

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
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All-State Construction, Inc.) ASBCA Nos. 50513, 50516, 54681
)
Under Contract No. N62472-93-C-0396)

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OPINION BY ADMINISTRATIVE JUDGE FREEMAN

All-State Construction, Inc. (All-State) appeals the denial of its claims under a construction contract for additional compensation, price and time adjustments. In this decision, we decide only entitlement and the number of days of excusable or compensable delay.¹

FINDINGS OF FACT

1. On 30 September 1994, the government contracted with All-State for construction of a hazardous waste storage facility at the Naval Weapons Station Earle, Colts Neck, New Jersey. The contract price at award was \$982,000. The specified contract completion date was 13 May 1995. (R4-50513, tab 1 at 2)

2. The contract included, among other provisions, the FAR 52.233-1 DISPUTES (DEC 1991) clause; the FAR 52.236-2 DIFFERING SITE CONDITIONS (APR 1984) clause; the FAR 52.243-4 CHANGES (AUG 1987) clause; and the FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) clause (R4-50513, tab 1 at 40-41).

¹ All-State's appeal of the government's claim for liquidated delay damages (ASBCA No. 50831) was heard and briefed with these appeals. However, in light of the Federal Circuit's subsequent remand of our decision on All-State's default termination appeal (ASBCA No. 50586), *Johnson v. All-State Construction, Inc.*, 329 F.3d 848 (Fed. Cir. 2003), we are deferring decision on ASBCA No. 50831 until our final decision on ASBCA No. 50586.

3. All-State's initial approved construction progress schedule showed work on-site starting during the week of 11 November 1994 (R4-50513, tabs 3, 4). Work on-site, however, did not start until 14 February 1995 (gov't supp. R4, tab 90 at 1). This delay was caused by All-State's delay in submitting an acceptable quality control (QC) manual and by the government's delay in removing material from the site (R4-50513, tabs 4, 5, 7).

4. The contract at award required excavation of the building site to a depth of nine feet, backfill to grade with select material, and compaction (R4-50513, tab 1, dwg. C-3). It further required that surplus excavated material be stockpiled within 100 feet of the excavation, tested for environmental contaminants, and disposed off-site in accordance with the test results and federal and state regulations (R4-50513, tab 1, specification § 02220, ¶ 3.8).

5. The select material specification required that the material meet specified gradation (sieve) sizes and be free of organic material, loam, trash and other objectionable material (R4-50513, tab 1, specification § 02220, ¶ 2.1.3). The contract boring logs showed that the material to be excavated contained organic material and loam (R4-50513, tab 1, dwgs. C-1, C-3, C-6).² The common fill specification required the material to be compactable to the specified density for the location. The suitability of both the select material and the common fill chosen by All-State was subject to approval by the contracting officer. (R4-50513, tab 1, specification § 02220, ¶¶ 2.1.1, 2.1.3 at 234)

6. On 24 February 1995, All-State tested the soil to be excavated for suitability as select material. The test report, dated 1 March 1995, confirmed the boring logs and found that the material did not meet the select material specifications. The report noted, however, that any excavated material free of organic material, loam and other objectionable material would meet the gradation (sieve) requirements if a minimum of 8% fine gravel were added. (Gov't supp. R4, tab 12 at 2)

7. Also on 1 March 1995, All-State tested the building site for Polychlorinated Biphenyls (PCBs) and total petroleum hydrocarbons. No hazardous levels of those

² All-State alleges that specification §02220, ¶ 3.3 states that "the Contractor is to reuse excavated materials" (app. supp. R4, tab 85 at 2253). This paraphrase omits an important qualification. The full sentence on re-use states: "Reuse excavated materials that meet the specified requirements for the material type required at the intended location" (R4-50513, tab 1 at 239). The cited specification does not represent that the excavated material would meet the select material requirement for backfill.

substances were found. (Gov't supp. R4, tab 94) An earlier test by the government in July 1993 also had found no PCB contamination (gov't supp. R4, tab 39).

8. On 8 March 1995, All-State dug a test pit in the area to be excavated and found various types of debris including steel, tin, large cinder fragments, creosote lumber and a refrigerator. On the same day, All-State submitted a written notice to the contracting officer claiming that the debris was a differing site condition. Also on the same day, the debris was observed by representatives of the contracting officer. (Gov't supp. R4, tabs 7, 90 at 17-18)

9. All-State performed no excavation from 11 March through 1 May 1995. Its daily reports for this period state that it was waiting direction from the government. (Gov't supp. R4, tab 90 at 23-47) The debris in the soil, however, did not physically prevent the excavation from proceeding as specified by the contract. Moreover, after the debris was observed by the contracting officer's representatives, neither the Differing Site Conditions clause, nor any directive by the contracting officer, required All-State to suspend the excavation and await further direction by the contracting officer.

10. On 13 March 1995, the contracting officer directed All-State to stockpile the soil, with disposition to be determined at a later date (app. supp. R4, tab 85 at 2252). All-State ignored this order, did not resume excavation, and continued to record in its daily reports that it was waiting for direction (gov't supp. R4, tab 90 at 25-43). On 14 March 1995, the contracting officer requested a cost and time proposal for locating the surplus soil stockpile approximately 450 feet from the excavation and deleting the off-site disposal requirement (Proposed Change (PC) #1). The request for proposal did not suspend work pending a decision on the proposal, and it expressly stated that it was not a notice to proceed with the proposed change. (App. supp. R4, tab 6)

11. On 22 March 1995, All-State offered a net price increase of \$75,600 for PC #1. This offer was based on its contention that, but for the debris, the existing soil could have been used for the select backfill (app. supp. R4, tab 7). By letter dated 23 March 1995, the contracting officer told All-State that the existing soil, as indicated in the boring logs, did not meet the criteria for select material and directed All-State to remove the existing soil and replace it with the specified select material (app. supp. R4, tab 8). There is no evidence that All-State at any time requested approval to use the excavated material, minus the debris, as common fill.

12. All-State did not proceed as directed in the contracting officer's letter of 23 March 1995. Instead, by letter dated 31 March 1995, it argued that the 23 March 1995 letter was a change to the contract (gov't supp. R4, tab 13), and by letter dated 18 April 1995, it proposed removing the excavated material under the \$90 per ton contract line item (CLIN) 1.b price for disposal of "contaminated" material (gov't supp. R4, tab 15;

R4-50513, tab 1 at 3).³ By letters dated 5 and 17 April 1995, the contracting officer repeated his 23 March 1995 directive (gov't supp. R4, tab 14; app. supp. R4, tab 12). On 26 April 1995, he issued a cure notice (app. supp. R4, tab 13). On 27 April 1995, he told All-State that the excavated material could not be disposed of as contaminated material until it was tested and characterized as required by specification section 02220, ¶ 3.8 (gov't supp. R4, tab 16).

13. All-State resumed the excavation on 2 May 1995, and with the exception of the area around three monitoring wells, substantially completed the excavation on 4 May 1995 (gov't supp. R4, tab 90 at 47, 51-52). All-State stockpiled the excavated material in the area indicated by PC #1 pursuant to an oral direction by the government on 28 April 1995 (gov't supp. R4, tab 90 at 43). On 2 May 1995, All-State took two soil samples from the excavation for hazardous contamination testing. A laboratory report dated 9 May 1995 on those samples showed "not detected" or readings below the "detection limit" for the 12 materials tested. (R4-50513, tab 10 at 4) All-State's 10 May 1995 daily report stated "Prelim [test] results show hot for PCBs" (supp. R4, tab 90 at 59). That statement, however, is not supported by the 9 May 1995 laboratory report. On 15 May 1995, All-State took soil samples from the stockpile of excavated material for contamination testing pursuant to specification § 02220, ¶ 3.8 (app. supp. R4, tabs 29-33).

14. All-State began backfilling the excavation on 16 May 1995. On the same day its quality control (QC) manager halted the backfill "until all test results are in." (Gov't supp. R4, tab 90 at 67-68) On 17 May 1995, All-State submitted the soil samples taken on 2 May 1995 for further testing. By letter dated 22 May 1995, received by the government on 25 May 1995, All-State provided the government with a laboratory report indicating that one of the two samples had a hazardous level of PCB contamination. (R4-50513, tab 10 at 1-3)

15. Specification § 01011, ¶ 3.3.4 specified the following procedures for "Unforeseen Hazardous Material":

If material, not otherwise identified as hazardous, is encountered which may be dangerous to human health if disturbed during construction operations, the Contractor shall stop that portion of the work and avoid coming in contact with the material. The Contractor shall immediately notify the Contracting Officer concerning the possible existence of

³ In addition to CLIN 1.b, specification § 02220, ¶ 3.10.6.2 provided for a per ton payment for "Excavation, handling, stockpiling, transportation, off-site treatment and disposal of Hazardous Waste at an approved RCRA or TSCA chemical waste landfill" (R4-50513, tab 1 at 243-44).

hazardous material. The intent is to identify materials such as friable and non-friable asbestos, polychlorinated biphenyls (PCBs) and paint containing lead. Within 14 calendar days, the Government will perform testing to determine if the material is hazardous. If the material is not hazardous or poses no danger, the Contracting Officer will direct the Contractor to proceed without change. If the material is hazardous and must be disturbed or handled to accomplish the work, the Contracting Officer will direct a change pursuant to the Contract Clauses titled "Changes" and "Differing Site Conditions."

(R4-50513, tab 1 at 72)

16. On 2 June 1995, the government took soil samples from the stockpile for comprehensive testing for hazardous materials (app. supp. R4, tab 36 at 1). On 12 June 1995, All-State gave the government a test report on the All-State stockpile samples taken on 15 May 1995 (the "Wastex tests") (app. supp. R4, tab 42 at 2). That report showed no PCB contamination, but did indicate four "volatile constituents" that exceeded State of New Jersey "clean-up level standards" (app. supp. R4, tab 38). The test report on the Government's stockpile samples taken on 2 June 1995 was dated 16 June 1995. That report showed no PCB, pesticide or other chemical contamination of the stockpiled material (app. supp. R4, tab 36). Based on the 16 June 1995 and the July 1993 test reports, the contracting officer determined that the work could proceed without change. He informed All-State of this determination by letter dated 20 June 1995. (App. supp. R4, tab 43; gov't supp. R4, tab 39; tr. 1555-56)

17. All-State admits that by 20 June 1995, it had been directed by the government to resume work (app. br. at 25). However, it refused to return to work unless the government agreed to indemnify it for any losses "involving contamination, including the handling of contamination" (app. supp. R4, tab 85 at 2407-09). On 26 July 1995, while All-State was still absent from the site, the government closed the monitoring wells in the excavated area (app. supp. R4, tab 50).

18. On 31 August 1995, All-State told the government that it would return to work if the government industrial hygienist assured that it was safe to work "without taking exceptional and costly precautions (i.e. air monitoring, respiratory protection, etc.)" (gov't supp. R4, tab 29). On 12 September 1995, the government sent All-State a memorandum by the station safety director stating that, based on a 1993 environmental site evaluation report and the Wastex test report submitted by All-State, air monitoring was not required and only the personal protective equipment (PPE) normally used during excavation or construction operations was necessary. (App. supp. R4, tab 85 at 2417-18) On 5 October 1995, when informed that All-State was retaining an industrial hygienist to

monitor the resumption of work, the contracting officer advised All-State that those services were not needed and that the government would not pay for them (app. supp. R4, tab 60).

19. The contracting officer, on 5 October 1995, also directed All-State to give three working days notice and have a government representative present, when taking soil samples for testing (app. supp. R4, tab 60). The only requirement in the contract for All-State to perform soil tests was the provision on disposal of surplus soil. That provision included no requirement for notice to the government or attendance of a government representative at the taking of samples for those tests. (R4-50513, tab 1 specification § 02220, ¶ 3.8 at 241)⁴

20. On 17 October 1995, All-State returned to work and “cleaned-up” the excavated area in preparation for resuming the backfill on the following day (gov’t supp. R4, tab 90 at 97, 99). On 17 October 1995, All-State had the equipment operators wear respirators and protective clothing and had air monitoring performed with an industrial hygienist on site (app. supp. R4, tab 73 at 1442-43). The air monitoring on 17 October 1995 showed that there were no airborne contaminants caused by either the stockpiled soil or the excavation operations (app. supp. R4, tab 73 at 1443). All-State did not perform air monitoring or use PPE after that date (app. br. at 28, ¶ 55).⁵ The backfill of the new building site was completed on 26 October 1995 (gov’t supp. R4, tab 90 at 113).

21. On 30 October 1995, the contracting officer issued unilateral Modification P00001 directing that the existing hazardous waste facility (Building QH-8) not be demolished until the new facility was completed and accepted (R4-50513, tab 2 at 2). The contract at award did not specify when the demolition of Building QH-8 was to take place (R4-50513, tab 1). All-State originally planned to demolish Building QH-8 over a 19-day period from 28 November through 16 December 1994 concurrent with the new facility site utility and foundation work (R4-50513, tab 4). Modification P00001 stated that neither the contract price nor time for completion were affected by the change and referred All-State to the Disputes clause if it disagreed (R4-50513, tab 2 at 2). All-State asserted its right to price and time adjustments for this change by letter to the contracting officer dated 2 November 1995 (R4-50513, tab 11 at 1-2).

⁴ There is evidence of only one notice of soil testing being given pursuant to this direction. That notice was given on 5 December 1995 for a soil test sample to be taken at the site of Building QH-8, the existing hazardous waste facility that was to be demolished when the new facility was completed. (App. supp. R4, tab 85 at 2500)

⁵ One year later, on 4 November 1996, the New Jersey Department of Environmental Protection sent All-State a determination that the excavated material met the state criteria for non-hazardous industrial solid waste (app. supp. R4, tab 140).

22. On 31 October 1995, the contracting officer issued unilateral Modification P00002, extending the time for completion of the contract 120 days to 10 September 1995 and increasing the contract price by \$12,322 for 61 compensable days of delay. The time extension and price increase were for the delay in the availability of the site for the start of work. (R4-50513, tab 2 at 3-4) *See* finding 3. On 27 December 1995, All-State submitted a claim in the amount of \$24,933 for the 61 days of compensable delay (R4-50513, tab 12). By final decision dated 25 October 1996, the contracting officer denied the claim entirely, and reduced the amount allowed in Modification P00002 for the 61 days to \$9,376 (R4-50513, tab 27). This decision was appealed. The appeal is docketed as ASBCA No. 50513.

23. Excavation for the new building wall footings began on 8 November 1995. The footings were not completed until the beginning of March 1996. (Gov't supp. R4, tab 90 at 125-219)

24. On 1 December 1995, All-State proposed replacing its current contractor quality control (CQC) manager with Mr. Thomas Reese. The current CQC manager was not a United States citizen. Citizenship or a specific authorization to enter the work site was required by the contract. (App. supp. R4, tab 85 at 2315-20; R4-50513, tab 1 specification § 01011, ¶ 3.2.3 at 71) Mr. Reese was disapproved by the government on 4 December 1995 because he did not meet the specification requirement for five years managerial or inspection experience in construction of buildings similar in size and type and involving the same major trades as the hazardous waste facility (app. supp. R4, tab 85 at 2321; R4-50513, tab 1, specification § 01400, ¶ 1.5.1.2, at 151-52).⁶ A second candidate proposed by All-State on 8 December 1995 and rejected on 12 December 1995 was not a registered professional engineer or registered architect, which was also required by the specifications (app. supp. R4, tab 85 at 2325-28, 2330; R4-50513, tab 1 at section § 01400, ¶ 1.5.1.2, at 151-52). On 12 December 1995, All-State demanded a contracting officer's final decision on the approval of Mr. Reese and stated that it would use Mr. Reese as its CQC manager until the decision was issued (app. supp. R4, tab 85 at 2329). After further review of Mr. Reese's qualifications, the contracting officer on 16 January 1996 approved him as "minimally qualified," but expressed concern about "his lack of adequate experience with regard to mechanical systems" (app. supp. R4, tab 85 at 2331).

⁶ The government's rejection letter of 4 December 1995 cited the experience requirement in the specifications and further stated that: "This includes building construction and most importantly environmental regulations" (app. supp. R4, tab 85 at 2321). While experience with environmental regulations was not expressly required in the specifications, building construction experience was, and Mr. Reese's experience was entirely in bridge and road construction (app. supp. R4, tab 85 at 2316-18). On that ground alone, he did not meet the specification requirement.

25. From 19 December 1995 through 7 March 1996, there were 54 calendar days, including intervening weekend days and holidays, when work was prevented by unusually severe weather.⁷ We have counted as unusually severe weather days those normal work days on which no work was performed due to freezing temperatures below the normal average for the day, plus those no-work days where the cumulative rain or snowfall for the month exceeded the normal cumulative rain or snowfall, plus the weekend days/holidays within the periods of no work due to those weather conditions. (Gov't supp. R4, tab 90 at 171-223; app. supp. R4, tab 153 at 2893-96)⁸

26. On 19 February 1996, All-State submitted a certified claim for a price adjustment in the amount of \$343,537.99 and for a time extension of 234 days for alleged differing site conditions, changes and delays occurring from award of the contract to 1 January 1996 (app. supp. R4, tab 85 at 2245-2262, tab 86). On 12 March 1996, the contracting officer issued unilateral Modification P00004 granting a time extension of two days to 12 September 1996 for rerouting a pipeline (R4-50513, tab 2 at 8).

27. With the exception of a part of the front wall, the exterior wall foundations were substantially completed on 26 March 1996 (gov't supp. R4, tab 90 at 240). During the remainder of March, all of April and most of May 1996, All-State constructed the interior wall foundations. These were substantially completed by 17 May 1996 (gov't supp. R4, tab 90 at 240-301).

28. On 20 May 1996, All-State began construction of the exterior and interior masonry walls (gov't supp. R4, tab 90 at 303). On 25 June 1996, work was halted on the walls pending government resolution of a latent conflict between a contract drawing detail for the masonry wall columns and the specifications (gov't supp. R4, tab 90 at 333-34). Contract drawing S-2 at detail "C1 column" showed a horizontal rebar lying on top of the two CMU blocks constituting each layer of the column (R4-50513, tab 1). If the rebar was installed as shown, however, the mortar joint between each successive layer

⁷ All-State's letter of 28 March 1996 claimed a 60-day time extension for unusually severe weather during "the entire period from December 19, 1995 thru February 18, 1996." This letter also stated: "Furthermore, there were approximately six days lost due to weather subsequent to February 18, 1996." The letter does not identify those six days by date. (App. supp. R4, tab 153 at 2856) The daily weather data in evidence for "normal conditions" does not go beyond 7 March 1996, and there is no other credible basis for determining whether any weather conditions after that date were unusually severe (app. supp. R4, tab 153 at 2896).

⁸ The record in this appeal permits a more precise determination of the calendar-day extension for work days lost due to unusually severe weather than the 7/5ths rule applied in *All-Seasons Construction and Roofing, Inc.*, ASBCA No. 45085, 94-3 BCA ¶ 27,096 at 135,017.

of blocks would be ¾-inch rather than the 3/8-inch required by specification § 04230, ¶ 3.3.9 (R4-50513, tab 1 at 329). On 27 June 1996, All-State was orally instructed to cut notches in the wall column blocks to resolve the conflict. This instruction was confirmed in writing on 1 July 1996. (App. supp. R4, tab 154 at 3025-26) The notching of the blocks was completed on or about 11 July 1996 (gov't supp. R4, tab 90 at 343).

29. On 20 July 1996, All-State submitted its cost and time proposals for the additional work and for “the government delays in providing direction” (app. supp. R4, tab 154 at 3028). The government argues that notching the blocks was “inherently required to construct the columns as specified” (gov't br. at 68). The conflict between the specified mortar joint width and the drawing detail presented structural integrity and visual appearance issues that could only be resolved properly by the project architect-engineer (app. supp. R4, tab 118 at 3673; tr. 492-95). Moreover, an internal government memorandum dated 12 August 1996 stated that the project architect-engineer had acknowledged that notching the blocks was “not customary procedure” (app. supp. R4, tab 96 at 4113). On this evidence we find that notching the blocks was not “inherently required” and was not within the scope of the omissions and misdescription provision of the specifications (R4-50513, tab 1 specification § 01011, ¶ 1.1.1 b.).⁹

30. Contract drawing S-2 (“Roof Plan”) omitted two “top of plank” elevations that were necessary for completion of the walls and installation of the roof panels. The omitted elevations were provided on 28 August and 10 September 1996. (App. supp. R4, tab 118 at 3685, 3690) Apart from correcting some forms on 28 August 1996, there is no credible evidence that the omission of these elevations on the contract drawing caused any other additional work or caused any critical path delay (gov't supp. R4, tab 90 at 399-400). The roof panels were not delivered on site until 4 October 1996 (gov't supp. R4, tab 90 at 445).

31. On 30 August 1996, the masonry subcontractor billed All-State \$14,000 for “additional time and delays in work progress awaiting Government direction for masonry details, time spent determining the roof elevation, interior wall elevations, additional time corresponding to the Architect . . . and awaiting response back from same” (app. supp. R4, tab 118 at 3687). Apart from the masonry block notching and the two omitted top-of-plank elevations noted respectively in findings 28 and 30 above, there is neither contemporaneous documentation nor credible testimony providing corroborating detail for the allegations in the invoice.

⁹ Specification § 01011, ¶ 1.1.1 b. stated: “Omissions from the drawings or specifications, or the misdescription of details of work which are manifestly necessary to carry out the intent of the drawings and specifications, or which are customarily performed, shall not relieve the Contractor from performing such omitted or misdescribed details of the work but they shall be performed as if fully and correctly set forth and described in the drawings and specifications.”

32. The contract drawings for the masonry walls and roof did not have a detail showing a slope on the top course of CMU wall blocks on roof-bearing interior walls matching the inward slope of the roof (tr. 513, 2100-01). Sloping the top course of the blocks on these walls, however, was manifestly necessary to carry out the intent of the drawings as indicated by the top-of-plank elevations, and was therefore within the scope of the omissions and misdescription provision of the specifications (R4-50513, tab 1, dwg, S-2). *See* finding 29, n.9.

33. All-State's original progress schedule showed the masonry walls taking 75 calendar days to complete (R4-50513, tab 4 at 2, line item 23). Allowing 16 days of delay for notching the column blocks, the masonry work that started on 20 May 1996 should have been completed on or about 19 August 1996. *See* finding 28. On 14 August 1996, the government quality assurance representative (QAR) noted on the daily report that the three-man masonry crew on site that day was too small and that there was "ample work for 2-3 mason crews." This remark was repeated by the QAR on subsequent daily reports. The masonry subcontractor, however, failed to increase significantly its manning on the site. The average daily masonry man hours increased by only four hours, or the equivalent of ½ man per day, over the remaining days of masonry work on the contract. (Gov't supp. R4, tab 90 at 381-469) The masonry work was still not completed when the masonry subcontractor abandoned the work on 23 October 1996. *See* finding 39.

34. On 13 September 1996, the contracting officer issued unilateral Modification P00005, deleting the surplus excavated material disposal requirement and reducing the contract price by \$30,076 for that deletion. Modification P00005 also ordered changes in the aqueous film forming foam (AFFF) fire extinguishing system and increased the contract price by \$12,000. (R4-50513, tab 2 at 9-18) These changes, however, did not increase the time required for performance of the contract. A schedule update by All-State prepared on 18 September 1996, five days after Modification P00005 was issued, allowed 48 days from 12 September 1996 for design and procurement of the system and 18 days for its installation (supp. R4, tab 82). The original (1 November 1994) schedule allowed 70 days for design and procurement of the original system and 21 days for its installation (R4-50513, tab 4 at 3).¹⁰

35. All-State's president testified that the AFFF system could be installed "at any time" (tr. 538). The contracting officer testified that it was "generally, one of the very last things to complete on the project" (tr. 1764). All-State's 18 September 1996 schedule update showed installation of the sprinkler system starting on 31 October 1996, two weeks after the scheduled completion of the masonry walls (supp. R4, tab 82). The masonry walls, however, were not completed by 31 October 1996 or at anytime thereafter

¹⁰ Both the original schedule and the 18 September 1996 update treat the AFFF system as part of the "sprinkler" system for scheduling purposes.

up to the termination of All-State's contract on 26 November 1996. *See* findings 33, 39 and 42. On this evidence, All-State has failed to prove that the changes to the ASFFF system caused any increase in the time required for performance of the contract. From the time the change order was issued through the termination of the contract, the masonry walls were the critical path delay. If All-State had proceeded to implement the AFFF system changes when ordered and in accordance with its 18 September 1996 schedule,¹¹ the system would have been available for installation before the masonry walls were completed, and the time required for installation of the changed system was no greater than the time required for installation of the original system. *See* finding 34.

36. On 4 October 1996, the contracting officer issued a non-compliance notice on Beam B-1 for not having the eight-inch minimum bearing on each end specified by details 123 and 126 on contract drawing S-2 (app. supp. R4, tab 156 at 2941). The short beam was due to an ambiguity in the drawing as to the intended length of the beam and an erroneous answer given by the government in response to All-State's inquiry before the beam was built. (App. supp. R4, tab 75 at 3176-79; R4-50513, tab 1, dwg. S-2 at "Roof Plan," Section 123/S2/S2, and Elevation 126/S2/S2) The non-compliance notice did not direct All-State to remove and replace the beam. It expressly stated that it did not authorize any work not included in the contract, that it was not a basis for additional payment or time, and that if All-State disagreed with the notice it should contact the contracting officer immediately. (App. supp. R4, tab 156 at 2941)

37. On 8 October 1996, All-State told the contracting officer that it had notified the vendor that the beam was too short and would assist the vendor with proposed shop drawings (gov't supp. R4, tab 77). On 1 November 1996, the contracting officer told All-State that the government had a plan to correct the problem, that there was no need for All-State to develop an alternative plan, and that the government would present its plan to All-State "once a determination is made as to whether this contract will be terminated for default." (Gov't supp. R4, tab 79) The suspension of work on correcting the Beam B-1 bearing did not preclude other work from being performed on the contract. Work continued on the masonry walls from 4 October until 22 October 1996 when it stopped, not because of the Beam B-1 bearing problem, but because the masonry contractor abandoned the job. *See* finding 39.

38. On 7 October 1996, All-State submitted a certified claim for a price increase of \$823,731 and a time extension of 455 days for alleged changes and delays occurring from 1 January 1996 through 4 October 1996 (app. supp. R4, tab 118 at 3613, 3615, 3671-93). The Beam B-1 problem was not among the specific items for which price and

¹¹ For reasons unexplained, All-State did not in fact proceed expeditiously to implement the AFFF system change order. It did not obtain a vendor quote on the changes to the system until 20 November 1996, more than two months after the change order was issued (app. supp. R4, tab 141).

time adjustments were asserted in this claim nor was it otherwise submitted to the contracting officer for decision as required by 41 U.S.C. § 605(a). All-State alleges that the cost of fabrication and installation of Beam B-1 was included in its 13 September 1996 Invoice No. 7. There is no line item for Beam B-1 in that invoice. (App. reply br. at 37; app. supp. R4, tab 116 at 1022) Invoice No. 7 was returned to All-State unpaid on 18 October 1996 on the ground that “[t]he amount to be retained for liquidated damages exceeds the amount of the invoice.” There is no evidence that the government reduced the amount otherwise due on Invoice No. 7 by the amount of the fabrication and installation cost of Beam B-1. (App. supp. R4, tab 130)

39. On 23 October 1996, the masonry subcontractor abandoned the work and was not replaced. No masonry or other substantial construction work was performed on the site after that date. (Gov’t supp. R4, tab 90 at 471-77)

40. By final decision dated 25 October 1996, All-State’s 19 February 1996 claim was denied entirely (app. supp. R4, tab 133). That decision was appealed, and the appeal was docketed as ASBCA No. 50516.

41. By letter dated 22 November 1996, All-State submitted a proposal to return to work and complete the contract. The proposal called for the government to, among other things, (i) enter into a bilateral modification in the amount of \$330,191.27 “for all changes and delays as of Oct. 4 1996”; (ii) appoint an “independent contract administrator” for the remaining contract work; and (iii) approve a revised progress schedule with a completion date of 27 June 1997. (R4-50516, tab 52)

42. By final decision dated 26 November 1996, the contracting officer rejected All-State’s proposal. He found that the terms of the proposal amounted to “an anticipatory repudiation of the contract,” and terminated the contract for default. (R4-50516, tab 53) At termination, the contract work was only 35 percent complete (gov’t supp. R4, tab 67 at 1).

43. A contracting officer’s final decision was never issued on the 7 October 1996 claim. On 13 July 2004, All-State appealed the deemed denial of that claim. That appeal is docketed as ASBCA No. 54681. The parties have agreed that ASBCA No. 54681 will be consolidated with and decided on the basis of the existing record and briefs in ASBCA Nos. 50513 and 50516.

44. At hearing and in the Proposed Conclusions of Law section of its post-hearing main brief, All-State has set forth 12 specific claim items from its 19 February and 7 October 1996 claims. Those claims as characterized by All-State are for (i) debris filled soil; (ii) contaminated (hazardous) soil; (iii) additional testing notification; (iv) monitoring wells; (v) QH-8 rescheduling; (vi) CQC manager; (vii) weather delays; (viii) notching

of masonry blocks; (ix) wall elevations; (x) masonry wall slope; (xi) beam B-1; and (xii) AFFF system redesign. (App. br. at 66-81)

DECISION

I. ASBCA No. 50513

This appeal was taken from the contracting officer's final decision No. 96-006N dated 25 October 1996 denying All-State's claim for a price increase of \$24,933 for 61 days of compensable delay in the start of work. *See* findings 3 and 22. The parties dispute only the amount of the price increase for the 61 days (app. br. at 9-10; gov't br. at 40-41). Therefore, the appeal is sustained on entitlement. Quantum will be determined in subsequent proceedings.

II. ASBCA Nos. 50516 and 54681

These appeals were taken respectively from the contracting officer's final decision denying All-State's 19 February 1996 claim and from the deemed denial of its 7 October 1996 claim. *See* findings 26, 38, 40 and 43. Our decision on the 12 specific items tried and briefed by the parties from those claims follows:

A. Debris-Filled Soil

All-State claims a price increase for the procurement of off-site select material, and complete remission of the price reduction in Modification P00005 for deletion of the surplus soil disposal requirement. All-State alleges that, but for the debris in the excavated soil, it would not have procured the off-site select material and would not have had any surplus soil requiring disposal (app. br. at 66-67).

It is not disputed that the debris found in the excavated soil on 8 March 1995 was a differing site condition, and All-State is entitled to price and time adjustments for any increased cost or time of performance caused by that condition. The excavated soil, however, was otherwise unsuitable for use as select material because it was shown on the boring logs to contain organic material and loam. Soil with organic material and loam did not meet the specified requirements for select material. *See* findings 5 and 6. There is also no evidence that All-State sought approval for use of the excavated soil, minus the debris, as common fill. *See* finding 11. On these facts, All-State has failed to show that either the procurement of the off-site select material or the obligation to dispose of the excavated soil was caused by the differing site condition.

All-State also claims a 50-day compensable delay from 8 March through 27 April 1995 as a result of the debris in the excavated soil. On the same day that the debris was discovered (8 March), All-State notified the contracting officer in writing, and the debris

was observed by the contracting officer's representatives. After the contracting officer's representatives had observed the debris, there was nothing in the Differing Site Conditions clause, and no directive by the contracting officer, requiring All-State to stop work to await further direction. Moreover, the debris did not physically prevent the excavation from proceeding. *See* finding 9.

The government's 14 March 1995 request for a price proposal for PC #1 was not an excuse for All-State to stop work. The request did not order a suspension of work pending decision on the proposed change, and it expressly stated that it was not a notice to proceed with the change. *See* finding 10. All-State's contentions that it needed direction to proceed were incorrect. All-State had all the direction it needed in the terms of the contract, which were specifically to excavate; stockpile the excavated soil within 100 feet of the excavation; test the excavated soil for environmental contaminants; and provide for proper disposal in accordance with the test results. *See* finding 4.

The contracting officer's direction on 28 April 1995 that the building site soil, when excavated,¹² be stockpiled approximately 450 feet from the excavation was a change to the contract provision that the soil be stockpiled within 100 feet of the excavation. *See* findings 4, 10 and 13. All-State, however, has failed to show that the change in location caused any increase in the time required for performance of the contract.

On its claim for the debris-filled soil, All-State is entitled to a price adjustment under the Differing Site Conditions clause for any increased cost caused by the debris. But that cost does not include the cost of the off-site select material. All-State is also entitled to a price adjustment under the Changes clause for any increased cost incurred for the relocation of the excavated soil stockpile. All-State is not entitled to complete remission of the price reduction for deletion of the surplus soil disposal requirement, but the proper amount of that reduction as measured by its actual cost savings will be determined in the quantum phase of these appeals. The claim for the debris filled soil is in all other respects denied.

B. Contaminated (Hazardous) Soil

All-State claims payment for handling "contaminated soil" under the provisions of specification § 02220, ¶ 3.10.6.2 (app. br. at 32-33, 69-70). The cited provisions apply to "Hazardous Waste." *See* finding 12, n.3. The Unforeseen Hazardous Material clause of the contract provided that the determination of whether a material was hazardous was to be made by the contracting officer on the basis of tests performed by the government. *See* finding 15. Comprehensive government tests of samples taken from the stockpiled excavated soil on 2 June 1995 showed no hazardous contamination. The contracting

¹² All-State at this time had excavated only the test pit and had not resumed work.

officer so informed All-State on 20 June 1995 and directed that the work proceed without change. *See* finding 16.

All-State reported that its own tests indicated the presence of four “volatile constituents.” *See* finding 16. The contracting officer concluded, on the recommendation of the naval station safety director, that those constituents required neither air monitoring nor special handling with PPE. *See* finding 18. There is no evidence that this conclusion was arbitrary, unreasonable or capricious. To the contrary, when All-State resumed excavation, its voluntary air monitoring showed no hazardous contamination requiring special handling. *See* finding 20.

All-State claims a price adjustment for performing “extra-contractual soil testing” at the direction of the government (app. br. at 32-33, 70-71). The testing referred to was the testing for contamination that the contracting officer told All-State on 27 April 1995 was required before the excavated material could be classified as contaminated for removal and disposal under CLIN 1.b. *See* finding 12. This testing was a contractual requirement for all surplus soil. *See* finding 4.

All-State claims payment for “health and safety” costs pursuant to specification § 02220, ¶ 3.10.6.3 (app. br. at 33, 70). The claimed costs were incurred for the air monitoring, industrial hygienist, and personal protective equipment used on 17 October 1995 when All-State resumed work. They were incurred despite the express advice of the government in its letters of 12 September and 5 October 1995 that they were not necessary. The government’s advice was proven correct by the results of the air monitoring on 17 October 1995. *See* findings 18 and 20.

All-State claims 134 days of compensable delay from 9 May through 20 September 1995 for the “contaminated soils issue” (app. br. at 32, 71-73). The first credible notice to the contracting officer of possible hazardous contamination was on 25 May 1995 when he received a laboratory test report from All-State indicating hazardous PCB contamination at one place in the excavation. *See* finding 14.¹³ The Unforeseen Hazardous Material clause of the contract provided that within 14 calendar days “the Government will perform testing to determine if the material is hazardous.” The clause further stated that: “[i]f the material is not hazardous . . . the Contracting Officer will direct the Contractor to proceed without change.” *See* finding 15.

The government took its soil samples on 2 June 1995 and completed the testing on 16 June 1995. On 20 June 1995, the contracting officer notified All-State that the tests showed that the soil was not contaminated with PCBs or other pesticides and chemicals

¹³ The statement in the 10 May 1995 daily report was not supported by a laboratory report at the time, and two previous site tests in March 1995 and July 1993 had found no contamination. *See* findings 7 and 13.

and that work could proceed in accordance with the contract. *See* finding 16. We construe the 14-calendar day provision in the Unforeseen Hazardous Material specification as requiring both the testing and the contracting officer's direction to occur within the specified 14 days, and conclude that the testing and direction in All-State's case was 12 days late.¹⁴

The completion of the excavation and backfill was on the critical path to completion of the work. Accordingly, we find 12 days of compensable delay caused by the government's failure to comply with the time requirement of the Unforeseen Hazardous Material specification of the contract. After 20 June 1995, however, there was neither excusable nor compensable delay caused by the contaminated soils issue. The delay from 21 June 1995 through the resumption of work on 17 October 1995 was due to All-State refusing to work without a promise of government indemnification, or additional government assurances of safety, for working with what it continued to argue was contaminated material. *See* findings 17-20. We find no justification in the contract or otherwise for All-State stopping work because it disagreed with the contracting officer's decision on a matter that the Unforeseen Hazardous Material clause expressly assigned to the contracting officer to make. *See* finding 15 and *Al Bosgraaf and Sons, Inc.*, ASBCA No. 43372, 92-3 BCA ¶ 25,046 at 124,842-43.

On its claim for contaminated (hazardous) soil, All-State is entitled to a 12-day compensable time extension. The claim is in all other respects denied.

C. Additional Testing Notification

All-State claims a price adjustment for the contracting officer's 5 October 1995 letter directing All-State to give three working days notice and have a government representative present when it took samples for soil tests (app. br. at 33, 73). *See* finding 19. The only requirement in the contract for All-State to perform soils tests was the provision on disposal of surplus excavated material. That provision included no requirement either for notice to the government or for a government representative to be present when soil samples were taken for the test. *See* finding 19. The contracting officer's 5 October 1995 direction was a change to the contract requirements for which All-State is entitled to a price adjustment under the Changes clause for any increased cost caused by the change.

D. Monitoring Wells

All-State claims a price adjustment and 159 days of compensable delay from 17 February 1995 through 26 July 1995 for the government delay in closing the three

¹⁴ The notification of possible contamination was received on 25 May 1995. The 14-calendar day period for testing and determination expired on 8 June 1995.

monitoring wells in the excavated area (app. br. at 36, 73). The government delay in closing these wells required All-State to work around the wells when it excavated the building site on 2-4 May 1995. But the presence of the wells did not prevent the start of the backfill on 16 May 1995. Moreover, the controlling cause of the work stoppage from 16 May through 16 October 1995 was not the presence of the wells, but initially the investigation of suspected soil contamination followed by All-State's refusal to resume work after the soil investigation was concluded. That the wells were not the controlling cause of the work stoppage is confirmed by the fact that when they were closed on 27 July 1995, All-State did not return to work but remained off the job until 17 October 1995 continuing to allege soil contamination and attempting to negotiate assurances from the government. *See* findings 16-20. On this record, All-State has failed to prove either excusable or compensable delay attributable to the government delay in closing the wells. We leave to the quantum phase the determination as to whether the presence of the open wells caused any increased cost in the initial excavation of the site.

E. QH-8 Rescheduling

All-State claims a price adjustment for administrative costs and 19 days of compensable delay for the change in the schedule for demolishing Building QH-8 (app. br. at 41, 74). The contract at award did not specify when the existing hazardous waste facility was to be demolished. All-State initially planned to perform the demolition over a 19-day period concurrent with the site utility and foundation work for the new facility. By unilateral Modification P00001, the contracting officer directed that the demolition of Building QH-8 occur only after the new facility was complete and accepted. *See* finding 21. All-State is entitled under the Changes clause to a price adjustment for any increased costs caused by the rescheduling in Modification P00001, and for purposes of computing liquidated delay damages, if any, a 19-day extension of the contract completion date. However, since the contract was terminated before the new facility was completed, the rescheduling caused no compensable delay in performance of the contract.

F. CQC Manager

All-State claims a price adjustment for increased costs allegedly incurred as a result of government delay in approving a replacement of All-State's CQC manager (app. br. at 44, 74). The need to replace the CQC manager was due to All-State's failure to select a manager that met the citizenship requirement of the specifications. The delay in obtaining approval of a replacement was due to All-State's proposal of candidates who did not meet the professional license and experience requirements specified for the position. *See* finding 24. The claim is without merit and is denied.

G. Weather Delays

All-State claims a non-compensable time extension of 60 days for unusually severe weather during the entire period from 19 December 1995 through 18 February 1996, and for 6 days “subsequent to February 18, 1996” (app. br. 48, 75-76). *See* finding 25, n.7). We have found that there were 54 calendar days during the period 19 December 1995 through 7 March 1996, including intervening weekend days and holidays, for which credible weather data is available when work was precluded by unusually severe weather. *See* finding 25. Pursuant to paragraph (b)(1)(x) of the Default clause of the contract, All-State is entitled to a non-compensable time extension of 54 days for unusually severe weather.

H. Notching of Masonry Blocks

All-State claims a price adjustment and 120 days of compensable delay for notching the masonry blocks in the wall columns (app. br. at 53, 76-77). The wall column blocks were not shown on the drawing as notched, and notching was not within the scope of the omissions and misdescriptions provision of the specifications. All-State is accordingly entitled to a price adjustment under the Changes clause for the cost of resolving the ambiguity in the drawing and notching the blocks, and to 16 days compensable delay from the date work was stopped on the walls (25 June 1996) until the notching was completed (11 July 1996). *See* findings 28 and 29.

I. Wall Elevations

All-State claims a price adjustment for the omission of “top-of-wall” elevations in the contract drawings (app. br. at 53-55, 77). All-State has proven entitlement to a price adjustment under the Changes clause for any increased costs caused by the omission of the two “top of plank” elevations that were provided by the government on 28 August and 10 September 1996. *See* finding 30. To the extent the 30 August 1996 masonry subcontractor’s invoice alleges additional omissions, the allegation fails for lack of corroborating detail in either contemporaneous documentation or credible testimony. *See* finding 31.

J. Masonry Wall Slope

All-State claims a price adjustment and five days of compensable delay for cutting the top course of CMU blocks on various interior roof-bearing walls to match the slope of the roof (app. br. at 55-56, 77-78). Sloping the top course of the blocks on these walls was manifestly necessary to carry out the intent of the drawings and part of the contract work in accordance with the omissions and misdescriptions provision of the specifications. *See* finding 29, n.9. All-State is not entitled to a price adjustment or extension of time for sloping the blocks to match the slope of the roof.

K. Beam B-1

All State claims the cost of fabrication and installation, and 53 days of compensable delay for the “Beam B-1 issue” (app. br. at 78-79). The Beam B-1 claim was not included in the 7 October 1996 claim nor was it otherwise submitted to the contracting officer for decision as required by 41 U.S.C § 605(a). *See* finding 38. All-State argues that the Beam B-1 claim is part of “the masonry delay claim” (app. reply br. at 36). It also argues that the non-compliance notice and the withholding of payment on Invoice No. 7 constituted a contracting officer’s decision not to pay for the fabrication and installation of Beam B-1 (app. reply br. at 37-38). We have made findings on the Beam B-1 issue to the extent those findings are relevant to claims otherwise properly before us. *See* findings 36 and 37. But we cannot reasonably construe either the non-compliance notice or the withholding of payment on Invoice No. 7 for offsetting liquidated delay damages as a contracting officer’s final decision not to pay for the fabrication and installation of Beam B-1 or for the claimed compensable delay. *See* findings 36 and 38. Accordingly, we are without jurisdiction to decide the Beam B-1 claim as presented at hearing and in All-State’s post-hearing brief.

L. AFFF System Redesign

All-State claims a 13-week (91-day) extension of the contract completion date from the date Modification P00005 was issued for the AFFF system redesign (app. br. at 81). We have found that the completion of the masonry walls, and not the changes to the AFFF system, was the critical path delay during the entire period from the issuance of Modification P00005 through termination of the contract. Moreover, when the contract was terminated on 26 November 1996, it was only 35 percent complete. *See* finding 42. All-State has failed to show that a delay in completion of the AFFF system to 13 December 1996 (the claimed 91 days from issuance of Modification P00005) would have caused a delay in completion of the contract either concurrent with and to the same extent as, or to a greater extent than caused by its own delay in completing the masonry walls. *See* findings 34 and 35. While we have concluded that Modification P00005 caused no increase in the time required for performance of the contract, we reserve for the proceedings on the remand of the default termination appeal the determination of whether or not the issuance of the AFFF system changes one year after the contract completion date of 12 September 1995, in conjunction with other relevant circumstances, amounted to a waiver of that completion date. We also note All-State’s claim that it incurred additional costs for redesign of the AFFF system over and above the \$12,000 allowed in Modification P00005 (app. br. at 66). That claim will be resolved in the quantum phase of the present appeals.

The appeals in ASBCA Nos. 50516 and 54681 are sustained in part and denied in part as indicated above.

Dated: 21 July 2004

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 Nos. 50513, 50516 and 54681, Appeals of All-State Construction, Inc., rendered in conformance with the Board's Charter.

Dated:

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