ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -	)	
	)	
Philips Lighting North American Corporation	)	ASBCA Nos. 61769, 61873, 62391
	)	
	)	
Under Contract No. CQ-12077	)	

APPEARANCES FOR THE APPELLANT:	Franklin C. Turner, Esq. Ethan Brown, Esq. Alexander W. Major, Esq. Matthew Wright, Esq. Cara A. Wulf, Esq. McCarter & English LLP Washington, DC
APPEARANCES FOR THE GOVERNMENT:	Jon B. Crocker, Esq. Chief Counsel Washington Metropolitan Area Transit Authority Washington, DC Eric W. Leonard, Esq. Tracye Winfrey Howard, Esq. Douglas Dreier, Esq. George E. Petel, Esq. Wiley Rein LLP Washington, DC

OPINION BY ADMINISTRATIVE JUDGE WOODROW

These appeals involve a contract to upgrade and replace the lighting systems at twenty-five parking garages owned by the Washington Metro Area Transit Authority (WMATA). Conformed Contract No. CQ-12077, Parking Garage Lighting Efficiency (the contract), required Philips Lighting North America Corporation (Philips) to upgrade and replace the lighting fixtures with energy-efficient LED technologies and install state-of-the art electricity metering equipment in all of WMATA's parking garages.

The contract established two phases of performance: the construction phase, during which Philips agreed to design and install the upgraded lighting and metering systems at each garage; followed by the maintenance phase, during which Philips would maintain the system for a period of ten years. The contract required WMATA to pay Philips in twenty semi-annual installments over the ten-year maintenance phase based on the energy savings achieved from the project. The contract did not require payment during the construction phase.

Philips moves for summary judgment contending that WMATA breached the contract by failing to pay Philips' invoices for installment payments and that WMATA breached its duty of good faith and fair dealing by causing delays during the construction phase of the contract. We grant partial summary judgment as to the payment obligations, but deny summary judgment as to Philips' allegations of breach of the covenant of good faith and fair dealing. Philips also moves to strike WMATA's affirmative defense seeking liquidated damages. We hold that the Board does not possess jurisdiction to entertain WMATA's request for liquidated damages, because WMATA's contracting officer did not issue a final decision upon the request as required by the disputes clause of the contract. Accordingly, we grant Philips' motion to strike WMATA's affirmative defense seeking liquidated damages.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

I. The Parties

1. Philips is a corporation involved in the manufacture and installation of residential, commercial, and industrial lighting systems (R4, tab 492 at 8733-34).

2. WMATA was created by an interstate compact between Maryland, Virginia, and Washington D.C. to, *inter alia*, operate a regional transportation system in the National Capital Area.

II. The Solicitation

3. On October 31, 2011, WMATA issued a Request for Proposals (RFP) to obtain a lighting system at its parking garages to produce "total cost and energy savings" (answer ¶ 6).

4. The purpose of the lighting project was to, among other things, improve lighting for customer comfort and safety and reduce WMATA's energy consumption and operating costs (R4, tab 1 at 113).

5. The RFP – which later was incorporated into the Contract – provided that the costs for the project would be financed through operating cost savings (R4, tab 1 at 18; answer ¶¶ 7, 18).

6. Philips provided WMATA with its energy consumption calculations as part of its proposal, the final version of which was dated August 30, 2013 (app. supp. R4, tab 492 at 8715-18).

7. In its proposal, Philips estimated WMATA's maximum potential energy consumption to be 22,992,704.88 kilowatt hours (kWh) per year (answer ¶ 33; R4, tab 492 at 8721).

8. Philips based this estimate on a survey of the total number and type of light fixtures in the garages multiplied by each fixture's energy consumption (R4, tab 492 at 8717-18).

9. Using its pre-bid estimate, Philips proposed that its system, once installed, would use only 7,376,876.45 kWh annually, providing WMATA with an expected annual kWh energy savings of 15,615,828.43 kWh per year – an annual proposed reduction of 67.92 percent. Philips' expected annual energy savings were incorporated into the contract (R4, tab 1 at 5-6; answer ¶ 34).

III. The Contract

10. WMATA and Philips entered into Contract No. CQ-12077 (contract) on October 18, 2013 (R4, tab 1 at 2; answer ¶ 37).

11. The contract provides that the Armed Services Board of Contract Appeals (ASBCA or Board) is "the authorized representative of the Board of Directors for final decisions on an appeal" taken from a decision of a contracting officer on a dispute "concerning a question of fact arising under or relating to the Contract" (R4, tab 1 at 63).

12. The contract incorporates various pieces of WMATA correspondence and related documentation, including five (5) non-consecutive pages of Philips' proposal, eight (8) pages of insurance certification paperwork, its own request for proposal, the Department of Labor Wage Rates (DC130002 08/23/2013), and fifteen (15) pages of amendments (R4, tab 1).

13. The contract includes a "PRICE SCHEDULE SHEET" that incorporates both Table 1 and Table 1A from Philips' proposal. Philips submitted this table in

response to the solicitation and it is incorporated into the contract. The "Guaranteed Energy Savings (kWh)" and "estimated kWh hours" in this table are power figures, not dollar figures. (R4, tab 1 at 5-6)

14. Table 1A set forth a schedule for WMATA to pay Philips "twenty (20) semi-annual installments to be made over the ten (10) year maintenance portion of the contract (the installment payments) from the savings achieved by the Project." The installment payments identified in The Price Schedule Sheet, totaling $16,487,486, anticipated that Philips' new garage lighting system would reduce WMATA's energy demand in these parking structures by approximately two-thirds, resulting in a "guaranteed energy savings" of 15,615,828 kWh per year. The Price Schedule Sheet further provided an "estimated kWh used" of 7,376,876 kWh in each operational year. (R4, tab 1 at 87-88; answer ¶ 21)

15. In addition to the twenty semi-annual payments, the parties also agreed that at the end of the ten-year Maintenance Phase, WMATA would have an end of term purchase option to acquire all lighting system assets in the twenty-five garages for a sum of $3,713,665. The combined sum of the purchase option and installment payments equal a total proposed project cost of $20,201,151. (R4, tab 1 at 5)

16. Functionally, the contract was divided into two phases: a construction phase, during which Philips would install the lighting system, and a maintenance phase, during which Philips would maintain that system for a period of ten years (answer ¶¶ 43-45).

17. The contract provided that Philips would not receive installment payments during the construction phase. After completion of the construction phase, Philips was to be paid by WMATA in twenty semi-annual installments over the ten-year maintenance phase of the contract, from the savings achieved from the project under the contract at Part II, § 2 ¶ 6(a) (R4, tab 1 at 84-85; answer ¶ 21).

A. Measurement of Energy Consumption

18. The contract established terms and conditions pertaining to the measurement of baseline and actual energy costs, as well as the calculation of energy savings (R4, tab 1 at 108, 121).

19. The amount of each "scheduled installment payment" is set forth in Table 1A (R4, tab 1 at 6).

20. With respect to the measurement and calculation of baseline and actual energy costs, the contract states:

> BASELINE AND ACTUAL ENERGY COSTS
>
> a. Baseline energy consumptions shall be established by directly measuring the power consumption for the current lighting system at each garage for a minimum period of six weeks before installation of the new lighting system. The measurement shall be accomplished by installing utility grade meters on all electrical circuits/panels not currently connected to dedicated meters. The contractor shall submit a plan for installing the meters within 45 days of notice to proceed.
>
> b. The utility grade meters shall remain in place and maintained for the life of this contract in order to measure actual energy consumption for the new lighting system.
>
> c. The energy cost shall be computed by multiplying price per Kwh paid by WMATA during the period by energy consumption for the period.
>
> d. Actual Project/energy savings shall be computed by multiplying the difference between the measured actual energy consumption and the baseline energy consumption by the price per KWh paid [by] WMATA during the period.

(R4, tab 1 at 108-09)

B. Payment Terms

21. The contract provides for semi-annual installment payments to be paid over the maintenance period. Paragraph 6 of the contract, Payment Terms, provides in relevant part:

> a. The Project costs will be paid in 20 semi-annual installments over the 10 year maintenance period (the "Installments Payments") from the savings achieved from

> the Project, to the extent the savings from the Project are equal to or higher than the Installment Payments. *If the Project savings are less than the scheduled Installment payments, then the scheduled Installment payment(s) for that period are deemed amended to equal the actual Project savings obtained (the "Amended Installment Payments").* The difference between the Amended Installment Payments and the scheduled Installment Payments shall be non-recourse to Metro.
>
> b. Installment Payments to the Vendor shall begin after final completion of the last of the 24 garages and after the guaranteed energy savings are verified through the measurement and verification plan. "Final Completion" shall mean that that [sic] the system installation is completed, tested, programmed, and providing required lighting levels with the guaranteed savings per the agreement and that WMATA has accepted the lighting system as installed.
>
> [. . . .]
>
> d. Partial payments are authorized upon receipt of supplies or services, acceptance by the COTR, and a properly executed invoice.

(R4, tab 1 at 84-85) (emphasis added)

22. WMATA is required to pay Philips after receipt of a properly completed invoice under the contract at Part II, § 2 ¶ 7(a). A "properly completed invoice" is one that is accompanied by the measurement and verification report verifying the actual savings obtained during the temporal period to which the invoice relates under the contract at Part II, § 2 ¶ 7(b) (R4, tab 1 at 85; answer ¶ 139).

23. Paragraph 7, Billing and Payment, provides in relevant part:

> a. Payment will be made after receipt of a properly completed invoice. . . .
>
> b. Invoices shall be supported by the measurement and verification report verifying the actual savings and shall

> contain the following information: date, contract and order number (if any), item numbers, description of supplies or services, sizes, quantities, unit prices, and extended totals. Final invoices must clearly be marked "FINAL" and cite the amount of the contract, amount previously paid, and the balance due.

(R4, tab 1 at 85)

24. The contract requires WMATA to pay Philips within 30 days of receipt of a properly prepared invoice, less any deductions provided in the contract. Paragraph 30, Payments, provides that:

> The Authority shall pay the Contractor, normally within 30 days of receipt of a properly prepared invoice or voucher, the prices stipulated in this contract for supplies delivered and accepted or services rendered and accepted, less any deductions provided in this contract.

(R4, tab 1 at 72; answer ¶ 98)

C. Disputes

25. The contract contains a disputes clause which establishes the Armed Services Board of Contract Appeals as the authorized representative of WMATA's Board of Directors for final decisions on an appeal. The disputes clause further provides that "any dispute concerning a question of fact arising under or related to this Contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his/her decision to writing and mail or otherwise furnish a copy thereof to the Contractor." (R4, tab 1 at 63)

IV. Contract Performance

26. On October 18, 2013, WMATA issued the Notice to Proceed to Philips (WMATA opp'n, Statement of Issues of Material Fact (Facts) at 7).

27. Philips performed circuit tracing on the electrical circuits in each garage, took a comprehensive inventory of the light fixtures in each garage, installed power meters, and took real-time measurements of the energy consumed by the existing lighting system in each garage (R4, tabs 477, 481).

28. Philips submitted "measurement and verification" (M&V) reports pursuant to the contract for each parking garage. The total directly measured power consumption of all of the garages was 19,186,521 kWh. Philips adjusted this baseline to 20,791,478 kWh to account for "documented fixture and circuit outages during the pre-install metering period." (App. supp. R4, tab 495 at 8948)

29. On April 16, 2014, after installing power meters and measuring the energy consumption for six weeks, Philips provided a baseline measurement and verification (M&V) report to WMATA (app. supp. R4, tabs 46, 46a).

30. WMATA rejected Philips' M&V report because of defects in the survey method (Jones Decl. ¶ 17).

31. The contract provided for the installation of all lighting systems within 730 calendar days from the date of award, setting the original completion date for the construction phase of the contract as October 18, 2015 as identified in the contract at Part II, § 2 ¶ 2(a) (R4, tab 1 at 84; answer ¶ 76).

32. Modification No. 001 to the contract, extended the completion date of the construction phase to August 31, 2016 (R4, tab 312a at 4667; answer ¶ 77).

33. Philips completed the construction phase of the contract on or before February 1, 2017 (resp. opp'n, Facts at 16).

V. Invoices for Payment

34. On May 2, 2018, Philips submitted invoices for the first three of the semi-annual installment payments to be paid over the ten year maintenance phase (R4, tab 31).

35. Invoice I, dated May 2, 2018, requested payment of $1,355,608.89, which included the amount due for equipment and services for period from September 1, 2016 to February 28, 2017. Invoice I also included $643,185.99, which represents one-half of the total savings realized by WMATA during the Construction Phase (September 14, 2014 to August 31, 2016), and to which Philips was contractually entitled (R4, tab 31 at 388).

36. Philips submitted Invoice II, dated May 2, 2018, requesting payment of $1,368,763.99, which included the amount due for equipment and services for period March 1, 2017 to August 31, 2017 ($725,578), plus $643,185.99, which represents the

second half of the total savings realized by WMATA during the Construction Phase and to which Philips was contractually entitled (R4, tab 31 at 398).

37. Philips submitted Invoice III, dated May 2, 2018, requesting payment of $740,089.50 for equipment and services for period September 1, 2017 to February 28, 2018 (R4, tab 31 at 408).

38. Each of the invoices included a measurement and verification report ("WMATA Parking Garage Lighting Retrofit Energy Savings Report"), which provided WMATA with a six-month savings summary and chart illustrating the energy savings during each of the respective invoices' six-month period (R4, tab 31 at 389-96; 399-406; 409-11).

VI. Notice to Cure Deficiency

39. On March 23, 2018, WMATA sent Philips a notice to cure deficiency (cure notice) stating that Philips is in breach of the contract for failure to: (1) "[d]eliver the supplies or to perform the services within the time specified in the contract, herein or any extension hereof;" and (2) achieve the Guaranteed Energy Savings of 15,615,828 kWh set forth in the Price Schedule Sheet, Amendment A10 Table 1. According to the cure notice, the "measured energy consumption for Year 1 ending January 31, 2018 produced an Energy Savings of only 14,729,854 kWh, which is a shortfall of 885,973 kWh of the guarantee." (R4, tab 479)

40. On April 2, 2018, Philips submitted a response to the cure notice. Philips asserted, in part, that it had completed the construction phase by August 31, 2016, and that it had produced the energy savings in accordance with the contract (R4, tab 481).

41. On June 21, 2018, Philips filed a Certified Claim for $3,464,462.38, seeking resolution of the matter pursuant to the contract's disputes clause (answer ¶ 291; app. supp. R4, tab 482).

42. WMATA did not respond to Philips' claim within 60 days (resp. opp'n, Facts at 46).

43. On September 5, 2018, Philips submitted a second claim summarily raising factual issues that Philips had submitted to WMATA as part of its Cure Notice Response and related correspondence (answer ¶ 298).

44. As of the date of the First Amended Complaint, WMATA has received invoices totaling $4,204,551.88, exclusive of interest (answer ¶ 155; R4, tab 31, app. supp. R4, tab 495).

45. On November 1, 2018, WMATA sent Philips its denial of Philips' second claim (answer ¶ 304-05).

46. WMATA admits it has made no payment at all to Philips under the contract (answer ¶ 158).

DECISION

As of February 2017, Philips had completed the construction phase of the contract. Since then, as of February 2019, it has presented four invoices for installment payments under the contract, totaling $4,204,551.88. However, WMATA has not paid the invoices and has made no other payments under the contract.

Philips moves for partial summary judgment on Counts II and III of its complaint. Count II alleges that WMATA breached the contract by failing to pay Philips' invoices for installment payments. Count III alleges a breach of the duty of good faith and fair dealing based, in part, on delays during the construction phase of the contract. We grant partial summary judgment as to the payment obligations in Count II, but deny summary judgment as to Count III.

I. Applicable Law and Standard of Proof for Summary Judgment

In this appeal, we previously held that we possess discretion to entertain motions for summary judgment pursuant to our 1973 rules[*] (Bd. corr. ltr. dtd. March 18, 2019). Motions for summary judgment must be denied unless there are no material facts in dispute and we are satisfied that the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987) (citing *Armco, Inc., v. Cyclops Corp.*, 791 F.2d 147, 149 (Fed. Cir. 1986). The moving party bears the burden of establishing the absence of any genuine issue of material fact, and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment. *Celotex Corp. v. Catrett*,

[*] Under the terms of the memorandum of understanding governing the Board's consideration of WMATA appeals, these appeals are subject to the Board's 1973 Rules.

477 U.S. 317, 322 (1986). We draw all justifiable inferences in favor of the nonmoving party. *CI2, Inc.*, ASBCA Nos. 56257, 56337, 11-2 BCA ¶ 34,823 at 171,353 (citing *Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1327 (Fed. Cir. 2010).

II. Whether Philips is Entitled to Summary Judgment on Count II for the Non-Payment of Invoices

Philips moves for summary judgment on Count II of its complaint, which alleges, *inter alia*, that WMATA breached the contract by failing to pay Philips' invoices for supplies delivered and services rendered and accepted. Although Count II contains additional allegations, including the failure to inspect for services, provide equitable adjustments for increases in work, and formally appoint a contracting officer, Philips' motion for partial summary judgment focuses principally on WMATA's payment obligation. Therefore, we address only the allegation that WMATA failed to pay Philips' properly prepared invoices.

Our evaluation of the payment obligation of Count II focuses on the interpretation of the contract's payment provision. According to WMATA, Philips has failed to fulfill a condition precedent to receiving payment under the contract, because it has not yet established that it has met the guaranteed annual energy savings set forth in the contract (resp. opp'n at 12). Philips, in turn, contends that the contract requires WMATA to pay Philips even if the actual energy savings are less than the guaranteed annual energy savings. In the event of an energy savings shortfall, the scheduled payments for that period are reduced to equal the actual project savings obtained (app. mot., Discussion at 16).

A. The Contract Provides for Partial Payments

Contract interpretation is a matter of law. *Boeing Co.*, ASBCA No. 60373, 18-1 BCA ¶ 37,112 at 180,624; *ThinkQ, Inc.*, ASBCA No. 57732, 13 BCA ¶ 35,221 at 172,825 (citing *Muniz v. United States*, 972 F.2d 1304, 1309 (Fed. Cir. 1992). In interpreting a contract, we begin with the plain language of the contract. *See, e.g., Banknote Corp. of America, Inc. v. United States*, 365 F.3d 1345, 1353 (Fed. Cir. 2004). The contract should be read as a whole, harmonizing and giving meaning to all provisions. *ThinkQ* at 172,825 (citing *NVT Tech., Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004)). In particular, the language of a particular contractual provision must be read in the context of the entire agreement. *Speegle Constr., Inc.*, ASBCA No. 54236, 05-1 BCA ¶ 32,866 at 162,863 (citing *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1555 (Fed. Cir. 1983).

Our analysis of WMATA's payment obligations starts with the plain language of the contract. The relevant provisions bearing on WMATA's payment obligations include Paragraph 6, Payment Terms, and Paragraph 30, Payment.

The key language of Paragraph 6, Payment Terms, provides in relevant part:

> a. The Project costs will be paid in 20 semi-annual installments over the 10 year maintenance period (the "Installments Payments") from the savings achieved from the Project, to the extent the savings from the Project are equal to or higher than the Installment Payments. *If the Project savings are less than the scheduled Installment payments, then the scheduled Installment payment(s) for that period are deemed amended to equal the actual Project savings obtained (the "Amended Installment Payments").* The difference between the Amended Installment Payments and the scheduled Installment Payments shall be non-recourse to Metro.

(SOF ¶ 21) (emphasis added)

Paragraph 30, Payments, provides that:

> The Authority shall pay the Contractor, normally within 30 days of receipt of a properly prepared invoice or voucher, the prices stipulated in this contract for supplies delivered and accepted or services rendered and accepted, less any deductions provided in this contract.

(SOF ¶ 24)

Taken together, these provisions expressly contemplate variances in the semi-annual installment payment amounts. Paragraph 6.a. of the contract defines two distinct terms: "scheduled installment payment," and "amended installment payment." The amount of each "scheduled installment payment" is set forth in "Table 1A: Option Annual Guaranteed Energy Savings and Total WMATA Costs – Philips" (Table 1A). Philips submitted this table in response to the solicitation and it is incorporated into the contract (SOF ¶¶ 13-14, 22).

In contrast, an "amended installment payment" occurs only when the actual project savings for that period is less than the scheduled amount. As expressly set

forth in paragraph 6.a., the distinction between "scheduled" and "amended" installment payments is based on the actual project savings obtained:

> [i]f the Project savings are less than the scheduled Installment payments, then the scheduled Installment payment(s) for that period are deemed amended to equal the actual Project savings obtained (the "Amended Installment Payments").

(SOF ¶ 21)

Thus, the "scheduled installment payment" is a cap on the maximum amount that WMATA would have to pay for any given period. If the lighting system saved more energy each year than the 15,615,828 kWh Philips estimated, then WMATA would benefit from extra savings and would not owe more than the scheduled payment set forth in Table 1A. The phrase "guaranteed energy savings" in Table 1A, therefore, reflects the parties' agreement that WMATA would never be required to pay more than the scheduled installment payment set forth in Table 1A.

The concept of a guarantee appears elsewhere in the contract, in Part II, § 2 ¶ 40:

> The vendor will provide a guarantee that, over the life of the Project, the annual energy costs (the difference between baseline energy cost and energy cost after the implementation of the Project) will be equal to or less than the Project's annual cost to Metro.

This provision is consistent with Philips' interpretation of the guarantee as a cap on annual installment payments. If the annual installment payment is equal to the actual energy savings, and the actual energy savings cannot exceed the "guaranteed" amount set forth in Table 1A of 7,376,876 kWh, then Philips has met its guarantee as defined in this provision.

WMATA proposes a much different interpretation of the payment provisions and Table 1A. According to WMATA, the "guaranteed energy savings" of 15,615,828 kWh set forth in Table 1A is a condition precedent to receiving payment. In WMATA's view, Philips is not entitled to any payment, because it has not yet established that it has met the guaranteed annual energy savings set forth in the payment provision (resp. opp'n at 12).

WMATA cites language in paragraph 6.b., stating that installment payments "shall begin after final completion of the last of the 24 garages and after the guaranteed energy savings are verified through the measurement and verification plan," as establishing a condition precedent to payment (resp. opp'n at 12, 14). According to WMATA, for the word "guarantee" to have any meaning, Philips must meet the "guaranteed savings" to receive payment (resp. opp'n at 15).

WMATA's interpretation presents a binary proposition: either the lighting system achieves the proscribed amount of savings and WMATA pays Philips the full scheduled payment, or the lighting system fails to achieve the savings and WMATA owes Philips nothing for that period (resp. opp'n at 12). The fundamental problem with this all-or-nothing interpretation is that it renders all of the provisions related to term "amended installment payments" superfluous, including paragraphs 6(a), 6(b), and 6(d), all of which reference "installment payments" or "partial payments." (SOF ¶ 21) It also would obviate the purpose of Table 1A, which sets forth a schedule of semi-annual installment payments (SOF ¶ 14). Indeed, under WMATA's interpretation, no payments *ever* would be due until Philips meets the imputed condition precedent. *NVT Tech. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004) ("an interpretation that gives meaning to all parts of the contract is to be preferred over one that leaves a portion of the contract useless, inexplicable, void, or superfluous").

WMATA attempts to save its interpretation by contending that paragraph 6.a. addresses only what happens after Philips delivers a compliant system that meets the guaranteed energy savings and *subsequently* fails to meet it in a later period. Under this interpretation, WMATA would have to meet the "guaranteed energy savings" at least once during the maintenance phase before being entitled to an installment payment. Thereafter, presumably, Philips would be entitled to "amended installment payments" in any subsequent period in which it failed to achieve the guaranteed energy savings.

This interpretation undercuts WMATA's contention that the guarantee is a condition precedent. Rather than appearing only once in paragraph 6.b., the term "guaranteed energy savings" is used throughout Table 1A to describe the projected savings for each year of the maintenance phase. Accepting that the term has the same meaning wherever it appears in the contract, *e.g.*, a condition precedent to payment, would mean that Philips must meet this level of energy savings each year, or forfeit any payment whatsoever. As before, this would render the term "amended installment payment" superfluous.

In summary, we read the contract as having a distinction between the terms "scheduled installment payment" and "amended installment payment." Pursuant to paragraph 6(b), Philips is entitled to the full "scheduled installment payment" only if it can demonstrate that the lighting system meets the "guaranteed energy savings" set forth in Table 1A. However, if the lighting system falls short of the stated savings amount, Philips is entitled to an "amended installment payment" pursuant to paragraph 6(a). Installment payments for each period are calculated by comparing the actual energy usage to the difference between the measured baseline and the "guaranteed energy savings." If the actual energy usage exceeds this amount, then the maximum WMATA would pay for, would be this difference. However, if the actual energy usage dropped below this amount, then WMATA would benefit by paying only the amount of the actual usage. Thus, the scheduled payment amount constitutes a cap on the maximum payment for each period. This interpretation of the contract gives meaning to all of its provisions and avoids the absurd result of requiring Philips to meet the guaranteed savings or forfeit payment altogether. *See BAE Systems Southeast Shipyards Mayport LLC*, ASBCA No. 59876, 17-1 BCA ¶ 36,799 at 179,364 (rejecting contractual interpretations that could yield absurd or commercially unreasonable results); *ITT Defense Communications Division*, ASBCA No. 44791, 98-1 BCA ¶ 29,590 at 146,703 (contract should be construed to avoid absurd results).

Having concluded that the payment provision permits partial payments, the factual dispute regarding the calculation of the baseline and whether Philips has met the guaranteed savings level safely can be deferred to the quantum phase of this appeal.

III. Whether Philips is Entitled to Summary Judgment on Count III for Violation of the Implied Duty of Good Faith and Fair Dealing

Count III of Philips' complaint alleges a breach of the duty of good faith and fair dealing (compl. ¶ 341-54). Philips contends that WMATA delayed the construction phase of the contract by, *inter alia*, delaying site inspection and acceptance, failing to notify appellant of the presence of a contracting officer, issuing an unsupported cure notice, and inducing Philips to prepare a remedial proposal that it had no intention of addressing on the merits (compl. ¶ 344).

Disputes concerning material issues of fact preclude us from granting summary judgment on Count III of Philip's complaint. A material fact is one that may affect the outcome of the decision. Allegations of a breach of the duty of good faith and fair dealing necessarily require us to examine the reasonableness of WMATA's actions considering all the circumstances. *Free & Ben, Inc.*, ASBCA No. 56129, 09-1 BCA ¶ 34,127 at 168,742 (quoting *Coastal Gov't Servs., Inc.*, ASBCA No. 50283, 99-1

BCA ¶ 30,348 at 150,088). Issues regarding reasonableness of a party's actions cannot ordinarily be resolved by summary judgment. *Sia Constr. Inc.*, ASBCA No. 57693, 14-1 BCA ¶ 35,762 at 174,986.

There are several material factual disputes concerning the cause of project delays during the construction phase. For example, the parties dispute whether WMATA delayed the installation of meters by preventing Philips from installing circuit tracing equipment on live circuits (resp. opp'n at 18, Rogers Decl. ¶ 8; answer ¶ 50). The parties dispute whether WMATA hindered the completion of the new lighting system by unreasonably delaying the substantial completion inspections required under the contract (app. mot., Discussion at 35; answer ¶ 92). The parties further dispute whether Philips completed the construction phase tasks by the August 2016 completion date (resp. opp'n at 18, Rogers Decl. ¶¶ 6, 8; R4, tab 21 at 331; answer ¶ 80), and whether Philips' November 7, 2016 letter constituted an admission that installation was not complete by the August 2016 deadline (resp. opp'n at 17-18, 20; R4, tab 21 at 331).

On the current record, these fact-intensive issues are not ripe to be resolved by summary judgment. *CiyaSoft Corp.*, ASBCA No. 59519, 17-1 BCA ¶ 36,731 at 178,896 (citing *Cooley Constructors, Inc.*, ASBCA No. 57404, 11-2 BCA ¶ 34,855 at 171,457).

IV. Whether WMATA Possesses a Claim for Liquidated Damages

The standards applicable to striking a defense and those applicable to summary judgment are stringent. Motions to strike a defense must be denied unless we are satisfied "that there are no questions of fact; that any questions of law are clear and not in dispute, and that under no set of circumstances could the defenses succeed." *Danac, Inc.*, ASBCA No. 33394, 88-3 BCA ¶ 20,993 at 106,071-72 (quoting *Carter-Wallace, Inc. v. Riverton Labs., Inc.*, 47 F.R.D. 366, 368 (S.D.N.Y. 1969)). "These narrow standards are designed to provide a party the opportunity to prove his allegations if there is the possibility that his defense or defenses may succeed after a full hearing on the merits." (*Id*. at 106,071)

These stringent standards are met in these appeals. We hold that WMATA's affirmative defense of delay is tantamount to an affirmative claim for entitlement to liquidated damages. Although the request is styled as an affirmative defense, it expressly requests payment of a sum certain amount of $975,205:

> 376. The Final Completion of the installation phase was 154 days late, and 472 days past the original completion

> date before WMATA accepted Philips' proposal for a no-cost extension.
>
> 377. The total liquidated damages due to WMATA under the Contract are $975,205.

(Answer ¶¶ 376-77)

The disputes clause of the contract requires that "any dispute concerning a question of fact arising under or related to this Contract . . . shall be decided by the Contracting Officer, who shall reduce his/her decision to writing . . ." (SOF ¶ 25). We previously have held that ASBCA is without jurisdiction to entertain a putative counterclaim where WMATA's CO did not issue a final decision upon any affirmative claim by WMATA, as required by the disputes clause of the contract. *See Conley Frog/Switch & Forge Co.*, ASBCA No. 53288, 02-1 BCA ¶ 31,737 (Jan. 24, 2002); *see also Arkinson Constr. Co.*, ENGBCA No. 6145, 1997 WL 853178 (Dec. 9, 1997).

In these appeals, WMATA has made no written demand seeking payment of liquidated damages. WMATA's cure notice, dated March 23, 2018, merely asserts WMATA's right to exercise its contractual remedies. The cure notice does not mention damages or make a demand for any payment of money. Nor does it assert a finite period of delay from which a sum of liquidated damages could be calculated. The mere assertion of a legal right to a remedy falls short of a written demand for payment of a sum certain. *Parsons Evergreene, LLC*, ASBCA No. 57794, 12-2 BCA ¶ 35,092 at 172,347 (holding that the government's letter asserting a right to assess liquidated damages was not a claim pursuant to the CDA); *see also ACEquip, Ltd.*, ASBCA No. 53479, 02-2 BCA ¶ 31,978 at 158,019 (holding that COFD that did not seek payment of liquidated damages was not a government claim for such damages under the CDA).

Therefore, pursuant to the disputes clause of the contract, the Board does not possess jurisdiction to adjudicate a government monetary claim raised for the first time in its pleadings. *Dynport Vaccine Co.*, ASBCA No. 59298, 15-1 BCA ¶ 36,069 at 176,135; *see also Optimum Servs., Inc.*, ASBCA No. 57575, 13 BCA ¶ 35,412 at 173,726.

CONCLUSION

For these reasons, we grant partial summary judgment as to the payment obligations in Count II, but deny summary judgment as to Count III.

Dated: July 30, 2020

KENNETH D. WOODROW
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

J. REID PROUTY
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. 61769, 61873, 62391, Appeals of Philips Lighting North American Corporation, rendered in conformance with the Board's Charter.

Dated: August 5, 2020

for Jamie D. Allott

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals