



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

December 4, 2015

CBCA 3491, 3636

A-SON'S CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT,

Respondent.

John G. Bravacos, Paoli, PA, counsel for Appellant.

Blythe I. Rodgers, Jonathan E. English, and Todd P. Maiberger, Office of the General Counsel, Department of Housing and Urban Development, Washington, DC, counsel for Respondent.

Before Board Judges **HYATT**, **POLLACK**, and **LESTER**.

LESTER, Board Judge.

By decision dated September 3, 2015, we granted in part and denied in part each party's motion for summary relief, which addressed whether respondent, the Department of Housing and Urban Development (HUD), was entitled to prorate monthly fee payments under Contract Line Item Numbers (CLINs) 0005 and 0007 (and corresponding option-year CLINs) of two contracts with appellant, A-Son's Construction, Inc. (Asons). *See A-Son's Construction, Inc. v. Department of Housing & Urban Development*, CBCA 3491, et al., 15-1 BCA ¶ 36,089. Through those contracts, which were awarded on June 1, 2010, Asons was to provide property management services for an ever-changing portfolio of HUD-owned real estate properties and was to receive a monthly fee payment for services rendered for each

property in its portfolio. A dispute arose between the parties regarding HUD's ability to prorate monthly fee payments for any property that was in Asons' portfolio for less than a full calendar month. HUD argued in its motion for summary relief that, in those instances in which HUD did not require services for a particular property for a full calendar month, it was entitled to prorate the monthly fee payment associated with that property and to pay only for those days in the month during which Asons was required to provide maintenance services for that property. Conversely, Asons argued that, based upon the plain language of the contracts, it was entitled to payment of a full month's fee for a property, beginning at the top of the calendar month, if, for any portion of that calendar month, the property was a part of Asons' maintenance portfolio. After resolving a jurisdictional issue, and rejecting HUD's release and waiver arguments, we granted summary relief on some contract interpretation issues, but denied summary relief on others because the record before the Board created genuine issues of material fact as to the meaning of ambiguous contract language.

Subsequently, HUD requested that we clarify whether our September 3, 2015, decision applied to, and disposed of, the agency's argument that Asons' post-award agreement to make voluntary option-year price reductions precluded Asons from objecting to HUD's subsequent proration of option-year monthly fee payments. Specifically, HUD argues that, "even if a latent ambiguity [in the contract language] exists, and Appellant relied on its alleged interpretation in submitting initial prices, Appellant is not entitled to recover for option years after Appellant's initial [voluntary price reduction] because Appellant changed its pricing while aware of the Agency's interpretation of the contract." Respondent's Request for Clarification (Oct. 15, 2015). HUD asserts that it raised this issue at pages 34 to 37 of its motion for summary relief, but that it is unclear whether our September 3, 2015, decision resolved the issue.

When rendering our prior decision, we interpreted HUD's discussion at pages 34 to 37 of its summary relief motion as overlapping with its argument that Asons' option-year claims were barred by release language contained in the bilateral contract modifications that effected the voluntary price reductions. HUD has since informed us that it intended the discussion on pages 34 through 37 of its motion to raise a legal argument separate and distinct from the release issue, even though the particular legal theory or concept upon which HUD is relying to support that argument is somewhat unclear. To ensure that our decision on the parties' summary relief motions is complete, and to provide the parties guidance for further proceedings in these appeals, we clarify our September 3, 2015, decision and, for the reasons set forth below, affirmatively reject HUD's argument that Asons' execution of bilateral modifications containing voluntary price reductions somehow bars Asons' objections to the proration of monthly fees.

Statement of Facts

In our September 3, 2015, decision, we presented a detailed statement of the facts giving rise to the parties' dispute, which we incorporate here by reference. *See A-Son's Construction*, 15-1 BCA at 176,198-204. Nevertheless, to provide a fuller explanation of the manner in which Asons' offers voluntarily to reduce its option-year prices arose, we summarize and supplement that factual statement here.

As we explained in our September 3, 2015, decision, Asons was awarded two Indefinite Quantity/Fixed Unit Rate contracts under which it was to provide property maintenance and preservation services at HUD-owned real estate properties: contract no. C-OPC-23653 for Geographic Region 1P (encompassing Michigan) (contract 23653) and contract no. C-OPC-23682 for Geographic Region 3P (including states in the New England area) (contract 23682). Exhibit 1 at R-000001, -000066; Exhibit 47 at R-001362, -001426. Under the contracts, Asons' duties included "inspecting the property, securing the property, performing cosmetic enhancements/repairs, and providing on-going maintenance." Exhibit 4 at R-000183 (§ B.1); *see id.* at R-000276 to -000313 (Performance Work Statement (PWS) requirements). For CLIN 0005, the contracts contained a chart that identified the "Quantity" of possible CLIN 0005 units that HUD might order in the base year as either 5544 or 10,332, identified the CLIN 0005 "Estimated Unit" as "Monthly," and identified the "Total Unit Price" for each unit in the base year as either \$455 or \$485. Exhibit 4 at R-000184; Exhibit 47 at R-001368; *see A-Son's Construction*, 15-1 BCA at 176,200 (reprinting chart from contract). For CLIN 0007, the "Quantity" of units was either 28 or 53, the "Estimated Unit" was "Monthly until sold," and the "Total Unit Price" was \$170. Exhibit 4 at R-000184; Exhibit 47 at R-001367.

Asons' two contracts were awarded as part of a broader solicitation, issued as solicitation no. R-OPC-23447, through which HUD awarded a total of approximately thirty-five separate Indefinite Quantity/Fixed Unit Rate contracts throughout the country for the property management services that HUD required. Exhibit 4 at R-000183; Exhibit 32 at R-000840. "During the 12-month base performance period" of these thirty-five contracts, "HUD [was to] assign assets [or particular property units that would require maintenance services], including new acquisitions," among the various contractors "in a random, yet even distribution without regard to property characteristics." Exhibit 4 at R-000284.

Both of Asons' contracts were for a base period of one year, with four one-year options. Exhibit 4 at R-000197 (§ F.2); Exhibit 47 at R-001381 (§ F.2). As an indefinite-quantity contract, "[d]elivery or performance [was to] be made only as authorized by orders issued in accordance with the Ordering clause." Exhibit 4 at R-000222 (§ I.4, using language from the Federal Acquisition Regulation (FAR) clause at 48 CFR 52.216-22, "Indefinite

Quantity (Oct 1995)"). The Ordering clause, in turn, provided that any services to be furnished would "be ordered by issuance of delivery orders or task orders," *id.* at R-000197 (§ F.3, using language of FAR clause 52.216-18, "Ordering (Oct 1995)"), which the contract stipulated would "be assigned/ordered once the Contractor receives notice from P260," a web-based Internet portal, "or as directed by the [Government Technical Representative]." *Id.* at R-000222 (§ I.3, "Ordering Process").

The contract further provided that the Government could exercise any of the four one-year options "by written notice to the Contractor within 30 days of contract expiration; provided that the Government gives the Contractor a preliminary written notice of its intent to extend at least 60 days before the contract expires." Exhibit 4 at R-000223 (§ I.6, using language from FAR clause 52.217-9, "Option to Extend the Term of the Contract (Mar 2000)"). The contract contained another clause, Clause G.5, suggesting that the various holders of the thirty-five geographic area contracts being awarded, including Asons, would have a "fair opportunity" to compete for option-year delivery orders:

ORDERING PROCEDURES (INDEFINITE QUANTITY/FIXED-UNIT-PRICE)

During the base period, the allocation of assets will be assigned on an equal basis. At the time of the option renewal, the contracting officer will bilaterally execute the modification with the asset allocation methodology included *which will consider a fair opportunity for each awardee*, price and past performance.

Exhibit 47 at R-001387 (emphasis added); *see* Exhibit 4 at R-000202 to -000203.

Although neither party has cited to anything in the original solicitation or the contracts themselves that lays out the manner in which HUD would decide whether to exercise options or to award delivery orders in option years, the FAR specifies that, in placing orders under multiple-award contracts, the contracting officer is to provide each awardee a "fair opportunity to be considered for each order exceeding \$3,000" except in certain defined circumstances. 48 CFR 16.505(b)(1)(i). The FAR provides the contracting officer "broad discretion in developing appropriate order placement procedures," *id.* 16.505(b)(1)(ii), procedures that are to be "[i]ncluded . . . in the solicitation and the contract." *Id.* 16.505(b)(1)(ii)(D).

We can find nothing in the appeal file showing that such procedures were actually included in the solicitation or the contract (and the parties have cited to none), but it appears that, during contract performance, HUD developed what it called a "Fair Opportunity Ordering" procedure through which, on a quarterly basis, it would conduct an evaluation

considering (depending on the time period) either price alone or a combination of both price and performance to determine which contract holders would receive the next available property assignments. Exhibit 68 at R-001812. On September 17, 2011, during the first option-year performance period (and after HUD had exercised Asons' first-year options),¹ Craig H. Karnes, HUD's director of the Marketing & Management Acquisition Center within its Office of the Chief Procurement Officer, provided the various contract holders, including Asons, with an information sheet explaining that "Fair Opportunity assignments will utilize a scale that ensures all contractors receive some assignments but that lower prices and higher performance will be rewarded." *Id.* at R-001814. On the sheet, HUD indicated that "[c]ontractors will be provided a Window of Opportunity (WOO) to submit Voluntary Price Reductions (VPR) to the contracting officer," which "will be entered into the pricing portion of the price/performance formula to make the rankings for the next ordering period." *Id.* at R-001815. Mr. Karnes notified the various contract holders that HUD was giving them the opportunity to reduce their first option-year prices before HUD made its next delivery order award evaluations, which would be "based on price alone":

Because the first round of competitions, effective October 1st, will be based on price alone, contractors are being provided a [WOO], effective immediately, to provide any pricing reductions to your current Option Year 1 pricing. It should be noted that price reductions are encouraged, but not mandatory. Any pricing reductions will be considered in the evaluation to allocate new inventory assignments until the full performance/price model is rolled-out.

Exhibit 68 at R-001812.

Asons took advantage of this opportunity and, through bilateral modifications M0006 (dated October 26, 2011) and M0007 (dated April 5, 2012) under contract 23653 and M0006 (dated March 9, 2012) under contract 23682, reduced its pricing for the CLINs applicable to the first-year options. Exhibit 7 at R-000332 to -000335; Exhibit 69 at R-001817 to -001820; Exhibit 73 at R-001906 to -001909. Included in one of these three price reduction modifications – modification M0006 under contract 23653 – was Asons' written release of the Government for "all liabilities, demands, obligations, requests for equitable adjustment, and claims . . . which the contractor . . . has or may have . . . arising under or relating to this modification of the contract." Exhibit 69 at R-001818. Neither of the other two

¹ HUD exercised Asons' first-year options in bilateral modifications effective June 1, 2011, extending both contracts from June 1, 2011, to May 31, 2012. See Exhibit 5 at R-000315, -000317; Exhibit 66 at R-001801, -001803.

modifications contained release language, and none of the modifications said anything about whether the monthly fee payment under any particular CLIN could be prorated.

Through bilateral modifications effective June 1, 2012, HUD exercised the second-year options. Exhibit 10 at R-000357, -000358; Exhibit 74 at R-001910, -001911. Subsequently, in mid- to late June 2012, Asons and HUD entered into bilateral modifications under both contracts through which Asons reduced its second-year option pricing. Exhibit 11 at R-000362 to -000365; Exhibit 75 at R-001967 to -001970. Those modifications contained release language similar to that from modification M0006 under contract 23653. Exhibit 11 at R-000365; Exhibit 75 at R-001968. In December 2012, Asons and HUD again entered into bilateral modifications to reduce second option-year pricing, Exhibit 13 at R-000368 to -000370; Exhibit 77 at R-001974 to -001977, although only the modification relating to contract 23653 contained release language. Exhibit 77 at R-001975.

On May 13, 2013, HUD exercised the third-year options for both contracts, Exhibit 14 at R-000371; Exhibit 79 at R-001979, and, through a bilateral modification containing release language effective December 1, 2013, Asons provided reduced prices for the third option-year CLINs under contract 23653. Exhibit 84 at R-002006 to -002008. We can find nothing in the appeal file indicating whether a similar modification was executed for contract 23682.

Discussion

HUD believes that Asons, by entering into bilateral modifications voluntarily reducing its option-year CLIN prices, effectively agreed to allow HUD to prorate monthly fees under option-year CLINs for any properties that were in Asons' property maintenance portfolio for less than a full calendar month. HUD's briefing is less than clear as to the specific legal theory that it believes encompasses this argument, making addressing the argument somewhat difficult. Nevertheless, having considered identifiable legal theories that might fit within the factual predicate that HUD has posited, we can see no basis upon which HUD can prevail on its argument.

In our September 3, 2015, decision, we addressed the effect of the written releases contained in some of the bilateral modifications that incorporated Asons' voluntary price reductions. As we discussed there, the release language that the bilateral modifications incorporated does not, on its face, purport to release all contractor claims under the contract, but instead releases only those claims "arising under or relating to *this modification* of the contract." *A-Son's Construction*, 15-1 BCA at 176,208 (quoting Exhibit 11 at R-000364 (emphasis added)). "Although the modifications changed the unit prices under the 'Total Unit Price' column for various CLINs . . . , they did not change or affect the 'Estimated Unit'

of any CLIN,” and “[i]t is under the ‘Estimated Unit’ column that the terms whose meaning is in dispute – ‘monthly’ and ‘monthly until sold’ – reside.” *Id.* “Nothing in the plain language of the modifications indicates that a price change under the ‘Total Unit Price’ column somehow modified the definition of ‘monthly’ in the separate ‘Estimated Unit’ column.” *Id.*

We also recognized that “all of the modifications at issue were forward-looking, rather than backward-looking, providing price changes for not-yet-performed option periods” after HUD had already exercised the options. *A-Son’s Construction*, 15-1 BCA at 176,208. “Because each release only applied to claims arising from or relating to ‘this modification to the contract,’” we held, “it could not apply retroactively to release claims that had accrued in prior periods – not a single one of the cited modifications dealt with or affected prior year prices or payments.” *Id.* We then addressed, and rejected, HUD’s argument that the modifications effectively changed the terms of the contracts to permit prorating:

To the extent that HUD is arguing that the releases applied to potential claims that would arise during future performance, “[s]uch a promise is not a release” because “[a] promise to discharge in the future an existing duty merely creates a new duty that can itself be discharged by the parties.” *Restatement (Second) of Contracts* § 284 cmt. a (1981). In essence, HUD is really arguing that, through the forward-looking modifications, the parties agreed to change the contract terms so that the word “monthly” was redefined to allow prorating. Nothing in the plain language of the modifications supports that position, and HUD has neither alleged nor presented evidence that the parties even discussed that concept in negotiating the modifications. The releases simply do not apply to the contract interpretation issue in dispute here.

Id.

Our resolution of HUD’s release argument controls our disposition of HUD’s current twist upon that argument, regardless of the legal theory that HUD might apply to it:

1. To the extent that HUD believes that Asons effectively agreed through entry of the bilateral modifications to redefine the meaning of the words “monthly” and “monthly until sold” under the “Estimated Unit” column in its contracts, we addressed and rejected that argument in our September 3, 2015, decision. As we stated there, the bilateral modifications changed the “Total Unit Price” for various CLINs, but had nothing to do with the “Estimated Unit” definitions that are the source of Asons’ current dispute. *A-Son’s Construction*, 15-1 BCA at 176,208. Accordingly, we cannot find that the bilateral modifications changed the meaning of the terms “monthly” and “monthly until sold” in these contracts.

2. To the extent that HUD believes that Asons waived its proration arguments by signing contract modifications addressing voluntary total unit price reductions without first affirmatively resolving its separate dispute about prorating estimated units under the contracts, we can find no support for such an argument. “[A] single government contract may give rise to more than one claim,” *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990), and we are aware of no requirement that all existing disputes under a single contract be resolved whenever the need for a contract modification to address a different and unrelated contractual issue arises.

3. To the extent that HUD is asserting that the bilateral modifications constituted an accord and satisfaction precluding Asons from arguing against proration of monthly fees, we cannot find an accord or a satisfaction based upon the existing record. Although tribunals often intertwine the concepts of accord and satisfaction and of release, they “constitute different legal theories, although both may occur within the same agreement entered into by the parties regarding contract rights and obligations.” *Moore Overseas Construction Co. ENG BCA PCC-125, 98-1 BCA ¶ 29,682, at 147,029*. “A claim is discharged by the doctrine of accord and satisfaction when ‘some performance different from that which was claimed as due is rendered and such substituted performance is accepted by the claimant as full satisfaction of his claim.’” *Case, Inc. v. United States*, 88 F.3d 1004, 1011 n.7 (Fed. Cir. 1996) (quoting *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1581 (Fed. Cir.1993)). “A valid accord and satisfaction requires four elements: (1) proper subject matter; (2) competent parties; (3) a meeting of the minds of the parties; and (4) consideration.” *O’Connor v. United States*, 308 F.3d 1233, 1240 (Fed. Cir. 2002). With regard to the necessary “meeting of the minds,” the agreement, to be binding as an accord, must provide that the offered performance is in full satisfaction of the claim:

“The process of making an accord . . . is the same as in the case of other contracts.” . . . “There must be accompanying expressions sufficient to make the creditor understand, or to make it unreasonable for him not to understand, that the performance is offered to him as full satisfaction of his claim and not otherwise. If not so rendered, there is no accord, either executory or executed, for the reason that there are no operative expressions of agreement – no sufficient offer and acceptance.”

Chesapeake & Potomac Telephone Co. of Virginia v. United States, 654 F.2d 711, 716 (Ct. Cl. 1981) (quoting 6 Arthur L. Corbin, *Corbin on Contracts* § 1276 (1962)).

Because accord and satisfaction is an affirmative defense, the party seeking to enforce it has the burden to prove all of the elements necessary to its invocation. *Bell BCI Co. v. United States*, 570 F.3d 1337, 1341 (Fed. Cir. 2009); *O’Conner v. United States*, 60 Fed. Cl.

164, 168 (2004). HUD has failed to produce or identify any evidence that would satisfy that burden. There is nothing in the record to suggest that Asons' agreement to reduce future prices on various option-year CLINs had any effect upon whether the monthly fees paid under option-year CLINs could be prorated if properties were in Asons' portfolio for less than a full calendar month. There is no language in the bilateral modifications indicating a meeting of the minds on that issue – the currently disputed terms “monthly” and “monthly until sold” are contained within the “Estimated Unit” part of the contract, while the bilateral modifications changed only the “Total Unit Price” portion of the contract. Further, HUD has presented nothing to indicate that, during negotiations (if any) for the voluntary price reductions, the parties even discussed whether the price reductions had any effect on the parties' existing dispute about proration. There was no accord and satisfaction on the proration issue.

4. To the extent that HUD is arguing that, because Asons knew of HUD's understanding of the terms “monthly” and “monthly until sold” when it executed the bilateral modifications, it is now barred from enforcing its own interpretation of those terms because it did not inquire about the ambiguity prior to execution, the argument is meritless. In its motion for summary relief, HUD appears to have attempted to invoke the patent ambiguity doctrine, stating that Asons “was aware of HUD's [prorated] payment of the relevant CLINs and [HUD's] interpretation of the contract by the time it agreed upon new pricing for option year one.” Respondent's Motion for Summary Relief at 36. HUD asserted that, because “there could not be any ambiguity at that point,” Asons “could not have relied (at least not reasonably) on its own alleged interpretation of the contract in submitting its new prices, given its clear knowledge of HUD's interpretation of the payment requirements.” *Id.* HUD then quotes from an unpublished decision in which a Court of Claims trial commissioner stated that, “where an alleged ambiguity is known to the contractor before it submits its bid, it is required to seek clarification from the contracting officer if it intends to later rely on its own interpretation.” *Id.* at 36-37 (quoting *C.L. Michner, Inc. v. United States*, 26 Cont. Cas. Fed. (CCH) ¶ 83,111 (Ct. Cl. 1979) (available at 1979 WL 16464 (Ct. Cl. Trial Div.)), *aff'd*, 618 F.2d 121 (Ct. Cl. 1979) (table).

The patent ambiguity doctrine is typically applied to preclude a contractor who recognized or should have recognized an ambiguity in a solicitation, but who failed to seek clarification of the ambiguity before bidding, from later relying upon its own unilateral interpretation of the ambiguous provision. *Triax Pacific, Inc. v. West*, 130 F.3d 1469, 1474-75 (Fed. Cir. 1997). “[I]t is designed to avoid . . . post-award disputes . . . by encouraging contractors to seek clarification before anyone is legally bound.” *S.O.G. of Arkansas v. United States*, 546 F.2d 367, 370-71 (Ct. Cl. 1976).

We need not address the extent to which the patent ambiguity doctrine might ever apply to a post-award written modification of an existing contract (a contract to which the parties are already bound) because it could not apply in the circumstances here. In addition to the fact that the bilateral modifications at issue modify only the “Total Unit Price” section of the contracts and not the “Estimated Unit” section that underlies the parties’ current dispute, the undisputed record makes clear that Asons had already “inquired” about the proration issue and that HUD was well aware of Asons’ belief that the contract did not permit monthly fee proration *before* the parties executed any of the bilateral modifications. As we discussed in our September 3, 2015, decision, Asons submitted a claim to the contracting officer on December 8, 2010, complaining about proration, *A-Son’s Construction*, 15-1 BCA at 176,205-06, and the record makes clear that each party was well aware of the other’s position on the proration issue by the time that they executed the bilateral modifications. HUD – although it knew Asons’ position on proration – took no steps to address and resolve the parties’ differing viewpoints on that issue before the modifications were signed or to indicate to Asons that, if Asons signed the modifications, it was accepting HUD’s proration position. In such circumstances, there is no basis for HUD to assert that Asons implicitly acquiesced to HUD’s position by executing these contract modifications. *See WPC Enterprises, Inc. v. United States*, 323 F.2d 874, 879 (Ct. Cl. 1963) (once the Government was aware of the contractor’s disagreement with the Government’s interpretation, “the burden of clarification was the defendant’s,” and “it must bear the risk of an insufficient attempt [to clarify], even though the plaintiff’s obtuseness likewise contributed to the continuance of the misunderstanding”); *George F. Cook Construction Co.*, ASBCA 28145, 84-2 BCA ¶ 17,419, at 86,755 (Government cannot impose liability for patent ambiguity upon contractor where “both parties became aware of the other’s interpretation prior to bid opening; neither acquiesced in the other’s interpretation; each thought the other had acquiesced but without reasonable grounds for so thinking; [and] neither took the proper steps to clarify the pertinent terms of the transaction until after the award was made”). In any event, the lack of relationship between the modifications to the pricing under the “Total Unit Price” column and the definitions contained in the “Estimated Unit” column of the contract precludes HUD’s insistence upon a post-award duty to inquire.²

² Our resolution of HUD’s question about Asons’ post-award obligation to make further inquiries about proration in the circumstances here does not resolve the still-open question of whether, under the patent ambiguity doctrine, Asons was required to inquire about the proration issue *prior* to contract award. For the reasons set forth in our September 3, 2015, decision, that issue remains a subject for consideration in future proceedings.

Decision

For the foregoing reasons, we reject HUD's argument that, by executing bilateral contract modifications containing voluntary price reductions, Asons is now barred from objecting to prorated CLIN fee payments.

HAROLD D. LESTER, JR.
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

HOWARD A. POLLACK
Board Judge