracting, Trataros's roofing subcontractor, surveyed the roof to determine the number of roof tiles that the contract required it to replace. Transcript at 432, 442-43, 459-61, 464-66. C&H concluded that it would be required to replace 7,684 tiles. Exhibit 11.

In addition to repairing the roofs, Trataros was required to dewater the site. Exhibit 1 at 0416. Also, it was required to remove and replace windows on every floor in the building. Exhibit 1 at 0223, drawings 2-21 through 2-26. The contract required Trataros to store roof tile materials at the job site so as to prevent them from being damaged. Exhibit 1 at 0815. Trataros was responsible for all materials delivered and work performed until completion and acceptance of the entire work, except for any completed unit of work which GSA accepted. Exhibit 1 at 0150. In addition, Trataros was required to keep the work area free from accumulations of waste materials. Before completing the work, Trataros was required to remove any rubbish and to leave the work area in a clean, neat, and orderly condition. Exhibit 1 at 0160. Trataros was also required to preserve and protect all structures and equipment on the work site, and to take all precautions necessary to protect the building during construction. Exhibit 1 at 0159, 0224.

Trataros prepared a hurricane preparedness plan for the project and submitted it to GSA in late August 1998. The plan outlined the actions that Trataros would take in the event of a hurricane. Exhibit 10. On September 18, 1998, a hurricane alert was put into effect for Puerto Rico. Transcript at 510. In preparation for the hurricane, Trataros moved roof tiles under the eaves and secured them there. Transcript at 430, 458-59, 512. GSA's construction manager was satisfied that Trataros tried its best to secure everything. Transcript at 510.

Hurricane Georges struck Puerto Rico on September 21, 1998. Transcript at 429. The hurricane damaged a fence on the north and west side of the job site. Transcript at 511, 521. It also blew out one window. Transcript at 511-12. After the hurricane, C&H surveyed ten areas where it planned to replace tiles. C&H determined that it would have to replace 1347 more tiles than it expected to replace in those areas when it made its June 18 survey of the roof. Exhibit 16; Transcript at 440. Some tiles fell off the building and landed on the ground. Some tiles landed on the scaffolding that was in place around the building. Transcript at 442. Trataros picked up these tiles on September 22 and 23, 1998. Transcript at 457. A considerable number of tiles were broken in place, but they had not blown off the roof. Transcript at 442. Photographs of the upper roof of the 1914 building before and after the hurricane show that more roof tiles were missing after the hurricane than before, especially on the hip where the east and north sides of the roof meet. Exhibits 18, 19. There is nothing in the record to show that GSA had accepted any part of the work when Hurricane Georges struck the island.

On December 9, 1998, Trataros asked GSA for an equitable adjustment to the contract price in the amount of \$17,760, which consisted of the following amounts:

General labor costs	
Sept 17-19 Preparing for the hurricane by securing roof tiles, protecting windows, cleaning the site of debris to prevent flying objects, lowering and securing a crane, and securing loose items in the building.	\$ 5,920
Sept 22 Repairing west fence and dewatering	1,280
Sept 23 Damage assessment, dewatering, removing protection and loose objects, and safety checking the building	2,360
Replace damaged window	
Material	585
Labor	60
Replace damaged roof tiles	
Material (1347 tiles x \$2.90/tile)	3,906.30
Labor (1347 tiles x \$1.51/tile)	2,033.97
Trataros mark-up of 10 percent	1,614.53

Trataros said that the work it performed constituted a change to the requirements of the contract. Exhibit 11.

On May 4, 1999, Trataros submitted a claim to GSA for an equitable adjustment to the contract price in the amount of \$66,099. The claim included the same amounts for general labor costs and window replacement costs as were included in Trataros's December 9, 1998 request. The amount claimed for replacing damaged roof tiles was different from the amount requested on December 9, 1998, as follows:

Replace damaged roof tiles	
Material (1347 tiles x \$4.20/tile)	\$ 5,657
Trataros labor (removal) (1347 tiles x \$2/tile)	2,694
Installation and labor by C&H	41,534

The increase in the amount claimed for replacing damaged roof tiles caused a resulting increase in Trataros's ten percent mark-up to \$6,009. Exhibit 16. Trataros's May 4, 1999 claim did not explain why the cost of the tile and the cost of Trataros's labor were more than they were in Trataros's December 9, 1998 submission.

Trataros's May 4, 1999 claim included an invoice from C&H for \$41,534, which included the following amounts:

Upper Roof Spanish Tile	
1,059 tiles x \$24.60	\$26,051.40

Lower Roof Spanish Tile	
66 tiles x \$24.60	1,623.60
Upper & Lower Eave Extension Spanish Tile	
3 top fixtures x \$4.67	14.00
50 hip and ridge x \$8.76	438.00
Tower Roofs Tapered Mission Tile	
169 tiles x \$24.60	4,157.00
Material handling	4,215.00
Supervision	5,035.00

Exhibit 16. There is no evidence the 1347 tiles covered by C&H's invoice and included in Trataros's claim were placed beyond the areas that the contract required to be repaired, or that GSA directed or required Trataros to repair the roof outside those areas, or that the extent of replacement exceeded the replacement rates set out in the contract drawings.

None of the costs that Trataros claims were reimbursed by insurance. The contract required Trataros to obtain workers' compensation, bodily injury, and automobile insurance for the project. Exhibit 1 at 0154, 0198. In addition to purchasing the insurance required by the contract, Trataros purchased general liability insurance. The insurance policy contained a deductible of \$480,000, so the costs that Trataros incurred as a result of the hurricane were not reimbursed by insurance. Exhibit 15.

The contracting officer denied Trataros's claim on July 7, 1999. The decision was based upon provisions in the contract that required Trataros to protect the building from damage, and also based upon GSA's belief that Trataros damaged the roof tiles before the hurricane occurred. Exhibit 17. Regarding damage to the roof, the record establishes that on May 15, 1997, C&H said that the roof tiles appeared to be in good condition. Exhibit 6. Photographs show that damage occurred to the roof tiles between September 1997, and June 1998, and that the damage was significant in many areas. Exhibit 20 (compare, for example, pages 5, 7, 16, 17; pages 3, 8, 9, 14; pages 2, 10, 11, 12, 19; and pages 4-7, 21, 22). In June 1998, GSA's construction manager told Trataros that existing roof tiles had been damaged by Trataros's construction operations, and Trataros acknowledged that it was responsible for some of the damaged tiles. Exhibits 7-9. The state of the roof tiles remained nearly unchanged between late June 1998, and September 1, 1998. Exhibits 20, 21. During that time, C&H was working on the roof. Transcript at 443.

### Discussion

During the performance of a contract, unanticipated circumstances can arise which increase a contractor's costs. Sometimes, the contract allocates the risk of the unexpected event as, for example, when a contract provides that the agency will bear the risk if a contractor encounters a differing site condition that increases the contractor's costs. Other times, a principle of common law establishes which party will bear the risk of an unexpected occurrence. For example, case law provides that an agency's failure to disclose facts to a

contractor can, in some circumstances, result in the agency bearing the risk of unanticipated performance difficulties that increase the contractor's costs. Here, there is no specific contract provision that places the risk of Hurricane Georges upon GSA or the contractor. Nevertheless, we conclude that, in accordance with common law principles, Trataros must bear that risk.

In its post-hearing brief, Trataros asserts that GSA should equitably adjust the contract price to cover the cost of replacing 1347 roof tiles that were damaged by Hurricane Georges because 1) Trataros could not obtain insurance that covered the hurricane damage and 2) there was nothing that Trataros could have done to protect the roof tiles from hurricane damage. Appellant's Post-Hearing Brief at 2. Trataros does not point to any provision in the contract or to any case law that places the risk of a hurricane upon GSA in either of these two circumstances.

Trataros's December 9, 1998 request for an equitable adjustment to the contract price stated that the work required as a result of Hurricane Georges amounted to a change to the contract. The contract requires GSA to bear the risk of any changes that it made to the contract work and to equitably adjust the contract price to compensate for any added costs that Trataros incurred as a result of a change. Exhibit 1 at 0178-79. The evidence does not establish, however, that the work for which Trataros seeks an equitable adjustment resulted from a change that GSA made to the contract's requirements.

Trataros's claim includes amounts for securing roof tiles and other loose items, protecting windows, cleaning debris, securing a crane, repairing a fence, dewatering, and repairing a window. All of these are costs that the contract, as awarded, required Trataros to absorb. Trataros was required to keep the work area free from accumulations of waste materials, to remove rubbish, and to leave the work site clean and neat. It was required to dewater the site. It was required to replace windows, and was responsible for all materials delivered and work performed until completion and acceptance of the work. Trataros was also required to preserve and protect roofing materials and all structures and equipment on the work site, and to take all precautions necessary to protect the building during construction. The costs that Trataros claims are for work within the scope of the contract work as awarded, and not costs that resulted from a change made by GSA to the contract work.

The remainder of Trataros's claim includes costs associated with replacing roof tiles. The contract, however, required Trataros to replace roof tiles to the extent set out in the drawings, and the drawings told Trataros that it should anticipate replacing roof tiles in various areas at specified rates. According to the survey that C&H made of the roof after the hurricane, 1347 more tiles were required to be replaced than were required to be replaced in June 1998. In arriving at this number, C&H looked at the roof in ten areas where it planned to replace roof tiles. There is no evidence to show that GSA required Trataros to provide roof tiles outside the areas where the contract required tile replacement or that GSA required Trataros to provide tiles in excess of the replacement rates set out in the contract. Like the costs discussed in the preceding paragraph, the costs that Trataros claims for replacing roof tiles are for work within the scope of the contract work as awarded, and not the result of a change made by GSA to that work.

Although no specific contract provision says which party will bear the risk of a hurricane, there is a body of case law that places this risk upon Trataros. A hurricane is an act of God and “[i]t is a general principle of law that neither party to a contract is responsible to the other for damages through a loss occasioned as a result of an act of God, unless such an obligation is expressly assumed.” Arundel Corp. v. United States, 103 Ct.Cl. 688, cert. den., 326 U.S. 752 (1945). In the absence of a contract provision to the contrary, if a contract specifies that a contractor is required to perform certain work and is responsible for that work until it is accepted, and an act of God either makes the work more difficult or expensive or damages the work before it is completed and accepted, the contractor must bear the added costs that are caused solely by the act of God. Barnard-Curtiss Co. v. United States, 301 F.2d 909 (Ct. Cl. 1962); Carman v. United States, 166 F.Supp. 759 (Ct. Cl. 1958); DeArmas v. United States, 70 F.Supp. 605 (Ct. Cl. 1947); Arundel Corp.; DeRalco, Inc., ASBCA 41,063, 91-1 BCA ¶ 23,576 (1990); James L. Ferry & Son, Inc., ENGBCA 3996, 81-2 BCA ¶ 15,330; Maintenance Engineers, ASBCA 23,131, 81-2 BCA ¶ 15,168; Praxis-Assurance Venture, ASBCA 24,748, 81-1 BCA ¶ 15,028; George A. Brown, AGBCA 76-193, 78-1 BCA ¶ 13,147; Maurice Constr. Co., ENGBCA 2930, 72-2 BCA ¶ 9716; L.A. Easterling Co., ASBCA 16,367, 71-2 BCA ¶ 9175; Paul Hardeman, Inc. et al., ENGBCA 2621, 65-2 BCA ¶ 4968. All of the costs that Trataros claims are, it asserts, the result of Hurricane Georges. As such, the risk of incurring these costs must be borne by Trataros.

#### Decision

The claim is **DENIED**.

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MARTHA H. DeGRAFF  
Board Judge

I concur:

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EDWIN B. NEILL  
Board Judge