



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

**THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND
IS BEING PUBLICLY RELEASED IN ITS ENTIRETY ON OCTOBER 7, 2024**

GRANTED: October 3, 2024

CBCA 7859

FRAMACO INTERNATIONAL INC.,

Appellant,

v.

DEPARTMENT OF STATE,

Respondent.

Douglas L. Patin and Erik M. Coon of Bradley Arant Boult Cummings LLP, Washington, DC; and Sam Z. Gdanski and Abraham S. Gdanski of Gdanski Law PC, Teaneck, NJ, counsel for Appellant.

Thomas D. Dinackus, Matthew S. Tilghman, and Alexandra N. Wilson, Office of the Legal Adviser, Buildings and Acquisitions, Department of State, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **RUSSELL**, and **O'ROURKE**.

RUSSELL, Board Judge.

Appellant, Framaco International Inc. (Framaco), has filed 131 cases with the Board (certain of which are consolidated) based on its contract with respondent, Department of State (State or agency), Bureau of Overseas Building Operations (OBO), to construct an embassy compound in Port Moresby, Papua New Guinea (PNG).

This decision is being issued in accordance with the Board's order on further proceedings of October 19, 2023 (Order), which largely adopted the parties' proposal to resolve approximately 100 of appellant's non-consolidated appeals brought pursuant to Board Rule 53 (48 CFR 6101.53 (2023)), along with certain claims in four of its consolidated appeals that were not based on Government-caused delay. *See* Rule 53 (governing accelerated procedures, which are available at an appellant's election but limited to appeals involving amounts in dispute of \$100,000 or less); *see also* Rule 1(a) ("The Board may alter [its] procedures on its own initiative or on request of a party to promote the just, informal, expeditious, and inexpensive resolution of a case."). The Order states that "[t]he presiding judge with the two members of the panel . . . will decide the following appeals for which the parties will submit briefing: CBCA 7508, 7512, 7513, 7549, 7561, 7572, 7573, 7625, 7695, 7712, 7847, and 7859 ('Selected Appeals')." The Order additionally states, "Decisions rendered by the panel will be in summary form either in writing or orally, if a hearing is held; will be final and conclusive; will not be set aside, except for fraud; and will not be precedential."

As agreed to by the parties, quantum in the non-consolidated appeals and certain claims in four of Framaco's consolidated appeals to which the Order applies will be decided based on a formula derived from any damage amounts awarded to Framaco in the Selected Appeals. In a subsequent joint response filed with the Board on March 19, 2024, the parties confirmed that the Order applies to the appeals described above.

In this appeal (CBCA 7859), Framaco seeks costs for customs fees that it paid on imported Controlled Access Area (CAA) construction materials procured for the New Embassy Compound (NEC) construction project. For the reasons stated below, the appeal is granted as to entitlement.

Background

I. The Contract

In September 2015, State awarded Framaco a firm-fixed-price contract, initially valued at approximately \$97 million, to construct the NEC in Port Moresby. Appeal File, Exhibit 1 at DOS-PTMO-00982321.¹ The project was originally designed in 2010 as a "Standard Secure mini-Compound" (SSmC) with a scope that included a lock-and-leave new office building, a perimeter security wall and fence, a main compound entry pavilion (MCAP), a service entry/utility building, and a support annex. Exhibit 2 at

¹ All exhibits are found in the appeal file, unless otherwise noted.

DOS-PTMO-00982414. Construction of the SSmC facility began in 2012, but in 2013, after forty percent of the project was completed, a future marine detachment was planned for Port Moresby and the embassy staffing requirement was increased. *Id.* State therefore descope the work under the 2012 contract and closed out that contract. The project was redesigned under an expanded NEC, incorporating the completed portions of the SSmC project as well as surplus equipment and materials, where appropriate. *Id.* The redesigned project included the perimeter security wall and fence, the MCAP, a new service compound entry pavilion, a new four-story office building and annex, a marine service guard residence, a service entry/utility building, an enlarged support annex, and a new recreation facility. *Id.*

The contract included the following provisions on reimbursement to the contractor for imposed customs duties:

G.10 TAX RELIEF PROCEDURES . . .

(a) *General.* This clause supplements [Federal Acquisition Regulation (FAR)] 52.229-6, Taxes – Foreign Fixed-Priced Contracts. . . . The prices set forth in this contract are exclusive of all taxes and duties from which the U.S. Government is exempt by virtue of agreement between the U.S. Government and the host country.

. . . .

(b)(1) *Procedures.* . . . The diplomatic tax privilege belongs to the U.S. Government, and applies to taxes and duties payable to the host country that are directly attributable to contract costs identified . . . as subject to exemption, e.g., taxes or duties levied by the host country on labor and materials that are applied to or utilized in performance of this contract

(2) The procedures in paragraph (c) are based on the current tax relief agreement between the Government and the host country and are subject to change. The Government shall reimburse the Contractor for any after-imposed tax or for any tax or duty specifically excluded from the contract price that the Contractor is required to pay or bear, including any interest or penalty paid, provided that the Contractor received written authorization from the Contracting Officer before making such payment.

. . . .

(c) The following procedures are included in, or are derived from, the agreement negotiated with the host country and are hereby incorporated into this clause:

All purchases made in Papua New Guinea are subject to goods and services tax (GST) and must be paid by the Contractor. . . . Notwithstanding any other provisions of this contract, it is the responsibility of the contractor to comply with all **Papua New Guinea** laws, regulations, rules, and requirements governing GST and exemptions. The contractor agrees to indemnify the U.S. Government in the event that the U.S. Government is unable to obtain GST reimbursement to which it otherwise would be entitled due to a failure by the contractor to follow all **Papua New Guinea** laws, regulations, rules, and requirements.

In the event the Government of Papua New Guinea revises the existing tax-relief requirements, which are described in this section, the Contractor shall follow the new requirements as soon as the Contractor is notified by the Project Director of the new requirements by an amendment to the contract.

Exhibit 1 at DOS-PTMO-00982349-50.

The contract also included the following at section H.20:

In the interest of expediting the project, the Government may, in its sole discretion, undertake to provide additional services for or on behalf of the Contractor which are not required of the Government under this contract, such as assisting the Contractor in obtaining customs clearances other than those for which the Government is responsible, tax exemptions, licenses, permits and approvals from local governmental authorities. However, the Government shall be under no obligation to do so, and neither the provision nor the failure to provide such services nor the manner in which such services are provided shall relieve the Contractor of or excuse the Contractor from any of its responsibilities under the contract.

Exhibit 1 at DOS-PTMO-00982373.

The contract, at section H.40.1, titled "Costs to be borne by Contractor," provided that "[t]he Contractor is responsible for paying all charges, whatsoever, *except customs duties* as provided herein, incurred in obtaining materials that must be imported for the project and in

transporting the materials from their place or origin to the construction site.” Exhibit 1 at DOS-PTMO-00982386 (emphasis added).

The contract additionally stated at section H.40.2, “Duty Free Clearance:”

The Contractor shall follow the instructions of the Contracting Officer . . . as to the manner of labeling the shipping containers or otherwise processing shipments of imported materials in order to obtain, or continue to receive, duty free clearance through customs. The Contractor shall be responsible for the payment of customs duties, if any, which (1) are imposed on items which are not labeled and processed in accordance with the Contracting Officer’s instructions, (2) are imposed on the Contractor’s tools, construction equipment and machinery imported for use on the project, or (3) are otherwise ineligible for duty-free entry.

Exhibit 1 at DOS-PTMO-00982387.

Finally, pertinent here, the contract incorporated by reference FAR 52.229-6, Taxes-Foreign Fixed-Price Contracts (Feb 2013), Exhibit 1 at DOS-PTMO-00982320, which states, in part, that “[t]he Contractor shall take all reasonable action to obtain exemption from or refund of any taxes or duties . . . from which the United States Government . . . [is] exempt under the laws of the country concerned.” 48 CFR 52.229-6(i) (FAR 52.229-6(i)).

II. Facts Related to Customs Duties

In the document, Initial Planning Survey, Port Moresby, Papua New Guinea (June 19, 2009), prepared for State by an architectural firm, the PNG customs procedures were described as follows:

All cargo arriving into Papua New Guinea must be declared through PNG Customs. The owner of the cargo or its appointed Customs Agent or Customs Broker is required to prepare papers (known as customs entry) describing nature of[,] quantity, value, supplier[,] and country of origin of the goods imported. This process begins as soon as the cargo departs origin (called pre clearances process). Actual import clearance and cargo released is after the cargo is received at port of disembarkation.

Exhibit 56 at DOS-PTMO-01452631.

Although neither the “owner” of the imported CAA construction materials nor the Government’s customs agent or customs broker, Framaco was nevertheless initially processing the customs duties exemption documents for the construction materials imported to PNG for the NEC project. Such documents included a Customs Clearance Request (CCR) used to secure tax and duty waivers from the PNG Government. *See, e.g.*, Exhibit 80.

In early 2021, after regularly approving the customs duties exemption documents Framaco had been submitting, the PNG Government stopped doing so. Exhibit 76; *see also* Appellant’s Opening Brief at 7.² Without such approval, Framaco could not receive refunds on the duties it paid on behalf of the United States. Around the same time, the PNG Government also changed its procedures for customs duties exemptions, specifically the time frame for submission of applications to obtain a refund on duties paid. In an email dated April 28, 2021, Framaco’s project manager stated the following about his communication with the PNG Government:

Originally, in 2020, we were told by IRC,^[3] that we could apply for all of these refunds on the original spreadsheet [listing imported materials] by paying an application fee for each application submitted with the letter from OBO confirming that Framaco is working for the US Embassy (which we already obtained).

We prepared the applications and attempted to apply for the refunds. Recently, Customs authorities verbally told us that Framaco could only apply for refunds dated 2020 and 2021. This is a new restriction in 2021 and has never been communicated prior to the IRC office reopening this year after a long shutdown and moving office spaces, when they would not accept applications.

² Although Framaco, in its opening brief, states that the PNG Government stopped providing customs duties exemptions in April 2021, Appellant’s Opening Brief at 7, Framaco had expressed concern about this issue prior to this date. *See* Exhibit 12 (In a June 12, 2020, email to State’s contracting officer, among others, Framaco’s project engineer stated, “One of the issues [with the customs exemptions duty documentation] is [that] the Embassy is the consignee, Framaco paid the [duties], and the [PNG] Government won’t reimburse to anyone other than the Consignee.”).

³ Presumably, the acronym refers to PNG’s Internal Revenue Commission.

Although we have proper exemption documents from OBO for these shipments, local IRC authorities now say that Framaco can only apply for refund for duties paid within the preceding 30 days. We have been trying to get these refunds for over 2 years and have been pushed off by the local authorities, but now, we can only apply for 30 days, which means the majority of these duties paid are in jeopardy of never being refunded, despite being imported under the Embassy's exemption for the benefit of [the United States Government].

Exhibit 72 at FRAM-1798334.

In a May 23, 2021, email to State department officials, the Contracting Officer's Representative (COR) explained:

To give you a bit more background on this issue, since early April,^[4] the [PNG] Department of Foreign Affairs had not returned customs exemption forms to us. After repeated emails and in-person visits over more than a month, they finally returned the forms but marked "not approved" and indicated the customs exemption can only be granted to the [United States Government] not Framaco. The forms show the [United States Government] as the consignee, importer, bill to and ship to. We haven't changed anything about the process we've been using for the last 5 years. There has been a change in management at the Department which I think may be the cause of the issues.

Exhibit 76 at DOS-PTMO-03256159.⁵

⁴ The panel assumes that the COR is referencing early April 2021.

⁵ Framaco's claim covers the period April 2019 to August 2022. Appellant's Opening Brief at 3. The record suggests that Framaco's difficulty in receiving duties refunds from the PNG Government prior to the time frame when the PNG Government stopped approving customs duties exemption documents submitted by Framaco (i.e., prior to around April 2021) may have been due to a number of factors including its failure timely to submit duty rebate or refund applications to the PNG customs service, in addition to the fact that it was not the owner or the consignee of the imported construction materials. *See, e.g.*, Exhibit 10 (November 29, 2019, PNG customs service document reflecting PNG's denial of Framaco's request for a duty rebate or refund because Framaco failed to submit the required application within thirty days after the goods were released from PNG's customs control); Exhibit 12.

In a May 25, 2021, letter responding to Framaco's concern on this issue, the contracting officer (CO) stated that PNG's Department of Foreign Affairs "informed the U.S. Government that customs duties exemptions [would] not be approved for material Framaco ships to [PNG]" and that, given this guidance from PNG, "material brought into the country by Framaco is not eligible for duty-free entry." Exhibit 25 at DOS-PTMO-02772944-45. The CO added that "[i]n the best interest of the project, the Government is continuing discussions on the topic with the Department of Foreign Affairs *but in the meantime Framaco must proceed with shipping materials to site to avoid delays.*" *Id.* at DOS-PTMO-02772945 (emphasis added).

In July 2021, the United States Embassy attempted to assist with this issue sending a communication to PNG's Department of Foreign Affairs (identified as Note No. 288/2021). Exhibit 28. The communication acknowledged PNG's concern regarding exemptions on materials and equipment accorded the Embassy being impermissibly passed along to Framaco, the contractor engaged by the Embassy for the NEC construction project. *Id.* at DOS-PTMO-03278035-36. The PNG Government's understanding, as quoted in Note No. 288/2021, was "that exemptions should not be passed on or extended to third parties." *Id.* at DOS-PTMO-03278036. *Id.* In the Note, the Embassy responded to PNG's concern stating:

While it is correct that Framaco International is purchasing the material, it is doing so on behalf of the U.S. Government through its contractual obligation to execute the construction of the new U.S. Embassy. The exemptions are not granted to Framaco but rather to the U.S. Embassy and we are requesting the Department honor its agreements with the U.S. Government on this critical matter. This material is being used exclusively for the construction of the new U.S. Embassy. The U.S. Government is the consignee and the importer, and is directly paying Framaco for this material. This issue is severely delaying our ability to complete the new U.S. Embassy and we would like to promptly address any concerns you may have.

Id.

Apparently, the issue with the PNG Government over the processing of customs duties exemptions was not resolved.

III. The Parties' Dispute

On May 30, 2023, Framaco submitted a claim to the CO for reimbursement of paid custom duties in the amount of \$78,126. Exhibit 53. Framaco asserted that, from April 23,

2019, through August 11, 2022, it was forced to pay these duties for CAA construction materials imported to PNG for the NEC construction project. *Id.* at DOS-PTMO-03715454; Appellant’s Opening Brief at 7. Framaco stated that the claim “was for the additional costs incurred due to the Government’s failure to provide [CCRs] for the project materials which are eligible for duty-free entry under Contract Section H.40 and constructive changes directed by the Government directing Framaco to continue shipping the project materials and paying related customs duties.” Exhibit 53 at DOS-PTMO-03715454.

The CO denied the claim, concluding that Framaco did not comply with PNG law because it failed timely to submit its refund requests to the PNG Government, thus making the imported construction materials “ineligible for duty-free entry” and, accordingly, making the cost of the duties Framaco’s responsibility per section H.40.2 of the contract. Exhibit 54 at DOS-PTMO-03718636; *see also* Exhibit 10 at DOS-PTMO-03103266. This appeal followed.

A. Framaco’s Arguments

Framaco states that it air-shipped CAA construction materials to the project from April 2019 through August 2022 and paid the customs fees for the materials but has yet to receive reimbursement for the payments. Appellant’s Opening Brief at 3. Framaco notes that the customs “[e]xemptions stopped being provided in early April 2021 because the PNG government decided it would no longer issue them to Framaco, only [to] the [United States Government].” *Id.* at 7.

Framaco argues that, under section H.20 of the contract, the Government was obligated to provide assistance with obtaining customs clearance exemptions for which the Government was responsible. Appellant’s Opening Brief at 2. It further argues that, under section H.40.2 of the contract, it was only responsible for following the CO’s “instructions as to the manner of labeling the shipping containers or otherwise processing shipments of imported materials” through customs. *Id.* (quoting Exhibit 1 at DOS-PTMO-00982387 (section H.40.2)). Framaco asserts that OBO breached its warranty to ensure duty-free clearance of imported materials as required under sections H.40.1 and H.40.2 of the contract. *Id.* at 7-8. It additionally argues that, under the Foreign Taxes Clause, FAR 52.229-6, the United States Government was obligated to pay the customs fees due to PNG’s failure to honor its agreement with the United States Government under which PNG had been granting customs exemptions to Framaco. *Id.* Framaco asserts that section G.10(b)(2) of the contract “required the government to reimburse the contractor for ‘any . . . duty specifically excluded from the contract price that the Contractor is required to pay or bear.’” *Id.* at 9 (quoting Exhibit 1 at DOS-PTMO-00982350).

Framaco disputes State's argument that the duties were not reimbursable because of Framaco's failure to follow PNG law requiring submission of customs duties exemption requests within PNG's prescribed time periods. Appellant's Opening Brief at 8. Framaco asserts that PNG exemptions were either not issued (due to PNG no longer approving customs exemptions for NEC construction materials shipped by Framaco) or PNG issued exemptions in an untimely manner, either way precluding Framaco from recovering the paid customs duties through no fault of its own. *Id.*; *see also* Framaco's Reply Brief at 6. Framaco adds that "contrary to OBO's assertions, . . . [the United States Government was] the only authority able to obtain the exemptions." Appellant's Opening Brief at 8.

B. State's Arguments

State reiterates its position that Framaco incurred costs related to customs duties "because it failed to comply with the procedures for obtaining exemptions for the shipments at issue, and then failed to submit timely requests for reimbursement to the PNG Government." Respondent's Initial Brief at 1. In arguing that Framaco is not entitled to reimbursement for the customs fees, State relies on section H.40 of the contract setting forth the contractor's responsibility to pay all charges incurred on importing materials for the contract except customs duties as explained in the section. *Id.* at 2. State goes on to argue:

There was no documentation that was an attachment to the contract, or incorporated by reference, that addressed any agreement between the United States and the PNG Government concerning customs duties. The contract did not state that the PNG Government would refrain from collecting any customs duties with regard to this project or would refund any such duties it collected. Thus, the contract did not warrant that the PNG Government would not assess customs duties on the construction materials imported into Papua New Guinea for the project.

. . . .

The contract did not place any responsibilities upon [the Department of State] with regard to Framaco's efforts to obtain customs exemptions.

Id. at 2-3; *see also* Respondent's Reply Brief at 3 (noting that no agreement between the United States and PNG "is attached to, or incorporated by reference into, the contract" and that, "[a]s a result, it is completely unclear what the terms of any such agreements might have been, and what the rights and obligations of the PNG Government and [the United States Government] were pursuant to such agreements.").

Relying on a final shipping log listing CAA shipments, State also argues that Framaco never applied for customs exemptions for the shipments at issue in this appeal. Respondent's Initial Brief at 4. State notes that "[a]ll of the shipments in this appeal have a CCR number that includes an 'F'[,]" but "[n]one of the shipments in the final shipping log include an 'F' in their CCR number and only one of the shipments listed in the claim is listed in the final shipping log." *Id.* at 4-5. Framaco disputes State's argument, noting that the customs documents at issue (the CCRs) related to shipments intended for a classified area and, thus, were not listed in the shipping log. Appellant's Reply Brief at 7-8.

Discussion

The issue that we must decide in this appeal is whether Framaco is entitled to reimbursement for the customs duties that it paid on behalf of the United States. Based on the record, we find that (1) State, not Framaco, was responsible for processing the customs duties exemption documentation; (2) State's argument raising the possibility that there was no agreement between the United States and PNG on customs duties exemption procedures is sufficiently rebutted by the contract and documents in the record discussing PNG customs exemption procedures and the United States' responsibility relating to those procedures; (3) contrary to State's argument, the contract contains no language supporting or evidencing that Framaco should not receive reimbursement for duties that it paid on the United States' behalf; and (4) Framaco is, in fact, entitled to reimbursement for the customs duties that it paid on behalf of the United States.

I. State Was Responsible for the Customs Duties Exemption Process

We agree with Framaco that the United States, not Framaco, was the only entity authorized to obtain the customs exemptions, especially after the PNG Government stopped processing customs duties exemption documentation submitted by Framaco. Although Framaco was initially processing the documentation to obtain the exemptions for the construction materials imported to PNG for the NEC project, and apparently did so for a number of years, the contract and other relevant documents in the record show that the United States was responsible for this task.

We note that, before the construction of the initial NEC project in 2012, State had an architectural firm prepare an initial planning survey. That document, dated June 19, 2009, discussed PNG customs procedures, stating that "[a]ll cargo arriving into Papua New Guinea must be declared through PNG Customs. The *owner of the cargo or its appointed Customs Agent or Customs Broker* is required to prepare papers (known as customs entry) describing nature of[,], quantity, value, supplier[,], and country of origin of the goods imported." Exhibit 56 at DOS-PTMO-01452631 (emphasis added). This pre-contract document

suggests that, pursuant to PNG customs procedures, the United States (or its agent or broker), *not* its contractor, was responsible for preparing customs papers for construction materials being imported to PNG for the NEC project.

During contract performance, the United States Embassy also recognized the United States' role in the duties exemption process. As conveyed in an Embassy Note, the PNG Government's position was "that exemptions should not be passed on or extended to third parties." Exhibit 28 at DOS-PTMO-03278035-36. In this same note, the Embassy urged the PNG Government to resume processing the customs exemption documentation for the imported construction materials submitted by Framaco but recognized that the customs "exemptions [were] not granted to Framaco but rather to the U.S. Embassy" and that the "U.S. Government [was] the consignee and the importer." *Id.* at DOS-PTMO-03278036. In this appeal, State does not directly dispute the Embassy's characterization of the United States' role as the "consignee" and "importer" of the imported construction materials. State also takes no issue with the PNG Government's position that the customs exemptions were not granted to Framaco, but to the United States, and that exemptions should not be passed on to third parties. Thus, the record indicates that the United States (or its broker or agent), not Framaco, should have arranged for duties reimbursement.

II. The Record Sufficiently Shows State's Obligations Under PNG Customs Procedures

State argues that the contract does not include any agreement setting forth the obligations of the PNG Government and the United States as to customs exemptions either as an attachment to the contract or incorporated by reference into the contract. Respondent's Reply Brief at 3. However, there was sufficient documentation in the record describing the United States' role as it relates to PNG customs procedures. The United States was characterized as the "owner," "consignee," and "importer" of the imported construction materials. Exhibit 28 at DOS-PTMO-03278036. Further, the United States Embassy recognized that customs exemptions were not granted to Framaco, but to the United States. *Id.* State does not reference any PNG law, rule, or procedure rebutting or contradicting the description of PNG's rule, as presented in the Embassy's communication, that duties "exemptions should not be passed on or extended to third parties," and, thus, the United States, as the owner of the imported construction materials (or perhaps an assigned agent or broker), was the party responsible for processing the required customs duties exemption documentation. *See id.*

The contract states that "[t]he prices set forth in this contract are exclusive of all taxes and duties from which the U.S. Government is exempt *by virtue of agreement between the U.S. Government and the host county.*" Exhibit 1 at DOS-PTMO-00982349 (emphasis added). The contract also states that certain procedures for GST and exemptions "are

included in, or are derived from, the agreement negotiated with the host country.” *Id.* at DOS-PTMO-00982350. These contract provisions, along with the United States’ and the PNG Government’s recognition that the United States was exempt from customs duties, strongly evidence some type of an agreement between the two countries. Accordingly, notwithstanding State’s argument to the contrary, the record sufficiently shows the United States’ obligations under the PNG Government’s customs rules and procedures.

Further, under State’s argument, if certain contract terms are based on the existence of an agreement between the United States and PNG (as so stated in the contract), and, in fact, no such agreement exists, this would be a latent ambiguity in the contract and, thus, the rule of *contra proferentem* would apply. *See, e.g., ACM Construction & Marine Group, Inc. v. Department of Transportation*, CBCA 2245, et al., 14-1 BCA ¶ 35,537, at 174,151 (discussing the rule of *contra proferentem*, which courts use to construe ambiguities in the contract against the drafter). Under this rule, we would find that, based on the contract language, an agreement between the United States and PNG exists and that, pursuant to this agreement, the United States is responsible for customs duties exemption requests. *See* Exhibit 28 at DOS-PTMO-03278036.

III. The Contract Does Not Negate Framaco’s Entitlement to Reimbursement

State relies on section H.40 of the contract and FAR 52.229-6 to support its argument that Framaco should not receive reimbursement for duties Framaco paid outside the time frame established by PNG rules for submitting duty refund or rebate requests. Respondent’s Initial Brief at 1-2. State also argues that Framaco should not receive reimbursement for duties where Framaco failed to “deliver the CCR paperwork to [State] in time for [State] and the PNG Government to play their roles in the process so that the completed CCR packet could be returned to Framaco by the time air shipment [of construction materials] arrived in PNG.” *Id.* at 6. State adds that it should not be responsible for “the costs that resulted from Framaco’s failure to ‘take all reasonable action’ to obtain reimbursement of . . . duties.” *Id.* We find that neither section H.40 of the contract nor FAR 52.229-6 supports State’s argument.

Section H.40.1 generally states that the contractor is responsible for paying all charges except customs duties as provided in the contract. Exhibit 1 at DOS-PTMO-00982386. However, the section does not indicate that the contractor would not receive reimbursement for customs duties that it paid on behalf of the United States if the contractor failed to follow host country rules or procedures for receipt of duties reimbursement or otherwise slowed down that process while working with State and the host country.

Section H.40.2 of the contract states that “[t]he Contractor shall be responsible for the payment of customs duties, if any, which (1) are imposed on items which are not labeled and processed in accordance with the Contracting Officer’s instructions, (2) are imposed on the Contractor’s tools, construction equipment and machinery imported for use on the project, or (3) are otherwise ineligible for duty-free entry.” Exhibit 1 at DOS-PTMO-00982387. There is no indication that Framaco failed to label and process items in accordance with the CO’s instruction or that Framaco is seeking cost reimbursement for duties imposed on its own construction materials. *See, e.g.*, Exhibit 27 at DOS-PTMO-02772285 (In a June 3, 2021 letter with the subject, Customs Clearance Certificate Delays from OBO, Notification of Change, Framaco notes that “pertinent [p]roject materials were shipped and labelled in accordance with Section C of the Contract and the Contracting Officer’s instructions.”).

As for subsection (3) of section H.40.2, the record is confusing because it seems that both the United States and PNG construed their agreement as placing responsibility for the customs duties exemption process squarely with the United States. This position is confirmed in the Embassy’s July 2021 communication discussed above. *See* Exhibit 28. Yet, around this same time, there was also an indication that PNG would nevertheless allow Framaco to continue to process customs duties exemptions on behalf of the United States if Framaco complied with recently-imposed filing deadlines. Exhibit 72 at FRAM-1798333. State’s argument under subsection (3) of section H.40.2 seems to be that Framaco failed to comply with PNG deadlines for certain material shipments making the materials “ineligible for duty-free entry.” Respondent’s Initial Brief at 1; *see also* Exhibit 54 at DOS-PTMO-03718636.

However, if during contract performance, the responsibility for customs exemptions was, in fact, to be shifted to Framaco from the United States and new requirements for the timely filing of customs documentation were to be imposed by PNG, such changes should have been incorporated into a contract modification. Exhibit 1 at DOS-PTMO-00982350 (section G.10(c)). Without such a modification, we return to the premise (or contract intent), to which both the United States and PNG agree – that the United States was responsible for customs duties exemptions under PNG’s customs procedures. Thus, under these procedures, the United States, not Framaco, was responsible for timely submitting customs duties exemption documentation necessary for duties reimbursement from PNG as evidenced by PNG refusing to accept such documentation directly from Framaco. Exhibits 1 at DOS-PTMO-00982349, 76. Framaco, having paid duties on behalf of the United States, should not be barred from seeking reimbursement for this incurred cost.

FAR 52.229-6(f) states, “The contract price shall be decreased by the amount of any . . . duty, other than an excepted tax, that was included in the contract and that the Contractor is required to pay or bear, *or does not obtain a refund of*, through the Contractor’s fault,

negligence, or failure to follow instructions of the Contracting Officer or to comply with the provisions of paragraph (i) [of this clause].” (emphasis added). FAR 52.229-6(i) states in relevant part, “[t]he Contractor shall take all reasonable action to obtain exemption from or refund of any taxes or duties, including interest or penalty, from which the United States Government, the Contractor, any subcontractor, or the transactions or property covered by [a] contract are exempt under the laws of the country concerned.” Under FAR 52.229-6(f), State’s remedy for Framaco’s alleged failures timely to process, or timely to assist with the processing of, customs duties exemption documentation would have been to reduce the contract price, not refuse reimbursement of the duties that Framaco paid, a cost exclusive of the contract price.⁶

Finally, we note that both Framaco and State assert arguments based on section H.20 of the contract. State argues that, under the section, it was not required to assist Framaco in dealing with the PNG Government on the customs duties matter but did so at its discretion. Respondent’s Initial Brief at 3. Framaco, on the other hand, argues that State was required to provide such assistance. Appellant’s Opening Brief at 2. We find the arguments based on section H.20 inapposite. The section only applies to customs procedures for which the Government has no responsibility under the contract. See Exhibit 1 at DOS-PTMO-00982373 (“In the interest of expediting the project, the Government may, in its sole discretion, undertake to provide additional services for or on behalf of the Contractor which are not required of the Government under this contract, such as assisting the Contractor in obtaining customs clearances *other than those for which the Government is responsible.*” (emphasis added)). Here, the record evidences that the Government was responsible for processing the customs duties exemption documentation, so, in this matter, section H.20 does not apply.

⁶ Notably, section G.10(c) of the contract requires that Framaco indemnify the United States in the event that the United States is unable to obtain GST reimbursement to which it would otherwise be entitled due to Framaco’s failure to follow PNG laws, regulations, rules, and requirements. Exhibit 1 at DOS-PTMO-00982350 (“The contractor agrees to indemnify the U.S. Government in the event that the U.S. Government is unable to obtain GST reimbursement to which it otherwise would be entitled due to a failure by the contractor to follow all **Papua New Guinea** laws, regulations, rules, and requirements.”) (emphasis in original). Under the plain language of this provision, the indemnification requirement does not seem to apply or extend to situations in which Framaco was at fault for the United States’ inability to obtain a duties exemption. *Id.*

IV. Framaco Is Entitled to Reimbursement of Its Costs

The contract states, “The Government shall reimburse the Contractor for any . . . duty specifically excluded from the contract price that the Contractor is required to pay or bear.” Exhibit 1 at DOS-PTMO-00982349. We find that the United States was responsible for coordinating the customs duties exemption with the PNG Government. Framaco incurred costs paying the duties on imported materials because State, as the responsible party, did not obtain the necessary customs duties exemptions, notably after the PNG Government stopped processing the documentation submitted by Framaco for this purpose. Indeed, in May 2021, the CO informed Framaco that it must proceed with shipping materials to the NEC project site to avoid delays. Exhibit 25 at DOS-PTMO-0277945. Framaco could not have done so without paying the customs duties on the imported CAA materials. State cannot now avoid reimbursing Framaco for costs incurred paying these duties. Accordingly, Framaco is entitled to recover its proven costs related to customs duties that it paid on behalf of the United States and for which it has yet to receive reimbursement.

Decision

The appeal is **GRANTED**.

Beverly M. Russell

BEVERLY M. RUSSELL
Board Judge

We concur:

Erica S. Beardsley

ERICA S. BEARDSLEY
Board Judge

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE
Board Judge