ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Alderman Building Company, Inc.	)	ASBCA No. 58082
	)	
Under Contract No. N40085-09-D-5321	)	

APPEARANCE FOR THE APPELLANT: Marilyn H. David, Esq.
Biloxi, MS

APPEARANCES FOR THE GOVERNMENT: Ronald J. Borro, Esq.
Navy Chief Trial Attorney
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Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE YOUNGER
ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND
MOTION TO DISMISS FOR LACK OF JURISDICTION
AND
APPELLANT'S CROSS-MOTION FOR SUMMARY JUDGMENT AND REQUEST
FOR DECLARATORY RULING

In this sponsored appeal regarding a contract for the renovation and interior repair of a building, the Navy moves for partial summary judgment, contending chiefly that the appeal is barred by a release, and alternatively, that we lack jurisdiction because appellant fails to state a sum certain and has failed to submit certain of its claims to the contracting officer for decision. In response to the motion, appellant Alderman Building Co., Inc. (Alderman) principally asserts the negative of the Navy's propositions. Alderman has also cross-moved for summary judgment, contending principally that the record establishes that the parties excepted the present claims from the release. Alderman also seeks a declaratory judgment permitting the addition of further direct and indirect costs to its claim. We deny as moot the Navy's motion for summary judgment and grant in part and deny in part its motion to dismiss, and we deny Alderman's cross-motion for partial summary judgment. We deny Alderman's request for a declaratory ruling.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

1. By date of 27 March 2009, the Navy awarded a Task Order for Supplies or Services under Contract No. N40085-09-D-5321 to appellant Alderman for renovations to the interior, repairs to building systems, and incidental related work, on a building at Camp Lejeune, North Carolina (R4, tab 1 at 1). The Task Order provided "[t]he entire work...shall be completed by 3/22/2010" (*id.* at 3).

2. The contract contained various standard clauses, including FAR 52.233-1, DISPUTES (JUL 2002); FAR 52.242-14, SUSPENSION OF WORK (APR 1984); FAR 52.243-3, CHANGES – TIME-AND-MATERIALS OR LABOR-HOURS (SEPT 2000); and FAR 52.243-4, CHANGES (JUN 2007) (R4, tab 5.6 at 11 of 31, tabs 5.7, 5.8, 5.9).

3. Thereafter, by date of 8 April 2009, Alderman entered into a subcontract with Big John's Electric Co., Inc. (Big John's) for labor, equipment, materials, and supplies for specified portions of the interior repairs to the building (R4, tab 5.12 at 1). The subcontract provided that "time is of the essence," and that Big John's was to "begin work within seven (7) days after notification" by Alderman (*id.* at 2).

4. Contract performance was characterized by repeated delays in starting work. Thus, despite the original completion date of 22 March 2010 (statement 1), it appears undisputed that Big John's did not start work until 19 February 2010 (R4, tab 5.38 at 2, tab 5.50).

5. By letter to the contracting officer dated 18 August 2011, Alderman submitted an uncertified claim on behalf of Big John's for $20,518, allegedly due to government delay in the start of the work (R4, tab 5.0). The claim is divided into nine issues, many of which are alternative to each other. The issues are tied to 68 supporting documents that were included with the claim package. We summarize the issues as follows:

(a) Issue 1: Alderman seeks recovery for Big John's "unabsorbed overhead for the repeated and uncertain delays by the Navy" in the start date.

(b) Issue 2: Alderman seeks that the Navy "honor the binding settlement agreement," in which Alderman asserts that Navy personnel agreed to settle Big John's claim for $20,519, representing $20,261 for Big John's extended overhead and $257 for Alderman's bond premium.

(c) In Issue 3: Alderman asserts that it is entitled to recover for Big John's under the Eichleay formula.

(d) Issue 4, Pass-Through Claim (labeled Issue 3): Alderman generally asserts that "Big John's meets the legal requirements for a pass-through claim."

(e) Issue 5 (labeled Issue No. 4): Alderman asserts that "[t]he periods of delay...are compensable to Alderman (for Big John's damages) under the Suspension of Work clause."

(f) Issue 6 (labeled Issue No. 5): Alderman likewise asserts entitlement under the Changes clause.

(g) Issue 7 (labeled Issue No. 6): Alderman asserts that "[t]he periods of delay...are compensable to [it] (for Big John's damages) as a breach of prime contract, causing Big John's to incur damages as a result, and/or its subcontract to be breached."

(h) Issue 8 (labeled Issue No. 7): Alderman propounds that the periods of delay are compensable as a breach of a duty "not to increase a contractor's costs of contract performance."

(i) Issue 9 (labeled as Issue No. 8): Alderman asserts entitlement to $20,518 as the amount that the claim is said to be worth, and as the amount that the contracting officer allegedly agreed to as a settlement. Alderman also asserts entitlement to interest under paragraph of the Disputes clause. (R4, tab 5.0 at 8, 10, 13-15; *see* statement 2)

6. By date of 19 January 2012, the contracting officer denied the claim in its entirety (R4, tab 6). Alderman thereafter brought this timely appeal.

7. By date of 20 February 2012, Alderman's president executed a release providing that, in consideration of a specified sum, Alderman:

> [D]oes, and by the receipt of said sum shall, for itself, its successors and assigns, remise, release and forever discharge the Government, its officers, agents, and employees, of and from all liabilities, obligations and claims whatsoever in law and in equity under or arising out of said contract.

(Respondent's Motion for Summary Judgment and Motion to Dismiss for Lack of Jurisdiction (mot.), ex. A) The release does not reflect that Alderman's president, or anyone else on behalf of Alderman, reserved any rights.

8. Alderman's lengthy complaint is in 15 counts. Styling the counts as Alderman does, we summarize them as follows:

(a) Count I: *Ordered & Constructive Suspensions of Work.* In general, Alderman alleges that the Navy "delayed the start of Big John's work, by delaying the Notice to Proceed and by successively revising the date the job site would be available and work could start" (compl. ¶ 27). Alderman then makes particular allegations regarding the delays in the start date, and alleges that the delays were unreasonable, that they were due to the Navy's convenience, and alleges entitlement to extended and unabsorbed home office overhead costs on behalf of Big John's (*id.* ¶¶ 28-46).

(b) Count II: *Breach of Contract Re Settlement Agreement*. In general, Alderman alleges that, in 2010, it exchanged a series of emails regarding its claim with Navy personnel, culminating in a 1 September 2010 email to Alderman from a supervisory construction manager in the Navy, who asked whether a $20,518 amount for was acceptable (*id.* ¶¶ 48-59). Alderman alleges that it "accepted the Navy's offer," forming a binding settlement agreement, which the Navy thereafter refused to honor (*id.* ¶¶ 60-74). Alderman seeks payment of the settlement amount, "plus interest, plus breach of contract damages" (*id.* ¶ 75).

(c) Count III: *Eichleay Claim & Prerequisites*. In general, Alderman alleges that it meets the requirements for application of the Eichleay formula, even though it did not begin performance (*id.* ¶¶ 77-92).

(d) Count IV: *Pass-Through Claim*. In general, Alderman alleges that its present claim "and this Complaint" satisfy the requirements for a pass-through claim (*id.* ¶¶ 95-100).

(e) Count V: *Acceleration of Work and Loss of Efficiency*. Alderman alleges that both it and Big John's "are entitled to compensation for accelerating the work to meet the time constraints imposed by the Navy" (*id.* ¶ 102). Alderman alleges that, because of the delayed start date and related factors, Big John's "had to increase its workforce, equipment, and normal and overtime hours to meet the deadline for completing the work," for which it and Big John's are entitled to "compensation for increased resources and for loss of efficiency" (*id.* ¶¶ 102, 105).

(f) Count VI: *Interference with Contract and Failure to Cooperate*. Alderman alleges that the Navy breached its duties to cooperate and not to hinder performance by failing to make the site available to Big John's to start work on time (*id.* ¶¶ 107-08).

(g) Count VII: *Breach of Warranty of Work-Start Date and Site Availability*. Alderman alleges that, each time that the Navy failed to make the site available on the promised start date, it breached a warranty of site availability, for which Alderman is entitled to damages for "an amount to be proved at trial" (*id.* ¶¶ 113-14).

(h) Count VIII: *Breach of Government Duty Not to Increase Contractor's Costs of Performance*. Alderman alleges that the delays in the start date caused Big John's "to incur damages and/or its subcontract to be breached" (*id.* ¶ 117).

(i) Count IX: *Breach of Duty of Good Faith & Fair Dealing.* Alderman alleges that the Navy is liable for damages to it for breaching the parties' "binding settlement agreement" to pay Big John's for delay damages (*id.* ¶¶ 120, 123).

(j) Count X: *Changes.* Alderman alleges that the periods of "delay, acceleration, and increased costs" that it has alleged are compensable under the Changes clause (*id.* ¶ 125).

(k) Count XI: *Breach of Contract.* Alderman alleges in the alternative that "[t]he periods of delay, acceleration, extra costs, etc." alleged in the complaint "are compensable to Alderman (for Big John's damages) as a breach of prime contract" (*id.* ¶ 128).

(l) Count XII: *Quantum Meruit.* Alderman alleges that, in the alternative, it is entitled to the extended overhead incurred by Big John's on a theory of quantum meruit (*id.* ¶¶ 131-35).

(m) Count XIII: *Equitable and Promissory Estoppel.* Alderman alleges that the facts relating to the delayed start satisfy the elements of both promissory and equitable estoppel, precluding the Navy from not paying Big John's extended overhead and the amount due under the alleged settlement agreement (*id.* ¶¶ 138-41).

(n) Count XIV: *Remedy Requested.* Alderman seeks $20,518, and prays that the Board "enforce the binding settlement agreement...regarding Big John's damages...for the same amount" (*id.* ¶¶ 143,145).

(o) Count XV: *Interest.* Alderman seeks interest "computed in accordance with [the Disputes clause], the Prompt Payment Act, and all other applicable law" (*id.* ¶ 148).

9. With respect to relief, for Count I (*see* statement 8(a)) and Counts IV through XIV (*see* statements 8(d)–8(n)), Alderman seeks an equitable adjustment "in the amount of at least $20,218, plus amounts to be adduce[d] at trial" (compl. at 34). For Counts II and III (*see* statements 8(b)–8(c)), and XI (*see* statement 8(k)), Alderman seeks $20,218 (*id.*). For Count XIII (*see* statement 8(m)), Alderman seeks to "estop Alderman [sic] from refusing to pay Big John's the monies owed, which amounts to at least $20,218, and amounts to be adduced at trial" (*id.*). For count XV (*see* statement 8(o)), Alderman seeks an award to Big John's of interest due under law (*id.*). Finally, Alderman seeks "attorney's fees with pre- and post-judgment interest...and all costs of litigation" (*id.* at 34-35).

10. With its opposition to the Navy's motion, Alderman has filed two exhibits from individuals with personal knowledge of the execution of the final release: (a) a

17 February 2012 email exchange between John Henderson, Alderson's project manager, and Melissa Schumaker, Alderman's accounts manager, with a copy sent to Meghan J. Hislop and Kelly J. Cannon, two Navy civilians; and (b) the affidavits of Mr. Alderman and Mr. Henderson.

11. With respect to the 17 February 2012 emails, the first is from Mr. Henderson to Ms. Schumaker regarding "Final Payment," with a copy to Ms. Hislop and Mr. Cannon. Mr. Henderson stated in his email that he had spoken to Ms. Hislop and Mr. Cannon and that, "[i]f we pursue the claim issue it will be in court and our closing out the project will not affect our ability of how we proceed with the [contracting officer's final decision] letter." He asked Ms. Hislop to "please shoot me a reply confirming this was our discussion." Shortly thereafter, Ms. Hislop replied, "Confirm." (Alderman's (1) Opposition to Navy's Motion for Summary Judgment & to Dismiss; (2) Cross-Motion for Partial Summary Judgment; (3) Request for Declaratory Ruling; and (4) Supporting Memorandum (app. opp'n), ex. 3)

12. In his affidavit, Mr. Alderman attests that he directed Mr. Henderson to advise the Navy that:

> [W]e did not want to do anything that would jeopardize Alderman's ability to pursue the [pending pass-through] claim and issues related to push-back of the contract start-date, including by closing out the project by signing a release. I had directed Mr. Henderson to negotiate an exception for the claim...from all project close-out documents, which would include the release and final payment.

(App. opp'n, ex. 2 at 2) Mr. Alderman further attests that Mr. Henderson reported back to him that the Navy personnel "specifically agreed...[t]hat Alderman excepted its claims and issues related to the push-back of the contract start-date from the project...close-out documents, including the release" (*id.*).

13. In his affidavit, Mr. Henderson attests that, in negotiations with Ms. Hislop and Mr. Cannon, he "made it clear that Alderman specifically excepted its claims, which included those related to the push-back of the contract start-date, from any project closeout or release and payment" (app. opp'n, ex. 1 at 1). He further attests that "Ms. Hislop and Mr. Cannon expressed the desire, on behalf of the Navy, for Alderman not to hold up project close-out and release while waiting for the claims, and they expressed that they saw that the solution would be to state an exception for the claims," which he states the parties accomplished through the 17 February 2012 email exchange (*see* statement 11) (*id.* at 2).

14. It is not evident from the present record whether either Ms. Hislop or Mr. Cannon had contracting officer authority at the time that they are said to have agreed to except the claim from the release. While Ms. Hislop appears to have been a contracting officer during some of the performance period (*e.g.*, R4, tab 5.50), both she and Mr. Cannon are typically identified as contract specialists in the record (*e.g.*, R4, tab 5.0 at 11, 13, tab 5.55; compl. ¶ 69; *see also* compl. and answer ¶ 97).

15. By order dated 25 July 2012, we determined that Alderman's "request for attorney's fees at this stage in the proceedings is premature and thus not properly before this Board," Alderman not having qualified as a prevailing party under the Equal Access to Justice Act, 5 U.S.C. § 504(a)(2).

DECISION

In its original motion papers, the Navy contended that it was entitled to summary judgment because the final release that Alderman executed bars the present pass-through claim. In the alternative, the Navy moved to dismiss all but the unabsorbed overhead claim on the grounds that Alderman has failed to state a sum certain for any of the other claims and had not previously presented them to the contracting officer.

In response to the Navy's motion for summary judgment, Alderman urged that its pre-dispute interpretation that it could continue to pursue its claims was made known to the Navy before execution of the release, which itself was not an integrated writing. Alderman contended that parol evidence reflects that the parties intended that the release would except the present claim, and that the release should now be reformed to reflect that intent. (App. opp'n at 9)

A. Cross-Motion for Summary Judgment

In moving for summary judgment, the Navy's original position was straightforward. It stressed the terms of the final release, which it argued are unambiguous and should be interpreted according to their plain meaning, without resort to extrinsic evidence. Given these terms, Alderman's failure to reserve any rights, and its acceptance of final payment, the Navy contended that the claim was barred and that was entitled to summary judgment. (Mot. at 11)

In opposition, Alderman urged that extrinsic evidence from affidavits and emails is admissible and establishes that the Navy agreed to except Alderman's claim for push-back of the project's start date. Alderman advanced the propositions that its pre-dispute interpretation was known to the Navy, that the release is not an integrated writing, and that parol evidence establishes the parties' contemporaneous intent to except the present claim from the scope of the release. (App. opp'n at 4-9) Alderman also told us that reformation

of the release is required due to either mutual mistake or unilateral mistake, and that the release is ambiguous (*id.* at 9-14).

After Alderman filed its opposition, the Navy changed its position. In its reply brief, the Navy announced that it "withdr[ew] that portion of its Motion for Summary Judgment asserting that Appellant's claim of unabsorbed overhead was released in the signed final release" (Respondent's Reply to Appellant's Opposition to Navy's Motion for Summary Judgment and Navy's Motion to Dismiss for Lack of Jurisdiction (gov't reply br.) at 8). The Navy now concedes that the email exchange attached to Mr. Alderman's affidavit (*see* statements 10-13) "raises a material factual dispute," precluding summary judgment on the issue (gov't reply br. at 8).

In evaluating the Navy's motion, and Alderman's cross-motion, we do not address Count V, as well as those portions of Counts X and XI (*see* statements 8(e), 8(j)-(k)). As we explain below in connection with the Navy's motion to dismiss, we lack jurisdiction over the acceleration allegations in those three counts.

With respect to other aspects of the motion and cross-motion for summary judgment, we agree that the email exchange and the accompanying affidavits of Mr. Alderman and Mr. Henderson, as well as the Navy's concession, raise a genuine issue of material fact, precluding summary judgment regarding the finality of the release. At most, the emails (*see* statement 11), can be read as an agreement to preserve some sort of claim, notwithstanding project close-out. The terms of that claim, however, cannot be extracted from the emails. For their part, the affidavits also do not support summary judgment. Mr. Alderman, the author of the first affidavit, was not present at the disputed meeting (*see* statement 12). Mr. Henderson, the author of the second affidavit, speaks of an agreement concerning "claims, which included those related to the push-back of the contract start-date" (statement 13), a phrase that begs the question of the scope of any exception.

We also deny Alderman's cross-motion for partial summary judgment. With cross-motions, "[t]he fact that both parties have moved for summary judgment does not mean that [we] must grant [summary] judgment as a matter of law for one side or the other; summary judgment in favor of either party is not proper if disputes remain as to material facts." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987). With cross-motions, we "must evaluate each party's motion on its own merits." *BMY, A Division of Harsco Corp.*, ASBCA No. 38172, 93-2 BCA ¶ 25,704 at 127,868.

Alderman tells us that it is entitled to summary judgment because the Navy's concession regarding the email exchange and the affidavit of Mr. Alderman are not sufficient to establish that "the exception to the release was limited to a claim for unabsorbed overhead using the Eichleay formula" (Alderman's Reply to Navy's

Opposition to Alderman's (1) Cross-Motion for Partial Summary Judgment and (2) Request for Declaratory Ruling; and Supporting Memorandum (app. reply br.) at 22). Alderman further argues that the Navy's concession that there is a genuine issue of material fact concerning the release does not defeat Alderman's cross-motion regarding unconscionability and equitable estoppel (app. reply br. at 24-25).

We deny the cross-motion for two principal reasons. First, assuming that there was an exception to the release, the record leaves open the authority of the Navy personnel who assertedly agreed to except the claim from the release. It is hornbook law that "[a] contract with the United States...requires that the Government representative who entered or ratified the agreement had actual authority to bind the United States." *Trauma Serv. Group v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997). The record does not establish which, if any, of the Navy personnel that Alderman cites in its argument had contracting officer warrants, or the amounts of those warrants (*see* statement 14). Second, apart from the authority issue, we reject the argument that the record supports summary judgment for Alderman. In ruling on the Navy's motion above, we have rejected the core proposition of Alderman's cross-motion, *viz.*, that the email exchange and the affidavit of Mr. Alderman "establish the meaning and scope of the exception to the release" (app. reply br. at 23). There is a triable issue regarding that proposition, and hence we cannot grant summary judgment for Alderman.

We accordingly deny the Navy's motion for summary judgment as moot, and deny Alderman's cross-motion for partial summary judgment.

B. Motion to Dismiss

In moving to dismiss all but the unabsorbed overhead claim, the Navy asserts that Alderman alleges "ten (10) new claims in its complaint." The Navy characterizes these "new claims," and we correlate them to counts in the complaint (*see* statements 8(a), 8(b), 8(f)-(l)), as follows:

* Estoppel and damages for ordered & constructive suspensions of work [Count I]
* Breach of contract regarding a settlement agreement [Count II]
* Acceleration of work and loss of efficiency [Count V]
* Interference with contract and failure to cooperate [Count VI]
* Breach [of] warranty work-start date and site availability [Count VII]
* Breach of government duty not to increase contractor's costs of performance [Count VIII]
* Breach [of] duty good faith and fair dealing [Count IX]

* Changes [Count X]
* Breach of contract [Count XI]
* Quantum meruit [Count XII]

(Gov't reply br. at 8) The Navy urges that we dismiss these claims for lack of jurisdiction. In opposing the motion, Alderman urges that it has not alleged new claims in the complaint, "but rather legal theories or remedies arising from the operative facts...presented in its claim" (app. reply br. at 3).

The applicable legal principles are straightforward. Our jurisdiction turns in part on a "sum certain" claimed. Although the amount, if any, that Alderman may finally be entitled to is uncertain, we can say that it sought a "sum certain" of $20,518 in the claim (*see* statement 5(b)).

The more important principle is that it is "the claim, and not the complaint, [that] determines the scope of our jurisdiction in this appeal" because a Contract Disputes Act claim "cannot properly be raised for the first time in a party's pleadings before the Board." *American General Trading & Contracting, WLL*, ASBCA No. 56758, 12-1 BCA ¶ 34,905 at 171,639. We articulated the corollary principles in *Shaw Environmental, Inc.*, ASBCA No. 57237, 12-1 BCA ¶ 34,956 at 171,844:

> Whether a claim before the Board is new or essentially the same as that presented to the [contracting officer] depends upon whether the claims derive from [the same] common or related operative facts. The assertion of a new legal theory of recovery, when based upon the same operative facts as the original claim, does not constitute a new claim. In determining a claim's scope, we are not limited to the claim document but can examine the totality of the circumstances.
>
> ...If a claim raised in a complaint is essentially different in nature from the claim submitted to the [contracting officer] for decision, even if the additional claim does not increase the claimed amount, it is a new claim that we do not have jurisdiction to consider under the [Contract Disputes Act]. [Citations omitted]

Applying these principles here, we deny the Navy's motion to dismiss with respect to Counts I, II, and III, which appear to rely upon "the same common or operative facts" as those set forth in Issues 1, 2 and 3 of the claim, regarding the delayed start of work and the alleged settlement agreement (*see* statements 5(a)-(c), 8(a)-(c)). For the same reason, we also deny the motion regarding seven other counts of the complaint. The facts alleged in these seven counts – Counts VI, VII, VIII, X, XI, XII, and XIII (*see* statements

8(f)-(h), 8(j)-(m)) – appear plainly comparable to the operative facts regarding the delayed start-date set out in Issue 1 of the claim (*see* statement 5(a)). The only exception to the foregoing would appear to be those portions of Counts X and XI containing allegations regarding acceleration (*see* statements 8(j)-(k)). Similarly, four other counts of the complaint appear to be predicated upon the same operative facts regarding the alleged settlement agreement as those set forth in Issue 2 of the claim (*see* statement 5(b)). Those counts are Counts II (addressed above), IX, XIII (addressed above), and XIV (*see* statements 8(b), 8(i), 8(m)-(n)). In addition, Count IV alleges the same legal theory regarding a pass-through claim as that set forth in Issue 4 of the claim (*see* statements 5(d), 8(d)). Finally, while we lack jurisdiction to award *quantum meruit* recovery, *Beyley Construction Group Corp.*, ASBCA No. 55692, 08-2 BCA ¶ 33,999 at 168,141, the operative facts alleged in Count XII (*see* statement 8(l)) appear duplicative of those underlying the *Eichleay* theory in Alderman's claim (*see* statement 5).

Taking the foregoing together, therefore, we deny the Navy's motion with respect to: Counts I, II, III, IV, VI, VII, VIII, IX, X, XI, XII, XIII and XIV, except as to those portions of Counts X and XI containing allegations regarding acceleration.

We grant the motion, however, regarding Count V, in which Alderman alleges acceleration and loss of efficiency, and those portions of Counts X and XI containing allegations of acceleration. Alderman does not appear to have sought relief for acceleration in its claim.

In addition, proof of acceleration appears on this record to invoke facts beyond those necessary to the Eichleay claim that it did submit to the contracting officer. "The three elements necessary to recover *Eichleay* damages are: (1) a government-imposed delay occurred; (2) the government required the contractor to 'stand by' during the delay; and (3) while 'standing by,' the contractor was unable to take on additional work." *Satellite Elec. Co. v. Dalton*, 105 F.3d 1418, 1421 (Fed. Cir. 1997). Alderman appears to be alleging constructive acceleration, inasmuch as there is no allegation of an express order to accelerate. To recover for constructive acceleration, Alderman must prove:

> (1) [T]hat the contractor encountered a delay that is excusable under the contract; (2) that the contractor made a timely and sufficient request for an extension of the contract schedule; (3) that the government denied the contractor's request for an extension or failed to act on it within a reasonable time; (4) that the government insisted on completion of the contract within a period shorter than the period to which the contractor would be entitled by taking into account the period of excusable delay, after which the contractor notified the government that it regarded the alleged order to accelerate as

> a constructive change in the contract; and (5) that the contractor was required to expend extra resources to compensate for the lost time and remain on schedule.

Fraser Constr. Co. v. United States, 384 F.3d 1354, 1361 (Fed. Cir. 2004). We cannot connect the operative facts necessary to the acceleration count to the operative facts in the claim, and hence we grant the Navy's motion regarding Count V and those portions of Counts X and XI containing allegations of acceleration.

C. Request for Declaratory Ruling

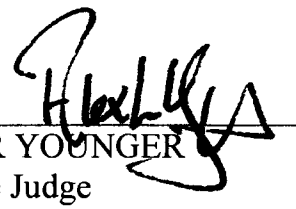
Alderman also seeks "a declaratory judgment under [FED. R. CIV. P.] 57, to the effect that the release...does not preclude additional direct or indirect damages claims or costs...relating to the Navy's push-back of the contract-start date" (app. opp'n at 26).

We deny the request. We have concluded above that there are triable issues regarding the finality of the release. Given that disposition, we cannot give the requested relief.

CONCLUSION

The Navy's motion to dismiss all claims other than the unabsorbed overhead claim is denied to the extent indicated. The Navy's motion for summary judgment regarding the unabsorbed overhead claim is denied as moot. Alderman's cross-motion for partial summary judgment is denied. Alderman's request for a declaratory ruling is denied.

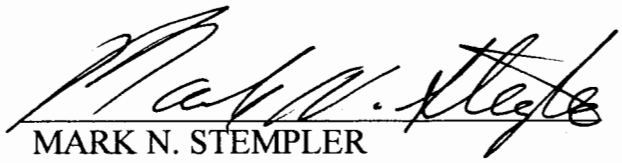
Dated: 8 August 2013



ALEXANDER YOUNGER
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur



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

I concur

PETER D. TING
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 No. 58082, Appeal of Alderman Building Company, Inc., rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals