

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
ON MOTION FOR RECONSIDERATION

The government moves for reconsideration of our 21 July 2004 decision on grounds of factual and legal error in our findings on weather delays and Building QH-8 rescheduling. We revise our finding on weather delays from 54 days to 52 days and deny the motion in all other respects.

A. Weather Delays

The government contends that our finding of 54 days of work stoppage for unusually severe weather included 18 days on which work was in fact performed on the site, despite the weather, and four “nice weather” days on which no work was performed for reasons unrelated to the weather. On review of the weather records (app. supp. R4, tab 153 at 2893-96) and the contractor daily reports (gov’t supp. R4, tab 90), we find that there were 52 days when work was stopped on the site as a result of unusually severe weather during the period 19 December 1995 through 7 March 1996. The specific days and the unusually severe weather on those days were as follows:^{*}

On the nine days from 19 through 27 December 1995, work was stopped as a result of unusually severe snowfall (gov’t supp. R4, tab 90). The historic normal snowfall for the

* Only one of the days in our original weather finding (finding 25) and none of the days in that finding, as revised herein, is on the government’s list of 18 working days and four “nice weather” days.

area for the month of December was 4.2 inches. On 19 December when work was stopped, the cumulative snowfall for the month to date was 7.70 inches, an 83 percent increase over the historic total normal for the entire month. On 21 December the cumulative snowfall for the month to date was 11.20 inches, a 167 percent increase over the historic normal total snowfall for the entire month. (App. supp. R4, tab 153 at 2893-94)

On the 23 days from 8 through 30 January 1996, work was stopped due to unusually severe snowfall followed by unusually severe rainfall (gov't supp. R4, tab 90). The historic normal total snowfall for the month of January for the area was 16.3 inches, and the historic normal total rainfall was 3.45 inches. On 8 January 1996, the area had 19 inches of snow that brought the cumulative snowfall to 21.1 inches for the month to date. Additional snow through 17 January brought the cumulative snowfall to 28.2 inches for the month to date, an increase of 73 percent over the historic normal total snowfall for the entire month. The snow was followed by heavy rains that, by the end of the month, amounted to 5.04 inches. This was a 46 percent increase over the historic normal total rainfall for January. (App. supp. R4, tab 153 at 2894)

On the seven days from 1 through 7 February, work was stopped by unusually cold temperatures (supp. R4, tab 90). The historic normal average daily temperature for the month of February in the area was 32.5° F. The average daily temperatures on 1 through 7 February 1996 ranged from a high of 23° F. on 2 February to a low of 6° F. on 5 February. The seven-day average daily temperature was 16° F. On the seven days from 8 through 14 February, the site was shut down by unusually severe snowfall with a total accumulation on 14 February of 10.3 inches, a 34 percent increase over the historic normal total February snowfall of 7.7 inches for the entire month. An additional six inches of snow on 17 February kept the site shut down for an additional five days through 21 February. On reconsideration, we do not count 16 and 22 February as weather days. (App. supp. R4, tab 153 at 2895; gov't supp. R4, tab 90)

On Monday, 4 March 1996, the site was shut down by unusually severe snowfall over the preceding weekend. The total snowfall for the month to that date was 6.7 inches, a 415 percent increase over the historic normal snowfall of 1.3 inches for the entire month. (Gov't supp. R4, tab 90; app. supp. R4, tab 153 at 2896)

The government contends that “the Board appears to have applied an incorrect legal standard by considering each day that the temperature fell below the historical average as severe weather constituting excusable delay.” The government further argues that “[the] correct approach is to first determine the historical average number of days of unusually severe weather that can be anticipated in each month and then find as excusable only the number [of] days that exceeds the historical average.” (Gov't mot at 3)

Paragraph (b)(1)(x) of the FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) clause of the contract allowed an extension of time for, among other things,

delay in completing the work caused by “unusually severe weather.” The term “unusually severe weather” in the Default clause includes both an unusual number of days of severe weather at the work site, *see, e.g. Donohoe Construction Company*, ASBCA Nos. 47310 *et al.*, 98-2 BCA ¶ 30,076 at 148,824, or unusually severe weather conditions (*e.g.*, unusually heavy snow or rain, unusually high tides, unusually high or low temperatures) during a particular period at the site, *see, e.g., W.S. Meadows Engineering, Inc.*, ASBCA Nos. 32536 *et al.*, 88-2 BCA ¶ 20,616 at 104,201. The government provides no case support for its argument that the clause requires proof of an unusual number of days of unusually severe weather. Nor are we aware of any such support. We agree that minor deviations from the historic normal average daily temperature do not necessarily amount to unusually severe weather. The deviation for the seven days from 1 to 7 February 1996, however, was a 52 percent downward deviation below freezing. *See* the fourth paragraph above. We find that deviation to be major and unusually severe in the context of construction work in cold weather.

The government contends that All-State is not entitled to a time extension for the unusually severe weather in the winter of 1995-96 because its own delay in proceeding with the work in the spring and summer of 1995 was responsible for contract work continuing into the winter (gov’t mot. at 4-5). The cases cited by the government for this argument all involve contractor claims for compensable delay. The government has cited no case where a non-compensable time extension for unusually severe weather pursuant to the FAR 52.249-10 DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) clause was denied because contractor delay had moved performance into the period when the unusually severe weather occurred.

It was reasonably foreseeable in the spring and summer of 1995 that All-State’s delay in proceeding with the work at that time would result in a day-for-day delay in completion of the work and would extend the performance of the contract into the winter months of 1995-1996. But an additional 52 days of delay due to unusually severe weather was not reasonably foreseeable, and All-State’s delay in the spring and summer months was neither a sufficient nor proximate cause of the additional 52-day delay in contract performance. Moreover, for purposes of assessing liquidated delay damages, the rule is well established that “if an excusable cause of delay in fact occurs, and if that event in fact delays the progress of the work as a whole, the contractor is entitled to an extension of time commensurate with the delay, notwithstanding that the progress of the work was concurrently slowed down by a want of diligence, lack of proper planning or some other inexcusable omission on the part of the contractor” *See Sun Shipbuilding & Drydock Company*, ASBCA No. 11300, 68-1 BCA ¶ 7054 at 32,610.

B. Rescheduling Building QH-8

The government alleges error in our decision extending the contract completion date by 19 days for Modification No. P00001. Modification No. P00001 prohibited the

demolition of Building QH-8 (the existing hazardous waste facility) until after the new facility was completed and accepted. The government first argues that: “All-State. . . was terminated long before the new facility was anywhere close to completion” (gov’t mot. at 5). We do not understand the relevance of this point. Our finding that All-State is entitled to a 19-day time extension for unilateral Modification No. P00001 is addressed to the starting point for computing liquidated delay damages, *i.e.*, the originally specified contract completion date as extended by subsequent contract modifications and other adjustments to which the contractor may be entitled. The fact that All-State was terminated long before the new facility was completed is irrelevant to the establishment of the contractually required completion date for purposes of a liquidated delay damages calculation.

The government next argues that “there were several contractor-related problems and delays negatively impacting the project when the contract was default terminated” (gov’t mot. at 5-6). This argument appears to imply that no extension of time was due because the demolition could have been performed concurrently with the contractor-delayed completion of the new facility. Modification No. P00001, however, expressly precluded any performance of the QH-8 demolition concurrent with construction of the new facility. It stated that the demolition “shall not be performed until after completion and acceptance of the new hazardous waste storage facility.” (R4-50513, tab 2 at 2)

The government further contends that the decision was made “without having the benefit of any evidence on whether the 19 days originally proposed by All-State to accomplish this effort was even reasonable” (gov’t mot. at 6). The 19 days required for demolition (including asbestos removal) of the existing hazardous waste facility was shown on All-State’s initial construction schedule dated 1 November 1994. That schedule was approved by the government on the same date. (R4-50513, tab 3 at 1, tab 4 at 3, items 54-55). All-State’s initial schedule and the government’s approval thereof are sufficient evidence of the reasonableness of the 19 days we have allowed for Modification No. P00001, in the absence of evidence to the contrary.

The government argues that our decision was incorrect because it was made without considering “whether the work could have been performed concurrently with other work at the end of the job” and “whether the work might have been deleted from All-State’s contract before the time for performance of this work ever occurred” (gov’t mot. at 6). We have already noted that Modification No. P00001 did not permit any concurrency of the demolition with the new construction. As to consideration of possible deletion of the requirement, we take judicial notice of the contracting officer’s final decision (COFD) appended to the government’s answer in All-State’s appeal of the liquidated delay damages assessment (ASBCA No. 50831). The COFD states that the “completion contract was awarded to complete the work required by the defaulted contract (including modifications P00001 through P00007 thereto).” Our allowance of a time extension for Modification No. P00001 under All-State’s contract is clearly appropriate since the same modification was a part of the completion contractor’s work.

C. Conclusion

For the reasons stated above, we sustain the motion for reconsideration in part to the extent that we find 52 days of excusable delay for unusually severe weather, *vice* 54 days in our prior decision, but in all other respects the motion is denied.

Dated: 22 September 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, 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