



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF DENIED: December 8, 2016

CBCA 4865, 5071

PERRY BARTSCH JR. CONSTRUCTION COMPANY,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Herman M. Braude of Braude Law Group, P.C., Washington, DC, counsel for Appellant.

Lisa A. Buechler, Office of the Solicitor, Department of the Interior, Lakewood, CO, counsel for Respondent.

Before Judges **SHERIDAN**, **ZISCHKAU**, and **O'ROURKE**.

O'ROURKE, Board Judge.

Appellant was awarded a contract to renovate the visitor center complex at Mammoth Cave National Park in Kentucky. During performance, numerous contract modifications were issued to reflect extensive changes to the work specified. The modifications identified additional tasks required by the agency and allocated funding and, in some cases, more time to perform them. A number of the modifications contained releases and exceptions, which are the genesis of this dispute and the reason the contracting officer denied appellant's subsequent claim. Respondent filed a motion for summary relief on the basis of release and accord and satisfaction, contending that one of the modifications included a global release of all claims. Appellant opposed the motion, arguing that the release in question was ambiguous and that there was no "meeting of the minds" regarding its scope. Due to significant factual disputes pertaining to the release, we deny the motion.

Background

I. The Solicitation and Contract

On January 21, 2010, the National Park Service (respondent or agency) issued a solicitation seeking firm, fixed-price proposals to perform phase 2 renovations of the Mammoth Cave National Park visitor center complex. Appeal File, Exhibit 1 at 1.¹ Mammoth Cave is a World Heritage Site that receives up to 120,000 visitors per month during the summer months and averages 50,000 monthly visitors during the balance of the year. Phase 2 of the project consisted of 10,264 square feet of selective demolition and alteration of the original 1956 visitor center and the extension of new building systems installed in phase 1. Exhibit 19 at 9. The solicitation required completion of the work within 450 calendar days and estimated the cost of the work to be between \$3 million and \$4.5 million. Exhibit 1 at 1.

On March 23, 2010, the agency awarded contract P10PC76064 to Perry Bartsch Jr. Construction Company (appellant or contractor) of Asheville, North Carolina for approximately \$4.4 million. Exhibit 1 at 2. The notice to proceed was issued on June 28, 2010, resulting in a required contract completion date of September 20, 2011.²

During performance of the contract, multiple change orders were issued by the agency in the form of contracting officer directives that were later incorporated into the contract by formal modifications. The agency issued fifteen modifications, most of which were executed bilaterally and contained releases and exceptions. Exhibits 3 - 17. Below are summaries of the modifications relevant to this motion.

II. Contract Modifications

Modifications 0001, 0003, 0004, 0006, 0007, and 0008

Modifications 0001, 0003, 0004, 0006, 0007, and 0008 were executed bilaterally on the following dates: September 24, 2010; November 8, 2010; December 14, 2010; March 3, 2011; August 2, 2011; and September 26, 2011. Altogether, they encompassed the labor, equipment, and materials required to complete sixty-three additional tasks at a cost of

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

² The contract terms provided for a total period of performance of 450 days, beginning on the date the contractor was issued a notice to proceed.

\$1,318,486. The changed work included tasks such as asbestos and lead paint abatement; concrete work; solar panel installation; unsuitable soil removal and replacement; structural steel remediation; construction of additional walls and fencing; and electrical and power modifications. Exhibits 3, 5-6, 8-10. Modifications 0001, 0003 and 0004 added no additional time to the schedule. Modifications 0006, 0007, and 0008 granted a combined 132 additional days to the schedule, fifty-seven of which were determined by the agency to be compensable to the contractor. All six bilateral modifications contained identical statements of release and exceptions as follows:

This Modification is satisfactory and is hereby accepted. In accepting this Modification, the Contractor acknowledges that he has no unsatisfied claim against the government arising from this modification, and the Contractor hereby releases and discharges the government from any and all claims or demands whatsoever arising out of or resulting from this Modification. The exceptions of this release are potential time impacts based on changes included in this modification. Time extensions due to these changes will be submitted, reviewed, and accepted or rejected for inclusion in a future modification.

Id.

Modification 0014

Modification 0014 was executed bilaterally on August 31, 2012, with an effective date of April 25, 2012.³ The first page of the modification describes its purpose as follows:

The purpose of this modification is to incorporate settlement agreements reached for unilateral change order modification 0013, various modifications to the scope of work, and Contracting Officer's directives in accordance with the attached schedule of changes (14 pages) and to provide an extension to the completion date of this contract. Modification 0014 additionally provides changes to the Key Personnel clause (Contract Clause H.1); specifically, Mr. Ron Davis replaces David Donahoo as the QA/QC [quality assurance/quality control] Supervisor for the Contractor. The total number of pages for this Modification 0014, including attachments, is 44 pages. Modification 0014 results in a net increase of \$165,830.00 to the contract price of \$5,839,625.00

³ According to documents in the record, the effective date of this modification was backdated to April 2012 to account for the time that elapsed between modification 0013 and the substantial completion date of August 31, 2012.

for a revised price of \$6,005,455.00. As a result of this modification 0014, the contract completion date is hereby extended 128 non-compensable calendar days from 668 to 796 calendar days or August 31, 2012. All other terms and conditions remain the same.

Exhibit 16 at 1.

The schedule of changes included in the modification consisted of four categories of changes, A, B, C, and D. Category A represented settlement agreements reached for changes made in modification 0013.⁴ Category B, entitled “Global Settlement Agreement for Various Items,” listed fifteen additional requirements and added \$108,000 and 128 non-compensable calendar days to the contract.⁵ Category C incorporated settlement agreements for eight additional requirements at a cost of \$57,830. Category D incorporated eleven “no-cost” changes to the contract, including deleting unnecessary reports and certifications from the contract requirements. Exhibit 16 at 10-21.

The first paragraph of the Schedule of Changes in modification 0014 states, “[T]his modification represents final agreement for all issues under this contract prior to closeout *as follows* [emphasis added].” Over the next fourteen pages, specific technical requirements were identified and described in detail within each category. The phrase “global settlement” only appeared in category B, and none of the categories address modifications 0001, 0003, 0004, 0006, 0007, or 0008, in which the contractor had executed earlier releases while still reserving its right to seek damages for potential time impacts based on the changes addressed by those modifications.

Contractor’s Statement of Release in Modification 0014

The final page of modification 0014 contains the following release:

WHEREAS, ***by terms of the above contract*** [emphasis added] for the Rehabilitate Visitor Center Complex Phase 2 construction project, entered into by the United States of America, hereinafter also referred to as the United

⁴ Modification 0013 was issued unilaterally on April 25, 2012. It required performance of sixteen additional items of work and was funded in the amount of \$53,664.

⁵

Additional language describing the purpose of this section states, “[T]he following represents the global settlement agreement for requests for equitable adjustments, Contracting Officer Directives, and requests for information”

States, and the contractor, Perry Bartsch Jr. Construction Company, it is provided that, after completion of all work and prior to final payment, the Contractor will furnish the United States with a release of all claims.

NOW THEREFORE, in consideration of the above premises and the payment by the United States to the contractor of the full amount under the contract, to wit, the sum of one hundred sixty-five thousand eight hundred and thirty dollars (\$165,830.00) for this Modification 0014 and the sum total of six million five thousand four hundred fifty-five dollars (\$6,005,455.00) for this project, ***the contractor hereby remises, releases and forever discharges the United States, its officers, agents, and employees, of and from all manner of debts, dues, liabilities, obligations, accounts, claims and demands whatsoever, in law and in equity, under or by virtue of the said contract with no exceptions*** [emphasis added].

Exhibit 16 at 23.

DI-137 (July 1996) Release of Claims Form

Department of the Interior Clause 1452.204-70, Release of Claims, is a term of the contract under Section I, Contract Clauses. The clause states,

After completion of work and prior to final payment, the Contractor shall furnish the Contracting Officer with a release of claims against the United States relating to this contract. The Release of Claims Form (DI-137) shall be used for this purpose. The form provides for exception of specified claims from operation of the release.

Exhibit 1 at 16.

The record contains a completed DI-137 Form, dated February 28, 2013, which the agency received on March 11, 2013. The release contains two exceptions: one for uncompensated government-caused delays and one for design discrepancies resulting in additional costs to the contractor. Exhibit 91 at 1. The record also contains two letters from the contracting officer regarding obtaining a final release from the contractor, one dated April 2, 2013, and one dated July 10, 2013. *Id.* at 3; Exhibit 90 at 88. The April letter rejected the release provided by the contractor, because it purportedly was too broad. According to the letter, the agency could not issue final payment on the contract until an updated release was provided by the contractor. Exhibit 91 at 3. A revised release was not

submitted before the agency issued a second letter to the contractor in July 2013. The July letter reads, in part:

This letter of Final Acceptance will confirm that the Government has accepted all work under this contract effective May 7, 2013 . . . Enclosed is a Release of Claims for work under this contract. Please execute all three copies of the Release of Claims and insert the word “None” in the blank provided for exceptions *if no outstanding claims exist* [emphasis added].

Exhibit 90 at 88.

Although the record does not appear to contain an additional DI-137, appellant’s notice of appeal references a release of claims form submitted to the agency on September 11, 2013, in which appellant listed exceptions to the release.

III. Respondent’s Claims and Subsequent Appeals

In June 2014, the contractor submitted a certified claim for \$1.45 million for changes and government-caused delays under the project.⁶ By letter dated August 1, 2014, the contracting officer declined to issue a final decision on the claim before receiving certified cost or pricing data from the contractor. On September 24, 2014, the contractor responded with additional information. The contractor filed its appeal with this Board on July 14, 2015, based on a deemed denial of the claim. On October 23, 2015, the contracting officer issued a decision denying the claim on the basis of accord and satisfaction and release. The contracting officer decided that modification 0014 of the contract settled any and all claims and disputes between the parties and that any additional claims were barred by the release it contained. Exhibit 93 at 1-8. On November 17, 2015, the contractor timely appealed that decision to the Board. The first appeal was docketed as CBCA 4865, and the second as CBCA 5071.

⁶According to the Complaint received by the Board on December 22, 2015, the total claim was calculated as follows: \$1,023,660 in additional general site conditions; \$144,000 in additional home office overhead; \$168,007 in additional costs to replace unsuitable subgrade and backfill testing; \$40,288 in additional replacement of unsuitable subgrade for storm drainage; \$44,686 for replacement of anchor bolt and connector plates on steel columns and realignment of the same; \$5000 for additional Prompt Payment Act interest for late payment of Requisition No. 27; and a bond fee of \$20,672, which represents a 1.45% charge on the subtotal of the above costs. We note that the total of these figures is \$1,446,313, not \$1.45 million.

The agency filed a motion for summary relief, asserting the Government's entitlement to summary relief based on the "unambiguous language in the Contract's releases, and primarily the full Contract release contained in Modification 0014." Respondent's Motion for Summary Relief at 16. The contractor opposed the motion, arguing that the release in modification 0014 is ambiguous, because the language contemplates that such a release would occur only in the future: "**after** completion of all work and prior to final payment, the contractor **will** furnish the United States with a release of all claims." The contractor also maintains that there was no "meeting of the minds" with regard to the global nature of the release. Appellant's Opposition to Respondent's Motion for Summary Relief at 1.

Both parties submitted affidavits in support of their positions. The affidavits address the facts and circumstances surrounding the relevant modifications and the various releases and exceptions they contain. The affidavits also address activities and discussions relating to a meeting held at the project site between the parties in early August 2012. Accounts of what transpired at the meeting and the overall objectives of the meeting vary. Agency personnel state that a global settlement of all claims under the contract was desired and intended by the Government. Agency personnel claim they communicated their intentions to the contractor before and during the meeting, and that the contractor agreed to this course of action.

The contractor argues that the purpose of the meeting was to settle unresolved, pending change proposals reflected in the modification and to agree upon a substantial completion date for the project. The contractor further asserts that there was no discussion of a final release that would absolve the Government of all claims, to include the ones previously reserved by the contractor.

Discussion

I. Standard of Review – Motion for Summary Relief

Summary relief is this Board's analogous procedure to summary judgment. *GE Capital Information Technology Solutions-Federal Systems v. General Services Administration*, GSBCA 15467, 01-2 BCA ¶ 31,445, at 155,306. Resolving a dispute by summary relief is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *Celotex Corp v. Catret*, 477 U.S. 317, 322 (1986). The purpose of summary relief is not to deprive a litigant of a hearing, but to avoid an unnecessary hearing when only one outcome can ensue. *Vivid Technologies, Inc. v. American Science & Engineering, Inc.*, 200 F.3d 795, 806 (Fed. Cir. 1999). When considering motions for summary relief, the moving party bears the burden of proving the absence of any genuine issue of material fact. *Id.* All justifiable inferences must be drawn

in favor of the non-movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In considering summary relief, the tribunal will not make credibility determinations or weigh conflicting evidence. *Anderson*, 477 U.S. at 249.

Respondent's motion seeks judgment in its favor as a matter of law based on the defenses of release and accord and satisfaction. The crux of respondent's argument is that the "plain, clear and unambiguous language" of the contractor's release contained in bilateral modification 0014 precludes any further relief from being granted to appellant under the contract.⁷ In its motion, respondent refers to that particular release variously as a "full release," "final release," and "global release," and argues that it operates as a complete bar to additional claims, including all future claims, because it applies to the entire contract. Appellant disputes this, responding that there was no "meeting of the minds between [Mr.] Bartsch [appellant's president] and the Government that the release in Modification 0014 constituted a full and complete release of an unstated future claim." He argues that the release was limited to the changes specified in the modification, and that, as written [by the agency], the release is ambiguous.

II. Standard of Review – Release Language

Discerning the parties' intentions regarding the scope of the release in modification 0014 is critical to resolving this dispute. Ideally, the language of the release itself constitutes the best evidence of whether the parties intended for the release to extinguish all past, present, and future claims. If that language is ambiguous, however, the Board can look to extrinsic evidence to interpret the release. *Bell BCI Co. v. United States*, 570 F.3d 1337, 1341 (Fed. Cir. 2009) (citing *McAbee Construction, Inc v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996)).

Due to the contractual nature of releases, courts have routinely interpreted them in the same manner as any other contract term or provision. *Metric Constructors, Inc. v. United States*, 314 F.3d 578, 579 (Fed. Cir. 2002). If the provisions of the release are unambiguous, they must be given their plain and ordinary meaning. *Douglas P. Fleming, LLC v. Department of Veterans Affairs*, CBCA 3661 et al, 16-1 BCA ¶ 36,509 at 177, 865 (citing *McAbee*, 97 F.3d at 1435, and *Alaska Lumber & Pulp Co. v. Madigan*, 2 F.3d 389, 392 (Fed.

⁷ Although respondent does not specifically address the six previous exceptions to the releases taken by appellant for the cumulative impact of the changed work on the overall schedule, given respondent's argument that the release in modification 0014 is a global release, we presume for the purposes of this discussion that respondent views this last release as superseding releases which contain the exceptions.

Cir. 1993)). On the other hand, if the provisions *are* ambiguous, extrinsic or parol evidence may be examined. *McAbee* 97 F.3d at 1434. In examining such evidence, if the Board determines that a material fact is in dispute, summary relief must be denied. *Leonard Greene v. Department of Homeland Security*, CBCA 49, 07-2 BCA ¶ 33,668, at 166,700.

III. Ambiguities in Modification 0014

The release at issue in this case contains several ambiguities. The first ambiguity is evident in the “whereas . . . now therefore,” language of the release itself. This construction implies that the first paragraph of the release has been satisfied. However, the record contains evidence that many tasks remained incomplete after achieving the substantial completion milestone and that all work under the contract was not accepted until July 2013.

A second ambiguity occurs in the first paragraph of the release which states, “by terms of the above contract . . . it is provided that, after completion of all work and prior to final payment, the Contractor will furnish the United States with a release of all claims.” Exhibit 16 at 23. Department of the Interior Clause 1452.204-70, Release of Claims, appears to be the only term of the contract that is instructive with regard to a final release. That clause prescribes the use of the Department’s Release of Claims Form (DI-137) for the purpose of executing the release after the work is complete. It reads, in part: “[T]he Release of Claims Form (DI-137) *shall* [emphasis added] be used for this purpose.” Modification 0014 does not reference or attach this form. Moreover, it was executed when the work was “substantially complete,” but not after *all* work was completed. The record requires further development with regard to whether or not the lack of this form precludes the application of the release to the entire contract.

Another challenge posed by the release is its broad language. The Board has previously decided that, in order to find release, a clear, manifest intent to waive future claims is required. *Au’ Authum Ki, Inc. v. Department of Energy*, CBCA 2025, 14-1 BCA ¶ 35,727, at 174, 891, citing *Washington Development Group-JWB, LLC v. General Services Administration*, GSBCA 15137, 03-2 BCA ¶ 32,319. In light of the numerous documented exceptions to releases taken by appellant in earlier modifications, as well as appellant’s stated intention to claim additional time in a future modification, clear and manifest intent to waive these claims is not evident in the release, particularly when it is tied to forty-four pages of unrelated technical changes and makes no mention of the earlier exceptions.

Respondent argues that the phrase “all manner of debts, dues, liabilities, obligations, accounts, claims and demands” includes future, unstated claims. Although this broad release could be construed as including such claims, it is not plainly evident. We cannot determine, from simply reading the release, whether its conditions were satisfied such that previously

reserved time impact claims were discharged, and the affidavits do not sufficiently address this. Testimony by those individuals who attended the meeting in early August 2012 is key to understanding what was discussed and agreed to at the meeting. Here, *Bell BCI* is not instructive with respect to the scope of the release, since the appellant in that case took no exceptions to it. That decision is instructive, however, to the extent that it supports examination of extrinsic evidence if the language of the release is ambiguous. That is the case here, so we examine such evidence below.

IV. Examination of Parol Evidence

The first page of modification 0014 contains the section that describes the purpose of the modification. That section does not reference a final release or global settlement of all claims under the contract. The parties' signatures are immediately below that section. Also, the fourteen-page schedule of changes within the modification refers to a "global settlement" in section B for "various items" listed thereunder. The contracting officer memorandum documenting the purpose and scope of modification 0014 also references a global settlement for the same list of items. None of the other sections in the schedule of changes mentions a global settlement. Structuring the modification this way appears to limit any global settlement to the items in section B. It also raises doubts about the global nature of the release—doubts which must be resolved in favor of the non-movant. *Celotex*, 477 U.S. 317, 325.

Affidavits submitted by both parties show that questions remain as to the scope of the release contained in modification 0014. The conflicting views they express create uncertainty as to whether appellant fully discharged the right to additional claims under the contract when it signed the modification. Respondent claims the release was global and appellant did not take exceptions to it. However, the Board has previously found that mere absence of a reservation of rights in a bilateral modification, does not operate to discharge all claims under the *entire contract*. Rather, it constitutes an accord and satisfaction as to the subject matter of the *modification*. *Fortis Networks, Inc. v. Department of the Interior*, CBCA 4176, 15-1 BCA ¶ 36,066, at 176,124. Here, the technical scope of modification 0014 is evident. Appellant asserts that it took no exceptions to this release because the parties settled the cost and time associated with performing the work identified therein. Appellant denies that any accord and satisfaction of his previously excepted claims was intended by signing modification 0014.

For a modification to operate as an accord and satisfaction sufficient to discharge a claim, the essential elements of competent parties, proper subject matter, consideration, and a meeting of the minds must be established. *Trataros Construction Inc. v. General Services Administration*, GSBCA 15344, 03-1 BCA ¶ 32,251, at 159,446. The record in this case

casts doubt on any assertion that a meeting of the minds existed regarding the scope of the release in modification 0014. A question exists as to whether the modification's release pertained only to those items in section B of the schedule of changes, or whether it pertained to all changes, or to the entire contract. There can be no accord and satisfaction if the parties were not in agreement about the finality of that release.

Finally, the parties continued to negotiate a release of claims long after modification 0014 was drafted and executed. This single fact undermines any assertion by the agency that modification 0014 was intended by both parties to be a final release of all claims. The Board has previously recognized such conduct as a circumstance under which a claim can survive a broad release. *Walsh/Davis Joint Venture v. General Services Administration*, CBCA 1460, 11-2 BCA ¶ 34,799, at 171,262. Moreover, the fact that the contracting officer who attended the meeting in August 2012 was the very same contracting officer who attempted to negotiate a final release of claims with the contractor almost a year after modification 0014 was executed further supports denying the motion for summary relief in this case.

Decision

For the foregoing reasons, the release contained in modification 0014 creates genuine issues of material fact that cannot be resolved by summary relief. Respondent's **MOTION IS DENIED**.

KATHLEEN J. O'ROURKE
Board Judge

We concur:

PATRICIA J. SHERIDAN
Board Judge

JONATHAN D. ZISCHKAU
Board Judge