UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RESPONDENT'S MOTION FOR PARTIAL SUMMARY JUDGMENT
GRANTED IN PART: September 18, 2024

CBCA 7967

FORTIS INDUSTRIES, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Aron C. Beezley of Bradley Arant Boult Cummings LLP, Washington, DC, counsel for Appellant.

Jay Bernstein, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **VERGILIO**, and **SHERIDAN**.

SHERIDAN, Board Judge.

The appellant, Fortis Industries, LLC (Fortis), appeals a final decision by a contracting officer of the respondent, General Services Administration (GSA), and seeks payment of what it describes as unsubstantiated deductions taken by the agency during the performance of the contract. Fortis contends that it is entitled to $291,751.02, plus interest, for deductions for November 2021 through June 2022. GSA has filed a motion for partial summary judgment. It relies upon a bilateral contract modification in which Fortis releases the Government from all obligations under the contract except for payment for work performed in June 2022. Fortis is bound by the release. It provides no colorable bases to support its assertion of duress to void the release, particularly when the release language was added after

Fortis refused to sign an initial modification. A note from Fortis, contemporaneous with its submission of the executed modification to the contracting officer, might exclude May 2022 payments from the release; however, prior periods for relief are foreclosed. For the foregoing reasons, we grant in part and deny in part GSA's motion for partial summary judgment. Fortis cannot recover amounts claimed for November 2021 through April 2022. Payments for May and June 2022 remain in dispute.

Background

GSA awarded Fortis commercial item contract 47PE0221R0020 (the contract) for base services operations and maintenance services at the Richard B. Russell Federal Building and Courthouse and the Martin Luther King Jr. Federal Building in Atlanta, Georgia. Fortis was to "provide all management, supervision, labor, materials, supplies and equipment" to perform the services, and performance was to begin on November 1, 2021. The contract was to run from November 2021 through October 2022.

Between November 2021 and June 2022, the agency made deductions to payments requested by Fortis. GSA cited failures related to staffing levels, performance, and lack of staff training, among other things, as reasons for these deductions. Fortis opposed these deductions and raised its concerns to GSA through email. GSA notified Fortis on June 16, 2022, that it would be terminating the contract for convenience and requested that the appellant "provide GSA a final cost for all unpaid services rendered thus far and up to June 30, 2022."

On June 27, 2022, GSA issued to Fortis a proposed modification terminating the contract for the Government's convenience (modification PS0004). The purpose of the modification was to terminate the contract at "no cost" to the Government. The next day, on June 28, 2022, a Fortis representative emailed GSA's contracting officer and objected to the "no cost" nature of the termination, asserting that Fortis "expect[s] to have meaningful costs if the government terminate[s] [the] contract." Furthermore, the representative requested that GSA's "legal office . . . take out [the "no cost"] language . . . [while Fortis] start[s] working on a termination cost proposal for [the Government's] review."

GSA replied to Fortis, writing, "We in fact did agree to a no-cost termination for the Government's convenience in lieu of a termination for cause (default). We did agree that any services up until 6/30/2022 will be paid." Subsequently, the parties met via phone call on June 29, 2022, to discuss the modification. After the meeting, GSA sent Fortis a revised version of modification PS0004 that was identical to the prior version except for the addition of the following language:

> c) The Contractor unconditionally waives any charges against the Government because of the termination of the contract and, except as set forth below, releases it from all obligations under the contract or due to its termination. The Government agrees that all obligations under the contract are concluded, except as follows: payment for work performed per [the] contract from 6/1/2022 – 6/30/2022.

Fortis signed and returned the modification to GSA on June 29, 2022, attached to an email that read:

> I've attached the signed modification. I know you need this back now so I went ahead and signed, but this says all obligations except for June of 2022; however, per our phone discussion, we're still owed for May 2022 services as well. Thank you.

On September 14, 2023, Fortis submitted a certified claim to GSA's contracting officer for $291,751.02 "for unsubstantiated deductions imposed during the performance of the Contract." The claimed amount represents monthly deductions made by GSA during performance of the contract from November 2021 through June 2022.

GSA's contracting officer issued a final decision (COFD) on December 18, 2023, denying the claim in its entirety. The COFD listed three reasons for the denial. First, the contracting officer determined that the deductions were proper because the "documentation demonstrates a clear pattern of Fortis not meeting all [contract] requirements." Second, "Fortis failed to provide supporting data for any of [its] allegations." Third, the release language in modification PS0004 "specifically releases GSA 'from all obligations under the contract or due to its termination.'"

Fortis appealed to the Board on December 21, 2023, seeking $291,751.02, plus interest. On February 21, 2024, GSA filed a motion for partial summary judgment, seeking denial of the portion of the claim relating to deductions made during and before May 2022 because modification PS0004 "clearly and unambiguously released GSA from any claims . . . related to or arising from work performed by Fortis between November 2021 and May 2022." Fortis opposes this motion, arguing that there are genuine disputes of material fact regarding: (1) whether Fortis was under economic duress when it signed modification PS0004; (2) "the extent to which the release unambiguously releases Fortis' claims"; and (3) whether Fortis reserved its right to claim amounts owed for the month of May in the email it sent to GSA on June 29, 2022.

Discussion

Standard of Review

"A party may move for summary judgment on all or part of a claim or defense if the party believes in good faith it is entitled to judgment as a matter of law based on undisputed material facts." Board Rule 8(f) (48 CFR 6101.8(f) (2023)). "'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 nonmovant.'" *United Facility Services Corp. v. General Services Administration*, CBCA 7618, 24-1 BCA ¶ 38,535, at 187,316 (quoting *Au' Authum Ki, Inc. v. Department of Energy*, CBCA 2505, 14-1 BCA ¶ 35,727, at 174,890). "The non-moving party may successfully defeat a motion for summary judgment by showing that a disputed material fact exists," but it must rely on more than the parties' pleadings and "must support its argument with evidence such as affidavits, depositions, answers to interrogatories, admissions, and other admissible documents." *CH2M-WG Idaho, LLC v. Department of Energy*, CBCA 6147, 19-1 BCA ¶ 37,339, at 181,593 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *see also Crown Operations International, Ltd. v. Solutia, Inc.*, 289 F.3d 1367, 1375 (Fed. Cir. 2002) (opposing party cannot rest on mere allegations to establish a genuine issue of material fact but must present actual evidence).

Release Language

We begin with the release language in fully executed bilateral modification PS0004. "Because a release is contractual in nature, it is interpreted in the same manner as any other contract term or provision." *Bell BCI Co. v. United States*, 570 F.3d 1337, 1341 (Fed. Cir. 2009) (citing *Metric Constructors v. United States*, 314 F.3d 578, 579 (Fed. Cir. 2002)). Hence, the Board will look to the plain language of the release, and "if the 'provisions are clear and unambiguous, they must be given their plain and ordinary meaning.'" *Id*. (quoting *Alaska Lumber & Pulp Co. v. Madigan*, 2 F.3d 389, 392 (Fed. Cir. 1993)). Extrinsic or parol evidence may only be examined if the language is ambiguous. *Id*.

Modification PS0004 states: "[Fortis] unconditionally waives any charges against [GSA] . . . and, except as set forth below, releases [GSA] from all obligations under the contract or due to its termination. . . . [A]ll obligations under the contract are concluded, except . . . payment for work performed [during June 2022]." The pertinent language releases the Government from all obligations under the contract except for work performed in June 2022. Fortis submitted its executed version of the modification with an attached statement that payment for May 2022 was still at issue. The parties have yet to address why, or why not, the payments for May are included in the modification, given the express reservation by Fortis.

The Court of Appeals for the Federal Circuit and this Board have enforced similarly phrased releases. *Bell BCI*, 570 F.3d at 1341–42; *cf. Walsh/Davis Joint Venture v. General Services Administration*, CBCA 1460, 11-2 BCA ¶ 34,799, at 171,262–63 (reviewing cases).[1] In *Bell BCI*, the Federal Circuit found that the language, "[t]he Contractor hereby releases the Government from any and all liability under the Contract for further equitable adjustment attributable to the Modification" was unambiguous. 570 F.3d at 1339, 1341–42. The language in this case is analogous, as it "release[d]" GSA "from all obligations under the contract."

Fortis contends that the release does not unambiguously bar future claims because the modification uses the term "obligations" instead of "claims." However, as in *Walsh/Davis Joint Venture*, this difference is not of consequence. *Id.* Generally, in this context, an "obligation" refers to the duty to pay or perform a certain act as required by a contract. A "claim" is what arises when one party seeks to enforce a contractual obligation. In this case, the appellant filed an appeal contending that it is owed money or, in other words, that GSA has failed to meet its contractual obligation to pay Fortis for services rendered. Hence, when the parties signed a modification "releas[ing] the Government from all obligations under the contract," with specific reservations, Fortis clearly relinquished additional costs associated with November 2021 through May 2022.

Despite the release language, the appellant points to several email exchanges between Fortis and GSA in an attempt to show that the parties did not intend the release to apply to the claims in this appeal. The first email was sent to GSA on June 17, 2022, in which Fortis' representative agreed, pursuant to a termination for convenience notification, to provide the Government with Fortis' final costs for services rendered. This email was sent before modification PS0004 existed, so it is not relevant to the parties' intent regarding the modification. Additionally, Fortis argues that its email dated June 28, 2022, objecting to a no-cost settlement supports its interpretation of the release. However, after the email was sent to GSA, the parties spoke via telephone to discuss the termination for convenience. Fortis sent GSA the signed modification later, attached to an email that said, "I know you need this back now so I went ahead and signed, but this says all obligations except for June of 2022; however, per our phone discussion, we're still owed for May 2022 as well." This email, if taken as true, suggests that the parties agreed during the phone call that Fortis was still owed for services rendered in June 2022 and potentially May 2022. There is no evidence that GSA replied to this email. However, it appears that, when signing the

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[1] The Board in *Walsh/Davis Joint Venture* denied the Government's motion for summary judgment. 11-2 BCA at 171,264. While the Board found that the release language was clear, it decided in favor of the contractor due to facts in the record that showed "the parties never intended the language to preclude the claims." *Id*. at 171,263–64. We discuss this in more depth later in the opinion.

modification, Fortis understood that payments for May were unresolved and not released. GSA does not address in its motion the payments for May 2022 that Fortis claimed were still owed. At this stage, there is a dispute regarding the applicability of the release to payments for May and June 2022.

In *Walsh/Davis Joint Venture*, the Board denied summary judgment because statements made in affidavits, if true, would have "confirm[ed] that the parties never intended the language to preclude the claim." 11-2 BCA at 171,263–64. Similarly, here, to resolve GSA's motion, we must accept as true the statements made in Fortis' email and draw all justifiable inferences in favor of the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Thus, while we cannot say for certain whether the parties intended the release to apply to May 2022, it is reasonable to infer that the statement, "per our phone discussion, we're still owed for May 2022," meant that the parties agreed to further consider claims from that month. If the parties agreed to consider claims from May 2022, the modification language did not represent the parties' intent, and the release will not be a bar to those claims. Consequently, we must deny GSA's motion for partial summary judgment as it pertains to deductions made in May and June 2022. This is a factual matter that needs further development.

<u>Duress</u>

Fortis contends that the Board should deny GSA's motion because genuine issues of material fact exist regarding whether Fortis signed bilateral modification PS0004 under economic duress. To establish economic duress, Fortis must establish three elements: (1) that it involuntarily accepted GSA's terms in modification PS0004, (2) that circumstances permitted no alternative, and (3) that such circumstances were the result of GSA's coercive acts. *Rumsfeld v. Freedom NY, Inc.*, 329 F.3d 1320, 1329 (Fed. Cir. 2003); *Systems Technology Associates, Inc. v. United States*, 699 F.2d 1383, 1387 (Fed. Cir. 1983); *Lynchval Systems Worldwide, Inc. v. Pension Benefit Guaranty Corp.*, CBCA 3466, 14-1 BCA ¶ 35,792, at 175,067. To demonstrate coerciveness, the appellant must show proof of a wrongful action by the Government that was illegal, a breach of an express provision of the contract without a good-faith belief that the action was permissible under the contract, or a breach of the implied covenant of good faith and fair dealing. *Freedom NY, Inc.*, 329 F.3d at 1329–30.

In support of all three elements of duress, the appellant points to a series of internal emails between Fortis employees. These emails include statements made regarding the negotiations for the modification. For example, a Fortis employee wrote, "Worthless call . . . they denied everything and said take what we're offering by the end of today or we'll terminate for cause. Signing now," and "They can't blackmail us into signing when they know the deductions are wrong." Neither email was sent to GSA employees. Regardless,

Fortis signed the modification while noting an exception only as to May payments continuing to be in dispute. Fortis has not met its burden to pursue duress as a basis to discount the modification and release.

"Mere conclusory assertions do not raise a genuine issue of fact." *Tacoma Boatbuilding Co.*, ASBCA 50238, 00-1 BCA ¶ 30,590, at 151,068 (1999). Furthermore, the Court of Claims, in *Fruhauf Southwest Garment Co. v. United States*, 111 F. Supp. 945 (Ct. Cl. 1953), wrote:

> In order to substantiate the allegation of economic duress or business compulsion, the plaintiff must go beyond the mere showing of a reluctance to accept and of financial embarrassment. There must be a showing of acts on the part of the defendant which produced these two factors. The assertion of duress must be proven to have been the result of the defendant's conduct and not by the plaintiff's necessities.

Id. at 951. The appellant has failed to meet this burden. Fortis' internal emails discussing concerns are not enough to require further development of the record. GSA's option to terminate for convenience or terminate for default is in keeping with the contract. Moreover, although Fortis did not initially agree to the "no cost" language, it ultimately signed the bilateral modification. Fortis has not alleged nor provided evidence of any specific GSA action that would be considered illegal or coercive. The fact that an agency may discuss a default versus a "no cost" convenience termination with a contractor does not necessarily constitute duress, particularly where the contracting officer is considering which type of termination is in the best interest of the Government. Emails that merely show Fortis' reluctance to sign the proposed modification are insufficient indicators of duress. As such, Fortis' claim that it entered into modification PS0004 under duress is not supported by the record.

Accordingly, we grant GSA's motion for partial summary judgment for deductions made in November 2021 through April 2022. We deny the motion for the May 2022 deductions and leave open the issue of whether the parties intended to release those obligations. As the agency recognizes in its motion, payments for June are in dispute and not covered by the release.

Decision

GSA's motion for partial summary judgment is **GRANTED IN PART**. Fortis may not recover deductions taken in November 2021 through April 2022. Payments for May 2022 and June 2022 remain in dispute.

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Joseph A. Vergilio
JOSEPH A. VERGILIO
Board Judge