

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

In *All-State Construction, Inc.*, ASBCA No. 50586, 02-1 BCA ¶ 31,794, we sustained this default termination appeal on the ground that the government's 38 percent retention of liquidated delay damages prior to substantial completion of the contract was a material breach entitling All-State to stop work. In *Johnson v. All-State Construction, Inc.*, 329 F.3d 848 (Fed. Cir. 2003), the Federal Circuit reversed and remanded on the ground that the government's common law set-off rights trumped the contract payment provisions. On the remand, we conclude that the default termination was otherwise proper and deny the appeal.

FINDINGS OF FACT

1. The contract at issue was awarded to All-State on 30 September 1994 for construction of a hazardous waste storage facility and related work at the Naval Weapons Station Earle, Colts Neck, New Jersey. The contract price at award was \$982,000. The specified contract completion date at award (13 May 1995) was subsequently extended by unilateral contract modifications first to 10 September 1995 and later to 12 September 1995. (R4, tab 1 at 1-4, tab 2 at 3-4, 7-8)
2. The contract was administered for the government by the Resident Officer in Charge of Construction (ROICC), Naval Weapons Station Earle, under the general supervision of the Northern Division, Naval Facilities Engineering Command.

3. The contract included among other provisions the FAR 52.233-1 DISPUTES (DEC 1991) clause, the FAR 52.249-10 DEFAULT (FIXED PRICE CONSTRUCTION) (APR 1984) clause, and the following provision in Section 01010 of the contract specifications:

1.12.2 Obligation of Government Payments

The obligation of the Government to make any of the payments required under any of the provisions of this contract shall, in the discretion of the Officer in Charge of Construction, be subject to:

....

(b) Any claims which the Government may have against the Contractor under or in connection with this contract ....

(R4, tab 1 at 40-41, 60)

4. All-State did not complete the contract work by 10 September 1995, the first extended completion date. On 31 October 1995, the ROICC approved All-State's revised schedule submitted 11 October 1995 showing completion of the contract on 8 April 1996. The approval letter stated that the approval was a "forbearance" that "does not constitute approval of a time extension or a waiver of the Government's right to assess liquidated damages." (Supp. R4, tab 2)

5. On 19 February 1996, All-State submitted a certified claim for a price increase in the amount of \$343,537 and a time extension of 234 days for alleged differing site conditions, changes and delays occurring from award of the contract through 1 January 1996 (R4, tab 41). This claim was denied entirely by Commander Branigan, a Northern Division contracting officer, in a final decision dated 25 October 1996 (R4, tab 68).

6. All-State did not complete the work by the forbearance date of 8 April 1996. As of 18 July 1996, it had completed only 24.47 percent of the contract work. (App. supp. R4, tab 46 at 7342) On 5 August 1996, the ROICC approved All-State's revised schedule dated 31 July 1996 showing completion on 14 November 1996. The approval letter again stated that the approval was a forbearance and not a contractual time extension or waiver of liquidated delay damages. (Supp. R4, tab 4)

7. The only substantial work performed by All-State on site during August 1996 was concrete and masonry work. After 12 August 1996, only one masonry crew was working on site when there was "ample work for 2-3 mason[ry] crews." (Supp.

R4-50513, tab 90 at 369-412) At some time in August 1996, All-State told the performance bond surety's representative (Mr. Vicario) that it "didn't have any more money to put into [the contract]" (supp. R4, tab 50 at 18-19, 45).

8. By letter dated 26 August 1996, the ROICC notified All-State that it was behind its most recently submitted progress schedule on 17 work activities. The letter requested All-State to "submit in writing the procedures or steps you intend to take to insure completion of this contract within the contract time, including a revision of your progress schedule." (Supp. R4, tab 6)

9. Two weeks later, All-State was still behind schedule on the same 17 activities and had not replied to the contracting officer's letter of 26 August 1996. By letter dated 11 September 1996 the ROICC again requested All-State to submit in writing the steps it intended to take to insure completion of the contract within the contract time and "an updated progress schedule" (supp. R4, tab 7; R4, tab 48; supp. R4-50513, tab 90 at 369-417). All-State's Invoice No. 7 dated 13 September 1996 showed that the work at that time was only 29 percent complete (app. supp. R4, tab 69 at 2).<sup>1</sup>

10. On 13 September 1996, the ROICC issued unilateral Modification No. P00005 containing a change order for the aqueous film forming foam (AFFF) fire suppression system. The change order allowed a \$12,000 price increase for the change, but no time extension. (R4, tab 2 at 9-10) No time extension was allowed because All-State could have performed the changed work without impacting its critical path to completion of the work (tr. Clarke, 1/329-31).

11. The AFFF system change order included the necessary information to redesign the system, and on 14 September 1996, All-State requested a price proposal for the change from its mechanical subcontractor (tr. Portnoy, 2/204; app. supp. R4, tab 63). All-State, however, did not at any time thereafter order the subcontractor or any alternative source to perform the change order.

12. On 18 September 1996, All-State submitted a revised progress schedule showing a completion date of 2 January 1997, but no written statement of the steps it was taking to assure completion on that date (app. supp. R4, tab 64). By letter dated 4 October 1996, the ROICC noted that "it is apparent that the work will not be completed by 14 November 1996," and directed All-State to show cause why the contract should not be terminated for default (supp. R4, tab 9).

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<sup>1</sup> This invoice was not received by the government until 24 September 1996. It was returned on 26 September 1996 for correction of the date to match the date of actual submission (app. supp. R4, tab 69 at 1). All-State did not resubmit the invoice until 8 October 1996. See finding 16.

13. Also on 4 October 1996, the ROICC issued a non-compliance notice on the installation of beam B-1. The non-compliance was the result of an ambiguity in the contract drawings and an erroneous answer by the government when inquiry was made before the beam was fabricated. (R4, tab 1, Dwgs. A-2, S-2; app. supp. R4, tabs 75, 76; app. supp. R4-50513, tab 75)

14. The beam B-1 problem delayed the adjustment and welding of four roof panels over the exterior loading dock of the building. However, all of the other roof panels covering most of the interior of the building were adjusted and welded on 7 October 1996. (Supp. R4-50513, tab 90 at 447) On 1 November 1996, the ROICC told All-State that it would provide a corrective action plan for beam B-1 “once a determination is made as to whether this contract will be terminated for default” (app. supp. R4, tab 92).

15. On 7 October 1996, All-State submitted a claim for price adjustment in the amount of \$823,731 and a time extension of 455 days for alleged changes and delays occurring from 1 January 1996 through 4 October 1996. The claimed 455-day time extension was the time extension allegedly required to perform the AFFF system change order. (App. supp. R4, tab 72)<sup>2</sup>

16. On 8 October 1996, All-State resubmitted its Invoice No. 7. The resubmitted invoice claimed 34 percent completion of the contract work and a payment due of \$120,878.67. The accompanying contract performance statement showed that All-State had made no progress on 37 of the 44 work items that its 31 July 1996 schedule had shown being performed in whole or in part during the period 31 July-7 October 1996. (R4, tab 48; app. supp. R4, tabs 46, 83)

17. On 14 October 1996, All-State replied to the 4 October 1996 show cause letter. The reply alleged that the various matters in the 19 February 1996 and 7 October 1996 claims were the cause of the delay of the work, and that All-State was entitled to an extension of time to 2 August 1997. (App. supp. R4, tab 79)

18. By letter dated 16 October 1996, the ROICC told All-State that it had failed to show excusable delay justifying the 2 January 1997 completion date on its 18 September 1996 schedule (*see* finding 12) and that he considered All-State to be in default of its obligation to timely complete the contract. This letter requested All-State to “contact this office to arrange a meeting to discuss this matter.” (Supp. R4, tab 11)

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<sup>2</sup> By letter dated 14 October 1996, All-State added to this claim a subcontractor’s claim for \$115,000 and a 180 day time extension for work on the AFFF system (app. supp. R4, tab 77).

19. On 18 October 1996, the ROICC returned All-State's resubmitted Invoice No 7 without payment because "[t]he amount to be retained for liquidated damages exceeds the amount of the invoice" (app. supp. R4, tab 83 at 1). The government at this time calculated the accrued liquidated damages at \$135,450 (\$350 x 387 days) (app. supp. R4, tab 81 at 3).<sup>3</sup>

20. All-State's masonry subcontractor did not return to work after 22 October 1996, and no masonry or other construction work was performed on the contract by All-State after that date (supp. R4-50513, tab 90 at 471-77; tr. Portnoy, 2/266-67). All-State admits in its post-hearing brief that: "Quite simply, All-State's subcontractors were not being paid – for base contract or changed work" (app. br. at 5).

21. On 22 October 1996, the ROIC submitted his recommendations to Northern Division for the final decision on All-State's 7 October 1996 claim. With respect to the claimed time extension, he found only 23 days for weather delays supported. With respect to the claimed time extension for the AFFF system change order, he recommended: "No additional time or extended overhead costs are required since 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." (App. supp. R4, tab 87 at 3, 7) The 7 October 1996 claim was pending final decision by the contracting officer when the contract was terminated on 26 November 1996.

22. The meeting with All-State requested in the government's 16 October 1996 letter was held on 28 October 1996. By this time, All-State had retained counsel, but its counsel did not attend the meeting. Government counsel was present as well as Mr. Vicario, the surety representative. All-State's claims were discussed, the parties stated their positions, and All-State requested a termination for convenience. This request was immediately denied by the government. Neither party invoked Federal Rule of Evidence, Rule 408 at any time before or during this meeting and no offers of compromise were exchanged. (Tr. Petrone, 1/13-15, 31, 75-83, 3/26-28, 35) On these facts, we find that this meeting was a contract administration meeting to determine the status of the job and the parties' positions, and not a meeting to negotiate a compromise settlement of their respective claims.<sup>4</sup>

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<sup>3</sup> Amendment No. 4 to the IFB increased the daily rate from \$350 to \$450 (R4, tab 1 at 48). Using the amended rate, the liquidated damages for 387 days were \$174,150.

<sup>4</sup> We do not imply that an express invocation of Rule 408 is always necessary for the Rule to apply, but in otherwise disputed circumstances, it is substantial evidence of the parties' intent.

23. After the 28 October 1996 meeting, Mr. Vicario met privately with All-State's president, Mr. Phillip Portnoy, to encourage All-State "to not walk off the job." Mr. Portnoy's response was that "the Navy was wrongfully withholding their funds and they [All-State] were not willing or a combination of not willing or not able to continue financially." (Supp. R4, tab 50 at 24) There is no evidence that this statement to the surety by Mr. Portnoy was intended to be part of any negotiations toward compromise, and we find that it was not.

24. On or about 16 November 1996, All-State submitted a revised schedule showing resumption of the work on 15 November 1996 and completion of the work on 27 June 1997 (app. supp. R4, tabs 98, 99 at 2).<sup>5</sup> All-State, however, did not resume work on 15 November 1996 or at any time thereafter.

25. On 19 November 1996, the representatives of the government, All-State and the surety (by telephone) met "to discuss possible termination for default of [the] contract" (supp. R4, tab 16; tr. Petrone, 3/34). At this time, All-State had not performed any construction work on the site since 22 October 1996 (R4-50513, tab 30 at 469-77). At this meeting, Commander Branigan offered a compromise proposal for completing the contract. But no agreement was reached except that All-State would submit a proposal to complete the job in writing (app. supp. R4, tabs 106). Although neither party expressly invoked Rule 408 at this meeting (tr. Petrone 1/31), we find that the government's offer of a compromise proposal to get All-State back to work constituted an element of compromise negotiation.

26. After the 19 November 1996 meeting, All-State did not resume work, and Mr. Phillip Portnoy told Mr. Vicario that the cost to complete the contract would require \$800,000, that All-State "did not plan on spending that money," and that All-State "didn't even have the money to spend" (supp. R4, tab 50 at 26-27). There is no evidence that this statement by Mr. Portnoy to Mr. Vicario, after the meeting with the government, was intended to be part of any negotiations towards compromise, and we find that it was not.

27. On 22 November 1996, All-State submitted its proposal for completing the work (app. supp. R4, tab 99). When Mr. Vicario received a copy of this proposal, he was concerned that "the Navy would view it as a take it or leave it kind of ultimatum by All-State." He subsequently discussed the proposal with Mr. Portnoy, and after this discussion had no assurance that All-State would continue performance of the contract. (Supp. R4, tab 50 at 30-32)

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<sup>5</sup> This schedule is not dated, but since it begins with 15 November 1996 (week ending 22 November 1996) we will refer to it hereafter as All-State's 15 November 1996 schedule (app. supp. R4, tab 98).

28. On 25 November 1996, Mr. Vicario told Commander Branigan that All-State was not going to complete the contract unless the conditions in its 22 November 1996 proposal were met (tr. Branigan, 1/45; supp. R4, tabs 20, 50 at 33-34). On 26 November 1996, Commander Branigan telephoned Mr. Portnoy to confirm what he had been told by the Mr. Vicario. Following this conversation by letter of the same date, Commander Branigan terminated All-State for default, citing among other reasons, “anticipatory repudiation” and “your current total lack of performance at the job site.” (App. supp. R4, tab 103)

29. By letter dated 27 November 1996, Commander Branigan notified Mr. Vicario that “inasmuch as All State Construction, Inc. was unwilling to proceed with performance of [the contract] unless the Navy accepted its proposal dated 22 November 1996, the Navy was left with no alternative but to terminate the subject contract for default” (app. supp. R4, tab 104).

30. When the contract was terminated, the work was no more than 35 percent complete (app. supp. R4, tab 101 at 1). Among the incomplete contract tasks that were not dependent on prior performance of the AFFF system change order or resolution of the beam B-1 problem were the tap and sleeve activities, water main, storm mains and drainage, fire hydrant, railroad jacking, paving, concrete slab, masonry,<sup>6</sup> blast panels, roofing, boiler, air handling equipment, duct work, plumbing, overhead doors, roofing, grills, ceramic tile, paving, lightning protection, and wiring for electrical and telephone service. (App. supp. R4, tab 87 at 3; tr. Branigan, 1/258-64, Portnoy, 2/179, Cummings, 4/269-76)

31. At hearing there was much testimony and in the briefs there is much argument whether the AFFF system change order or the beam B-1 problem affected All-State’s critical path to completion of the work. For purposes of our decision here, that issue is not relevant. What is relevant is whether either of those items was a cause of All-State’s 35 day work stoppage from 23 October through 26 November 1996. The evidence is clear that they were not. With respect to the AFFF system change order, Mr. Ralph Portnoy, who was assisting his father in managing the project, testified that: “A lot of

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<sup>6</sup> The testimony of All-State’s scheduling expert that the masonry work was “essentially done” when the contract was terminated is not credible (tr. Crowley, 4/171). All-State’s resubmitted Invoice No. 7, dated 8 October 1996, claimed only 50 percent completion of the masonry (app. supp. R4, tab 83 at 5). No masonry work was performed after 22 October 1996, and All-State’s 15 November 1996 schedule showed “block inside” and “block finish” work being performed continuously from 16 November 1996 through 28 March 1997 (app. supp. R4, tab 98).

issues have been made here, that we could have been doing other work while the AFFF system was being designed, approved, procured, installed and tested. Absolutely true, your honor” (tr. Portnoy, 2/157, 179).

32. With respect to the beam B-1 problem, the evidence is that it affected only the final adjustment and welding of four roof panels over the exterior loading dock and a masonry course on top of the beam. The roofing panels over most of the interior of the facility were adjusted and welded on 7 October 1996. (Supp R4-50513, tab 90 at 447) On 22 October 1996, the last day All-State performed any construction work on site, the government’s quality assurance report noted, and we find, that: “A considerable amount of work could be performed and is not affected by [beam] B-1” (supp. R4-50513, tab 90 at 470).<sup>7</sup>

33. On 24 February 1997, All-State appealed the default termination. On 21 July and 22 September 2004, in *All-State Construction, Inc.*, ASBCA Nos. 50513, 50516, 54681, 04-2 BCA ¶ 32,711 at 161,831-34, *modified on recon.*, 04-2 BCA ¶ 32,778 at 162,084, we allowed an additional 99-day time extension of the contract completion date based on All-State’s 19 February and 7 October 1996 time extension claims. This decision extended the contract completion date to 20 December 1995. The allowed time extension did not include any time for the AFFF system change order which we found not to be a critical path item. 04-2 BCA ¶ 32,711 at 161,834.

## DECISION

### A. All-State’s Preliminary Motions

Citing the Federal Rules of Evidence, Rule 408, All-State moves to exclude “any and all evidence [of] alleged statements of repudiation made during settlement negotiations.” All-State identifies the settlement negotiations as the 28 October and 19 November 1996 meetings, its 22 November 1996 proposal to the government, and the 26 November 1996 telephone conversation between Commander Branigan and Mr. Phillip Portnoy. (App. mot. at 1-2, 13) Rule 408 states in relevant part:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability or invalidity of

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<sup>7</sup> Mr. Ralph Portnoy admitted at hearing that the lack of resolution to the beam B-1 problem did not prevent the masonry subcontractor from working on the brick facing (tr. Portnoy, 2/268-69).

the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. . . .

We have found that the 28 October 1996 meeting was a contract administration meeting and not a meeting to negotiate a compromise settlement of the parties' disputes. *See* finding 22. Therefore it is not subject to the Rule. We have found that the 19 November 1996 meeting did involve an element of compromise negotiation, and therefore both that meeting and All-State's 22 November 1996 written settlement proposal are subject to the Rule. *See* findings 25, 27 and *Scott Aviation*, ASBCA No. 40776, 91-3 BCA ¶ 24,123 at 120,727-28.

The telephone conversation on 26 November 1996 between Commander Branigan and Mr. Portnoy is more problematic with respect to Rule 408. *See* finding 28. However, considering the preceding compromise negotiation on 19 November, All-State's 22 November proposal, and the absence of any evidence of a clear statement by Commander Branigan that compromise negotiations were over, we conclude that any statements by Mr. Portnoy in the 26 November 1996 telephone conversation are also protected by the Rule.

We deny All-State's companion motion to exclude evidence of the statements made by Mr. Phillip Portnoy to Mr. Vicario after the 28 October and 19 November 1996 meetings. *See* findings 23 and 26. The purpose of Rule 408 is to promote frank and free discussions to achieve the public policy favoring compromise and settlement. *Scott Aviation*, ASBCA No. 40776, 91-3 BCA ¶ 24,123 at 120,727. The question under the rule is "whether the statements or conduct were intended to be part of the negotiations towards compromise." *Ramada Development Co. v. Rauch*, 644 F.2d 1097, 1106 (5<sup>th</sup> Cir. 1981).

The statement to Mr. Vicario following the 28 October 1996 meeting was made before any compromise negotiation took place, and we have found that neither that statement nor the statement made after the 19 November 1996 meeting were intended to be part of the negotiations toward compromise. Moreover, Mr. Vicario was representing the surety. He was not the agent or representative of either the government or All-State. No purpose of the rule would be served by excluding from evidence otherwise relevant statements made by either party to him prior to, or otherwise outside, their own direct face-to-face or telephone negotiations.

All-State also objects to Mr. Vicario's testimony on grounds of relevance and hearsay. We do not agree. The statements of All-State's president to Mr. Vicario are relevant because they establish the reasons for All-State's work stoppage ("the Navy was wrongfully withholding their funds") and that it "didn't even have the money to spend"

to complete the job. *See* findings 23 and 26. Mr. Vicario’s evidentiary deposition testimony about those statements was not hearsay because the statements were admissions by an officer of All-State on a matter within the scope of his employment and made while he was so employed. *See* FED R. EVID. 801(d)(2)(D).

All-State also moves to strike (i) the report and testimony of the Navy’s scheduling expert, Mr. Cummings, on All-State’s failure to make progress, and (ii) all evidence of defects in All-State’s work. Since we find the default termination fully supported on the grounds of All-State’s failure to proceed with the work in accordance with its Disputes clause obligation, we do not reach the alternative grounds for termination argued by the government, and therefore consider the motions to strike moot.

### B. The Merits

Paragraph (i) of the contract Disputes clause required All-State to “proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract . . . .” *See* finding 3. When All-State was terminated on 26 November 1996, it had (i) stopped all construction work on the contract for the preceding five weeks, and (ii) its president had stated to the surety representative that it was unwilling and financially unable to resume work because “the Navy was wrongfully withholding their funds.” *See* findings 20, 23, 24, and 26. These facts establish by themselves a breach by All-State of its obligation under paragraph (i) of the Disputes clause.<sup>8</sup>

A failure to proceed pursuant to paragraph (i) of the Disputes clause is separate and distinct from a failure to prosecute the work with such diligence as to insure completion within the specified time – a basis for termination under paragraph (a) of the Default clause. A failure to proceed pursuant to paragraph (i) of the Disputes clause is a material breach, *see 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), for which summary termination is proper under the government’s common law rights reserved in paragraph (d) of the Default clause whenever it occurs and without regard to the specified completion date of the contract. *See Polyurethane Products Corp.*, ASBCA No. 42251, 96-1 BCA ¶ 28,154 at 140,545 (applying the comparable paragraph (h) of the FAR 52.249-8 supply contract Default clause); and *ITT Kellogg, A Division of International Telephone & Telegraph Corp.*, ASBCA No. 9580, 65-1 BCA ¶ 4675 at 22,335 (“an abandonment of performance

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<sup>8</sup> Although the contracting officer cited “anticipatory repudiation” as a basis for the termination, we base our decision on All-State’s on-going breach of its Disputes clause obligation. *See Joseph Morton Co. v. United States*, 757 F.2d 1273, 1277 (Fed. Cir. 1985) (default termination upheld if proper on grounds other than those relied upon by the contracting officer).

after waiver of delivery date by the promise[e] is sufficient to relieve the promisee of a duty to establish a new and reasonable delivery date . . . before terminating for default.”).<sup>9</sup>

All-State argues that its work stoppage was not a default because it was caused by the government’s wrongful retention of liquidated damages from contract payments otherwise due. All-State contends that the retention was wrongful because (i) the government waived the contract completion date by issuing the AFFF system change order, (ii) the government failed to establish a new date based on the time required to perform that change order, and (iii) there was consequently no valid completion date for which liquidated delay damages could be assessed. We do not agree. Only wrongful retentions are excusable causes of default. *See Tennis Court Specialties, Inc.*, ASBCA No. 25510, 82-2 BCA ¶ 16,054 at 79,647. The government’s liquidated damages claim was disputed in All-State’s 19 February 1996 and 7 October 1996 time extension claims including the AFFF system change order time extension claim. Those claims in turn were disputed by the ROICC’s 22 October 1996 recommendations to the contracting officer on the 7 October 1996 claim and the contracting officer’s 25 October 1996 final decision on the 19 February 1996 claim. The 7 October 1996 claim was pending final decision by the contracting officer throughout the period of All-State’s work stoppage up to the termination. *See* findings 5, 15 and 21. The government’s retention of its disputed liquidated damages claim during this period was not wrongful. Under paragraph 1.12.2(b) of Section 01010 of the contract, the government’s retention rights were not limited to undisputed claims but applied to “[a]ny claims which the Government may have against the Contractor under or in connection with this contract.” *See* finding 3. The retention otherwise has also been held proper in *Johnson v. All-State Construction, Inc. supra*, 329 F.3d at 852-55.

All-State alleges that the government’s withholding of its corrective action plan for the beam B-1 problem pending decision on the default termination was a breach of its duty of good faith and fair dealing (app. br. at 74-81). *See* findings 13 and 14. Deferral of the corrective action did not prevent All-State from proceeding with other work during the five weeks preceding the default termination. *See* finding 32. There was no breach of the duty of good faith and fair dealing in the deferral action.

All-State argues that the initial rejection of its Invoice No. 7 for correction of the date on the invoice was a material breach by the government entitling it to stop work (app. br. at 97-100). Assuming *arguendo* that rejection of the invoice for that reason was improper, All-State has not shown that the cost or time required to resubmit the invoice

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<sup>9</sup> We accordingly consider moot the question of whether the non-critical path AFFF system change order issued after the contract completion date waived that date.

with the date of its actual submission was sufficiently material to justify stopping work. See finding 9, n.1.

All-State argues that the appeal must be sustained because “the Contracting Officer did not perform an adequate analysis of any of the enumerated FAR default factors . . .” (app. br. at 74). The “enumerated FAR default factors” are the seven items that FAR 49.402-3(f) states the contracting officer “shall consider . . . in determining whether to terminate a contract for default.” Although compliance or noncompliance with FAR 49-402-3(f) may aid in determining whether there has been an abuse of discretion in the decision to terminate, the regulation does not confer any rights on the defaulting contractor. *DCX, Inc. v. Perry*, 79 F.3d 132, 135 (Fed. Cir. 1996), *cert. denied*, 519 U.S. 992 (1996). In All-State’s case, there was no abuse of discretion in terminating for default a contractor who, in breach of its Disputes clause obligation, had failed to perform any work for five weeks because the government was withholding disputed liquidated delay damages.

We have carefully considered All-State’s other arguments and have found in them no basis for excusing its five week default on its Disputes clause obligation and insufficient substance to warrant discussion.

The appeal is denied.

Dated: 12 July 2006

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

I concur

I concur

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

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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:

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