

ARMED SERVICES BOARD OF CONTRACT APPEALS

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

APPEARANCE FOR THE APPELLANT: Barbara G. Werther, Esq.
Arent Fox Kintner Plotkin
& Kahn, PLLC
Washington, DC

APPEARANCES FOR THE GOVERNMENT: Fred A. Phelps, Esq.
Navy Chief Trial Attorney
Mark R. Wiener, Esq.
Senior Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN

All-State Construction, Inc. (All-State) moves for summary judgment on those counts of this appeal seeking to convert a default termination to a convenience termination. We grant the motion as to Count IV (“Wrongful Default Termination/Failure to Make Progress Payments”) to the extent that the Government’s retention of 38 percent of All-State’s earned progress payments was, in the circumstances, a material breach of the contract which discharged All-State of its obligation to perform.

STATEMENT OF UNDISPUTED FACTS

1. The contract was awarded to All-State on 30 September 1994 for construction of a hazardous waste storage facility (R4-50513, tab 1 at 55-56). The contract general provisions included the FAR 52.212-5 LIQUIDATED DAMAGES - CONSTRUCTION (APR 1984) clause; the FAR 52.232-5 PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACT (APR 1989) clause; and the FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) clause. The contract at award required completion of the work by 13 May 1995. Subsequent unilateral modifications extended the contract completion date to 12 September 1995. (R4-50513, tab 1 at 40-41, 55, 68, tab 2 at 1, 4, 8, 20)

2. The contract specifications at Section 01010, “General Paragraphs,” paragraph 1.12.2 stated in relevant part: “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.” (R4-50513, tab 1 at 60)

3. All-State began work on site on or about 8 March 1995. Performance of the work was substantially delayed thereafter for various reasons, the excusability of which is disputed. On 31 October 1995 and again on 5 August 1996, the Government accepted revised completion schedules from All-State. On each occasion, the Government expressly stated that its acceptance of the revised schedule was solely for purposes of mitigating damages and without waiver of its rights to assess liquidated damages and terminate for default at a later date. The schedule accepted on 5 August 1996 showed a completion date of 14 November 1996. (R4-50586, tab 27; app. memorandum, ex. 45)

4. By 13 September 1996, All-State had completed only 29 percent of the contract work, and on 24 September 1996 it submitted a third revised schedule projecting completion of the work on 2 January 1997. By letter dated 16 October 1996, the contracting officer told All-State that it had failed to demonstrate any adequate excuse for its untimely performance and that he was recommending a default termination to the terminating authority. (App. memorandum, ex. 51 at 52; R4-50586, tab 64)

5. Two days later, on 18 October 1996, the contracting officer rejected All-State’s most recent progress payment invoice (Invoice No. 7) because “[t]he amount to be retained for liquidated damages exceeds the amount of the invoice,” and because “it is not prudent at this time to make further payments to you until we are sure that sufficient funds are available in the contract to cover the costs of reprocurement and the assessment of liquidated damages if the contract is terminated for default” (app. memorandum, ex. 30 at 1). As of 18 October 1996, the liquidated damages for delay in completion, measured from 12 September 1995 and with no allowance for All-State’s pending claims for 689 days in time extensions, were \$180,900 and accruing at \$450 per day (R4-50513, tab 1 at 48, 69, R4-50516, tab 34 at 17, tab 44 at 8).

6. Prior to Invoice No. 7, the Government had paid All-State \$211,573.50 and had retained \$30,100 for liquidated delay damages (Invoice No. 3) and \$3,000 for “10% withheld” (Invoice No. 5) (app. memorandum, ex. 51 at 16, 39, 40). On All-State’s Invoice No. 7, the Government did not dispute that the total earned amount to date was \$338,772.17 (app. memorandum, ex. 34 at 2). With the rejection of that invoice, the Government retained a total of \$127,198.67 (38 percent) from All-State’s otherwise undisputed earned amount for completed work.* On or about 28 October 1996, ten days after the rejection of its Invoice No. 7, All-State stopped work on the contract (R4-50516, tab 51 at 8).

7. At a meeting with the contracting officer on 18 November 1996 and by letter dated 22 November 1996, All-State proposed a settlement of all disputed issues. The

* $(\$338,772.17 - \$211,573.50)/\$338,772.17$

proposed settlement included, among other things, a contract price increase in the amount of \$330,191.27 “for all changes and delays.” This amount was the difference between All-State’s total incurred costs to date and the progress payments made by the Government for completed work. (R4-50586, tab 71 at 2) At this time, in addition to its claims for time extensions, All-State also had asserted claims for an aggregate price increase of \$1,167,269 (R4-50516, tab 34 at 17, tab 44 at 8).

8. By letter dated 26 November 1996, the contracting officer terminated the contract for default, citing a telephone conversation earlier that day in which All-State’s president allegedly confirmed that All-State would not complete the work unless the Government accepted its proposed settlement (R4-50586, tab 72).

DECISION

The FAR Payments clause of the contract provided for periodic payments as work progressed based on the agreed percentage of work completed. Paragraph (e) of that clause provided that: “if satisfactory progress has not been made, the Contracting Officer may retain a maximum of 10 percent of the amount of the payment until satisfactory progress is achieved.” Paragraph (e) further provided that: “When the work is substantially complete, the Contracting Officer may retain from previously withheld funds and future progress payments that amount the Contracting Officer considers adequate for protection of the Government and shall release to the Contractor all the remaining withheld funds.” *See* FAR 52.232-5 (APR 1989).

The rejection of All-State’s Invoice No. 7 on 18 October 1996 for recoupment of liquidated delay damages, in conjunction with the earlier withholdings for the same purpose, amounted to a cumulative retention of 38 percent of the undisputed amount otherwise due All-State for completed work. *See* Findings 5 and 6. This retention of more than three times the maximum allowed by the FAR Payments clause for failure to make satisfactory progress was a material breach of the contract discharging All-State of any further obligation of performance. *See Nexus Construction Company, Inc.*, ASBCA No. 31070, 91-3 BCA ¶ 24,303 at 121,460-63 where the retention was 44 percent of the earned amount for completed work. While the 10 percent limit on retentions in paragraph (e) of the clause may not apply to retentions “[w]hen the work is substantially complete,” the rejection of All-State’s Invoice No. 7 occurred when the work was only 34 percent complete. The 10 percent limit clearly applied at that stage of the work.

To the extent specification section 01010, paragraph 1.12.2 b. is interpreted as permitting the retention, before substantial completion of the work, of liquidated delay damages in excess of the express limit in the FAR Payments clause, it is in violation of the FAR clause which is mandated by regulation, and the Government cannot by law benefit from it. *See Beta Systems, Inc. v. United States*, 838 F.2d 1179, 1185 (Fed. Cir. 1988). Nor can the Government justify its withholding as an exercise of its common law right of

set-off. The Government clearly limited that right with respect to the excessive withholding at issue here when it entered into the contract with paragraph (e) of the FAR Payments clause. *See Grant County Savings & Loan v. Resolution Trust Corp.*, 968 F.2d 722, 725 (8th Cir. 1992) (common law set-off right may be waived by party's agreement).

The Government has offered, and we have found, no evidence on the motion showing a genuine issue of material fact as to either the amount or purpose of the retention or the materiality of the Government's breach. Nor does the record suggest any waiver of the breach by All-State. *See H.E. & C.F. Blinne Contracting Company, Inc.*, ENG BCA No. 4174, 83-1 BCA ¶ 16,388 at 81,480, cited approvingly in *Nexus Construction Company, Inc.*, ASBCA No. 31070, 91-3 BCA ¶ 24,303 at 121,463.

Since All-State's obligation to perform was discharged by the Government's breach of its payment obligations on 18 October 1996, All-State was not in default thereafter either for delay in completing the work, or for stopping work on or about 28 October 1996, or for refusing to return to work thereafter except on conditions satisfactory to itself. In these circumstances, and pursuant to paragraph (c) of the Default clause, the termination on 26 November 1996 must be considered as one for the convenience of the Government. In view of this result, we need not address the issues in the other counts.

The motion for summary judgment is granted on Count IV to the extent indicated above. The appeal from the termination for default is sustained.

Dated: 21 February 2002

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

(Signatures continued)

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:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals