

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
All-State Construction, Inc.) ASBCA No. 50586
)
Under Contract No. N62472-93-C-0396)

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OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON APPELLANT'S MOTION FOR RECONSIDERATION

All-State moves for reconsideration of our decision of 12 July 2006 denying its appeal of a default termination. *All-State Construction, Inc.*, ASBCA No. 50586, 06-2 BCA ¶ 33,344. All-State first contends that the Board erred in denying the appeal because the government “issued its notice of termination, without taking any affirmative steps to put All-State on notice that the time for compromise had concluded and that All-State must either perform or face termination” (app. mot. at 4).

On 4 October 1996, the government issued All-State a letter to show cause why the contract should not be terminated for default (*see* finding 12).¹ At this time, the specified contract completion date was 12 September 1995, the established forbearance date was 14 November 1996, All-State was more than one year late in performance of the contract, and it had completed no more than 35 percent of the contract work (*see* findings 1, 6, 30). On 14 October 1996, All-State responded to the show cause letter citing two claims previously submitted for an aggregate amount of \$1,167,268 and an aggregate time extension of 689 days (*see* findings 5, 15, 17). On 16 October 1996, the government replied that All-State had failed to establish excusable delay, that it was in default for failure to timely complete the contract, and that it should contact the government “to arrange a meeting to discuss this matter” (*see* finding 18).

¹ References to findings are to those in our 12 July 2006 decision.

While this possible termination for default for failure to complete on time was pending, All-State stopped work completely on 22 October 1996 (*see* finding 20). The reason for stopping work as stated by All-State's president to its surety was that "the Navy was wrongfully withholding their funds" and that All-State was "not willing or a combination of not willing or not able to continue financially" (*see* finding 23).

Paragraph (i) of the FAR 52.233-1, DISPUTES (DEC 1991) clause of the contract expressly required All-State to proceed diligently with performance of the contract pending final resolution of its claims (R4, tab 1 at 40). In stopping work, All-State was clearly aware of the possible consequence of termination for breach of the Disputes clause. In a letter to the surety's agent dated 7 August 1996, All-State discussed this possibility in connection with a proposal to stop work to pressure the government to settle its claims (supp. R4, tab 5 at 4).

On 28 October 1996 the parties met to discuss All-State's claims (*see* finding 22). At this meeting, the government advised All-State that "you've got to go back to work" (tr. Petrone, 1/14). In a meeting on 19 November 1996 and by telephone on 26 November 1996, the government and All-State discussed settlement (*see* findings 25, 28). The statements of the parties in these discussions are privileged under Federal Rule of Evidence 408. There is, however, not a scintilla of evidence showing that in undertaking these discussions, the parties agreed that All-State's Disputes clause obligation to proceed with performance would be suspended while the discussions were in progress and until further notice thereafter.

When the 26 November 1996 settlement discussion was concluded without agreement, All-State was, and for the past 35 days had been, in a continuous breach of its Disputes clause obligation to proceed diligently with performance pending final resolution of its claims. This was a material breach for which summary termination was proper. *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1275-77, *aff'd on reh'g*, 186 F.3d 1379, 1380 (Fed. Cir. 1999); *Polyurethane Products Corp.*, ASBCA No. 42251, 96-1 BCA ¶ 28,154 at 140,545. Moreover, in the circumstances here present, where the requirement to continue working was clear and All-State was fully aware of the consequences of stopping work, the government had no obligation before terminating to order All-State to do what the contract already required it to do.

Delfour, Inc., VABCA Nos. 2049 *et al.*, 89-1 BCA ¶ 21,394; *James W. Sprayberry Construction*, IBCA No. 2130, 87-1 BCA ¶ 19,645; and, *Milwaukee Transformer Co.*, ASBCA No. 10814, 66-1 BCA ¶ 5570 cited by All-State are not on point. In *Delfour*, on the date of termination the exact work remaining to be corrected "was still not clearly defined." 89-1 BCA at 107,856. In *Milwaukee* and *Sprayberry*, there were also specification problems requiring resolution before the contractor could reasonably proceed with the work. *See* 66-1 BCA at 26,051 and 87-1 BCA at 99,455-56. In All-State's case, the reason for the work stoppage stated by All-State's president at the

time of the stoppage was not the AFFF system change order, the defective beam B-1 specification, or any other technical problem, but the government's refusal to settle All-State's claims (*see* findings 23, 26). Moreover, unlike the situation in *Delfour* where the government had expressed no urgency and had given no warning of pending termination, the government expressly advised All-State on 28 October 1996 that it must return to work, and All-State's 7 August 1996 letter to its surety's agent shows that it was aware of the possible consequences of not proceeding as required by the Disputes clause. *Supra*.

All-State next contends that the government's "refusing to clarify the problem with the B-1 Beam" and issuing Modification No. P00005 (the AFFF system change order) without a time extension were material breaches of the contract entitling it to stop work (app. mot. at 6, 12). We disagree. The beam B-1 problem was a defective specification problem that could be remedied either by shoring the beam as installed or reordering and reinstalling a beam with the proper length. The government did not "refuse to clarify the problem." It only deferred a decision on the particular corrective action to be taken until after a decision on terminating the contract was made. (*See* findings 13-14 and evidentiary citations therein) The beam B-1 defective specification and a reasonable time to decide on the corrective action were within the scope of the FAR 52.243-4, CHANGES (AUG 1987) clause of the contract and were not a material breach (R4, tab 1 at 41).²

All-State cites *G. W. Galloway Co.*, ASBCA Nos. 17436 *et al.*, 77-2 BCA ¶ 12,640 for the proposition that a default termination is improper where the government withholds information even though the contractor could have continued performance (app. mot. at 9). In *Galloway*, the contractor's failure to proceed was held excusable because, among other things, the contracting officer in issuing changes to a defective bonding specification "refused to commit himself or to give any assurance" that those changes "would be the sole and final bonding criteria to be used." 77-2 BCA at 61,274-75, 61,298. There are no comparable facts in All-State's case. The delay ordering definitive corrective action for the beam B-1 specification was expressly stated on 1 November 1996 as being for a limited duration pending decision on the default termination (*see* finding 14). This delay did not prevent All-State from reasonably performing other work on the project pending a decision on beam B-1 (*see* finding 30).

There was also no material breach by the government in issuing Modification No. P00005 without a time extension. The issuing officer believed that: "the AFFF system is not a critical path item and a considerable amount of work can be performed and needs to occur before the AFFF system is installed" (*see* finding 21). This action

² Assuming that the government directed a complete replacement of the installed beam, All-State's estimated time for reordering and reinstalling the beam was only five weeks (app. supp. R4, tab 98).

was within the scope of the FAR 52.243-4, CHANGES (AUG 1987) clause of the contract and to the extent All-State believed that it was entitled to a time extension it had a contractually prescribed remedy in the FAR 52.233-1, DISPUTES (DEC 1991) clause of the contract (R4, tab 1 at 40-41).

All-State argues that “a termination for default is a nullity where the government allows the completion date to pass, directs the contractor to perform additional work, but fails to establish a new time of performance” (app. mot at 12). The cases All-State cites for this argument all involved terminations for failure to make timely delivery or failure to progress so as to endanger performance of the contract. *See DBA Systems, Inc.*, ASBCA No. 34664, 89-3 BCA ¶ 22,202 at 111,685; *Motorola Computer Systems, Inc.*, ASBCA No. 26794, 87-3 BCA ¶ 20,032 at 101,415-16; *Electronics of Austin*, ASBCA No. 24912, 86-3 BCA ¶ 19,307 at 97,631. They did not involve breach of the Disputes clause obligation to diligently perform the contract pending resolution of claims. Whether or not All-State was entitled to an extension of the contract completion date, the forbearance date or both as a result of the AFFF system change order and correction of the beam B-1 specification were matters disputed by the parties and subject to resolution under the Disputes clause of the contract. If the Disputes clause obligation to continue performance “pending resolution” of the dispute had any meaning whatsoever, the government’s common law right to terminate for its breach could not be dependent on the establishment of a new completion date which was the very matter in dispute. *See ITT Kellogg, A Division of International Telephone & Telegraph Corp.*, ASBCA No. 9580, 65-1 BCA ¶ 4675 at 22,335.

All-State argues that it was not required to proceed with any other work until the beam B-1 problem was resolved and a time extension established for the AFFF system change order because the other work was “non-critical and would not have meaningfully advanced the project” (app. mot. at 7). We do not agree. The diligent performance required by the Disputes clause is not governed by the disputed critical path and time extension claimed by All-State, but by the existing contract completion date and the work that could be reasonably performed to advance the project pending resolution of the dispute. The AFFF system change order and the beam B-1 problem did not preclude work proceeding on the items listed in finding 30 of our decision.³ Those items, as measured by All-State’s 8 October 1996 Contract Performance Statement, amounted to more than 50 percent of the remaining incomplete work on the contract (app. supp. R4, tab 83). Whether ultimately found to be critical path items or not, completion of those items at a time when the contract was more than a year late and only 35 percent complete

³ Those items were the tap and sleeve activities, water main, storm mains and drainage, fire hydrant, railroad jacking, paving, concrete slab, masonry, blast panels, roofing, boiler, air handling equipment, duct work, plumbing, overhead door, grills, ceramic tile, lightning protection and wiring for electrical and telephone service.

would have measurably advanced the project. All-State was obligated by the Disputes clause to proceed accordingly.

On reconsideration we find no error in our decision of 12 July 2006 and reaffirm denial of the appeal.

Dated: 26 February 2007

MONROE E. FREEMAN, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 50586, Appeal of All-State Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals