

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
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AmerescoSolutions, Inc. ) ASBCA No. 56811  
 )  
Under Contract No. DACA87-03-D-0007 )

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OPINION BY ADMINISTRATIVE JUDGE TING  
ON APPELLANT’S MOTION FOR SUMMARY JUDGMENT

AmerescoSolutions, Inc. (ASI) and the U.S. Army Engineering Support Center in Huntsville, Alabama (the Corps), entered into an indefinite delivery/indefinite quantity contract (Contract No. DACA87-03-D-0007) for ASI to provide a broad range of design and construction services under a Facility Repair and Renewal (FRR) program for government installations and facilities. Under the contract, the Corps awarded Task Order No. 0013 (TO 0013) to renovate the Alaska Command Center Headquarters Building (ALCOM Building) at Elmendorf Air Force Base, Alaska. The Corps subsequently terminated TO 0013 for default, and ASI timely appealed the contracting officer’s decision. ASI challenged the validity of the default termination and sought to have it converted to a termination for convenience.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 8 January 2003, ASI entered into an indefinite delivery/indefinite quantity contract with the Corps, covering a broad range of design and construction services for the FRR program for government installations and facilities. The contract makes no provision for liquidated damages. (Supp. R4, tab 1; amended compl. ¶ 5, amended answer ¶ 5)

2. The FRR contract incorporates by reference FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) which provides, in part:

(a) If the Contractor refuses or fails to prosecute the work or any separate part, with the diligence that will insure its completion within the time specified in this contract...or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work...that has been delayed....

(Supp. R4, tab 1 at ALCOM000128) The contract also included FAR 52.232-5, PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (MAY 1997) which required the government to “make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates of work accomplished...” (*id.* at ALCOM000127).

3. On 3 March 2005, the Corps issued TO 0013 to ASI for the renovation of the ALCOM Building at Elmendorf Air Force Base. TO 0013 has no liquidated damages provision. (Supp. R4, tab 2; amended compl. ¶ 9, amended answer ¶ 9)

4. The original contract completion date (CCD) of TO 0013 is not in dispute. Bilateral Modification No. P00018 signed by the parties on 4 January 2007 provides: “Construction completion date for building 9480 shall be 05 December 2008” (gov’t opp’n, ex. 19).

5. ASI performed the demolition phase of the project, stripping interior spaces within the contracted scope of work virtually down to the concrete structure and removing all known asbestos-containing materials. At the conclusion of this phase, an independent industrial hygienist certified that the levels of airborne asbestos fibers were below legal limits. (App. mot., attach. A, Gagnon decl. (Gagnon decl.) ¶ 2<sup>1</sup>)

6. After renovation had been underway for nine months, on 12 September 2008, ASI directed all interior construction work cease, after precautionary air monitoring showed a potentially unsafe level of airborne asbestos in some parts of the building’s interior. At this point, the project was approximately 85% complete. (Gagnon decl. ¶ 3)

7. ASI concluded, and the Corps agreed, that the hazard posed by the unexpected presence of airborne asbestos required the development and execution of a remediation plan before interior work could resume. According to ASI, the ongoing suspension of

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<sup>1</sup> Gary E. Gagnon (Gagnon) was ASI’s Regional Director of Operations for the Alaska District, and in that position had direct responsibility and personal knowledge of the matters set out in his declaration (app. mot., attach. A).

interior work pending remediation efforts made the 5 December 2008 CCD unattainable. (R4, tab 56; supp. R4, tab 161; Gagnon decl. ¶ 4) By letter dated 23 September 2008, the Corps contracting officer Laura J. Sheldon (CO Sheldon) reiterated the government's earlier direction for ASI "to follow the requirements of the contract, evaluate any potential asbestos hazard in accordance with the requirements of EM 385-1-1, and develop and implement a plan to progress the work and meet the 5 December 2008 deadline for completion of the project" (R4, tab 56).

8. By letter dated 3 October 2008, CO Sheldon, advised ASI that its 1 September 2008 schedule update lacked detail to show its plan to complete the project by 5 December 2008. The letter said ASI's failure to plan its work demonstrated that the 5 December 2008 CCD would not be met. The CO notified ASI that its failure to progress the work, to adequately plan the work, and to properly schedule the work to be conditions endangering performance of the contract. The letter went on to say "unless these conditions are cured within 10 days after receipt of this notice, the Government may terminate for default...this contract." The CO directed ASI to provide a "recovery schedule" showing its "anticipated completion date" on the remaining contract work by no later than 15 October 2008. (R4, tab 55)

9. ASI's 15 October 2008 response forwarded a revised project schedule that was based on the assumption that notice to proceed with abatement of airborne asbestos would be issued by the Corps by 1 November 2008. The response said "as ASI has previously advised, this project will not be completed by 5 December 2008." (R4, tab 54) On 21 October 2008, ASI forwarded a Safety and Health Plan and a Hazard Abatement Plan for the boiler and electrical rooms prepared by Alaska Abatement Corporation (gov't opp'n, exs. 17, 18). By letter dated 22 October 2008, CO Sheldon demanded from ASI by no later than 27 October 2008 a plan of action and associated schedule to begin work by no later than 30 October 2008 (R4, tab 49).

10. On 24 October 2008, the Corps provided its comments to ASI's Safety and Health Plan and Hazard Abatement Plan (gov't opp'n, exs. 15, 16). ASI resubmitted its Hazard Abatement Plan on the boiler and electrical room on 27 October 2008 to which the Corps provided its comments on 30 October 2008. On 30 October 2008, the Corps approved ASI's plan for the two rooms but required resubmittal addressing the Corps' concerns. (Supp. R4, tab 237)

11. In October 2008, ASI engaged Alaska Abatement Corporation (AAC) to clear several basement equipment rooms so that limited work could resume on the electrical and mechanical systems while a plan was being developed for remediating asbestos in the remainder of the building. The Corps' approval of the remediation plan on 30 October 2008 allowed ASI to resume limited electrical and mechanical work in the first week of December 2008. (Gagnon decl. ¶ 5)

12. On 27 October 2008, ASI submitted a revised schedule which incorporated an estimated 90-day asbestos abatement period. ASI estimated that it would finish the project by 22 June 2009. (R4, tab 44 at COE 000234)

13. By serial letter H-261 dated 7 November 2008, ASI submitted an “interim” schedule showing a 26 May 2009 completion date. In this interim schedule, ASI estimated that the necessary asbestos remediation work would require at least 90 days after a qualified abatement contractor was given notice to proceed. ASI emphasized that this 90-day estimate was of “questionable reliability” since a remediation plan was still being prepared, and ASI had not yet sought bids from qualified abatement contractors. ASI noted that it would need “a definitive commitment from an abatement contractor” before a final schedule could be submitted. ASI also noted that the 26 May 2009 completion schedule assumed that abatement would commence promptly. ASI asked if its approach to revising the schedule was acceptable. (R4, tab 34; Gagnon decl. ¶ 7) On 13 November 2008, the Corps rejected the interim schedule for several reasons. Among them, ASI’s schedule lacked sufficient breadth and detail and ASI had not addressed the Corps’ concerns outlined in its 3 and 22 October 2008 letters. The Corps requested an electronic “recovery schedule” in PRX format to be submitted by 18 November 2008. The Corps did not specify a CCD to which ASI should target its scheduling efforts. (R4, tabs 33, 49, 55)

14. By letter dated 14 November 2008, ASI responded that “at this point ASI can only offer the Government a PRX schedule that is based upon the current assumption that a full 90 days of abatement work will be required before construction activities can resume in the ALCOM building” (R4, tab 31). The Corps then advised by letter dated 18 November 2008 that “[a] construction schedule, associated narrative, and prx file incorporating an assumed 90-day abatement activity is acceptable at this time” (supp. R4, tab 269).

15. A more extensive abatement plan for the areas not covered by AAC was prepared by a California-based consultant, Environmental and Occupational Risk Management, Inc. (EORM). The plan prepared by EORM was submitted on 17 November 2008 and conditionally approved by the Corps on 8 December 2008. While that remediation plan was being prepared by EORM and evaluated by the Corps, ASI was unable to solicit bids from potential abatement subcontractors, or obtain any commitments as to how long the remediation work might take. (Gagnon decl. ¶ 6)

16. As the 5 December 2008 CCD approached, CO Sheldon sent a letter to ASI dated 4 December 2008 stating:

Effective 6 December 2008, ASI is in contract default. The Government will allow ASI to proceed based on its recovery schedule provided with ASI serial letter H-261. As stated in prior correspondence, Government review of the

H-261 recovery schedule has determined deficiencies in areas addressing required activities, logic and activity durations. As a result of these deficiencies the Government is unable to determine the reasonableness of the completion date of 26 May 2009 proposed by ASI in its H-262 schedule.

The Government will continue to monitor progress and address schedule concerns with ASI to ensure contract obligations are met. The Government will make every effort to expedite submittal review and turnaround times, however, reserves the right to use times allotted in the contract. The Government reserves the right to terminate for default if your firm fails to make acceptable progress.

(R4, tab 29) ASI responded to this letter by moving forward with project-related work, believing that late completion would be permitted so long as ASI was making “acceptable progress” toward completion (Gagnon decl. ¶ 9).

17. ASI’s 7 December 2008 letter responded to the CO’s 4 December letter in part as follows:

ASI disputes the Government’s contention that it is currently in default. Given the differing site conditions and changes associated with the ongoing asbestos issues, plus numerous extra work items imposed upon ASI though [sic] unilateral contract modifications, there is no doubt that ASI is entitled to a considerable extension of the completion deadline set by the Government.

That said, ASI understands the need to move forward with the project expeditiously, and to that end has successfully cleared several areas in the ALCOM building where work activities have resumed.

ASI is presently gathering and evaluating proposals for remediating airborne asbestos to AHERA levels in the remaining interior spaces. As previously communicated, ASI intends to forward a recovery schedule to the Government after a subcontract for that work has been awarded.

(R4, tab 28)

18. Based on what the Corps stated in its CO's 4 December 2008 letter, ASI directed subcontractors to remain on standby until remediation work had proceeded to a point where interior work could resume. As a result, ASI incurred liability for standby costs. (Gagnon decl. ¶ 9)

19. While the Corps and ASI disputed which party should bear the costs associated with the asbestos remediation work and the subcontractor's standby, ASI agreed to assume these costs while reserving its right to submit a claim (Gagnon decl. ¶ 10).

20. On 5 January 2009, the Corps' ACO sent this letter to ASI:

The most recent schedule the Government received, as an attachment to ASI serial letter H-261, shows completion of all work on the project on 26 May 2009. ASI has not changed the 26 May date in its subsequent related correspondence (H-266, H-271, and H-273).

The Corps of Engineers has reported 26 May 2009 to the Air Force as the date ASI committed to finish its work under the current contract, and the Government will measure ASI's progress accordingly....

....

The Government acknowledges that ASI does not plan to complete its contract work until 26 May 2009. The Government is not extending the contract completion date, which remains 5 December 2008. As such, ASI remains in default of its contract, as stated in our serial letter C-319. Additional [sic], in accordance with FAR 52.249-10, ASI and its sureties shall be liable for any damages to the Government resulting from the failure to complete the work within the specified time, whether or not ASI's right to proceed with the work is terminated.

(R4, tab 26)

21. After the Corps conditionally accepted ASI's remediation plan on 8 December 2008, ASI solicited bids and began negotiations with qualified asbestos abatement subcontractors. On 9 January 2009, ASI entered into a subcontract with R&D Environmental, Inc. (RDE), an Alaska-based abatement contractor, for implementation of the remediation plan. (Gagnon decl. ¶ 11)

22. By letter dated 7 January 2009, ASI submitted to the CO a schedule showing an anticipated CCD of 6 July 2009. This schedule (2 January 2009 data date) was based in a fixed remediation plan and a firm subcontractor commitment. The letter told the CO that in addition to limited work that could resume in the boiler and electrical rooms and areas in the basement, ASI's new abatement contractor was "already mobilizing and starting work." (Supp. R4, tab 331; Gagnon decl. ¶¶ 12, 13) The Corps did not object to the 6 July 2009 projected completion date (Gagnon decl. ¶ 13).

23. RDE began abatement work in the ALCOM building on 13 January 2009. As RDE cleared spaces within the building, those spaces were inspected and approved by ASI's industrial hygiene consultant and Corps personnel. After testing and inspections were satisfactorily completed construction work resumed in those areas. (Gagnon decl. ¶ 14)

24. Abatement work proceeded more slowly than anticipated for a number of reasons, some of which ASI and RDE attribute to the Corps. ASI asserted that final inspections demanded by the Corps before construction work resumed in cleared areas were taking days to schedule and complete. According to ASI, the time lost was not something ASI had built into the 8 January 2009 schedule. (Gagnon decl. ¶ 15)

25. ASI provided the Corps with weekly updates to the 8 January 2009 schedule. The updates showed that the project completion was slipping to late July and then to August 2009. By 10 February 2009, the schedule updates had added 30 work days due to inspection issues, pushing the projected completion date to 24 August 2009. (Gagnon decl. ¶ 16)

26. In a letter dated 12 February 2009 to ASI, the ACO stated that "[t]he Government is observing...a continuing failure by ASI to properly manage the work and progress the schedule." The letter reviewed various ASI schedules showing 26 May, 6 July, 24 July, and 24 August 2009 as the projected completion date. The letter went on to say:

At this point the abatement work is not being adequately progressed. The areas remaining to be cleaned represent approximately 5-6 times the amount of work performed on the Third floor and North stair. Based solely on production rates to date, and not taking into consideration any delays due to failed clearance testing and re-cleaning, it appears that the remaining asbestos work can not be anticipated to be complete until possibly the end of May or June.

Given the current progress of abatement, or lack thereof, it is questionable whether the 24 August 09 Finish date recently published by ASI is realistic.

The projected Finish date has continued to slip on a weekly basis, from 26 May 09 to the most recent 24 August 09. Irrespective of the contractual completion date of 05 Dec 2008, ASI is failing to control and diligently manage the work such that the project completes in a timely manner.

The 24 August 09 finish date is not acceptable to the Government. ASI is requested therefore to provide the following:

....

- 8) Provide a revised construction schedule that reflects the 26 May 2009 completion date.

(Supp. R4, tab 374; Gagnon decl. ¶ 17)

27. ASI responded to the Corps by letter dated 17 February 2009. The six-page letter detailed the reasons for schedule slippage. The letter said it “cannot at this point provide an abatement schedule calling for work to be completed within 90 days,” and

8. ASI will not achieve project completion by 26 May 2009 under current Government directives. Even if changes are made as suggested above, ASI does not believe it would be able to achieve completion by that date.

(Supp. R4, tab 376)

28. By letter dated 27 February 2009, CO Sheldon terminated TO 0013 for default:

1. You are hereby notified that the referenced contract task order is terminated in its entirety in accordance with the Contract Clause, Default (Fixed-Price Construction) (Apr 1984).

2. You are in default since you have failed to perform and complete the work in accordance with the contractual completion date of 5 December 2008 as specified in Modification P00018, dated 4 January 2007.



....

6. I have determined that your failure to perform is not excusable. This notice constitutes my decision that you are in default, as specified and that your failure to perform is not excusable. You have the right to appeal this decision under the Disputes Clause of the contract.

(R4, tab 15)

29. ASI incurred costs to abate the airborne asbestos and to move the project toward completion between 5 December 2008 and the termination on 27 February 2009, 84 days later. The costs incurred included approximately \$280,000 paid to RDE to abate the airborne asbestos and nearly \$100,000 paid to EORM for the remediation plan and supervision. ASI also incurred costs for itself and its construction subcontractors during this period. (Gagnon decl. ¶ 19)

30. ASI's Pay Request #27 sought payment for undisputed work performed from October 2008 through January 2009. After Pay Request #27 was approved by the Corps for payment on 6 February 2009, ASI submitted it to the Corps' accounting center. Payment was pending when ASI was terminated for default. ASI initially believed that Pay Request #27 would not be processed because the Corps wanted to allocate the money to its procurement effort. (Gagnon decl. ¶¶ 20, 21) CO Sheldon explained that before the Corps received Pay Request #27, the Corps received a complaint from ASI's subcontractor that ASI "was wrongfully withholding \$612,359.00." Based on this complaint, the Corps decided it "would withhold paying Pay Request #27 until this issue had been resolved." (Gov't opp'n, ex. 1) In its reply to the Corps' opposition, ASI states "ASI was not aware of the initial reason for the withholding, but does not dispute the Corps' statement that this was the reason" (app. reply at 4).

### DECISION

In moving for summary judgment, ASI relies principally on *DeVito v. United States*, 413 F.2d 1147 (Ct. Cl. 1969). ASI contends that the two-prong test established in *DeVito* for an election by the government to waive "a contractor's non-completion of the work by the contract completion date" (mot. at 15) is "clearly met" (*id.* at 16). According to ASI, the Corps' forbearance began as early as October 2008, and it unreasonably waited 84 days after the 5 December 2008 CCD to terminate ASI for default while allowing it to proceed with a recovery schedule showing 26 May 2009 as the completion date (mot. at 16). ASI's motion also tells us that it relied on the Corps' forbearance and incurred costs to continue to work toward contract completion with the Corps' knowledge and encouragement (mot. at 17).

Recognizing that the Board has held in *Olson Plumbing & Heating Co.*, ASBCA Nos. 17965, 18411, 75-1 BCA ¶ 11,203, *aff'd*, 602 F.2d 950 (Ct. Cl. 1979), that the *DeVito* waiver doctrine does not apply to construction cases, ASI points out that “[s]everal more recent Board cases have nevertheless found the *DeVito* waiver principle applicable to construction cases.” ASI cites, as examples, *Technocratica*, ASBCA No. 47992 *et al.*, 06-2 BCA ¶ 33,316; *B.V. Construction, Inc.*, ASBCA No. 47766 *et al.*, 04-1 BCA ¶ 32,604; and *Overhead Electric Co.*, ASBCA No. 25656, 85-2 BCA ¶ 18,026, *aff'd*, 795 F.2d 1019 (Fed. Cir. 1986) (table). (Mot. at 18)

Recognizing also that the Corps’ termination letter reserved the right to terminate for default if ASI were to fail to make acceptable progress, ASI’s motion tells us that “the Government cannot reserve the right to default a contractor based on a past deadline while simultaneously encouraging the contractor to continue post-deadline performance” (mot. at 21-22). Finally, ASI’s motion says that the Corps never established a new and realistic completion date after it waived the 5 December 2008 CCD. ASI contends that the Corps could not legally terminate ASI’s contract on a “failure to make adequate progress basis” (mot. at 22). For this proposition, ASI’s motion relies upon *ITT Corp. v. United States*, 509 F.2d 541 (Ct. Cl. 1975), another supply contract case.

In opposing ASI’s motion, the Corps tells us that we have rarely applied *DeVito* to construction cases (gov’t opp’n at 9). It highlights the unique circumstances in *Technocratica* and *B.V. Construction* and distinguishes those cases on the basis that in this case “the Government always considered time of the essence and was greatly concerned about the failure to meet the CCD” (*id.* at 11). The Corps says it “put the Appellant on notice that the CCD remained 5 December 2008” on multiple occasions and while it allowed ASI to proceed it reserved its right to terminate for default if ASI failed to make acceptable progress (*id.* at 14-15). The Corps says “the Board’s construction cases demonstrate that the Government may preserve its right to enforce the CCD while encouraging the contractor to continue post-deadline performance” (*id.* at 16).

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247 (1986). “[S]ubstantive law will identify which facts are material. *Id.* at 248; *Colbert v. Potter*, 471 F.3d 158, 164 (D.C. Cir. 2006). A material fact is one which may make a difference in the outcome of the case. All justifiable inferences must be drawn in favor of the nonmoving party. *Liberty Lobby*, 477 U.S. at 248, 255.

In moving for summary judgment, ASI proposed 29 paragraphs of what it considered to be undisputed facts (mot. at 4-13, ¶¶ 1-29). Relying upon the legal principles enunciated in *DeVito*, 413 F.2d 1147, ASI raised this issue: “[W]hether the Corps waived the December 5, 2008 completion deadline for the ALCOM Task Order...and improperly terminated ASI for default without setting a new completion deadline” (mot. at 14).

In opposing ASI's motion, the Corps did not respond to any of ASI's proposed undisputed facts except for ¶ 29 relating to Pay Request #27. Instead, the Corps set out in 22 paragraphs its own "Statement of Undisputed Material Facts" (gov't opp'n at 2-8, ¶¶ 1-22). The Corps' opposition did provide in its "Statement of Disputed Material Facts" not facts but these contentions:

1. The Government disputes the Appellant's contention that the Government's conduct indicated time was not of the essence.
2. The Government disputes the Appellant's contention that the Government's reservation of a right to terminate was ineffective....
3. The Government asserts that it did not pay Pay Estimate No. 27 due to deficiencies in the Appellant's work[.]
4. The Government asserts that its decision to terminate Appellant was made within a reasonable amount of time.
5. Each of these statements of disputed fact will be more fully addressed in this response.

(Gov't opp'n at 1)

ASI's reply tells us that the Corps failed to identify any material facts in dispute but "takes issue with ASI's legal contentions arising out of undisputed facts and then adds a 'Statement of Undisputed Material Facts' of its own" (app. reply at 1). ASI tells us that for purposes of its summary judgment, it "does not dispute any facts alleged in the 22 numbered paragraphs" of the Corps' "Statement of Undisputed Material Facts" (*id.* at 4). ASI's reply reiterated that "[t]he overarching issue presented...is whether the Corps' default termination of ASI's contract for failure to meet the December 5, 2008 contract completion date was illegal because, based on the undisputed facts, the Corps had waived the completion date as a matter of law" (*id.* at 1).

As is evident from their motion papers, the parties disagree what law governs this appeal; they therefore differ on what facts are material for purposes of ASI's summary judgment motion. We have combined and set out the undisputed statements of facts proffered by the parties in ¶¶ 1-30 above. Depending on which legal theory is applicable, facts material to either theory are not in dispute.

## Governing Law

We start with the law. *DeVito* involved failure to timely deliver on a supply contract. In *DeVito*, the Court of Claims explained what “is popularly if inaccurately referred to as a ‘waiver’ of the right to terminate” concept:

Where the Government elects to permit a delinquent contractor to continue performance past a due date, it surrenders its alternative and inconsistent right under the Default clause to terminate, assuming the contractor has not abandoned performance and a reasonable time has expired for a termination notice to be given.

*DeVito*, 413 F.2d at 1153.

The Court went on to establish the necessary elements of an election by the non-defaulting party to waive default in delivery:

(1) failure to terminate within a reasonable time after the default under circumstances indicating forbearance, and (2) reliance by the contractor on the failure to terminate and continued performance by him under the contract, with the Government’s knowledge and implied or express consent.

*Id.* at 1154.

In 1975, we decided *Olson Plumbing and Heating Co.*, ASBCA Nos. 17965, 18411, 75-1 BCA ¶ 11,203, *aff’d*, 602 F.2d 950 (Ct. Cl. 1979). *Olson Plumbing* was a construction case. We held in that case the *DeVito* principle did not apply to construction contract cases for two reasons: First, construction contracts generally provide for payment for work completed after the contract completion date. Second, construction contracts generally contain a liquidated damages provision, and the assessment of such damages indicates time is of the essence. Thus, under these circumstances, the element of detrimental reliance is difficult to establish.

In *Nexus Constr. Co.*, ASBCA No. 31070, 91-3 BCA ¶ 24,303, *aff’d on recon.*, 92-1 BCA ¶ 24,577, the contractor missed the completion date in a construction contract; the government forbore termination for default. The government encouraged the contractor to continue performance without establishing a new completion date. The Board found that the government’s encouragement to expedite performance did not act as a waiver of the completion date, nor did it preclude the government from terminating the contract. Citing *Brent L. Sellick*, ASBCA No. 21869, 78-2 BCA ¶ 13,510 at 66,194-95, the Board noted in construction contracts which contain provisions entitling the contractor

to payment for the value of the work completed after the delivery date and entitling the government to assess liquidated damages, “detrimental reliance on the contractor’s part cannot be found merely from a period of Government forbearance [sic] coupled with continued contractor performance in reliance thereon.” *Nexus*, 91-3 BCA ¶ 24,303 at 121,458.

Although the FRR contract and TO 0013 do not contain a liquidated damages clause, they do include FAR 52.232-5, PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (MAY 1997) which requires the Corps to make monthly progress payments as work proceeds (SOF ¶ 2). Thus, one of the factors we identified in *Olson Plumbing* for not applying the *DeVito* principle is present. In this case, the Corps actually approved Pay Request #27 for work performed by ASI from October 2008 through January 2009 for payment. Pay Request #27 was withheld for reasons unrelated to ASI’s performance under TO 0013 – the Corps received complaints from ASI’s subcontractor that it was wrongfully withholding payment due it (SOF ¶ 30). As we said in *Joseph Morton Co.*, ASBCA No. 19793, 80-2 BCA ¶ 14,502 at 71,497, “It is the *entitlement* to payment or credit that removes the element of detriment necessary for a waiver of due date. If payment or credit has not in fact been given, that is a separate matter irrelevant here.”

*Olson Plumbing* is still good law. Contrary to what ASI’s motion seems to imply, there is no recent blurring of the distinction between supply and construction cases. To the extent we have applied the *DeVito* principle to construction cases, “unusual circumstances” were found to exist after development of the record at a hearing.

In *Technocratica*, 06-2 BCA ¶ 33,316, the Navy terminated two construction contracts for default. On the first contract, we found after the contract completion date had passed, the CO elected to allow the contractor to “muddle through a little bit longer” and see how things went. 06-2 BCA at 165,187. In letters to the contractor after the completion date had passed, the CO made no mention of liquidated damages. In the meantime, the Navy allowed the contractor to perform work and did not terminate the contract for default “10 to 13 months after the contract’s completion date.” *Id.* at 165,187. On the second contract, in its letter to the contractor two days after the contract’s deemed completion date, the Navy did not state that it continued to deem the contract completion date to be in effect nor that liquidated damages were accruing or would be assessed. In the meantime, the contractor continued performance with the Navy’s full knowledge and consent, and the Navy did not default terminate the contract until more than 11 months after the contract completion date. *Id.* at 165,189. After a hearing, we found both contracts were improperly terminated under the foregoing “unusual circumstances.” *Id.* at 165,188.

In *B.V. Construction*, 04-1 BCA ¶ 32,604, NASA did not terminate BV’s construction contract for over two years after the extended contract completion date. BV’s contract did not include a liquidated damages provision, hence, after the original contract

completion date passed, NASA did not mention liquidated damages. After a hearing, we found that for 20 months after the completion date passed, NASA continued to discuss and negotiate with BV proposed changes to the contract work and BV resumed work at the direction and in reliance of the CO's election not to terminate the contract. We found NASA's contract administration showed no urgency in resolving the problems that occurred at the start of BV's contract and indicated to BV that time was not of the essence. Based on these "unique circumstances," we concluded that NASA waived the extended completion date. *Id.* at 161,350-51.

In *Overhead Electric*, 85-2 BCA ¶ 18,026, we said "it takes unusual circumstances for that [*DeVito*] rule to be applied in construction cases." *Id.* at 90,473. In that case, the Corps in Alaska terminated one item under a construction contract under "the peculiar facts of this case." *Id.* In concluding that the Corps waived the completion date, we found the Corps did not take action to terminate after the completion date for the work came and went, did not mention that it intended to assess liquidated damages and treated the completion date as no longer of the essence.

Has ASI's Motion Shown "Unusual Circumstances" for Application of the DeVito Rule to This Construction Case as a Matter of Law?

Unlike the situations in *Technocratica*, *BV Construction* and *Overhead Electric*, where the government's conduct supported a conclusion that time was no longer of the essence, the Corps' CO in this case notified ASI by letter dated 4 December 2008, one day before the 5 December 2008 CCD that "[e]ffective 6 December 2008, ASI is in contract default" (SOF ¶ 16). While skeptical about the reasonableness of the completion date proposed by ASI in its recovery schedule, the CO nonetheless allowed ASI to proceed on the basis of that schedule showing a projected completion date of 26 May 2009 (*id.*). ASI was told "[t]he Government reserves the right to terminate for default," and forbearance would depend on ASI making "adequate progress" (*id.*).

One of the factors the Board considered in determining whether "unusual circumstances" existed in applying *DeVito* to construction cases was the length of time between the CCD and the termination. In *Technocratica*, it was 10 to 13 months after the contract completion date in one contract and 11 months in the second contract. In *B.V. Construction*, it was over two years. In this case, the original CCD was 5 December 2008; TO 0013 was terminated for default on 27 February 2009, 84 days later. Even if we start the forbearance period from mid-September 2008 when the Corps first became aware of the airborne asbestos, the termination occurred about five months later.

Relying on *Patten Co.*, ASBCA No. 35319, 89-3 BCA ¶ 21,957, ASI's motion argues that "the Government cannot reserve the right to default a contractor based on a past deadline while simultaneously encouraging the contractor to continue

post-deadline performance” (mot. at 22). As the Corps points out, *Patten* is a supply contract case (gov’t opp’n at 15). The rule for construction cases is quite different. In affirming the Board, the Court of Claims said in *Olson Plumbing*, 602 F.2d at 955:

Where the right to terminate has been expressly reserved or when liquidated damages have been imposed by the non-breaching party, the other party has a heavier burden of proving that the right to terminate for failure to deliver on time has been waived.... The Government’s express reservation of its rights and assessment of liquidated damages surely made clear to plaintiff that the Government was not excusing the breach.

We explained in *Joseph Morton Co.*, ASBCA No. 19793, 78-1 BCA ¶ 13,173 at 64,411, *aff’d on recon.*, 80-2 BCA ¶ 14,502, that “forbearance for a time under a construction contract is not normally inconsistent with a subsequent termination for default or assessment of liquidated damages; forbearance hereunder was not an election as it was in *DeVito*.”

In this case, the ACO’s 5 January 2009 letter – 53 days prior to the termination – to ASI maintained that “[t]he Government is not extending the contract completion date, which remains 5 December 2008” and “ASI remains in default of its contract” (SOF ¶ 20). This coupled with the CO’s 27 February 2009 letter basing the default termination on ASI’s failure to complete the work in accordance with the CCD of 5 December 2008 (SOF ¶ 28) suggests, drawing all reasonable inferences in favor of the nonmovant, that the Corps never waived the 5 December 2008 CCD.

Does the Corps’ Failure to Establish a Reasonable and Specific Completion Date Invalidate the Default Termination as a Matter of Law?

ASI contends that the Corps “having waived the contract completion date” (mot. at 22) “never established a new and realistic completion date” (mot. at 26). Relying on *DeVito* and *ITT Corp.*, ASI argues “[t]he Corps’ failure ever to establish a reasonable completion date invalidates the default as a matter of law” (mot. at 26). We need not reach the issue of whether the Corps’ failure to establish a reasonable and specific completion date invalidates the termination for default on the basis of failure to make progress. In *Olson Plumbing*, the Court of Claims spoke to this issue: This duty – to unilaterally or bilaterally set a reasonable time for performance – “does not arise under the rule of *ITT* until the facts and circumstances show the due date has been waived.” 602 F.2d at 957. Here, ASI has not established that the Corps waived the 5 December 2008 CCD under the “unusual circumstances” legal standard for construction cases.

CONCLUSION

Based on the undisputed facts the parties proffered, we conclude that ASI has failed to demonstrate “unusual circumstances” required as a matter of law for application of the *DeVito* waiver/estoppel doctrine to this construction appeal to be entitled to summary judgment.

Accordingly, ASI’s motion for summary judgment is denied.

Dated: 15 November 2010

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PETER D. TING  
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. 56811, Appeal of AmerescoSolutions, Inc., rendered in conformance with the Board's Charter.

Dated:

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