Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

MOTION FOR PARTIAL SUMMARY
RELIEF DENIED: March 18, 2005

GSBCA 15502, 16055, 16551

TURNER CONSTRUCTION COMPANY,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Patrick J. Greene, Jr. and Richard L. Abramson of Peckar & Abramson, P.C., River Edge, NJ, counsel for Appellant.

Thomas Y. Hawkins, Robert M. Notigan, Richard Hughes, and Amanda Wood, Office of General Counsel, General Services Administration, Washington, DC; and Michael DeChiara, Matthew S. Quinn, Christopher P. McCabe, Michael J. Vardaro, and Michelle Fiorito of Zetlin & DeChiara LLP, New York, NY, counsel for Respondent.

Before Board Judges **BORWICK**, **NEILL**, and **HYATT**.

BORWICK, Board Judge.

This matter involves substantial claims concerning the construction of the United States Courthouse and Federal Building, Islip, New York. Appellant seeks, in the first count of its complaint, an equitable adjustment under the standard contract clauses found in Government construction contracts. In the complaint's second count, appellant seeks recision or reformation and restitution based upon the doctrines of superior knowledge, fraud in the inducement, or mutual mistake. In the complaint's third count, appellant seeks reformation or recision of contract modification 45, which waived certain of appellant's delay claims, on the grounds of failure of consideration, fraud in the inducement, or superior knowledge. Respondent, through its motion for summary relief, seeks dismissal of the second and third counts of the complaint and the labor inefficiency portion of appellant's claim that respondent says was asserted under a theory of constructive acceleration. Since there are material facts in dispute, we deny respondent's motion.

Background

The Second Count

Respondent's contentions

Contract drawings

Respondent says it is entitled to summary relief on the second count, based upon the following alleged uncontested facts. On or about August 18, 1995, the Government issued to prospective bidders a bid set of construction contract drawings, dated June 19, 1995, that The Spector Group (TSG), part of the Government's architectural team, represented were sufficiently coordinated and were biddable and buildable. Respondent's Statement of Uncontested Facts ¶¶ 9, 10. Between October 11 and December 3, 1995, appellant issued thirteen requests for information seeking clarification with respect to alleged errors and omissions that appellant had discovered in the bid set. *Id.* ¶ 10. The design team responded with amendments to the bid set. *Id.*

On December 13, 1995, the Government determined that the bids received were in excess of the estimated construction contract amount for the project and notified TSG of the necessity for re-design of the project. Respondent's Statement of Uncontested Facts ¶ 11. The new drawings were to be biddable and buildable. *Id.*

Pursuant to the re-design effort which occurred between January and May 1996, on May 10, 1996, the Government issued amendments 11-16 (the re-bid set) to prospective bidders. Respondent's Statement of Uncontested Facts ¶ 12. At the time the Government issued the re-bid set, the Government had directed TSG to prepare a conformance set of drawings combining the June 19, 1995, bid set and the re-bid set. *Id.* ¶ 13. The Government asked appellant whether it desired to see the conformance set before bid; appellant recommended that the Government not issue the conformance set until after appellant had submitted its bid. *Id.*

On June 6, appellant submitted its offer for $189,799,802 based on the re-bid set of drawings and the Government accepted appellant's offer on June 12, 1996. Respondent's Statement of Uncontested Facts ¶ 14. On June 18, the Government issued its notice to proceed, and on June 20, the Government issued its conformance set of drawings to appellant. *Id.* ¶¶ 14-15.

The contracting officer states that at no time prior to award did she ever believe that there were errors or omissions in the plans or that the re-bid set was not biddable and buildable. Declaration of Contracting Officer Joan Ryan (Ryan Declaration) (Jan. 18, 2005) ¶ 9.

Appellant reviewed the conformance set and issued a four-set document entitled Conformance Set Review that identified changes between the bid and re-bid set, items in the conformance set that needed clarification, and errors and omissions. Respondent's Statement of Uncontested Facts ¶ 15.

TSG analyzed appellant's Conformance Set Review volumes and issued responses to

the Government, which supplied them to appellant. Respondent's Statement of Uncontested Facts ¶¶ 16-17. Pursuant to that analysis and additional negotiations with appellant, the Government also issued bi-lateral modifications 9, 11, 15, 16, 23, 31, 40, 61, and 100, through which the total amount paid to appellant was increased by $698,986. *Id.* ¶ 18. Although not explicitly stated by the Government, the obvious implication of paragraph eighteen of its uncontested facts is that these modifications should have resolved any lingering questions appellant may have had concerning the suitability of the drawings for construction.

Post-construction contract services

The Government says that, despite initial disputes with the design team as to the scope of post-construction contract services (PCCS), between June 1996 and July 10, 1997, it issued a series of modifications to the design team increasing the scope of PCCS and money available for PCCS up to $4,898,697. Respondent's Statement of Uncontested Facts ¶¶ 19-22. The Government states that "at no time" did the Government provide or intend to have anything less than adequate PCCS with respect to the work being performed by appellant. *Id.* ¶ 22. At no time did members of the design team state that they would not perform PCCS because of negotiations over the scope and price for PCCS. The Government maintains that the design team always took the position that they would provide all required services for the project with the assumption that they would eventually negotiate and be paid for those services. *Id.*

Appellant's contentions

Appellant disputes that TSG's final working drawings that resulted in the first bid set and the first bid set of drawings were biddable and buildable. Appellant's Statement of Genuine Issues ¶ 9. Appellant notes that the final working drawings were not accompanied by a written certification as to the completeness, accuracy, and coordination of the drawings. *Id.* Appellant says that Mr. Arnold Feinsilber, an employee of the architect, admitted that the final working drawings lacked substantial coordination and that TSG was unwilling to complete the design. *Id.*; Appellant's Exhibits 8, 9.

Appellant also relies on the affidavit of Mr. Mark Boyle, appellant's purchasing manager, who states:

> When we were bidding the Islip project, we believed that each set of documents issued to us for bidding, or that would be issued to us for construction, would consist of a complete and fully coordinated set of documents from which we could build the project without subsequent change.
>
> . . . .
>
> Had we known of the incomplete, defective and uncoordinated design, the design team's history of chronically late and incomplete design deliverables, the design team's history of repeated misrepresentations concerning the quality and completeness of their product, the GSA's concerns about the design team's ability to perform its design services in a competent and timely manner, the

> decision to defer completion and coordination of the design to the shop drawing phase, the GSA's dispute with the design team concerning whether the design team was entitled to additional compensation to re-design the project to bring the project within the GSA's budget, the inadequate scope of work of the design team's services during the initial phases of the project, and the design team's contention that the option for those services had expired, or any of the foregoing matters, we would not have bid the job on the stated terms.

Affidavit of Mark Boyle (Boyle Affidavit) (Feb. 18, 2005) ¶¶ 3-5 (emphasis added). He also states that:

> [I]n bidding projects, contractors do not have the time or resources to check the extensive design coordination efforts that are believed and assumed to have been properly, fully and completely performed on behalf of the owner prior to construction.

Boyle Affidavit ¶ 4.

<u>The Third Count--Contract Modification 45</u>

The Government says that the contract included a requirement that the concrete floors and roof be completed before pouring the basement slab on grade (SOG). The requirement was included in drawing F-101, note 12: "The basement slab on ground and the ramp shall be constructed after all the 11 floors (plus roof) of concrete have been constructed."

Respondent's Statement of Uncontested Facts ¶ 23; Respondent's Exhibit 1 (Declaration of Ken Chin, Professional Engineer (Chin Declaration) (Jan.14, 2005)). Appellant does not dispute that, before the execution of modification 45, the contract contained that restriction. Appellant's Statement of Genuine Issues ¶ 23.

Respondent says that the requirement that the floor and roof concrete pour precede the basement SOG pour was based on the professional opinion of the geotechnical consultant. In a report of December 12, 1994, the consultant predicted differential settlement if the concrete construction for the basement SOG preceded the concrete construction of the upper floors and the roof. The drawing requirement was meant to significantly reduce the risk of cracking in the basement slab caused by the predicted differential settlement. Respondent's Statement of Uncontested Facts ¶ 24.

Appellant disputes that the basement SOG restriction served any useful purpose, but admits that appellant asked the Government to remove the restriction. Appellant's Statement of Genuine Issues ¶ 24. Although appellant admits that the report of December 12, 1994, predicted differential settlement, appellant says that in April 1997, the author of the report noted that the removal of a judges' parking area eliminated the principal concern for differential settlement, and, as long as the construction of the ramp was deferred, earlier construction of the basement SOG would not result in unacceptable differential settlement. *Id*.

Respondent says that contrary to contract requirements, appellant requested permission to pour the basement SOG prior to completing the floors and the roof. Respondent's Statement of Uncontested Facts ¶ 25; Ryan Declaration ¶ 16. Respondent says that when appellant sought this permission, it claimed that errors and omissions in the Government's conformance drawings were the cause of delays to the project, an allegation the Government rejected. The Government believed that appellant and its subcontractors caused the delay. Respondent's Statement of Uncontested Facts ¶ 25.

Appellant admits that it requested the option to pour the basement SOG before completing all concrete floors, but only as part of a recovery plan that included an integral package of several provisions, all of which were essential to accomplish the goal of making up time in a project "riddled with design errors and related delays." Appellant's Statement of Genuine Issues ¶ 25. Appellant disputes respondent's contention that respondent then believed that appellant was responsible for the delays.

Contract modification 45, dated August 5, 1997, provided as follows:

> 1. Notwithstanding any of the provisions of Note No. 12 on drawing F-101, dated 4/23/96, to the contrary, the Contractor shall have the option to construct the basement slab-on-grade (exclusive of the ramp) prior to the completion of construction of all the concrete floors of the building (plus roof). Such early construction shall be at [the] sole risk of the Contractor to provide such work in strict conformance with the requirements of the Contract. Any and all such work shall be provided without any additional cost or expense to, or credit from, the Government and without any adjustment to the Contract Completion Date or Contract Price.
>
> . . . .
>
> 4. The Government shall review the Contractor's submittals described in paragraph 2 above, within fourteen (14) calendar days of receipt of submission.
>
> 5. Within twenty[-]one (21) calendar days of the receipt by the Government of
>
> a) Applicable Metal Deck and Shear Stud shop drawings, and
>
> b) Written request for review from the contractor,
>
> The Government shall review those Metal Deck and Shear Stud shop drawings listed on such request for review, provided the timing of the submission of the drawings requested for review shall be phased, floor-by-floor, in sequence of the work as it shall be performed, over reasonable intervals so as to permit orderly and efficient review by the Government.
>
> . . . .

The Contractor shall not request review of any Metal Deck or Shear Stud shop drawings until the Structural Steel Erection shop drawings relating to the floor that [sic] such deck or stud work shall be performed shall have been approved, either unconditionally or as noted. In the event that there shall be any objection to any such reviewed Metal Deck or Shear Stud shop drawing, the Government, upon request of the contractor, agrees to expedite the consultation between its A/E [architect/engineer] consultants and the Contractor for the purpose of resolving such objection.

6. The Government, upon request of the Contractor, agrees to expedite consultation between its A/E consultants and the Contractor for the purpose of resolving outstanding objections to the Contractor's Air Handling Unit submissions.

7. The Government, upon request of the Contractor, agrees to expedite consultation between its A/E consultants and the Contractor for the purpose of resolving contract design problems that may arise during the shop drawing or coordination stages of the construction of the mechanical equipment for the penthouse level.

8. The Contractor hereby forever and unconditionally discharges, remises, and releases the Government, its agents, servants, employees, officials, successors, and assigns from any and all claims, liabilities, obligations, demands, actions, suits, debts, charges and causes of action for:

a) time extension or extensions for completion of the Contractor's performance under the Contract; and

b) direct and indirect impacts and associated costs due to time whether known or unknown at the time of making of this modification, arising out of:

x) any acts, omissions, or events occurring (including but specifically not limited to, any and all contract and contract document modifications, PLDs; RFIs [requests for information]; or RFPs [requests for proposals] made or issued) on or prior to July 1, 1997 or

y) any of the agreements contained in this contract modification.

9. Notwithstanding any of the provisions of paragraph 8 above to the contrary, the Contractor hereby reserves its rights, if any, for any claims which it may have for adjustments in the contract price for additional direct and indirect costs of labor and material of its subcontractors (exclusive of any direct or indirect impacts or associated costs due to time).

10. Notwithstanding any of the provisions of paragraph 8 above to the contrary, the contractor hereby reserves its rights, if any, for any time extensions and impact costs, if any, arising:

a) Out of the discovery of additional contaminated soil in the garage area at any time after the later to occur of (i) the rescinding by the Government of Stop Work Order 001, dated October 22, 1996, and (ii) the releasing by the Government to the Contractor of possession of the garage area;

b) After August 1, 1997 out of Stop Work Order 002, dated October 22, 1996, as a result of the Government not having rescinded Stop Work Order 002 or delivered possession of the garage area to the contractor on or prior to August 1, 1997;

c) Out of Stop Work Order 003, Revision #1, dated May 9, 1997;

d) On or after July 1, 1997 resulting from redesign of elevator supports as described in contractor's Notice of Change #X109;

e) On or after July 1, 1997 resulting from redesign of plenums as described in contractor's Notice of Change # X119; and

11. Notwithstanding any of the provisions of paragraph 8 above to the contrary, the Contractor hereby reserves its rights, if any, for any claims relating to adjustments in the contract price for payments due to its subcontractor, Steelco, Inc.

12. Notwithstanding any of the provisions of paragraph 8 above to the contrary, the contractor hereby reserves its rights, if any, for any claim relating to adjustments in the contract price for payments due to any of its subcontractor[s] other than Steelco, Inc., for direct or indirect impacts and associated costs of such other subcontracts arising out of any acts, omission, or events occurring (including but specifically not limited to, any and all contract and contract document modifications; PLDs; RFIs; or RFPs made or issued) after May 1, 1997.

13. Nothing contained in this modification shall be construed as:

a) acceptance or approval by the Government of any construction schedule, or any part thereof, previously submitted by the Contractor to the Government;

b) an admission or determination by the Government as to the validity of any alleged claim reserved by the Contractor;

> c) the waiver or release by the Government of any defense to any such claim; or
>
> d) the release or waiver by the Government of any claim or counterclaim which the Government may have as against the Contractor.

Appeal File, Exhibit 8 (modification 45).

Respondent says that Turner and its subcontractors, with the exception of Steelco, entered into a contract modification with the Government to waive certain delay claims that existed prior to the proposed modification in consideration for relief from the requirement that the concrete floors and roof be installed prior to pouring the basement SOG and for an agreement by the Government to cooperate with appellant and prioritize review of certain submittals. Respondent's Statement of Uncontested Facts ¶ 26; Chin Declaration ¶ 4; Ryan Declaration ¶ 17. The Government states that it always intended on complying with its agreement to prioritize and cooperate with appellant during review of certain submittals, in a shorter time required by the specifications. Ryan Declaration ¶ 21.

Appellant disputes Respondent's Statement of Uncontested Facts ¶ 26. Appellant states that modification 45 was a recovery plan that contained several interrelated provisions, each of which was essential to the overall goal of recovering lost schedule time due to alleged deficiencies in government drawings and government delay in submittal reviews. Appellant's Statement of Genuine Issues ¶ 26; Affidavit of Thomas Nickel (Nickel Affidavit) (Feb. 18, 2005) ¶¶ 4, 19.[1] Appellant says that the recovery plan embodied in modification 45 was to install the basement SOG earlier than planned and to provide for expedited review of air handler unit shop drawings which would have allowed appellant to install the air handling units in the basement earlier than scheduled. Nickel Affidavit ¶ 19. The earlier installation of the air handling units coupled with timely installation of the metal deck and concrete on the lower floors would have allowed finish work on the lower floors to begin early. *Id*. Appellant anticipated that the expedited handling of submittals--including air handling and metal deck and shear stud shop drawings--would result in return times for submittals of less than twenty-one days. *Id*. ¶¶ 19, 21.

Appellant references a letter of May 28, 1997, from TSG acknowledging modification 45, but stating that since there is no adjustment to the A/E contract for "this accelerated work," TSG would implement the agreement by giving precedence to work covered by the modification over other work. TSG also stated that submittals that were not pertinent to the modification might be set aside temporarily and that, except at TSG's discretion, it would not work premium time. Nickel Affidavit, Exhibit 14. Appellant says that if it had known that the Government had intended not to add resources to the A/E review team, but to divert existing resources to work covered by modification 45 at the expense of other work, it would not have agreed to modification 45. Nickel Affidavit ¶ 28.

---

[1] Mr. Nickel says he is shocked and dismayed that the Government is attempting to enforce the release or waiver provisions in modification 45. Nickel Affidavit ¶ 4.

Labor inefficiency/constructive acceleration

We consider appellant's and respondent's contentions together.

Respondent says the contract completion date was October 17, 1999. Respondent says that appellant did not comply with the scheduling provisions of the contract in that appellant did not timely update its schedule. Respondent's Statement of Uncontested Facts ¶ 36; Chin Declaration ¶ 13. Appellant says that it substantially complied with the scheduling requirements by submitting monthly reports including delays and impact analysis and that the respondent waived the requirement of schedule updates. Appellant's Statement of Genuine Issues ¶ 36; Nickel Affidavit ¶ 11. Respondent says that at no time did appellant submit a schedule analysis seeking an extension of time for alleged design deficiencies. Respondent's Statement of Uncontested Facts ¶ 36(b); Chin Declaration ¶ 13. Appellant says it substantially complied with the update requirements by submitting monthly reports seeking time extensions and explaining delays. Appellant says that respondent approved and then repudiated its proposed thirty-two month schedule, and that formally asking for an extension of time would have been futile. Appellant's Statement of Genuine Issues ¶ 36(b); Nickel Affidavit ¶ 14.

Respondent (without attribution to a document or affidavit) says appellant did not accelerate the activities of its subcontractors. Respondent's Statement of Uncontested Facts ¶ 41. Appellant agrees. Appellant's Statement of Genuine Issues ¶ 41.

Respondent states that even though appellant did not request extensions of time, it accelerated the work of its subcontractors and that most of the subcontractors suffered inefficiency due to re-sequencing of work and stacking of trades resulting in loss of productivity. Respondent's Statement of Uncontested Facts ¶ 42.

Appellant disputes that it accelerated its subcontractors, admits that its subcontractors suffered labor inefficiencies, but attributes the labor inefficiency claim to deficiencies in the design documents. Appellant's Statement of Genuine Issues ¶ 42.

Discussion

Board Rule 108(g)(1)[2] provides:

> A motion for summary relief should be filed only when a party believes that, based upon uncontested material facts, it is entitled to relief in whole or in part as a matter of law.

This rule is modeled on Rule 56 of the Federal Rules of Civil Procedure, pertaining to summary judgment, and we rely on our precedent and case law construing Rule 56 in applying our rule. *AT&T Communications v. General Services Administration*, GSBCA 14732, 00-2 BCA ¶ 31,128.

---

[2] 48 CFR 6101.8(g)(1) (2003).

We are obliged in ruling on motions for summary relief to draw all inferences in favor of the party opposing the motion; a motion for summary relief is proper only on those facts about which we "need not function as an arbiter among differing versions of every factual reality for which evidentiary support has been presented." *Cable Electric Products, Inc. v. Genmark, Inc.*, 770 F.2d 1015, 1020 (Fed. Cir. 1985); *Viacom, Inc. v. General Services Administration*, GSBCA 15871, 04-2 BCA ¶ 32,639, at 161,506. All significant doubt over pertinent factual issues must be resolved in favor of the party opposing summary relief. Summary relief is appropriate only when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Armco, Inc. v. Cyclops Corp.*, 791 F.2d 147, 149 (Fed. Cir. 1986); *Barmag Barmer Maschinenfrabrik AG v. Murata Machinery, Ltd.*, 732 F.2d 831, 835-36 (Fed. Cir. 1984); *Viacom*; *Peter Johnson v. General Services Administration*, GSBCA 15604, 01-2 BCA ¶ 31,599, at 156,163-64. Our duty at the summary relief stage of proceedings is not to weigh the evidence but to determine the existence of material facts in dispute. *Anderson v. Liberty Lobby*, 497 U.S. 242, 249 (1986); *Contractors Ass'n of Eastern Pennsylvania, Inc. v. City of Philadelphia*, 6 F.3d 990, 1003 (3d Cir. 1993) (district court's summary judgment reversed in suit challenging set-aside program as violative of Equal Protection Clause where defendant presented evidence of racial discrimination sufficient to defeat motion).

Respondent says it is entitled to summary relief on the second count because appellant relies on its "tortured interpretation of project correspondence." Respondent's Memorandum at 8. Respondent says that "the Government always believed, and still believes, that the design team's drawings were 'biddable and buildable' . . . [that] the design team intended to perform under its contract and that [appellant] was often more fully informed regarding the project than the Government." *Id.* at 9. Appellant has a very different view of the facts. Each party's version as to whether the construction drawings put out for bid were biddable and buildable and what appellant knew or should have known about the deficiencies in the drawings is supported by facially competent evidence (dueling affidavits and interpretations of contemporaneous documents). The same is true of the issue about funding of PCCS. Respondent's motion for summary relief on the complaint's second count must be denied.

Modification 45

Appellant argues that modification 45 fails for want of consideration and was obtained by the Government's concealment of facts that negated any value of GSA's promises to expedite certain design services, which appellant characterizes as the principal benefit that appellant was promised in modification 45. Appellant's Opposition to Respondent's Motion for Summary Relief at 50. Respondent argues that modification 45 was of clear benefit to appellant and that the Government fully intended to comply with modification 45. Respondent's Memorandum in Support of Motion for Summary Relief at 34. Based on the language of modification 45 and the facts upon which the parties do agree, it does not appear to us that appellant's argument is a persuasive one.

As a general rule, the execution by a contractor of a release which is complete on its face reflects the contractor's unqualified acceptance and agreement with its terms and is binding on both parties. *C&H Commercial Contractors, Inc. v. United States*, 35 Fed. Cl. 246 (1996). An unambiguous release will be considered complete accord and satisfaction

and parol evidence will only be considered to resolve a release that is found to be ambiguous. *Jackson Construction v. United States*, 62 Fed. Cl. 84 (2004); *North American Construction Corp. v. General Services Administration*, GSBCA 14472, 98-2 BCA ¶ 29,910.

Modification 45, while detailed, in the words of the document itself, unambiguously "forever and unconditionally discharges, remises, and releases the Government" from certain of appellant's delay claims specified in the modification. Modification 45 also states the consideration for the waiver--release of the contract restriction on the timing of the concrete construction for the SOG and a Government agreement to "expedite" consultation between the Government and its A/E concerning certain mechanical shop drawings and submittals and metal deck or shear stud shop drawings.

Consideration is sufficient under the Restatement of Law if there is a bargained-for exchange, which as shown in the immediate paragraph above, there obviously was in this case. Restatement Second of Contracts §§ 71(1), (3), 79(a) (1979). Under a traditional benefit/detriment analysis, consideration is sufficient if there is <u>any</u> benefit to the promisor or detriment to the promisee. Consideration, in the context of a Government contract, must render a benefit to the Government and not merely a detriment to the contractor. *National Micrographics Systems Inc. v. United States*, 38 Fed. Cl. 46, 51 (1997). Neither the benefit nor detriment need be actual; it is a sufficient legal detriment if the promisee agrees to perform any act, no matter how slight, and so long as he does so at the request of the promisor and in exchange for the promise. The term "benefit" means the receipt as the exchange for a promise some performance or forbearance which the promisor was not previously entitled to receive. 3 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts*, §7.4 at 41, 47 (4th ed. 1992).

In this matter, despite appellant's insistence on the existence of alleged material disputed facts, both parties agree that the Government agreed to lift the contract restriction on the SOG concrete construction and agreed to expedite consultation with its A/E. In exchange the appellant waived certain delay claims. The Government, the promisor here, received the benefit of appellant's waiver of the specified delay claims. Of course, appellant also received a benefit of release of the contract restriction and a Government agreement to expedite coordination with its A/E of certain submittals. Appellant's argument that the contract restriction that was released "served no useful purpose" is irrelevant to the existence of valid consideration.

Appellant's reliance on *Paccon, Inc. v. United States*, 399 F.2d 162 (Ct. Cl. 1968) is misplaced. That case held that a gratuitous insertion of a waiver of delay claims in equitable adjustment modifications for direct costs alone was not supported by consideration, since the contractor was entitled to the direct costs. The waiver of claims here was not gratuitous, but was part of the bargained-for exchange.

We will not, however, make a final determination on modification 45. Appellant also claims Government fraud in the inducement in negotiating modification 45. Because this second issue remains unproven, and may conceivably have some bearing on the consideration issue, we defer any final ruling on consideration until the record in this case is closed.

Here appellant, through the Nickel affidavit, claims that, in executing modification 45, appellant expected respondent to add resources to the submittal review activities and also maintain existing resources for other activities of the construction project. The Government disputes that statement, but, drawing all inferences in favor of appellant and against respondent, appellant has pled enough to avoid summary relief and summary dismissal of this count.

Labor inefficiency

There are disputed facts as to whether appellant or respondent was responsible for the labor inefficiencies, if any, encountered by appellant's subcontractors on the job. The parties dispute whether appellant was building the project to an early thirty-two month schedule or to the contract completion date. The parties fight over whether a claim of labor inefficiency can ever be brought without calling it "constructive acceleration." The parties are in dispute as to whether appellant claimed time extensions. Appellant says it did in its monthly reports and respondent says it did not claim time extensions through a time impact analysis as required by the contract. What is clear is that disputed issues of fact prevent summary relief on this issue.

Decision

Respondent's motion for summary relief is **DENIED**.

____
ANTHONY S. BORWICK
Board Judge

We concur:

_____________________________	_____________________________
EDWIN B. NEILL Board Judge	CATHERINE B. HYATT Board Judge