



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF DENIED: December 22, 2016

CBCA 5456

AHTNA ENVIRONMENTAL, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Anne Marie Tavella and Traeger Machetanz of Davis Wright Tremaine LLP, Anchorage, AK, counsel for Appellant.

Rayann L. Speakman, Office of the Chief Counsel, Western Federal Lands Division, Federal Highway Administration, Department of Transportation, Vancouver, WA, counsel for Respondent.

Before Board Judges **SULLIVAN**, **LESTER**, and **O'ROURKE**.

LESTER, Board Judge.

Pending before the Board is a motion for summary relief that respondent, the Department of Transportation, filed on September 30, 2016. In its motion, the Government asserts that appellant, Ahtna Environmental, Inc. (AEI), failed to execute within the time period required by its contract a final voucher reserving the claim that it is now pursuing.

The Government argues that, as a result of that failure, and under the terms of the contract at issue, AEI's claim is now barred. For the reasons set forth below, we deny the Government's motion.

Statement of Uncontested Facts

I. The Contract

On March 18, 2013, AEI was awarded a firm fixed-price contract, contract no. DTFH70-13-C-00007 (the contract), by the Federal Highway Administration (FHWA) for bridge removal, culvert installation, and other items of work at Rock Creek within the Denali National Park and Preserve, Denali Borough, Alaska. Appeal File, Exhibit 2 at 8, 13.¹ The FHWA awarded the contract as a total small business set-aside pursuant to Federal Acquisition Regulation (FAR) 52.219-6, 48 CFR 52.219-6 (2013). Exhibit 2 at 1. Although the primary contracting officer for the contract held overall responsibility for administering the contract, she was assisted by a Construction Operations Engineer (COE) who held a contracting officer's warrant providing him authority in matters up to \$150,000 and executed some modifications to the contract (which he signed using the title "Contracting Officer"). Exhibits 6, 7, 24, 24(2), 47.

The contract incorporated the "Payments under Fixed-Price Construction Contracts (Sept 2002)" clause from FAR 52.232-5, which included a paragraph providing for final payment under the contract conditioned upon the contractor's execution of a release of claims, subject to any specific claims that the contractor expressly reserved from the release:

Final payment. The Government shall pay the amount due the Contractor under this contract after —

- (1) Completion and acceptance of all work;
- (2) Presentation of a properly executed voucher; and
- (3) Presentation of release of all claims against the Government arising by virtue of this contract, other than claims, in stated amounts, that the Contractor has specifically excepted from the operation of the release.

Exhibit 2 at 88; *see* 48 CFR 52.232-5(h).

¹ All exhibits referenced in this decision are found in the appeal file, unless otherwise noted.

The contract also incorporated the Standard Specifications for Construction of Roads and Bridges on Federal Highway Projects, FP-03 (Standard Construction Specifications), which included a separate provision, section 109.09, that expressly incorporated the “Payments” clause at FAR 52.232-5 and also added other requirements associated with final payment.² Rather than have the contractor prepare, certify, and submit a voucher to the Government seeking final payment following completion of all work, the FHWA was to take the contractor’s final pay records and, after some type of audit, prepare its own final voucher identifying the costs to which the FHWA believed the contractor was entitled. The FHWA would then provide that final voucher to the contractor for review and approval along with a draft release of all claims under the contract:

109.09 Final Payment. Follow the requirements of FAR Clause 52.232-5 Payment under Fixed-Price Construction Contracts and FAR Clause 52.232-27 Prompt Payment for Construction.

Upon final acceptance and verification of final pay records, the Government will send, by certified mail, a final voucher ([Standard Form (SF)]1034) and a release of claims document. Execute both the voucher and the release of claims, and return the documents to the Government for payment. The date of approval by the Government of the final voucher for payment constitutes the date of final settlement of the contract.

If unresolved claims exist or claims are proposed, reserve the right to the claims by listing a description of each claim and the amount being claimed on the release of claims document.

Exhibit 4 at 52-53; *see* Statement of Uncontroverted Facts (SOUF) ¶ 3.

The final paragraph of the “Final Payment” clause in section 109.09 specifically indicated that, if the contractor did not within ninety days after receipt execute and return to the Government the final voucher and release of claims document that the FHWA had prepared, the final voucher and release documents would be deemed executed, with all claims arising under the contract being deemed released:

Failure to execute and return the voucher and release of claims document within 90 days after receipt shall constitute and be deemed execution of the

² The FHWA represented during a telephonic status conference on November 29, 2016, that this clause has been used in various FHWA contracts since at least 1985.

documents and the release of all claims against the Government arising by virtue of the contract. In this event, the day after 90 days from receipt constitutes the date of final settlement of the contract.

Exhibit 4 at 53.

II. Contract Performance

AEI was authorized to proceed with the contract work on April 15, 2013. SOUF ¶ 4; Exhibit 9 at 1. AEI completed its work on October 2, 2014. SOUF ¶ 5. During the course of contract performance, AEI submitted several notices to the FHWA alleging changed conditions and objecting to withholding and retention of various contract amounts.

On February 11, 2015, the FHWA, through the COE, issued a unilateral contract modification, no. 019, taking a contract price deduction of \$48,568.92 as compensation for work that the Government believed did not conform with contract requirements. Exhibit 10 at 1, 7; SOUF ¶ 6. AEI responded to the notification of that deduction by letter to the COE dated April 9, 2015, submitting what it titled a “Request for Equitable Adjustment (Changes Due to Unilateral Contract Modification 019),” in which it challenged the Government’s \$48,568.92 in deductions and, in addition, AEI’s alleged forfeiture of a \$25,000 retainage. Exhibit 12 at 1; SOUF ¶ 8.

The next day (April 10, 2015), AEI received the SF-1034 final voucher and release of claims document (as contemplated by section 109.09 of the contract’s Standard Construction Specifications) that the FHWA had prepared and mailed on March 26, 2015. SOUF ¶¶ 7, 9. In an accompanying letter from the FHWA’s final review engineer, the FHWA indicated that a failure to return the executed final voucher within ninety days would be considered a release of all claims against the Government:

Please review the FP-03, Subsection 109.09, and Final Payment. Failure to execute and return the voucher and release of claims within 90 calendar days shall be considered execution of the documents and release of all claims against the Government arising by virtue of the contract.

If there are any claims, reserve them by listing the claim(s) and amount(s) on page 2, Release of Claims.

Exhibit 11 at 1.

On June 16, 2015, AEI submitted a response to the FHWA's letter. SOUF ¶ 11; Exhibit 13. AEI represented that it would not be executing and returning the final voucher and release of claims and that, instead, it would provide the FHWA with a request for equitable adjustment (REA) based upon an unforeseen permafrost issue and changes to a mechanically stabilized earth wall that had resulted from a deficient project design, as well as a challenge to the FHWA's retention of funds and assessment of liquidated damages:

[AEI] will not be executing and returning [FHWA's] final voucher and release of claims for the following reasons:

1. The voucher is inaccurate in numerous respects, the most apparent being the retention and liquidated damages that [FHWA] has deducted from amounts owed AEI. AEI's objections to these deductions have been set forth in numerous discussions, emails and correspondence with [FHWA] including serial letters 18 through 25.
2. AEI is also entitled to an equitable adjustment to its contract for time and costs relating to (a) unforeseen permafrost, and (b) changes to the SE MSE [southeast mechanically stabilized earth] wall necessitated by the deficient project design, both of which issues have been discussed between AEI and [FHWA] orally and through written communications.
3. The interim performance rating which AEI received on this project is in error and needs to be revised.

AEI is in the process of preparing an REA which will address the above issues and looks forward to sitting down and resolving that REA with [FHWA] representatives. Until the above issues are resolved, AEI will not be executing a final release or final voucher.

Exhibit 13 at 1. AEI also "request[ed] that [FHWA] revise the current voucher to reflect that it is an interim voucher, subject to the above reservations, and proceed to pay the amounts due under such interim voucher to AEI." *Id.*

By letter dated June 18, 2015, the FHWA contracting officer responded to AEI's June 16, 2015, letter, representing that AEI was "past the time to submit a REA." Exhibit 14 at 1; *see* SOUF ¶¶ 12, 13. The contracting officer cited no authority or contract provision

supporting that assertion.³ She stated only that “[t]he contract specifications under Section 109.09 state the process for Final Payment and closing the contract” and that “[i]t is very clear that if you do not submit an executed Release of Claims within 90 days of receipt of the SF-1034 and Release of Claims, you will forfeit your right to submit a claim on this project.” Exhibit 14 at 1. “If you would like to reserve your right to claim on this project,” she wrote, “we need to receive the executed Release of Claims within the 90 day timeframe.” *Id.* Nevertheless, the contracting officer acknowledged her understanding that, “within the past few months,” AEI had “sent a letter to [the COE] with regards to this project.” *Id.* She indicated that the COE was temporarily unavailable and that “the administration and closeout of this project is now under my control as contracting officer.” *Id.*

AEI has asserted that, even though a temporary receptionist signed a return receipt showing delivery to AEI of the contracting officer’s letter of June 18, 2015, that letter was never distributed to AEI management, and AEI management never saw it until AEI received the appeal file in this case. In any event, AEI did not execute and return the final voucher or a release of claims within ninety days of its receipt of those forms from the Government or at any time thereafter.

On December 11, 2015, AEI submitted an REA to the COE seeking an upward equitable adjustment in the contract price of \$2,263,619.30, asserting that the FHWA caused various changes and delays to the project for which AEI was entitled to compensation and, further, that the FHWA had imposed liquidated damages for delays that were caused by factors such as unusually severe weather that were outside AEI’s control. SOUF ¶ 18; Exhibit 15 at 1-31. The COE, after having sought additional information from AEI regarding the merits of its REA, responded to AEI’s REA on April 5, 2016. SOUF ¶ 19; Exhibit 16 at 1. Although the COE denied the majority of the REA, he did so based upon the merits of the issues presented and did not indicate that AEI had released its claims. *Id.* at 1-6. He

³ During a telephonic conference with the Board on November 29, 2016, the FHWA explained that, by June 18, 2015, it was too late for AEI to submit an REA because contract performance was already complete. Because there could be no benefit to the contract from post-performance negotiation of any contract disputes, the FHWA explained, an REA was not appropriate, and any monetary disputes would have to be submitted as a CDA claim. Although we question the FHWA’s position that an REA cannot be submitted after contract performance is complete, *see Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541, 1549-50 (Fed. Cir. 1995) (costs incurred in the negotiation process following submission of an REA benefit the contract purpose and may be allowable as contract administration costs), it does not appear that the contracting officer’s statement affected either party’s subsequent actions, rendering it irrelevant to the issue before us.

agreed with AEI that it was entitled to recover its costs incurred in preparing its REA, but indicated that he needed more information about those costs. *Id.* at 6.

On April 26, 2016, the FHWA issued final payment to AEI on the contract in the amount of \$438,507.57, plus interest in the amount of \$7108.88. SOUF ¶ 20; Exhibit 23. Nothing in the record explains why the FHWA suddenly issued final payment at that time. The contracting officer subsequently informed AEI in May 2016 that, because the FHWA should have made final payment in July 2015, it had added the interest payment pursuant to the Prompt Payment Act (PPA), 31 U.S.C. §§ 3901-3907 (2012), to compensate for the payment delay. Exhibit 18 at 1.

On April 28, 2016, AEI converted its REA into a certified claim, which it submitted to the COE. SOUF ¶ 22; Exhibit 17. The COE forwarded it to the contracting officer, who, on May 11, 2016, sent an email message to AEI indicating that there had been a miscommunication within her office and that the COE had lacked authority to respond to AEI's December 2015 REA. Exhibit 18 at 1. The contracting officer stated that "I will be considering your claim and the REA preparation costs that [the COE] indicated [in his response to the REA] may be compensable." *Id.*

By letter dated June 3, 2016, the contracting officer requested additional information from AEI on the REA preparation costs that the COE had indicated were recoverable. Exhibit 20. On July 6, 2016, the contracting officer again requested information about the REA preparation costs claim and, in addition, indicated that she would issue a decision on AEI's April 28, 2016, claim no later than August 19, 2016. Exhibit 22.

On August 17, 2016, the contracting officer denied AEI's claim. She indicated that AEI "did not reserve its right to file a claim on the Release of Claims document" and "did not return the SF-1034 or Release of Claims to the government." Exhibit 1 at 2. Because AEI "did not reserve its right to file a claim in accordance with the requirements of the contract," she denied AEI's claim in its entirety, with the exception of AEI's request for recovery of REA preparation costs. *Id.* She denied the REA preparation cost claim based upon a lack of sufficient information. *Id.*

Discussion

I. The Standard for Summary Relief

"Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts." *Au' Authum Ki, Inc. v. Department of Energy*, CBCA 2505, 14-1 BCA ¶ 35,727, at 174,890.

“The moving party bears the burden of demonstrating the absence of genuine issues of material fact,” and “[a]ll justifiable inferences must be drawn in favor of the non-movant.” *General Heating & Air Conditioning, Inc. v. General Services Administration*, CBCA 1242, 09-2 BCA ¶ 34,256, at 169,264 (quoting *AFR & Associates, Inc. v. Department of Housing & Urban Development*, CBCA 946, 09-2 BCA ¶ 34,226, at 169,168). “A fact is considered to be material if it will affect the Board’s decision, and an issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the non-movant after a hearing.” *Id.*

II. The Purpose of Section 109.09

The Contract Disputes Act (CDA) provides that “[e]ach claim by a contractor against the Federal Government relating to a contract . . . shall be submitted within 6 years after the accrual of the claim.” 41 U.S.C. § 7103(a)(4)(A) (2012). Nevertheless, as the Court of Appeals for the Federal Circuit recognized in *Do-Well Machine Shop, Inc. v. United States*, 870 F.2d 637 (Fed. Cir. 1989), Congress, in enacting the CDA, did not intend “to prevent parties from agreeing to terms [in their contracts] that would further expedite the claim resolution process.” *Id.* at 641. If a contract with the Government contains a term limiting a contractor’s right to bring claims to a period less than the six-year period for which the CDA provides, or (as in this case) to notify the Government of anticipated claims, “[t]he United States can enforce the waiver of, or agreement to, a given limitations period with the same force as a private party.” *Id.* Accordingly, the Federal Circuit in *Do-Well* enforced a contract provision that limited to one year after contract termination the time that a contractor could submit a termination settlement proposal. *Id.* at 640-41; see *Jonathan Noeldner v. Department of Agriculture*, CBCA 5379, 16-1 BCA ¶ 36,499, at 177,844-45 (clause requiring contractor to submit all claims within sixty days after timber sale is closed “is enforced because ‘[t]he consequences of failing to comply with [the] time limitation provision[] are explicit in the contract language’” (quoting *Duffy, Inc. v. Department of Agriculture*, CBCA 1369, 09-2 BCA ¶ 34,250, at 169,253)).

Section 109.09 purports to create the same type of limitation: it requires the contractor to notify the FHWA of any claims that it intends to pursue within ninety days after receipt of the FHWA’s draft final voucher and draft release of claims. Although the FHWA describes the provision as creating a “deemed executed and delivered” release of claims,⁴ the

⁴ There is a question, which we do not resolve here, about whether the “deemed executed and delivered” release language in section 109.09 is consistent with the requirements for a final payment release in FAR 52.232-5(h). The FAR provision requires that, before the Government can make final payment, there must be a “[p]resentation of a

provision, in essence, acts as a waiver of the contractor's ability to maintain claims under the contract. If the contractor does not submit a release of claims (with a reservation of specific claims) to the Government within the prescribed time, it waives all claims. Such a waiver provision is not unenforceable simply because the time limit imposed for reserving claims is shorter than the statute of limitations identified in the CDA.

III. The Effectiveness of AEI's Purported Waiver of Claims

A. Whether The Purported Release Covers AEI's Claim

It is clear that AEI's letter of June 16, 2015, notifying the FHWA of its anticipated claims was sufficient to preclude any waiver of those claims. If a contract clause requires a contractor to notify the Government within a specified period of time of a contract change or a differing site condition, lack of such notice does not automatically bar the contractor's

properly executed voucher" and "[p]resentation of release of all claims against the Government." 48 CFR 52.232-5(h)(2), (3). The word "presentation" generally refers to an actual affirmative delivery of what would be, in this instance, a written executed final voucher and release. *See Random House Webster's Unabridged Dictionary* 1529 (2d ed. 2001) (defining "present" and "presentation"). Under section 109.09, however, the contractor is not required to "present" an executed final voucher or release. Instead, it is the Government that initially prepares and "presents" to the contractor a final voucher, but one that, as evidenced by the voucher in the record, is not executed. *See Exhibit 11*. On the same form as the voucher, the Government includes a draft, but unsigned, release. *See id.* Pursuant to section 109.09, the contractor's failure to execute and return the final voucher and release (expressly reserving any claims that the contractor wishes to reserve) within ninety days after receiving the Government's voucher is "deemed execution of the documents and the release of all claims against the Government" under the contract. *Exhibit 4 at 53*. Because we can resolve the Government's motion to dismiss on other grounds, we need not decide whether section 109.09's "deemed delivered" provision is consistent with FAR 52.232-5(h)'s requirement for a "presentation" of an executed final voucher and release of claims. We note, though, that a contract provision which conflicts with, rather than permissibly supplements, a mandatory FAR clause is typically unenforceable unless the contracting officer obtained authorization from the agency head for a deviation under FAR 1.403 or 1.404. *See Johnson Management Group CFC, Inc. v. Martinez*, 308 F.3d 1245, 1256 n.2 (Fed. Cir. 2002) ("A contracting officer is not authorized to deviate from the requirements of procurement regulations when the necessary authorization to do so has not been given."); *Southwest Marine, Inc.*, ASBCA 34058, et al., 91-1 BCA ¶ 23,323, at 116,985 (1990) (clause inconsistent with Changes clause in FAR was held unenforceable).

recovery unless the Government can establish that it was prejudiced by the lack of notice. *Singleton Contracting Corp.*, IBCA 1413-12-80, 81-2 BCA ¶ 16,269, at 75,607; *see Mutual Construction Co.*, DOT CAB 1075, 80-2 BCA ¶ 14,630, at 72,157 (finding that “the Court of Claims has consistently frowned upon overly technical and illiberal applications of the written notice requirements in contract clauses, particularly where the underlying facts were known to the Government”); *DeMauro Construction Corp.*, ASBCA 17029, 77-1 BCA ¶ 12,511, at 60,650 (“We have held for many years that this notice should be waived if the lack of it did not result in prejudice to the Government.”). We see no reason not to apply that same rule to a deadline for reserving claims prior to final payment, at least in the circumstances here.

It is impossible to see how the FHWA was prejudiced by AEI’s failure to list its reserved claims on the SF-1034 voucher given that, prior to the due date for its submission, AEI expressly told the FHWA in a letter what its claims were going to encompass and asked for additional time to complete an audit so that it could accurately quantify the amounts due. If the responsible Government officials are aware or should be aware of the anticipated claim and the contractor’s desire to reserve it, “strict compliance with a contract’s written notice requirements is not required.” *A.R. Mack Construction Co.*, ASBCA 50035, 01-2 BCA ¶ 31,593, at 156,139. Knowing of AEI’s intent, the FHWA’s insistence on requiring AEI to complete and return the written release of claims on the specific form that the FHWA wanted inappropriately places form over substance and ignores the FHWA’s actual knowledge of AEI’s anticipated claims. *See Nippon Hodo Co. v. United States*, 160 F. Supp. 501, 502 (Ct. Cl. 1958) (considering the effect of a release on a claim, “[w]e see no tendency of the law in the direction of elevating form over substance; or of imposing upon parties a bargain which they never intended to make”). What AEI provided to the FHWA in its June 16, 2015, letter was sufficient to avoid a waiver of its claims.

Further, irrespective of the June 16, 2015, letter, by the time that the FHWA made final payment, it was well aware of AEI’s specific claims and the dollar amounts of those claims. By the time that the FHWA eventually issued the final payment, AEI had submitted a detailed REA discussing the factual and legal bases of the claims that AEI intended to pursue, and the FHWA (through the COE for the contract) had thoroughly analyzed and evaluated the merits of the REA. The entire purpose of the release of claims required by section 109.09 and FAR 52.232-5(h) is to permit the Government to close out and make final payment on the contract, with knowledge of the scope of any outstanding claims that might affect the Government’s ultimate liability. *Santee Modular Homes, Inc.*, ASBCA 95-220-1, 96-2 BCA ¶ 28,432, at 142,032; *see P.I.O. GmbH Bau und Ingenieurplanung v. International Broadcasting Bureau*, GSBCA 15934-IBB, 04-1 BCA ¶ 32,592, at 161,245 (“The primary purposes of a release are to finalize the rights of the parties and to evidence completion of performance.”). As the Comptroller General explained in *DNH Development Corp.*,

57 Comp. Gen. 407 (1978), if the Government delays making final payment until after it gains full knowledge of the scope and content of the contractor's anticipated claim, it cannot viably bar that claim based upon a release that it knew, when making final payment, was not intended to cover the claim:

[B]y its very terms, the release was not to become effective until payment by the Government of the amounts withheld. Prior to such payment, [the contractor] had expressly notified the contracting officer by telegram of its error. We believe that where the contracting officer has been actually notified of a mistake in the execution of a release before final payment effectuating the release has been made, subsequent payment with such knowledge by the contracting officer does not extinguish the Government's liability under the contract.

Id. at 409-10; *see Jo-Bar Manufacturing Corp. v. United States*, 535 F.2d 62, 66 (Ct. Cl. 1976) ("Where the contracting officer knows, or is properly chargeable with knowledge, that at the time of final payment the contractor is asserting a right to additional compensation, even though formal claim therefor has not been filed, the fact of final payment does not bar consideration of a later formal claim."); *Rogers Excavating*, AGBCA 79-180-4, 83-2 BCA ¶ 16,701, at 83,087 (finding contractor's amendment of release to except additional claims, made prior to final payment, effective to reserve those claims); *Historical Services, Inc.*, DOT CAB 72-8, et al., 72-2 BCA ¶ 9592, at 44,838 ("Even if the Government thinks it has made the final payment . . . , there can be no final payment . . . when the Contracting Officer knows or should know that the contractor is asserting a legal right to additional moneys under the contract.").

The FHWA does not describe AEI's actions as amounting to a waiver of AEI's right to reserve claims. Instead, it argues that AEI's failure affirmatively to present a release identifying any reserved claims in a timely manner should be treated, through some type of legal fiction, as though AEI actually executed a release of all claims. The FHWA asserts that it provided AEI with specific release language (in a draft release of claims) and that AEI accepted that release when it failed to sign and return the release within the ninety-day window that section 109.09 allows. According to the FHWA, then, AEI affirmatively released all claims through its inaction. The FHWA then argues that, rather than engaging in a waiver analysis, we should apply strict contract interpretation rules to determine whether the language of the release, or of the draft release language that the FHWA sent to AEI that is now "deemed" to constitute the release, encompasses AEI's current claim.

In support of its argument, the FHWA relies heavily upon the Court of Appeals for the Federal Circuit's decision in *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387

(Fed. Cir. 1987). In *Mingus Constructors*, the Court held that, if a contractor actually signs a release, any reservation of claims must be specific and that, if the “terms of the exception . . . are too broad,” they will be ineffective to preserve the contractor’s right to maintain a future action. *Id.* at 1394. Further, the “Payments” clause at issue in this appeal, located at FAR 52.232-5, requires that, in any reservation of claims in a written release, the contractor must identify claims “in stated amounts, that the Contractor has specifically excepted from the operation of the release,” 48 CFR 52.232-5(h)(3), which is very similar to the “Payments” clause language at issue in *Mingus*. See 812 F.2d at 1394. Accordingly, the FHWA argues that, even if we consider AEI’s June 16, 2015, letter as an effort to reserve claims, it is ineffective because it did not identify the dollar amounts of AEI’s potential claims.

The situation here is different from that in *Mingus Constructors*. There, the contractor signed a release of all claims, but attempted to reserve what the Court described as a meaningless “blunderbuss exception” that did “nothing to inform the government as to the source, substance, or scope of the contractor’s specific contentions,” and the Court held that such a broad exception, which did not identify the amount of any potential claim, was ineffective as a reservation of rights. *Mingus Constructors*, 812 F.2d at 1394. Signing a release is an action with consequences. *D&L Construction Co.*, AGBCA 97-205-1, 00-2 BCA ¶ 31,001, at 153,122. An executed “release is valid and binding upon” the signatory, and “claims not set out in an exception are released.” *A.L. Coupe Construction Co. v. United States*, 139 F. Supp. 61, 65 (Ct. Cl. 1956). Here, though, AEI neither signed nor presented a release to the FHWA. In fact, AEI actively sought to delay the release submission deadline, expressly asking the FHWA to reclassify what the FHWA had tagged a “final voucher” and consider it an interim voucher because AEI was not yet in a position to quantify its claims. That request was consistent with the Federal Circuit’s guidance in *Mingus Constructors*, in which the Court stated that, “if at the conclusion of the contract the contractor is left with the feeling that he has incurred unjustified costs, the contractor should investigate the existing facts before signing the required release, rather than merely listing on the release a vague intention to file a claim.” *Mingus Constructors*, 812 F.2d at 1395.

If the final voucher and release provisions of FAR 52.232-5(h) alone applied here, the contractor would have an unfettered ability to defer the release submission until it could quantify its claims, given that, under the FAR provision, it decides when to present its final voucher and release of claims. Section 109.09 purports to wrest the timing of that submission decision from the contractor and give it to the Government. Once the Government sends the contractor a draft final voucher and draft release, the contractor has a very limited time to respond. In doing so, though (and assuming that the “deemed executed” language in section 109.09 is compatible with the “presentation” requirements of FAR 52.232-5(h)), the Government has to exercise some reasonableness in the timing of its demand for submission of a final voucher and release. See *Barseback Kraft AB v. United*

States, 36 Fed. Cl. 691, 705-06 (1996) (party vested with discretion under the contract must exercise that discretion reasonably), *aff'd*, 121 F.3d 1475 (Fed. Cir. 1997). Here, AEI had not even submitted a progress payment request for much of its work, much less a final payment request, before the FHWA, on its own initiative, calculated what it thought AEI should be paid and, by sending AEI a draft voucher, started the ticking of AEI's clock for reserving any claims under the contract. In the circumstances here, given that AEI expressly asked the FHWA to delay AEI's need to respond to the draft voucher or to submit a final release while simultaneously identifying for the FHWA the claims that it was working to quantify, the FHWA could not reasonably insist upon the strict time limit imposed by section 109.09, especially when AEI had never submitted anything indicating a view that it was looking for an immediate final payment. In any event, for the reasons set forth above, because the contracting officer had or should have had a full understanding of the scope and amount of AEI's anticipated claims before making final payment on April 26, 2016 (following AEI's detailed REA submission in December 2015), the FHWA cannot rely on the release in the circumstances here.

C. The Effect of the FHWA's Post-Release Evaluation of AEI's Claim

Even assuming that AEI's disclosures prior to final payment did not preserve its claim, the FHWA's post-release consideration of AEI's REA and then its claim letter would negate any argument that the release effectively barred the claim.

A tribunal may decline to find that a claim is barred by release "where the parties continue[d] to consider the claim after execution of a release." *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1581 (Fed. Cir. 1993) (citing *Winn-Senter Construction Co. v. United States*, 75 F. Supp. 255, 260 (Ct. Cl. 1948)). "Such conduct manifests an intent that the parties never construed the release as an abandonment of plaintiff's earlier claim." *Id.* (quoting *A & K Plumbing & Mechanical, Inc. v. United States*, 1 Cl. Ct. 716, 723 (1983)). Where the Government continues to review, consider, and negotiate the contractor's claim for a significant period of time after the supposed release, the release will generally be found not to bar the claim. *Id.*; see *J.G. Watts Construction Co. v. United States*, 161 Ct. Cl. 801, 807 (1963) ("where the conduct of the parties in continuing to consider a claim after the execution of the release makes plain that they never construed the release as constituting an abandonment of the claim, . . . the release will not be held to bar the prosecution of the claim").

That is exactly what happened here. After informing the contracting officer in June 2015 that it intended to pursue monetary relief, AEI submitted a detailed REA to the COE for the contract on December 11, 2015. The COE expended considerable effort in reviewing that REA on its merits, requesting additional information, and preparing a decision, issued

on April 5, 2016, denying most of AEI's monetary requests on the merits, but identifying a potential entitlement to REA preparation costs. Subsequently, after AEI submitted its claim on April 28, 2016, the contracting officer indicated that she would consider it and requested information about the REA preparation costs. Never during the entire process of evaluating the REA did either the COE or the contracting officer mention that the FHWA viewed AEI's claims as barred by release. That assertion came only in the contracting officer's decision on AEI's claim. Although the FHWA cites to the contracting officer's earlier June 18, 2015, letter informing AEI that it needed to submit its reservation of claims within the ninety-day period following receipt of the final voucher to avoid a release of claims, that letter, even had AEI management seen it, is insufficient to justify a waiver of claims in light of the agency's subsequent conduct.⁵ The agency's actions indicate that it did not consider the claim to be barred.

The FHWA asserts the COE considered AEI's REA only because of an internal FHWA miscommunication. *See* Respondent's Reply at 10. It argues that AEI should have submitted its REA to the contracting officer rather than the COE, that the COE mistakenly considered the REA when he lacked sufficient contracting authority to do so, and that the COE, without authority to consider the REA, was unaware of the release. The FHWA acknowledges, though, that the contracting officer was fully aware that the COE was reviewing AEI's REA as it was happening and even attended at least one meeting about the REA with the COE before a decision was issued. Declaration of Contracting Officer ¶¶ 11-14 (Oct. 26, 2016).⁶ The FHWA asserts that, although the contracting officer was aware that the COE was reviewing an REA, she did not "make the connection" in her mind that AEI was the contractor that had submitted the REA and did not realize until a meeting on April 20, 2016 (after the REA decision had been issued) that AEI was involved with it.

⁵ AEI has presented evidence that its management never saw the contracting officer's June 18, 2015, letter, even though it acknowledges that its receptionist signed for the letter and that AEI received it. In light of the agency's subsequent actions in evaluating AEI's REA and deciding it on the merits, we deem it unnecessary to consider the extent to which we should charge AEI's management with constructive knowledge of the letter.

⁶ In fact, the record contains an email communication between the contracting officer and her legal counsel dated March 25, 2016, indicating that legal counsel had spoken to the COE about the REA, that the contracting officer was aware that the COE was preparing a decision on the REA, and that the contracting officer was concerned about the length of time that it was taking for the decision to issue and about the delay's "impact to our time to respond if a claim is filed." Exhibit 54 at 1. Although the contracting officer says that she did not realize that the REA involved AEI, the heading on the email message says "Rock Creek REA," *id.*, and AEI was the only contractor working on the Rock Creek project.

Id. ¶¶ 11, 15. The FHWA argues that, because the contracting officer did not realize that AEI was the contractor involved, we should discount the agency's consideration of AEI's REA and subsequent claim on the merits and the agency's failure to mention the release during those evaluations.

Given the ample information in front of her, the contracting officer's failure to "connect the dots" until April 2016 is not a defense to the agency's continual evaluation of AEI's REA on its merits for several months, without mention of a release. That the contracting officer might have been extremely busy with other matters might explain her failure to realize that AEI was the contractor submitting the REA, but it is not a reason for us to ignore the agency's actions as a whole. Particularly given her knowledge that the COE was considering the REA, the contracting officer is chargeable with knowledge about his actions and their effect, as well as of the information in her possession. *See Marvin Engineering Co.*, ASBCA 28470, 85-3 BCA ¶ 18,305, at 91,855 (discussing when knowledge of actions of or information within possession of agency employee should be chargeable to contracting officer); *Aerojet-General Corp.*, ASBCA 13372, 73-2 BCA ¶ 10,164, at 43,837 (same).

Finally, the test for determining whether a payment constitutes "final payment" is "whether both parties could have reasonably and logically considered that payment as such." *AVI Manufacturing Co.*, GSBCA 5006, 80-2 BCA ¶ 14,611, at 72,067 (quoting *Gulf & Western Industries, Inc.*, ASBCA 22204, 79-1 BCA ¶ 13,706, at 67,229). Given the agency's actions, AEI quite reasonably had no reason to believe that the agency, as it considered AEI's REA and claim and requested additional information in support of it, viewed the claim as barred by release. In addition, the REA decision indicating that AEI might be entitled to recover REA preparation costs, coupled with the contracting officer's subsequent evaluation of that issue when considering AEI's claim, is wholly inconsistent with the notion that AEI previously had given a full release of all claims under the contract. *See Jack L. Olsen, Inc.*, AGBCA 87-345-1, 91-2 BCA ¶ 23,850, at 119,530 (partial allowance of claim after consideration on merits is inconsistent with, and a waiver of, prior release). In these circumstances, even if there had originally been an effective release of claims, the agency's post-release actions establish that it did not cover the claim now pending before the Board.

Decision

For the foregoing reasons, we **DENY** the Government's motion for summary relief. The Board will schedule further proceedings in this appeal by separate order.

HAROLD D. LESTER, JR.
Board Judge

We concur:

MARIAN E. SULLIVAN
Board Judge

KATHLEEN J. O'ROURKE
Board Judge