ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -	)	
	)	
ACC Construction Co., Inc.	)	ASBCA Nos. 63528, 64067
	)	
Under Contract No. W912QR-17-C-0021	)	

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OPINION BY ADMINISTRATIVE JUDGE MELNICK ON THE GOVERNMENT'S PARTIAL MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

These appeals by ACC Construction Company (ACC) arising from a construction contract with the Army Corps of Engineers essentially allege compensable government delays arising from COVID-19 requirements and seek the return of associated liquidated damages. The government requests dismissal for lack of jurisdiction of the liquidated damages portion, claiming that it is time barred. It also contends we lack jurisdiction over a count of the complaint alleging breach of the implied duty of good faith and fair dealing upon the ground that ACC did not present it in its claim to the contracting officer. The contention that the liquidated damages claim is time barred borders on frivolous and is otherwise meritless, as is the contention that the good faith and fair dealing count was not asserted in the appellant's claim. Additionally, the government seeks summary judgment, arguing that all the claims are barred because they were submitted after final payment, and that the delay claims were either released or the subject of an accord and satisfaction. We deny summary judgment, ruling the government has not established final payment that would pose a bar to the claims, ACC's claims do not encompass the period that was the subject of a release, and the government has not demonstrated an accord and satisfaction.

FINDINGS OF FACT (FINDINGS) FOR PUPOSES OF THE PARTIAL MOTION TO DISMISS

1. On July 13, 2017, the U.S. Army Engineer District, Louisville, awarded the contract identified above to ACC for the design and construction of an Equipment Concentration Site, Tactical Equipment Maintenance Facility, and General Purpose Warehouse at Fort A.P. Hill,[1] Virginia (R4, tab 13 at 1-2; gov't prop. facts ¶ 1; app. gen issues ¶ 1). Standard clauses incorporated into the contract included FAR 52.233-1, DISPUTES (MAY 2014); FAR 52.243-4, CHANGES (JUN 2007); and FAR 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984) (R4, tab 13 at 1922, 1934-35, 1943-44).[2] The contract also contained FAR 52.211-12, LIQUIDATED DAMAGES-CONSTRUCTION (SEP 2000), providing that ACC "shall pay liquidated damages to the Government in the amount of $1,670 for each calendar day of delay until the work is completed or accepted." (*id.* at 1837). Additionally, the contract contained FAR 52.232-5, PAYMENTS UNDER FIXED-PRICE CONSTRUCTION CONTRACTS (MAY 2014); and 52.232-27, PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (MAY 2014) (*id.* at 1910-12, 1914-20).

2. On May 14, 2019, ACC submitted a certified claim to the contracting officer for $2,811,944.86 and a 278-day time extension. This included $1,412,744 in alleged costs for complying with requirements imposed by the Virginia Department of Environmental Quality (DEQ) and $1,399,200.86 stemming from the related 278-day alleged delay. ACC appealed the denials of its amended claims to this Board, which ruled adversely to it on September 1, 2022. *ACC Constr. Co.*, ASBCA Nos. 62265, 62937, 22-1 BCA ¶ 38,194. ACC then appealed to the United States Court of Appeals for the Federal Circuit, which affirmed. *ACC Constr. Co. v. Sec'y of the Army*, No. 2023-1372, 2024 WL 2064620 (Fed. Cir. May 9, 2024). We refer to this as the DEQ litigation.

3. Performance continued while the DEQ litigation was pending. ACC submitted 33 invoices on the project (R4, tab 65 at 3384). In reaction to numbers 22

[1] In August 2023, Fort A.P. Hill was renamed Fort Walker. In August 2025, Fort Walker was renamed Fort Anderson-Pinn-Hill, commonly abbreviated Fort A.P. Hill.

[2] The document page numbers commence with two zeros that we have deleted.

through 33 the government issued ENG Form 93, titled “Payment Estimate-Contract Performance” (“Pay estimate” or “PE”) (R4, tabs 65, 110, 119; gov’t supp. br. exs. 3-11).[3] Among other things, the contents of the form’s various blocks include the contract identity and work description; dates covered by the estimate; the completion date; contract amount; total earnings to date, previous deductions, retentions, payments, and earnings; current period earnings; and retained percentage. Additional blocks identify deductions other than retained percentage and total deductions for the period, leading to an amount due block. There is also space for a “DETAILED EXPLANATION AND OR REMARKS.” Finally, the form contains a block entitled “CONTRACTING OFFICER APPROVAL SIGNATURE.” (R4, tab 110 at 3711)

4. The government’s motion to dismiss initially relies upon three of the pay estimates. PE 22, dated February 19, 2020, was issued the day after the government received an invoice from ACC (R4, tab 110). It covered January 1 through February 13 and deducted $66,800 in liquidated damages for the January 4 through February 13, 2020, period (*id.* at 3712). The contracting officer approval block is signed by Mr. Cory Pugh (*id.* at 3711).

5. The second pay estimate relied upon by the government is PE 32, issued in response to ACC invoice 32, and signed by Mr. Pugh in the contracting officer approval box on August 2, 2021 (R4, tab 119;[4] gov’t prop. facts ¶ 43; app. gen issues ¶ 43). The Detailed Explanations box states that following the $66,800 in liquidated damages deducted in PE 22 from invoice 22, liquidated damages were deducted in varying amounts from nine more invoices, including $43,420 in PE 32, for a total of $497,660 (R4, tab 119 at 3771).

6. The third pay estimate the government relies upon is PE 33, issued in response to ACC invoice 33, and signed by Mr. Pugh in the contracting officer approval box on December 15, 2021 (R4, tab 65; gov’t prop. facts ¶ 46; app. gen issue ¶ 46). It repeats the deductions for liquidated damages described in PE 32 without withholding any more (R4, tab 65 at 3384).

7. Mr. Pugh was not the contracting officer. He was the Contracting Officer’s Representative (COR) (gov’t supp. br. 1-4, ex. 1); *ACC Constr.*, 22-1 BCA ¶ 38,194 at 185,475. The government’s motion omitted disclosing that Mr. Pugh was not the contracting officer. The government only admitted that fact after the Board issued an order questioning his status based upon testimony and findings made in the DEQ litigation (bd. order dtd. March 2, 2026; govt. supp. br.). As the government revealed after prompting by the Board, the duties delegated to Mr. Pugh as COR by

[3] We suspect the government issued a PE in response to all invoices but the record is not sufficiently complete to confirm that.

[4] The parties appear to mistakenly cite Tab 118.

the contracting officer were to verify contractor performance, perform inspections and acceptance of services, maintain communications that were to be signed "Contracting Officer's Representative," monitor performance, notify the contractor and contracting officer of deficiencies, and direct correction. He was also to record and report to the contracting officer faulty or nonconforming work, delays or problems. Additionally, he was to make monthly reports, coordinate site entry, and complete a Contractor Performance Evaluation in the appropriate database. Finally, he was to ensure contractor manpower reporting. He was explicitly barred from obligating the payment of money by the government or take any action that may affect contract funds. (Gov't supp. br. at ex. 1) We find Mr. Pugh was not authorized to issue contracting officer decisions under 41 U.S.C. § 7103(a).[5]

8. The DEQ litigation arose from the same contract as these appeals. *ACC Constr.*, 22-1 BCA ¶ 38,194 at 185,470. Mr. Pugh testified in the DEQ appeal he was not the contracting officer, only the COR. *Id.* tr. of record vol. III at 97-98. The Board found in its DEQ decision that Mr. Pugh was only the COR. *Id.* at 185,475.

9. In response to the Board's inquiry about Mr. Pugh's authority, among other things the government's supplemental brief added PEs 24 through 31 to the record. They are the additional payment estimates deducting incremental amounts in liquidated damages. PEs 24, 25, and 28 through 31 contain Mr. Pugh's signature in the contracting officer signature box. (Gov't supp. br. exs. 3-11)

10. PEs 26 and 27 contain the signature of the Administrative Contracting Officer (ACO), Mr. Michael Roach.[6] The explanation block for PE 26 recites the liquidated damages deductions taken from previous invoices and adds $21,710 resulting in a total of $258,850. PE 27 repeats the series of deductions and adds $18,370 for a total of $277,220. (Gov't supp. br. at exs. 6-7) Mr. Roach was delegated his ACO authority on August 11, 2017, by the contracting officer, Mr. Patrick Duggins. It includes authorization to perform administrative functions in accordance with FAR 42.302. (Gov't. supp. br. ex. 2) That provision permits the

[5] We leave for the merits proceedings our determination whether he was authorized to withhold contract funds as liquidated damages in light of the limitations upon his authority.

[6] The Board's order for supplemental briefing did not reopen the briefing of the motion to dismiss for the submittal of new evidence signed by other people in support of the government's motion. It merely ordered evidence and argument about the authority of Mr. Pugh, who signed the documents relied upon by the government's motion. (Bd. order dtd. March 2, 2026) The government should have sought leave to amend its motion to add new, independent evidence. Nevertheless, ACC has addressed the government's new evidence in its supplemental response so we shall consider it.

ACO to review requests for payments under the progress payments clause and make payments. It also grants authority to issue "decisions under the Disputes clause on matters in which the [ACO] has the authority to take definitive action." FAR 42.302(a)(10), (13)-(14). Based upon his delegation of authority, we conclude Mr. Roach was authorized under 41 U.S.C. § 7103(a) to issue contracting officer decisions assessing liquidated damages.

11. None of the pay estimates say they are contracting officer decisions or contain a description of the appeal rights required by 41 U.S.C. § 7103(e). At bottom, each pay estimate is a routine action addressing how much would be withheld and paid to ACC in response to that invoice, with 10 withholding liquidated damages (R4, tab 65 at 3384). Because PEs 22, 24 through 25, and 28 through 33 were not signed by the contracting officer, we find they were not contracting officer final decisions assessing liquidated damages. PEs 26 and 27 were signed by the ACO but the government offers no evidence he considered them to be contracting officer final decisions. Given that their language is otherwise no different than the others, they were issued by the ACO in the middle of a series of 10 pay estimates withholding incremental amounts of liquidated damages, all on the same standard form, when the other eight, including five issued afterwards, were not issued by the ACO, we find they did not express an intent by him to be final decisions, and would not be recognized as such by ACC. Nor did he sign PE 33, which did not withhold any additional amounts but re-summarized the total liquidated damages withholdings.

12. On November 16, 2022, Mr. Daniel Netherton, another ACO, sent a letter to ACC notifying it that "the Government intends to execute the final payment and assessment of liquidated damages," explaining that liquidated damages had been previously withheld for the period between the contract completion date and the substantial completion date. He then referred ACC to the contract's disputes clause "if you wish to pursue further action on this matter." (R4, tab 69) We infer from the letter's expression of intent to assess liquidated damages that ACO Netherton did not believe a final decision had been issued on the matter. We also infer that his advice that ACC should refer to the Disputes clause to pursue further action shows the ACO thought ACC could still pursue a claim for the return of liquidated damages. This letter bolsters our conclusion that the prior pay estimates were not themselves final decisions.

13. On January 20, 2023, ACC submitted to Mr. Netherton a Request for Equitable Adjustment (REA) seeking a 486-day time extension due to COVID impacts affecting the project critical path and $2,133,385.35 (R4, tab 72).

14. On February 7, 2023, ACC filed a notice of appeal docketed as ASBCA No. 63528, claiming to appeal from the ACO's November 16, 2022, letter (see ¶ 12), which ACC characterized as a government claim for liquidated damages. The parties

agreed to stay that appeal while the DEQ appeal remained pending in the court of appeals. (Gov't prop. facts ¶¶ 55-56; app. gen issues ¶¶ 55-56; R4, tab 82)

15. On August 14, 2024, after the court of appeals affirmed the Board's DEQ decision, ACC submitted a certified claim to the contracting officer for 486 days and $1,821,858.48 (gov't prop. facts ¶ 58; app. gen issues ¶ 58; R4, tab 85). ACC claimed entitlement because of COVID impacts and the government's refusal to timely address the resulting delays (*id.* at 3502-03). Because the time extension sought would extend completion past the substantial completion date, it sought release of all liquidated damages, totaling $497,660. Alternatively, it sought a determination that substantial completion was at least as early as September 8, 2020, and sought a 99-day reduction of liquidated damages to total $165,330. (*Id.* at 3504) ACC argued it was entitled to recover based upon changes, constructive changes, and the terms of the contract's default clause. It also alleged the government breached the contract for failing to properly recognize the date of substantial completion. Finally, ACC contended the government breached the implied duty of good faith and fair dealing "by failing to work with ACC on COVID issues, impacts, and delays. Instead, [it] withheld time extensions, enforced liquidated damages, and generally failed to partner to complete the work." (*Id.* at 3505) On November 22, 2024, the contracting officer denied the claim (R4, tab 84). ACC's February 5, 2025, notice of appeal was docketed as ASBCA No. 64067 and has been consolidated with ASBCA No. 63528. Both are now proceeding.

16. The consolidated complaint is organized by docket number. For ASBCA No. 63528, it says little more than what we have already described. It purports to appeal from the contracting officer's November 16, 2022, letter that it alleges is a final decision assessing liquidated damages. (Compl. ¶¶ 16-17) For ASBCA No. 64067, the complaint alleges that ACC repeatedly sought relief from COVID impacts but only received late time extensions and no additional funds (compl. ¶ 20). It claims the government continually changed safety, testing, quarantine, and site access requirements, causing delays and impacts justifying 486 days of excusable and compensable delay (*id.* ¶¶ 35, 37). It contends that substantial completion took place on September 8, 2020 (*id.* ¶ 71). Counts I through III seek 486 days, $1,821,858.48 in costs, and the release of $497,660 in liquidated damages premised upon a theory of change, constructive change, or delay, while Count V also seeks the same recovery because of the government's refusal to cooperate to resolve the COVID impacts on a theory of breach of the duty of good faith and fair dealing (*id.* ¶¶ 52-69, 76-80). Based upon its allegation that it substantially completed on September 8, 2020, Count IV seeks release of 99 days in liquidated damages, totaling $165,330, based upon breach of contract (*id.* ¶¶ 70-75).

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION FOR SUMMARY JUUDGMENT

1. The following facts are not in dispute. On March 18, 2020, the ACO informed ACC about necessary precautions due to the COVID-19 pandemic (R4, tab 24; gov't prop. facts ¶ 8; app. gen. issues ¶ 8). ACC then encountered various delays caused by COVID leading to an October 8, 2020, bilateral modification extending the contract completion date by 20 days to January 23, 2021, due to "delays caused by COVID-19 for the period" March 13, 2020, to June 26, 2020. ACC released the government from liability "attributable to such facts or circumstances." (R4, tab 57) On July 13, 2020, ACC reported to the ACO that a subcontractor employee tested positive for COVID (R4, tab 53). On July 15, the contracting officer notified ACC he was "tracking" a two-day time extension due to the issue, to which ACC responded, "Yessir thanks" (R4, tab 93). On August 13, and September 11, ACC reported COVID continued to impact the schedule and would assess delays with the government (R4 tab 94 at 3646-47, tab 98 at 3664-65). On October 14, 2020, ACC reported the project was 98% complete, projecting completion on December 17, 2020. It repeated that COVID continued to impact the schedule and would assess delays with the government. (R4, tab 101 at 3671-72, 3676-77) On December 15, 2020, the government's engineer informed ACC that "construction work on this contract was considered substantially complete and possession was taken . . . ." He stated final payment would be withheld pending final acceptance of the contract work. (R4, tab 62)

2. On May 20, 2021, the government completed unilateral Modification A00013, extending the contract completion date by two days due to the July 2020 COVID delay, which made it February 20, 2020. The modification says it covers all COVID delays for the June 27 to November 18, 2020, period. ACC did not agree to the modification. (R4, tab 64; gov't prop. facts ¶ 44; app. gen issues ¶ 44)

3. On December 14, 2021, ACC submitted a prompt payment certification and supporting data for payment invoice 33, dated December 13 (R4, tab 120; gov't prop. facts ¶ 45; app. gen issues ¶ 45). It left $100 remaining to be sought for punch list work (R4, tab 120 at 3777 (Activity No. C1720)). On December 15, 2021, Mr. Pugh signed PE 33, which continued to reserve $100 (R4, tab 65; gov't prop. facts ¶ 46; app. gen issues ¶ 46).

4. On September 26, 2022, the ACO wrote to ACC. Citing FAR 52.232-5 and 52.232-27, he purported to enclose "ENG Form 93 and Release of Claims for the contract." Again, ENG Form 93 is the payment estimate form. He requested ACC sign both. He then pronounced that if ACC "intend[ed] to reserve the right to pursue any disputes, [it] must annotate the Release of Claims with a description of each dispute and amount . . . ." He stated that "[o]utstanding disputes **DO NOT** prevent release of pay to you; however, refusal to sign final pay documentation will delay

payment." Finally, he opined that "[p]er the Prompt Payment Clause, the due date for making final payment is the 30th day after the Government confirms the Contractor completed all contract actions." (R4, tab 66) (emphasis in original)

5. On September 27, 2022, ACC responded that it would not execute ENG Form 93 and the release of claims for several reasons, indicating it would not seek final payment. First, it noted the Board's September 1 denial of its DEQ appeal was not final and ACC was evaluating whether to appeal.[7] Second, ACC had not agreed to Modification No. A00013, which failed to encompass the entirety of the delays caused by COVID and the government's response, including impact on "labor production, labor availability, material availability and equipment availability." Third, it asserted the liquidated damages were excessive and operated as a penalty because there was no immediate need for the building and the government was slow taking possession. ACC stated that until those issues were resolved it would not execute the form and release sought by the government. (R4, tab 68)

6. As observed above, nearly two months later, on November 16, 2022, the ACO responded for the government, declaring that it intended to execute the final payment "and assessment of liquidated damages" (R4, tab 69). On December 7, the ACO notified ACC that all work on the contract was completed on December 6, and it was accepted in accordance with FAR 52.246-12 (R4, tab 123). The same day, the ACO sent another letter repeating the contents of his September 26 letter seeking execution of ENG Form 93 (payment estimate) and a release of claims. He notified ACC that the government's date to make final payment was the 30th day after it confirmed contract completion. (R4, tab 122) One week later, on December 13, the government paid $100 to ACC (R4, tab 125). On December 22, less than 30 days after the ACO confirmed contract completion, ACC informed him by letter that it would appeal the Board's DEQ decision, and it would be filing a certified claim for delay caused by COVID affecting labor, materials, and equipment. It also would be appealing the assessment of liquidated damages. (R4, tab 70)

DECISION

The government moves to dismiss all of ACC's efforts to recover liquidated damages for lack of jurisdiction, arguing that its deductions of those amounts in pay estimates were government claims that ACC did not appeal to the Board within 90 days. Additionally, it suggests we lack jurisdiction over ACC's breach of good faith and fair dealing contention because it was not presented in a claim to the contracting officer. Furthermore, the government moves for summary judgment upon all of ACC's allegations because its claims were made after final payment, ACC

[7] The letter refers to the "1 September 2022 ruling." It is clear from the filings the parties understand that to be the Board's DEQ decision.

released all delay claims stemming from COVID for the period March 13 through June 26, 2020, and its delay claims arising after June 26, 2020 were the subject of an accord and satisfaction.

I. Motion to Dismiss for Lack of Jurisdiction

A. Liquidated Damages

The government contends the Contract Disputes Act (CDA) claim mechanism, as applied to the facts, deprives us of jurisdiction to entertain ACC's appeal as it pertains to the government's withholding of liquidated damages. *See* 41 U.S.C. §§ 7101-09. "A prerequisite for jurisdiction. . . over a CDA claim is a *final decision* by a contracting officer on a *valid claim*." *Northrop Grumman Computing Sys., Inc. v. United States*, 709 F.3d 1107, 1111-12 (Fed. Cir. 2013) (emphasis in original). Contractor claims against the government involve two separate acts. The contractor must submit a written claim to the contracting officer who then issues a written decision. 41 U.S.C. § 7103(a)(1)-(2), (d).[8] If for money, the claim must provide notice of its general amount. *Envistacom, LLC*, ASBCA No. 63796, 25-1 BCA ¶ 38,775 at 188,486. If the claim exceeds $100,000, it must be certified in accordance with 41 U.S.C. § 7103(b). *Id.* Under the CDA, the government may also assert claims against contractors. It provides that "[e]ach claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer." 41 U.S.C. § 7103(a)(3). Thus, when the contracting officer makes a claim upon the contractor the claim and the final decision are the same thing. *See L-3 Commc'ns Integrated Sys., L.P.*, ASBCA Nos. 60713, 60716, 17-1 BCA ¶ 36,865 at 179,625 (explaining that when "the CDA claim is a government claim, the contracting officer's final decision is considered to be the claim"). "If a purported claim is found to be insufficient for any reason, the insufficiency is fatal to jurisdiction under the CDA." *Northrop Grumman*, 709 F.3d at 1112. The Board's jurisdiction is also dependent upon a claimant appealing a contracting officer's final decision within 90 days of the decision's receipt. 41 U.S.C. § 7104(a); *D.L Braughler, Co. v. West*, 127 F.3d 1476, 1480 (Fed. Cir. 1997). "The contracting officer's decision on a claim is final and conclusive and is not subject to review by any forum, tribunal, or Federal Government agency, unless an appeal or action is timely commenced" either here within 90 days or in the United States Court of Federal Claims within 12 months of the date of receipt. 41 U.S.C. § 7103(g), 7104; *see also D.L. Braughler*, 127 F.3d at 1480.

To the extent the ACO's November 16, 2022, letter to ACC constitutes a government claim for liquidated damages, as ACC contends, it timely appealed from it

[8] The decision may be implied from a failure by the contracting officer to issue a decision within the required period. *See K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000, 1005 (Fed. Cir. 2015).

to this Board on February 7, 2023 (findings ¶¶ 12, 14). ACC also submitted a certified claim on August 14, 2024, seeking the return of all liquidated damages in the amount of $497,660, or alternatively $165,330. That claim contains all the required elements of the CDA's claim criteria. The government does not suggest otherwise. The contracting officer's November 22, 2024, denial of the claim was timely appealed on February 5, 2025. (Finding ¶ 15)

The government's motion contends that PE 22, dated February 19, 2020, and PE 32, dated August 2, 2021, are contracting officer final decisions assessing liquidated damages upon ACC that were not appealed to this Board within 90 days. Though it does not say so specifically, it implies that they are now final and unreviewable and therefore the Board lacks jurisdiction to entertain ACC's demand for the release of liquidated damages in these proceedings. (Gov't mot. at 13-16) Ruling upon that contention requires determination of the underlying facts. "The facts supporting jurisdiction are subject to fact-finding by the Board based on our review of the record," which we have performed here. *Sungwoo E&C Co.*, ASBCA No. 61144 *et al.*, 22-1 BCA ¶ 38,125 at 185,206. We have found that those documents were only signed by Mr. Pugh, who was not a contracting officer and not authorized to issue a contracting officer's final decision under 41 U.S.C. § 7103(a) (findings ¶¶ 4-5, 7). The government has made no effort to show, either in the main briefing or its supplemental submissions, that a contracting officer's final decision triggering appeal rights can be issued by someone only clothed with the authority of a COR. Given that "[a] prerequisite for jurisdiction. . . over a CDA claim is a *final decision* by a contracting officer," *Northrop Grumman*, 709 F.3d at 1111-12, PEs 22 and 32 did not constitute anything that ACC could have appealed. The same is true for PEs 24-25, and 28-31 (submitted by the government in its supplemental brief) as well as 33. None of them were signed by a contracting officer and therefore they are not final decisions. (Findings ¶¶ 6, 9)

Having been forced to recognize in its supplemental filings that most of the documents it claims are contracting officer decisions were only signed by a COR, the government's supplemental filings observe that the government need not issue a final decision to withhold liquidated damages. That is true and undercuts the government's position since the entire premise of the government's motion is that its pay estimates are contracting officer final decisions that had to be appealed within 90 days. Because they are not, they do not present anything that is final and unreviewable that could trigger 41 U.S.C. § 7103(g)'s preclusion of our jurisdiction to review ACC's appeals regarding liquidated damages. The government's contentions that PE 22 and 32 are final decisions, as well as its additional suggestion about PEs 24-25, 28-31, and 33, are completely baseless. The government is reminded that it is bound to a duty of candor in advancing its arguments.

What remains are PEs 26 and 27, executed by ACO Michael Roach on June 30 and July 7, 2020 (gov't supp. br. at exs. 6-7). Though the government's motion did not expressly rely upon these documents, it included them as exhibits to its supplemental brief, suggesting they also constitute government claims under the CDA. ACC argues that Mr. Roach was not authorized to issue a contracting officer decision asserting a government claim for liquidated damages (app. supp. br. at 3-5). We found above that he was authorized to do so. (Finding ¶ 10) However, we conclude he did not do so.

It is true that a contracting officer can assert a claim for liquidated damages in a CDA final decision. *See Placeway Constr. Corp. v. United States*, 920 F.2d 903, 906-07 (Fed. Cir. 1990). However, as already noted, the government concedes the contracting officer may also withhold liquidated damages without issuing a final decision (gov't supp. br at 3). *See R.R. Gregory Corp.*, ASBCA No. 58517, 14-1 BCA ¶ 35,524 at 174,111; *Parsons Evergreene, L.L.C.*, ASBCA No. 57794, 12-2 BCA ¶ 35,092 at 172,345-47; *see also K-Con*, 778 F.3d at 1003-007 (describing government withholding liquidated damages, followed by a contractor claim for their return that was held to trigger the right to sue under the CDA). Whether a CDA claim exists is decided on a case-by-case basis, which can include reviewing the surrounding correspondence. *See Holmes & Narver, Inc.*, ASBCA No. 51430, 99-1 BCA ¶ 30,131 at 149,055. It is a common-sense analysis that includes determining whether the document provides adequate notice that it is a claim. *See Red Bobtail Transp.*, ASBCA Nos. 63783, 63784, 24-1 BCA ¶ 38,598 at 187,639. Thus, the question we have been presented is whether these two pay estimates, issued in the middle of a series of 10 withholding incremental amounts of liquidated damages, all on the same standard form, expressed an intent by the ACO to be CDA final decisions, and would be recognized as such by ACC, when the other eight signed only by the COR, including five issued afterwards, were not. Given the totality of the facts, we have found they did not express such an intent and it would not have been reasonable to expect ACC to recognize them as such to start the 90-day clock for taking an appeal here.[9] (Findings ¶¶ 11-12) Because they too are not final decisions, they do not preclude our jurisdiction to review ACC's liquidated damages appeals. This comports

[9] Had the ACO signed all 10 pay estimates withholding liquidated damages the government would have us conclude that, rather than function as a routine pay administration mechanism issued in response to routine invoices, each was a final decision that had to be appealed here or challenged in the Court of Federal Claims to avoid finality under the CDA. Thus, ACC would have to file 10 separate actions over the course of a year and a half, forfeiting any that it overlooked, to fully challenge the withholding of less than half a million dollars in liquidated damages. ACC would have to commence litigating liquidated damages piecemeal before they were fully withheld or the impact of possible government delays could be determined.

with *R.R. Gregory*, where the Board considered Corps contracting officer pay estimates withholding liquidated damages to not be final decisions and recognized the contractor's right to assert its own claims challenging the liquidated damages within six years of claim accrual. 14-1 BCA ¶ 35,524 at 174,110-12.

For all these reasons, the government's motion to dismiss ACC's appeals as they pertain to liquidated damages is denied.

B. Good Faith & Fair Dealing

The government also seeks dismissal of Count V of the complaint for lack of jurisdiction, alleging the government breached the implied duty of good faith and fair dealing because ACC did not present it in its claim to the contracting officer. We cannot exercise jurisdiction over new claims that were not previously presented to the contracting officer. *Conrad Shipyard, LLC*, ASBCA No. 63869, 25-1 BCA ¶ 38,796 at 188,686. "Claims are separate from one another when they assert grounds that are materially different from each other factually or legally." *Id.* The action before the Board must arise from the same operative facts as the claim submitted to the contracting officer, seek essentially the same relief, and not advance a materially different legal theory. *Id*. (citing *Wilwood Eng'g Inc.*, ASBCA Nos. 62773, 62774, 22-1 BCA ¶ 38,116 at 185,144-45).

After reciting a detailed chronology of events, ACC's August 14, 2024, certified claim alleged that COVID delays stemmed from government policies and procedures that impacted ACC's means and methods, added more testing and protocols, and led to loss of manpower, material, and equipment delays. It alleged "the Government did not timely address ACC's COVID impacts." (R4, tab 85 at 3502-03) Elsewhere, the claim alleged that ACC suffered "productivity impacts due to work protocols and restrictions, including safety, testing, and access, due to ever-changing and often conflicting government directives." It contended "ACC sought timely resolution of these delays but was told to wait until the delays were done and [the] project closed out before seeking resolution." It concluded that "[b]y not timely addressing these delays, it forced additional and unnecessary acceleration and schedule compression." (*Id.* at 3503-04) In addition to arguing the government's acts constituted changes or constructive changes, the claim expressly alleged that "the government breached the implied duty of good faith and fair dealing by failing to work with ACC on COVID issues, impacts, and delays. Instead, the Government withheld time extensions, enforced liquidated damages, and generally failed to partner to complete the work" (*id.* at 3505). Count V of the complaint tracks the claim's allegations by contending that the government "refused and failed to cooperate with ACC to resolve the COVID-related impacts to the Project schedule and performance" (compl. ¶ 79). ACC's claim alleges the government failed to timely address COVID impacts and delays, arguing its conduct breached the implied duty of good faith and this is precisely what Count V alleges (R4, tab 85 at 3505; compl. ¶¶ 79-80). Count V does not allege grounds materially different from the claim factually or legally; it arises from the same operative facts as the claim, seeks the same relief, and advances the same legal theory. The government's meritless motion to dismiss Count V for lack of jurisdiction is denied.

II. Motion for Summary Judgment

In addition to seeking dismissal of portions of ACC's appeals, the government claims it is entitled to summary judgment in its entirety upon the appeals because ACC's "claims" were submitted after final payment and are barred under the doctrines of release, waiver, and accord and satisfaction (gov't mot. at 18).

A. Final Payment

ACC relies upon paragraph (f) of the Changes clause which says: "No proposal by the Contractor for an equitable adjustment shall be allowed if asserted after final payment under this contract." (R4, tab 13 at 1935; gov't mot. at 19-20). FAR 52.243-4(f), CHANGES (JUN 2007). The government maintains that under this provision, "claims made for the first time after final payment are barred as untimely unless the contracting officer knew the contractor was asserting an additional claim" (gov't mot. at 20).

Initially, we note the only claim by ACC at issue here is its August 14, 2024, certified claim for 486 days and $1,821,858.48 based upon COVID impacts, and the government's refusal to timely address the resulting delays, and that also seeks release of liquidated damages. That claim is the subject of ASBCA No. 64067. (Finding ¶ 15) The government has failed to explain how this language in the Changes clause could apply to ASBCA No. 63528, which purports to be an appeal by ACC from a government claim for liquidated damages (finding ¶ 14). There is no ACC claim at issue in that appeal so the government's argument is inapplicable to it. Second, Counts IV and V of the complaint are for breach of contract (compl. at 9-10). Though ACC asks for an equitable adjustment as its remedy for Count IV, the remedy for breach of contract is typically damages, not an equitable adjustment under the Changes clause. The government has cited no cases applying paragraph (f) to bar recovery for breach of contract.

With respect to ACC's changes claims that are the subject of ASBCA No. 64067, the government's final payment defense is an affirmative defense upon which it bears the burden of proof. *Matcon Diamond, Inc.*, ASBCA No. 59637, 20-1 BCA ¶ 37,532 at 182,263. "[W]hether a contractor's claim is asserted prior to final payment is determined by a two-step inquiry: (1) when, if at all, was final payment made? and (2) was the claim asserted before that time?" *David Grimaldi Co.*, ASBCA No. 36043, 89-1 BCA ¶ 21,341 at 107,594. Often a contractor release informs the former inquiry, but "[i]n cases where the last payment occurs without execution of a release, it may be necessary to look to the surrounding facts and circumstances to determine whether the final payment which bars subsequent claims has taken place." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 n.4 (citing *Gulf & W. Indus., Inc. v. United States*, 6 Cl. Ct. 742 (1984) and noting there the "court looked to the totality of the facts and circumstances to determine when final payment had occurred where the contractor had executed no release relative to the portion of the contract at issue"). There is no release here, so we review the totality of the undisputed facts to determine whether the government has established entitlement to a summary judgment ruling that it issued final payment barring subsequent claims.

Under the contract's Payments under Fixed-Price Construction Contracts clause, final payment was due after completion and acceptance of all work, ACC presented a properly executed voucher, and ACC presented a release of all contract claims against the government, other than claims in stated amounts that ACC specifically excepted from the operation of the release (R4, tab 13 at 1910-12). FAR 52.232-5(h) (MAY 2014). The contract's Prompt Payment for Construction Contracts clause required the government provide final payment 30 days after the government received a proper invoice or accepted the work, whichever was later (R4, tab 13 at 1914). FAR 52.232-27(a)(ii)(A)(1)-(2) (MAY 2014). After ACC declined to agree to unilateral Modification No. A00013, it submitted payment invoice 33, leaving $100 remaining, which the government approved (SOF ¶¶ 2-3). On September 26, 2022, citing the two payment clauses just discussed, the ACO sought a final payment request from ACC and its execution of a release of claims. Saying first that refusal to sign the documentation would delay the payment, the ACO then inconsistently declared that the Prompt Payment clause required the government issue the final payment 30 days after the government confirmed completion of the work, regardless of what ACC did. (SOF ¶ 4) That was wrong, for as we just observed, the due date was at least 30 days after the government accepted the work or received a final payment invoice, whichever was later. The next day, ACC refused to execute a payment request or release because it was considering appealing its DEQ claim, Modification No. A00013 failed to address all the delays, and the liquidated damages operated as a penalty. It communicated there were unresolved issues and its dissatisfaction with the compensation it had received. (SOF ¶ 5) Ignoring ACC's reasons for declining to pursue the $100, nearly two months later, on November 16, the ACO unilaterally declared that the government intended to execute final payment and assess liquidated damages. On December 7, the ACO declared the work completed and accepted. He then repeated his demand that ACC seek payment of the $100 and provide a release of claims, as well as his incorrect opinion that the government was to make final payment 30 days after it confirmed completion, which would have been January 6, 2023. Nevertheless, only one week later, and without warning, the government paid ACC the remaining $100. On December 22, still prior to the date the ACO identified he would issue payment, ACC notified the ACO it was appealing the DEQ decision and would be filing a certified claim for delay caused by COVID and the assessment of liquidated damages. (SOF ¶ 6)

When ruling upon summary judgment, the evidence must be viewed in the light most favorable to the non-movant and all reasonable inferences should be drawn in favor of the nonmoving party. *See Dairyland Power Coop. v. United States*, 16 F.3d 1197, 1202 (Fed. Cir. 1994). The undisputed facts suggest the reasonable inference that the government inappropriately foisted final payment upon ACC, springing it upon ACC earlier than it would have expected. First, it wrongfully insisted that it had to issue final payment 30 days after it declared the contract complete, regardless of whether ACC had requested final payment. The contract does not require that. Under the FAR payments clauses discussed above, ACC had no contractual expectation that it would be subjected to a final payment barring previously unidentified claims when it had not yet made a request for final payment. Second, after indicating to ACC that it would issue the unnecessary payment 30 days after declaring the contract complete, the government accelerated the payment without warning, issuing it merely one week later and denying ACC the full 30-day period the government suggested it would have to notify the government of any claims. It can be inferred that this smacks of deceptive conduct. The final payment limitation in the Changes clause is not a trap to be set or tool for abusive gamesmanship. Notably, ACC provided notification of its intent to pursue claims within 30 days. The absence of a request for payment because of unresolved issues, the government's misapplication and misrepresentation of the contents of the payment clauses, along with an inferred deception, establish a triable question about the mutuality of the $100 payment as a final payment that can bar future claims. *See JT Constr. Co.*, ASBCA No. 54352, 06-1 BCA ¶ 33,182 at 164,465; see also *Merritt-Chapman & Scott Corp*., ASBCA No. 9834, 66-2 BCA ¶ 5768 at 26,856 (rejecting the suggestion that final settlement is achieved by the government "presenting to the contractor a unilateral account stated and disregarding his protests against the account").

The government relies principally upon *Matcon Diamand,* 20-1 BCA ¶ 37,532 at 182,264, for the proposition that the contractor's omission of a release of claims does not bar application of the final payment rule. There was no question there that the contractor requested final payment and it was issued. The same is true for *Arab Shah Constr. Co.*, ASBCA No. 60813, 17-1 BCA ¶ 36,846, the precedent relied upon by *Matcon.*[10] Here, final payment barring subsequent ACC claims is not so evident

[10] Notably, *Chronometrics*, *Inc.*, ASBCA No. 46581, 95-1 BCA ¶ 27,476 at 136,876, cited by *Arab Shah*, potentially suggests another issue. It says that when no release has been issued the contractor need only assert its claim "within the life of the contract." There is at least a question whether the contract was still alive when ACC notified the government of its current claims on December 22, 2022, given that ACC was still pursuing its previously identified DEQ claim to

given the absence of a payment request and the government deception we infer for the purposes of summary judgment. The government does not cite any precedent barring unidentified claims under the undisputed facts present here, where the government issued payment against the wishes of the contractor, despite the contractor declining to request final payment or issue a release due to unresolved issues. Accordingly, we deny the government's request for summary judgment based upon final payment.

B. Release

The government seeks summary judgment for purported delays from March 13, 2020, to June 26, 2020, on the grounds they were released by the parties' October 8, 2020, bilateral modification (SOF ¶ 1). ACC's response notes the modification did not release claims for delays arising before March 13 or after June 26. We deem ACC to concede it is not seeking recovery for delays during the identified period. Given that ACC does not seek compensation for the specified period, there is no basis for granting summary judgment pertaining to that period.

C. Accord and Satisfaction

The government also seeks summary judgment for delays claimed by ACC related to the period after June 26, 2020. It argues that unilateral Modification No. A00013, extending the period of performance by two days with no compensation for COVID-19 delays during the period of June 27, 2020, to November 18, constitutes an accord and satisfaction barring all other delay claims for that period (SOF ¶ 2). An accord and satisfaction occurs when performance different from what was claimed is rendered and accepted by the claimant as full satisfaction of its claim. *Bell BCI Co. v. United States*, 570 F.3d 1337, 1340-41 (Fed. Cir. 2009). Among other things, to prevail the government must prove a meeting of the minds and consideration. *Id.* at 1341. ACC did not agree to Modification No. A00013 (SOF ¶ 2). The government cites no case law finding a meeting of the minds and consideration based upon a government unilateral modification to which the contractor did not consent. Nor does it matter that ACC responded "Yessir" to the ACO's July 2020 mention of the two-day extension after ACC reported a positive COVID test (SOF ¶ 1). Nothing about that establishes an accord and satisfaction applying to all delays occurring after June 26. The government's contention is meritless and accordingly its request for summary judgment is denied.

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the court of appeals. *See Gulf & W.*, 6 Cl Ct. at 751-55. That issue has not been briefed and we decline to address it further at this time.

CONCLUSION

The government's motions are denied.

Dated: July 16, 2026

MARK A. MELNICK
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

J. REID PROUTY
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

DAVID D'ALESSANDRIS
Administrative Judge
Acting 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. 63528, 64067, Appeals of ACC Construction Co., Inc., rendered in conformance with the Board's Charter.

Dated: July 16, 2026

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