ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
DTC Engineers & Constructors, LLC	)	ASBCA No. 57614
	)	
Under Contract No. W912QR-09-C-0011	)	

APPEARANCE FOR THE APPELLANT: Timothy T. Corey, Esq.
Hinckley Allen Snyder LLP
Hartford, CT

APPEARANCES FOR THE GOVERNMENT: Thomas H. Gourlay, Jr., Esq.
Engineer Chief Trial Attorney
Jennifer M. Payton, Esq.
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Louisville

OPINION BY ADMINISTRATIVE JUDGE THRASHER ON
THE GOVERNMENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

This appeal involves a Corps of Engineers contract for the design and construction of an Armed Forces Reserve Center. The government moves for partial summary judgment on that part of the appeal based upon a claim for severe weather delay. The government contends there is no genuine issue of material fact because the weather delays in question are the subject of two bilateral modifications that created an accord and satisfaction between the parties barring appellant's claim and that damages are not recoverable for severe weather delays in any event under the terms of the contract (gov't mot. at 1). Appellant counters there was no accord and satisfaction created by the terms of the bilateral modifications, it did not waive its claims and its claim for damages is actionable as a matter of law pursuant to the Suspension of Work and Differing Site Conditions clauses (app. opp'n at 4, 8). We deny the motion.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. On 22 January 2009, U.S. Army Corps of Engineers, Louisville District (the government) entered into Contract No. W912QR-09-C-0011 with appellant, DTC Engineers & Constructors, LLC of North Haven, Connecticut (DTC), for design and construction of an Armed Forces Reserve Center located at Arkadelphia, Arkansas. The contract was a fixed-price construction contract in the original lump sum amount of $12,413,062.10. (R4, tab 3 at 1-2)

2. The contract included the mandatory FAR and DFARS clauses including: 52.233-1, DISPUTES (JUL 2002); 52.236-2, DIFFERING SITE CONDITIONS (APR 1984); 52.242-14, SUSPENSION OF WORK (APR 1984); 52.243-4, CHANGES (JUN 2007); 52.249-10, DEFAULT (FIXED-PRICE CONSTRUCTION) (APR 1984); and, 252.243-7002, REQUESTS FOR EQUITABLE ADJUSTMENT (MAR 1998) (R4, tab 3 at 99, 101, 109, 116, 138). The Default clause provides for time extensions if a "delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor" such as unusually severe weather.

3. In addition, the contract specifications specifically addressed unusually severe weather delays. Specification § 00 80 00.00 06, "SPECIAL CLAUSES," ¶ 1.27, TIME EXTENSIONS FOR UNUSUALLY SEVERE WEATHER, ER 415-1-15 (31 OCT 89) (the Weather clause), provides in pertinent part as follows:

> This provision specifies the procedure for the determination of time extensions for unusually severe weather in accordance with the contract clause entitled "Default: Fixed Price Construction." In order for the Contracting Officer to award a time extension under this clause, the following conditions must be satisfied:
>
> The weather experienced at the project site during the contract period must be found to be unusually severe, that is, more severe than the adverse weather anticipated for the project location during any given month.
>
> The unusually severe weather must actually cause a delay to the completion of the project. The delay must be beyond the control and without the fault or negligence of the Contractor.

The Weather clause goes on to predict the following adverse weather days:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
9	4	4	4	3	1	1	1	1	1	2	5

> Upon acknowledgement of the Notice to Proceed (NTP) and continuing throughout the contract, the Contractor will record on the daily CQC report, the occurrence of adverse weather and resultant impact to normally scheduled work. Actual adverse weather delay days must prevent work on critical activities for 50 percent or more of the Contractor's scheduled work day. The number of actual adverse weather delay days shall include days impacted by actual adverse weather (even if

> adverse weather occurred in previous month), be calculated chronologically from the first to the last day of each month, and be recorded as full days. If the number of actual adverse weather delay days exceeds the number of days anticipated listed above, the Contracting Officer will convert any qualifying delays to calendar days, giving full consideration for equivalent fair weather work days, and issue a modification in accordance with the contract clause entitled "Default (Fixed Price Construction)."

(R4, tab 3, Specifications and Plans Vol. 1 (vol. 1), § 00 80 00.00 06 at 19, 20)

4. The original contract performance period required completion within 510 days after receiving notice to proceed (R4, tab 3 at 1, block 11).

5. Notice to proceed was issued 6 February 2009, establishing a completion date of 1 July 2010 (R4, tab 4). Specification § 01 03 00.00 48, "DESIGN SUBMISSION REQUIREMENTS AFTER AWARD," ¶ 3.1.4.a provides in pertinent part: "The Contractor shall design and detail a complete and usable facility before construction begins. **Fast-track design and construction will be permitted on this project.** Fast-tracking includes site work, ordering long-lead materials, and mobilization." (R4, tab 3, vol. 1, § 01 03 00.00 48 at 1) Likewise, ¶ 3.4.2c., "Construction Phase," provides in pertinent part: "No construction will be allowed on work for which the design has not been reviewed and approved" (*id.* at 8).

6. However, because fast track design and construction was permitted on the project, construction of portions of the facility could begin if the final design submittal for that portion had been approved by the government. Specification § 00 80 00.00 06, ¶ 1.68, "SEQUENCE OF DESIGN/CONSTRUCTION (FAST TRACK)," provides in pertinent part,

> b.... The Contractor may begin construction on portions of the work for which the Government has reviewed the final design submission, all Government required revisions have been completed, revised documents have been resubmitted and are deemed satisfactory by the Government.

(R4, tab 3, vol. 1 § 00 80 00.00 06 at 31)

7. By letter dated 26 August 2009, DTC was authorized to proceed with on-site construction *subject* to six conditions. One of those conditions provided that all submittals applicable to the work must be submitted and approved prior to work beginning. (R4, tab 11) Site work began in October 2009 (R4, tab 29).

8. There were numerous rain days during late 2009, including: 13, 27, 29-30 October; 16, 29 November; 2, 8, 12, and 23 December (R4, tabs 29, 34, 35).

9. Agreed-upon mud days where the soil was too wet to work were 28 October, 17 and 30 November 2009 (R4, tabs 29, 34).

10. There were also numerous rain days during early 2010, including: 16, 21, 23, and 29 January; 4, 5, and 8 February (R4, tabs 37, 39).

11. There were also numerous mud days during 2010, including: 18-20, 22, 25, 30 January; 1-3 and 9 February (R4, tabs 37, 39).

12. By letter dated 3 February 2010, the contracting officer's representative (COR) Mr. Mitchell Eggburn noted that DTC's schedule update narrative report stated that it was at that point 106 days late, a slippage of an additional 4 days since its October schedule report. COR Eggburn directed DTC to take steps to minimize this delay, including increasing the number of shifts being worked and increasing the amount of equipment on site. (R4, tab 40)

13. On 14 February 2010, a Basic Change Document (BCD) was initiated finding DTC entitled to seven calendar days for unusually severe weather from 6 February 2009 through 31 December 2009 (R4, tab 41).

14. By letter dated 23 April 2010, Administrative Contracting Officer (ACO) Johnny Ringstaff, based on DTC's progress being approximately 30% late, directed DTC to provide a resource-loaded schedule, showing, at a minimum, "appropriate crews with number of members" (R4, tab 43).

15. By letter dated 14 May 2010, DTC requested an equitable adjustment of $326,852 and a 51-day time extension for delayed issuance of the notice to proceed with on-site construction (R4, tab 44).

16. On 19 May 2010, a BCD was issued finding DTC entitled to six calendar days for unusually severe weather from 1 January 2010 through 3 March 2010 (R4, tab 46).

17. By letter dated 24 May 2010, DTC requested an equitable adjustment of 19 rain days and 57 to 76 mud days, plus $330,600 in additional costs based upon $5,800 a day for 57 days. The letter acknowledged that it had already been granted 13 rain days; however it asked for 19 additional rain days based upon the actual weather and alleged that it had encountered 3 to 4 mud days following each significant rain event. (R4, tab 47)

18. On 28 May 2010, DTC's attorney, Mr. Timothy Corey, wrote to the CO and ACO objecting to an interim unsatisfactory performance evaluation proposed for DTC on

the basis that the delays upon which the evaluation was based were the fault of the government (R4, tab 48). Item 3 on page 2 of the letter addressed "Excessive Rainfall & Additional General Conditions," and stated that government-created delays exposed "initial project activity and site work...to the seasonal heavy winds and rainfall," and that "'the Government failed to (and continues to do so) acknowledge the unrecoverable damage to the project schedule due to excessive, abnormal rainfall and site & earthwork schedule delays." The letter went on to state that "The Government only allowed 14 rain days to date without any subsequent mud days," and "[a] more accurate rain & mud day allowance would be: 19 rain days; and, at minimum 57 mud days." Mr. Corey also alleged, among other things, under item 4 on page 3, that DTC incurred hardship and time delays to replace saturated unsuitable fill damaged by excessive rainfall at the site, and that "[r]eplacement structural fill was also damaged by excessive rainfall." (*Id.*)

19. By letter dated 2 June 2010, ACO Ringstaff responded to DTC's 24 May 2010 request, stating that field personnel had agreed upon a 13 calendar-day time extension due to rain. The letter further advised that the contractor was entitled to time, but not monetary compensation for weather delays under the Default clause. (R4, tab 49)

20. On 19 July 2010, the ACO Ringstaff and on 21 July 2010, Mr. Shay Atluru, president of DTC, signed bilateral Modification No. A00003, agreeing upon a six-day time extension for the weather-related delays between 1 January 2010 and 3 March 2010 pursuant to the authority of the Default clause. A new completion date of 14 July 2010 was established "at no additional cost to the Government." Included in the modification was a closing statement that stated:

> It is further understood and agreed that the adjustment provided herein constitutes compensation in full on behalf of the Contractor, his subcontractors and suppliers, for all costs and markup directly or indirectly attributable to the change ordered, for all delays related thereto, and for performance of the change within the time frame stated.

(R4, tab 53) Although the record is not clear, evidently DTC did not return the signed copy of the modification until 14 September 2010 (app. supp. R4, tab 39 at 3).

21. On 16 August 2010, DTC advised the government's contract administrator that: "DTC filed a request for equitable adjustment based on the Government's delays in issuance of a Notice to Proceed which pushed the project into unforeseen winter conditions. The Government rejected this request without merit, accordingly DTC is filing a certified claim which it intends to pursue to the fullest extent of the law." (R4, tab 35 at 2 n.1)

22. A jointly attended planning conference with government and DTC participating, facilitated by a third-party neutral, was scheduled for 26 August 2010. Conference topics identified during pre-conference consultant interviews included the topic of "Open REA's and Weather-days." The conference agenda also included an "Actionable Next Steps" list that reflects the ACO, Mr. Ringstaff, would "Review Weather Days." (App. supp. R4, tab 37)

23. By letter dated 13 September 2010, DTC alleged the size of the area reserved for excess fill material to be a differing site condition. DTC alleged that the far northeast corner of the site originally designated as "Area Reserved for Permanent Placement of Excess Fill Material" was too small and did not provide sufficient storage space for the project needs. DTC further alleged that the area needed a storm water management design that included, swale installation and extension and a new culvert at the road entrance east of the wash rack facility. (R4, tab 58)

24. On 15 September 2010 Rod Garner, the ACO, forwarded an e-mail to Jeffrey Newell, DTC's project construction engineer, stating "I have no record of A00002 being signed and returned" (app. supp. R4, tab 40 at 3). Mr. Newell responded he would find a copy and forward it to Mr. Garner (*id.* at 2). On 20 September 2010, Mr. Newell e-mailed Mr. Garner stating, "I cannot locate our copy of mod A00002. Is it possible to have another copy e-mailed? I will have Shay sign as soon as I get it." (*Id.*) Mr. Garner e-mailed a copy to Mr. Newell that same day (*id.*). Also that same day, Mr. Newell separately forwarded Mr. Garner's e-mail within the company to Robert Ellis asking,

> By signing these [the two mods] are we waiving our right to go after the extra rain days? That might have been the logic used in NOT signing and returning them before. Please see the attached documents from Rod. I don't want us to give up our rights to file an REA or claim at a later time.

(App. supp. R4, tab 40 at 1) Mr. Ellis replied, "No, our signing does not negate our right to pursue additional time now or later" (*id.*). Mr. Newell replied that he would have Mr. Atluru sign the attached copy that same day and then forward it back to "Rod Garner and company" (*id.*).

25. DTC's president signed bilateral Modification No. A00002 on 21 September 2010 and Mr. Newell forwarded the executed modification to Mr. Garner that same day (app. supp. R4, tab 39). Modification No. A00002 granted DTC a seven-day time extension for the weather delays between 6 February 2009 and 31 December 2009. The modification stated it was executed pursuant to the Default clause. However, it referenced 52.236-2, the Differing Site Conditions clause, not 52.249-10, the Default clause. A new

completion date of 8 July 2010 was established "at no additional cost to the Government."[1] A closing statement was included in the modification, stating:

> It is further understood and agreed that the adjustment provided herein constitutes compensation in full on behalf of the Contractor, his subcontractors and suppliers, for all costs and markup directly or indirectly attributable to the change ordered, for all delays related thereto, and for performance of the change within the time frame stated.

(R4, tab 59)

26. On 14 February 2011, DTC submitted its request for a contracting officer's final decision on its claim seeking "an extension of time, damages for delays and disruption, payment for the unpaid contract balance and rescission of the liquidated damages withheld by USACE" (R4, tab 2 at 1).[2] DTC sought return of $307,832 in liquidated damages withheld for 239 days of delay and compensation in the amount of $2,252,724 in delay damages for 253 days of delay and $145,507 for "DISPUTED CHANGE ORDERS." DTC attributed 144 days of delay during the period from 14 October 2009 through 22 April 2010 to "Record Rainfall/Unsuitable Soil/Inadequate Lay Down Space." (R4, tab 2 at 1, 14, 16, 17, 21) The "Impacts" resulting in the delay portion of the claim are presented in four sections of DTC's claim:

Under section A of Part VI of its claim, "Delayed Issuance of Notice to Proceed (NTP)" DTC asserts that the government "is responsible for time loss between anticipated June 26, 2009 100% Correct Fast Track Final design review and the August 26, 2009 issued NTP, including the impact the delay had on forcing the project's site work schedule into wet, winter conditions" (*id.* at 8). The delay from 26 June to 26 August was 60 days (*id.* at 9).

Under section B of Part VI of its claim, DTC asserts that the government is responsible for submittal delay from 26 June to 12 October 2009 that delayed the start of construction at the site. DTC cites as an example the delayed approval of its silt fence submittal (*id.* at 10). It attributes 49 additional days of delay to this cause (*id.* at 16).

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[1] The result of Modification Nos. A00002 and A00003 was an extension of the completion date by 13 days from 1 July to 14 July 2010. Modification No. A00003 extended the completion date by 6 days from 8 July to 14 July 2010 (R4, tab 53). Modification No. A00002 extended the completion date by 7 days from 1 July to 8 July 2010 (R4, tab 59).

[2] The record also refers to a date of 15 February 2011 for the claim. We need not resolve this discrepancy for purposes of this opinion.

Likewise, under section C of Part VI of its claim, "Record Rainfall during the Winter of 2009 - 2010," DTC stated, "[t]he project was forced into wet, winter conditions that materially impacted the means and methods of construction.... The effects of this record rainfall can only be calculated by comparing the planned duration for this work and the actual duration for the same amount of work." (*Id.* at 12) It identified 144 days of delay in this section (*id.* at 16).

Under section D of Part VI of its claim, "Unsuitable Soil and Inadequate Lay Down Space" DTC stated:

> [DTC] incurred hardship and substantial time delays excavating, removing, stockpiling and replacing saturated unsuitable soil and/or fill material damaged by excessive rainfall at the site during October 2009 - February 2010. The evidence of rainfall and adverse conditions is well documented in both USACE records, [DTC] Daily and Monthly reports.... Additionally, [the contractor] was not awarded any dryout/mud days following any of the excessive rain days as documented in the daily reports.
>
> ....
>
> ...Consequently, [DTC] was forced to work in wet weather and incur substantial costs for the purchase of structural fill, extensive site preparation and additional compaction requirements above and beyond the normal scope and budget.

(R4, tab 2 at 13)

27. On 22 April 2011, the CO denied DTC's claim in its entirety. Addressing severe weather delays, the decision stated, "To the extent you seek delay damages for severe weather, your remedy is time, not compensation, since the Contract provides that weather delays are addressed by modification issued in accordance with the Default clause." (R4, tab 1 at 7) Specifically, the CO found that DTC's claim for additional days of excusable delay or damages due to severe weather was barred by accord and satisfaction referencing both Modification Nos. A00003 and A00002 finding there was no entitlement to damages or additional time for severe weather delays (R4, tab 1 at 11). However, the modification language upon which she based her decision was different from the actual language of the executed modifications. The language upon which she relied, referencing both modifications, stated:

> In consideration of the modification agreed to herein as complete and equitable adjustments, the Contractor hereby

> releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to this adjustment.

(R4, tab 1 at 11) Neither accord and satisfaction nor Modification Nos. A00002 or A00003 were referenced in her decision in relation to any other of DTC's claims (delayed notice to proceed, submittal delays, unsuitable soil and inadequate lay down space) (*id.* at 7-10, 12).

28. On 5 May 2011, DTC appealed the CO's final decision to this Board. Paragraphs 35 and 36 of the complaint aver entitlement to 144 calendar days of delay "associated with the record rainfall, unsuitable soil due to wet weather, [and] inadequate lay down space." Paragraph 40 of the complaint avers that the total number of days of delay is 253 days, consisting of 60 days relating to design review and approval, 49 days relating to submittal disapprovals, and 144 days relating to extended site civil installation.

DECISION

The government moves for partial summary judgment on that part of the appeal that is based upon a claim for severe weather delay upon the alternative grounds that the claim is barred by accord and satisfaction and damages are not recoverable for severe weather delays under the terms of the contract (gov't mot. at 1). The government's initial motion referenced paragraphs 35, 36 and 40 of appellant's complaint (gov't mot. at 1). However, in its response to appellant's opposition the government amended its motion to only paragraphs 35 and 36 (gov't reply at 5). Thus, the government's motion is directed at what appellant refers to as its "Record Rainfall/Unsuitable Soil/ Inadequate Lay Down Space" claim which it asserts is a combination of: "(i) the Government's granting insufficient rain and mud days; (ii) DTC's hardship and substantial time delays excavating, removing, stockpiling and replacing saturated unsuitable soil and/or fill material damaged by excessive rainfall; and (iii) inadequate lay down space" (app. opp'n at 2). Appellant's position is that its inadequate lay down space claim is asserted pursuant to the Differing Site Conditions clause, 52.236-2 and that the remainder of this claim seeks relief in the form of both excusable delay and compensation pursuant to the Default clause, 52.249-10 and the Suspension of Work clause, 52.242-14 (*id.*).

Summary judgment is properly granted only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. 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. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987); *Dixie Construction Co.*, ASBCA No. 56880, 10-1 BCA ¶ 34,422 at 169,918.

Damages for Adverse Weather Delays

We view appellant's claim as one based upon seasonal differences in weather, as a result of government delays, rather than one based upon unusually severe weather as characterized by the government. *Charles G. Williams Construction, Inc.*, ASBCA No. 42592, 92-1 BCA ¶ 24,635 at 122,930. Appellant's adverse weather claim is not grounded in the Weather clause or the Differing Site Conditions clause (except for the inadequate laydown portion) but instead is based upon a constructive suspension by the government under the Suspension of Work clause (app. opp'n at 9). Specifically, appellant contends the government wrongfully delayed the design review and submittal process preventing appellant from proceeding under the contract which resulted in the work being pushed into the winter months where appellant was delayed by severe weather conditions (app. opp'n at 9, 10). Wrongful government delays that are not reasonably anticipated and push a contractor's performance into periods of adverse weather can be a cause of additional delay for which a contractor may be compensated. *Charles G. Williams Construction*, 92-1 BCA ¶ 24,635 at 122,930.

We find that there is a genuine issue of material fact whether government delays in issuing authorization to proceed with site work and approving submittals constituted a constructive suspension under the Suspension of Work clause sufficient to entitle appellant to an adjustment. In addition, there are genuine issues of material fact as to whether a differing site condition was present. As a result, we deny the government's motion as it relates to this issue.

Accord and Satisfaction

The government also contends appellant's claim for 144 days of delay associated with record rainfall is barred by accord and satisfaction based upon execution of two bilateral modifications, Modification Nos. A00002 and A00003 (gov't reply at 5). The government relies entirely upon the language of the closing statements of the modifications for its proof of an accord and satisfaction (gov't reply at 6). The closing language of both modifications is identical, stating:

> It is further understood and agreed that the adjustment provided herein constitutes compensation in full on behalf of the Contractor, his subcontractors and suppliers, for all costs and markup directly or indirectly attributable to the change ordered, for all delays related thereto, and for performance of the change within the time frame stated.

(SOF ¶¶ 20, 24)

The government asserts "this provision means that the modifications were full and final settlements of 'all costs and markup directly or indirectly attributable to' the weather delays incurred during the period '26 August 2009 (Authorization to Begin On-Site Construction) – 31 December 2009' and the weather delays incurred during the period '10 January 2010 [sic] – 3 March 2010,' respectively" (gov't reply at 6). The government asserts that the language is "clear and unambiguous" (*id.*).

The government bears the burden of proof on the issue raised by its motion since accord and satisfaction is an affirmative defense. *Southern Defense Systems, Inc.*, ASBCA Nos. 54045, 54528, 07-1 BCA ¶ 33,536 at 166,135. Accord and satisfaction has been defined as:

> [T]he discharging of a contract or cause of action by an agreement of the parties to give and accept something in settlement of the claim or demand of the one against the other, and by performing such agreement; the "accord" being the agreement, and the "satisfaction" its execution or performance.

Southern Defense Systems, 07-1 BCA ¶ 33,536 at 166,135 (citing *Optimum Design, Inc.*, ASBCA No. 16986, 74-1 BCA ¶ 10,622 at 50,395). The elements of proof that the government must prove to find an accord and satisfaction are: (1) proper subject matter; (2) competent parties; (3) a meeting of the minds of the parties; and (4) consideration. *Brock & Blevins Co. v. United States*, 343 F.2d 951, 955 (Ct. Cl. 1965).

There is no alleged dispute of fact regarding proper subject matter, competency of the parties or consideration. However, appellant contends it reserved its rights to severe weather-related claims in writing prior to execution of the modifications and there is evidence that negotiations continued on these claims after execution (app. opp'n at 8). As a result, appellant asserts there is a genuine issue of material fact whether there was a "meeting of the minds" between the parties related to both modifications.

Interpretation of the Parties' Intent from the "Accord and Satisfaction" Language

To prevail, the government must prove that execution of the two modifications was intended as a mutual agreement between the parties for the specific purpose of settling appellant's claim for weather-related delay and damages under the Suspension of Work and Differing Site Conditions clauses. *Brock & Blevins Co.*, 343 F.2d at 966; *Southern Defense Systems,* 07-1 BCA ¶ 33,536 at 166,135. The plain language of the modifications does not contain any specific language stating there was an accord and satisfaction intended to foreclose appellant's claim for delay and damages under these clauses. Rather, the modifications are internally inconsistent on their face. On the one hand, they state they are issued pursuant to the Default clause which relates to excusable non-compensable delay (SOF ¶ 2). On the other hand, they refer to a change, and "all

costs and markup directly or indirectly attributable thereto", which would potentially implicate the Changes clause or other clauses providing for monetary relief. As a result of this internal inconsistency, it is impossible to discern whether the parties intended an accord and satisfaction and, if so, to determine the scope of that agreement, without resort to extrinsic evidence. Therefore, we conclude the parties must be afforded the opportunity to further develop the record on this issue. As a result, we find summary judgment is not appropriate in this instance since the record requires further development for the Board to render a decision. *ASFA Construction Industry and Trade, Inc.*, ASBCA No. 57269, 11-2 BCA ¶ 34,791 at 171,250; *General Dynamics Land Systems, Inc.*, ASBCA No. 57293, 11-2 BCA ¶ 34,844 at 171,405; *CI², Inc.*, ASBCA Nos. 56257, 56337, 11-2 BCA ¶ 34,823 at 171,354. Given the fact the government exclusively relies upon the plain language of the modifications to support its' motion, the government has failed to meet its burden of proof establishing undisputed facts that the parties intended execution of Modification Nos. A00002 and A00003 to constitute an accord and satisfaction barring appellant's claim.

Evidence that Some of Appellant's Claims were Reserved in Writing Prior to Execution of the Modifications

Furthermore, appellant contends there is evidence prior to execution of the modification evidencing its intent to reserve some claims from the scope of the modification. Appellant relies upon two letters to the government, DTC's letter of 24 May 2010 and attorney Corey's letter of 28 May 2010, that it asserts are evidence establishing a genuine material issue of fact whether there was a meeting of the minds between the parties (app. opp'n at 6, 7; SOF ¶¶ 17, 18). In support of its position, appellant asserts the facts presented here are analogous to those found in our decisions, *M.E.S., Inc.*, ASBCA No. 56454, 09-2 BCA ¶ 34,176 and *Valenzuela Engineering, Inc.*, ASBCA No. 54490, 06-2 BCA ¶ 33,399 (app. opp'n at 6, 7).

The referenced 24 May 2010 letter specifically requested rain delay days and asserted appellant's related claim for compensation for government caused delays (SOF ¶ 17). The 28 May 2010 letter objected to an unsatisfactory project evaluation appellant had received and again asserted its claims referencing "cost implications" and "schedule implications" (SOF ¶ 18). However, neither letter specifically addressed the issue of reservation of rights but merely again asserted appellant's claim. However, a 16 August 2010 letter put the government on notice that appellant intended to file a claim for "the Government's delays in issuance of a Notice to Proceed which pushed the project into unforeseen winter conditions." (SOF ¶ 21). Drawing all reasonable inferences in favor of appellant, we find there is a genuine issue of material fact regarding whether appellant's letter of 16 August 2010 letter constituted a reservation of appellant's claim as to Modification No. A00002 and possibly Modification A00003 (if it was not returned to the government until September 2010). *DTS Aviation Services, Inc.*, ASBCA No. 56352,

09-2 BCA ¶ 34,288 at 169,378 (citing *Gart v. Logitech, Inc.*, 254 F.3d 1334, 1339 (Fed. Cir. 2001)).

Continuing Negotiations of Modification No. A00003

Appellant also contends that there was continuing consideration of appellant's claims by the government after execution of the modifications (app. opp'n at 7, 8). Where the conduct of the parties after execution of an agreement indicates that an accord and satisfaction was not consummated between the parties the agreement will not be a bar to prosecution of the claim. *England v. Smoot Corp.*, 388 F.3d 844, 849 (Fed. Cir. 2004); *Community Heating & Plumbing Co. v. Kelso,* 987 F.2d 1575, 1581 (Fed. Cir. 1993); *John T. Jones Construction Co.*, ASBCA Nos. 48303, 48593, 98-2 BCA ¶ 29,892 at 147,975, *aff'd*, 178 F.3d 1307 (Fed. Cir. 1998) (table).

In support of its contention, appellant points to an agenda from a 26 August 2010 "Planning Conference" that was held after execution of Modification No. A00003 and before execution of Modification No. A00002 (app. opp'n at 8). The conference agenda states that a neutral facilitator noted after pre-conference consultant interviews that one of the topics identified for discussion during the meeting would be "Open REA's and Weather-days" (SOF ¶ 22). In addition, the "Action List" from the same meeting states that ACO Ringstaff was tasked with an action item to "Review Weather Days" (*id.*). We note that Modification No. A00003 by its terms only included weather delays between January and March 2010 and not the weather delays that would later be addressed the month after the conference within Modification No. A00002. There is no evidence in the record that identifies the specific REA, time period or weather days referenced and possibly discussed during this meeting or whether this conference was ever held. However, whether there is a genuine material disputed fact "must be viewed in the light most favorable to the party opposing the motion, with doubts resolved in favor of the opponent." *DTS Aviation Services, Inc.*, ASBCA No. 56352, 09-2 BCA ¶ 34,288 at 169,378 (citing *Gart v. Logitech, Inc.*, 254 F.3d 1334, 1339 (Fed. Cir. 2001)). As a result, we do not weigh the evidence of record or make findings of fact, but only determine whether there are genuine disputed issues of material fact suitable for resolution at trial. *DTS Aviation*, 09-2 BCA ¶ 34,288 at 169,378. Based upon the record and drawing all reasonable inferences in favor of appellant, we find there is a genuine issue of material fact in dispute regarding whether the parties continued to consider appellant's claims after execution of Modification No. A00003 on 21 July 2010.

CONCLUSION

The government's motion for partial summary judgment is denied for the reasons stated.

Dated: 9 March 2012

JOHN J. THRASHER
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

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. 57614, Appeal of DTC Engineers & Constructors, LLC, rendered in conformance with the Board's Charter.

Dated:

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