ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -	)	
	)	
Shneez Veritas, LLC	)	ASBCA No. 62067
	)	
Under Contract No. W91B4N-11-D-7016	)	

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OPINION BY ADMINISTRATIVE JUDGE EYESTER ON THE GOVERNMENT'S MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT AND APPELLANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The United States Army (government or Army) moves for dismissal arguing that Shneez Veritas, LLC (SVL or appellant), has shifted its theory for recovery from the one identified in its claim to three new ones identified in the complaint. The Army argues that SVL never presented two of its new theories of recovery to the contracting officer for a determination and therefore the Board is deprived of jurisdiction over them. The Army also asserts that SVL is precluded by two prior settlement agreements from asserting all of its claims and therefore the Army is entitled to summary judgment as a matter of law on its affirmative defenses of release and waiver. In turn, appellant has cross-moved for partial summary judgment, for the second time, arguing that the claims underlying this appeal are not barred by the prior settlement agreements.[1] For the reasons set forth

[1] On the same day it filed this motion, appellant filed a Motion for Leave to File a Sur-Reply and Sur-Reply to the government's prior motions to dismiss and for summary judgment. The parties agreed to consolidate appellant's sur-reply and motion for partial summary judgment and therefore the government's response

below, we deny the government's motions and grant appellant's motion for partial summary judgment.[2]

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

Contract Background

1. On August 12, 2011, the Bagram Regional Contracting Center awarded Indefinite-Quantity Contract No. W91B4N-11-D-7016 to SVL for trucking services in Afghanistan (R4, tab 2 at 1, 5-7). The period of performance included a one-year base period beginning on September 16, 2011 (contract line item number (CLIN) 0001); one 12-month option period (CLIN 1001); and one 3-month option period (CLIN 2001) (*id.* at 7-9, 14). The CLINs included the following three types of transportation and delivery services referred to as suites: suite 1 for bulk fuels, suite 2 for dry cargo, and suite 3 for heavy cargo (*id.* at 10-12).

2. According to the contract, the government anticipated issuing task orders on a fiscal year basis, with individual mission shipments scheduled weekly (R4, tab 2 at 22). The contract, as amended, incorporated by reference Federal Acquisition Regulation (FAR) clause 52.212-4, CONTRACT TERMS AND CONDITIONS-COMMERCIAL ITEMS (FEB 2012) (R4, tab 23 at 13). The termination for convenience paragraph of the clause states:

> (l) Termination for the Government's convenience. The Government reserves the right to terminate this contract, or any part hereof, for its sole convenience. In the event of such termination, the Contractor shall immediately stop all work hereunder and shall immediately cause any and all of its suppliers and subcontractors to cease work. Subject to the terms of this contract, the Contractor shall be paid a percentage of the contract price reflecting the percentage of the work performed prior to the notice of termination, plus reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system, have resulted from the termination. The Contractor shall not be required to comply with the cost accounting standards or contract cost principles for this

cited in this decision addressed the consolidated motions. *See* Board Order dated May 9, 2022.

[2] On February 9, 2021, the Board issued a decision denying appellant's first motion for partial summary judgment. *Shneez Veritas, LLC*, ASBCA No. 62067, 21-1 BCA ¶ 37,799. Familiarity with the facts is presumed.

> purpose. This paragraph does not give the Government any right to audit the Contractor's records. The Contractor shall not be paid for any work performed or costs incurred which reasonably could have been avoided.

FAR 52.212-4.

3. The government issued four orders to SVL (R4, tabs 3-25). Orders 0001-0003 provided funding for CLIN 0001, the contract's base year of performance (R4, tabs 3, 8-9). On September 16, 2012, the agency exercised option period one (R4, tab 19 at 1), and on the same day issued order 0004, which provided funding for all suites under CLIN 1001, the contract's first option period (R4, tab 20 at 1, 3).

4. On January 28, 2013, the contracting officer issued modifications terminating the contract and all four of SVL's orders for convenience (R4, tabs 29-33). The modifications instructed SVL to stop all work and have its suppliers and subcontractors cease work (*see e.g.*, R4, tab 29 at 2). According to the email notice regarding termination, "no more missions [would] be allocated" to SVL under the contract (R4, tab 462 at 1).

Claims, Final Decisions, and Settlement Agreements

5. On October 28, 2013, SVL submitted a settlement proposal titled "Settlement Claim for Termination for Convenience" (R4, tab 47). The first settlement occurred on March 8, 2014, when the government issued Modification No. 7 for order 0004, "to effect a partial settlement proposal resulting from the Termination for Convenience effective 28 Jan 2013. . . . [and] cover[] claims against the base contract and task orders 0001, 0002, 0003 and 0004" (R4, tab 50 at 1). According to the modification, the parties settled only those costs identified in Part 1, General and Administrative Costs-Post Termination, as set forth in SVL's termination settlement proposal. The modification explained that SVL did not release or waive its rights or claims with respect to "Financial Cost of loan" and certain other costs identified in its termination settlement proposal, or any other claims that may exist under the contract. (*Id.*)

6. On October 13, 2014, the agency and SVL discussed the remaining termination settlement costs (R4, tab 897 at 6). After the meeting, SVL informed the contracting officer that as the termination for convenience had been delayed over a year, they had to pay significant additional finance charges that should be recouped (R4, tab 895 at 2). The contracting officer made an offer to SVL and stated that the loan amount requested is unallowable and the delay in closing out the final settlement was partly due to SVL's submission of additional claims and litigation (*id.* at 1-2). SVL expressed concern over the amount offered, and asked if, after accepting the offer, "would [SVL] still have a [chance] to submit any other claims in case we find something in which we have not been

able to find as of yet" (*id.* at 1). The contracting officer responded and increased the settlement amount, but did not respond to SVL's question about additional claims (*id.*).

7. Next, on October 23, 2014, the agency issued Modification No. 11, which was also to "effect a partial termination settlement" and changed the period of performance end date to January 28, 2013 (R4, tab 63 at 1). The modification covered costs for Tapestry airtime, operations center rental costs, truck yard rental costs, alterations of leased property, salary/per diem/travel/fuel costs, and settlement expenses (*id.* at 2).

8. As these modifications were only partial settlements, on November 24, 2014, the agency issued a contracting officer's final decision (COFD) denying the remaining termination settlement costs sought by SVL (R4, tab 66). These costs included: travel expenses after contract termination, company liquidation, bank charges, contingency costs, acquired assets, disposition of assets, and the financial cost of loans (*id.* at 1-2). SVL appealed that COFD to the Board which was docketed as ASBCA Nos. 59844-59850.

9. In 2015 and 2016, SVL submitted several additional claims, including the following to the contracting officer: inaccurate charges on the quality assurance plan (QASP) (*see* R4, tab 67); no pay[3] missions (*see* R4, tab 70); demurrage[4] for after the fact mission sheet completion returns of fuel (*see* R4, tab 71); additional no pay missions during the contract (*see* R4, tab 72); and mission units not paid during the invoicing and fuel return (*see* R4, tab 73).

10. On January 29, 2016, SVL emailed the contracting officer some background information for the claims submitted in 2015 (R4, tab 75 at 1). According to SVL:

> [W]e have successfully worked with our contracting officer[s] and settled most of the claims to date and these are the remaining [transportation movement requests] that will bring our contract to a closeout as we have successfully negotiated the T4C already. We have no other claims. . . .

(*Id.*)

[3] No pay refers to those missions for which the agency did not pay SVL (*see* R4, tab 406 at 2-16 where contracting officer stated the mission would either be "pay" or "no pay" for various reasons including lack of documentation).

[4] According to the agency, demurrage is "an agreed [upon] penalty charge by a customer for delays beyond the scheduled time to load or unload shipments" (R4, tab 1001 at 1; *see also* R4, tab 1 at 9 (performance work statement ¶ 5.9 explaining truck demurrage)).

11. On March 7, 2016, SVL and the contracting officer signed a settlement agreement to resolve ASBCA Nos. 59844-59850. According to the March 2016 agreement:

> 4. Effective upon the receipt by SVL of the payment set forth in paragraph 1, this Settlement Agreement constitutes a full release and accord and satisfaction of any and all claims, demands, or causes of action, actual or perceived, known or unknown, arising under or related to the termination of the Contract for convenience or ASBCA Nos. 59844-59850, with the exception of any breach of this Settlement Agreement that may arise following its execution by both Parties.
>
> . . . .
>
> 6. Effective upon the receipt by SVL of the payment set forth in paragraph 1, SVL remises, releases, and discharges the Government, its officers, agents, and employees of and from all civil liabilities, obligations, claims, appeals, and demands which it now has or hereafter may have, whether known or unknown, administrative or judicial, legal or equitable to include any amounts presently owed SVL, attorney's fees, interest and costs under the Equal Access to Justice Act, arising under or in any way related to the termination of the Contract for convenience or ASBCA Nos. 59844-59850.

(R4, tab 76 at 2-3)

12. A few months later, SVL reminded the agency of several of its outstanding claims and resubmitted the claim certifications to the agency (R4, tabs 78-79). On August 30, 2016, the agency and SVL entered into another settlement agreement concerning the QASP deductions, no pay missions, fuel return demurrage claim, and mission unit discrepancies (R4, tab 80 at 1-2). According to the August 2016 settlement agreement:

> This Settlement Agreement constitutes a full release and accord and satisfaction by [SVL] of any and all claims, demands, or causes of action, actual or perceived, known or unknown, arising under or related to this claim which formed the basis for this Settlement Agreement. [SVL] remises, releases, and discharges the Government, its officers, agents, and employees of and from all civil liabilities, obligations, claims, appeals and demands which it now has or hereafter

> may have, whether known or unknown, administrative or judicial, legal or equitable, including attorney's fees, arising under or in any way related to the disputes which formed the basis of this Settlement Agreement.

(R4, tab 80 at 2) On April 24, 2017, the parties executed a settlement agreement to correct an error due to the currency used to pay the August 23, 2016 settlement agreement. The settlement agreement contained the same release language as the August 2016 settlement agreement. (R4, tab 81)

13. Despite once stating there were no more claims, on July 19, 2017, SVL submitted a claim for all suites in demurrage and mission complete/no pay missions (R4, tab 82). On October 17, 2017, the agency denied the claim (*see* R4, tab 987). In response, SVL informed the agency that the claims for transportation movement requests submitted in January 2016 and part of the August 2016 settlement agreement, "are NOT part of the July 19, 2017 [request for equitable adjustment (REA)]" and that "SVL understands that it has fully released the [United States Government (USG)] for" the prior 2016 transportation movement requests. According to SVL, the July 19, 2017 claim was "never part of any negotiation or settlement." (*Id.* at 2)

14. On October 25, 2017, the contracting officer informed SVL that the August 2016 settlement agreement barred any further claims (R4, tab 987 at 1). SVL stated that although they thought all of the transportation movement requests had been identified in the beginning of 2016, they discovered more in April 2016, and the August 2016 settlement agreement did not include the transportation movement requests identified in the July 2017 claim. SVL stated it did not agree the August 2016 settlement agreement was binding because it was not a "closeout or a global settlement." SVL also stated that it reserved the right to file an "impact claim of not getting paid on time for erroneous reasons." (R4, tab 989 at 1)

15. On December 11, 2017, SVL submitted a final demurrage claim via email. According to SVL's email, there were three "FINAL CLAIMS BEING SUBMITTED TO THE USG FOR CLOSEOUT/GLOBAL RELEASE" (R4, tab 990 at 3). Two of the three final claims were for fuel demurrage and the July 2017 demurrage (which was mainly concerning transportation movement requests). The email stated a third REA with a settlement offer would be forthcoming. (*Id.* at 1)

16. On December 20, 2017, SVL emailed the agency with a subject line "For settlement purposes only – REA & Settlement Offer" and stated that it served as the final REA to close out the contract (R4, tab 89 at 3-4; app. statement of issues, dated Dec. 13, 2021, ex. A at SVL8295). The email lists the following as attachments: SVL DELAY CLAIM.pdf; SVL REA LEGAL OPINION.pdf; SVL EXTENDED OVERHEAD CALCULATIONS.pdf; SVL EXTENDED OVERHEAD CALCULATIONS.pdf (app.

statement of issues, dated Dec. 13, 2021, ex. A at SVL8295). In the email, SVL attempted to negotiate a settlement for its remaining claims and stated it would withdraw this final claim regarding interest and overhead if SVL would be paid a percentage of its demurrage claim. SVL also explained that it attached an opinion setting forth a basis for the "delay claim," "as well as the following bad faith events by" the government, which included, for example: failing to pay SVL "on time"; requiring SVL hire lawyers to prepare REAs and negotiate settlements; requiring SVL perform missions at the request of the government one year past the termination; and causing SVL to maintain all operations without anywhere to bill the overhead due to closing out the contract. (R4, tab 89 at 4; app. statement of issues, dated Dec. 13, 2021, ex. A at SVL8295)

17. As noted, the email set forth several attachments. One of the attachments is a letter dated December 19, 2017, with the subject line "SVL Request for Equitable Adjustment for delay – extended overhead and late payments." The REA asked for "$6,112,348.80 Extended overhead claim" as well as $2,316,468 for violation of the Prompt Payment Act and $760,000 in interest. Specifically, the document stated: "The attached REA is for extended overhead of SVL, who[ ] had to finish all of the work as requested by the contracting officers far beyond the termination for convenience of the contract which occurred on January 28, 2013." According to SVL, it had to manage an office, staff, yard, global distribution management system (GDMS), and trucks containing U.S. government goods which all occurred well beyond the termination for convenience. SVL stated that the agency failed to address these issues in closing out the project in a timely manner. (R4, tab 83; app. statement of issues, dated Dec. 13, 2021, ex. A at SVL8297-98)

18. Another attachment to the email is a memorandum, signed by a consultant, stating that "SVL has the right to collect for the following costs of extended overhead on the contract due to agency actions that have extended the contractual performance from the termination of convenience date through December 2016" (R4, tab 84 at 1). The document also stated that since final performance of the work orders did not occur until November 2014, SVL needed an administrative staff for three years to support its efforts to get paid for that work due, to government caused delays since the issuance of the termination for convenience (*id.* at 2). The document argued the Eichleay formula was the proper method in which to calculate or measure these unabsorbed overhead costs (*id.* at 2-6).

19. The consultant's memorandum believed Eichleay was the correct formula because the unabsorbed overhead was the result of government caused delays. According to the memorandum, the government caused delay was the failure of the government to quickly close-out the contract which required SVL to continue performance, and complete additional work to close-out the contract after the termination (*id.* at 2). Further, the memorandum argued that the government delay caused SVL to

incur additional overhead in order to maintain and administratively support the government, including requests by the government payment office (*id.* at 4).

20. The December 20, 2017 email also included two of the same spreadsheets titled "SVL extended overhead calculations." The spreadsheets set forth SVL's total contract billings, total company billings, total company overhead, overhead costs per month, overhead monthly costs multiplied by months in the years 2013-2017, days of delay, the daily overhead allocation, and the total delay costs as calculated by SVL. (R4, tab 90; app. statement of issues, dated Dec. 13, 2021, ex. A at SVL8308-09)

21. The parties do not dispute that these documents comprised the December 2017 REA (gov't reply br. at 3-4; app. statement of material facts at 18-19). Further, we find that SVL argues in its REA it is entitled to unabsorbed overhead costs because it had to perform work beyond the termination for convenience and the government delayed in closing out the contract and remaining issues.

22. On August 28, 2018, the contracting officer issued a final decision on the July 19, 2017 claim for demurrage (dry, heavy, and fuel) and mission complete/no pay missions (R4, tab 85).[5] The agency agreed to pay SVL for the claim on demurrage only (*id.* at 7).

23. On August 30, 2018, SVL forwarded the December 20, 2017 REA to the contracting officer, seeking payment for delay and extended overhead (R4, tab 1055). On September 10, 2018, SVL emailed the contracting officer and stated:

> As per our last conversation, we agreed that you will take a look at this claim that was submitted in Dec 2017.
>
> I have forwarded all bills/bank records for payments [via Federal Express] for our unabsorbed overhead as requested for review." SVL stated that it "just want[s] to get paid for the staff salaries and life support needed to administ[er] the contract and closeout of subcontractor and suppliers due to performing a year beyond the termination with regard to missions and collecting 85% of what was owed to SVL upon termination.

(R4, tab 86 at 1) The contracting officer acknowledged receipt of the package on September 10, 2018 (R4, tab 1057 at 1).

[5] According to the final decision, SVL submitted an updated claim on February 26, 2018 and April 16, 2018 that increased the claim request, and provided additional supporting data to the agency upon its request (R4, tab 85 at 1).

24. On September 12, 2018, the contracting officer informed SVL that it had submitted an REA, not a claim, and that SVL needed to submit a signed claim with a certification (R4, tab 1058 at 1). On that same day, SVL certified its claim for overhead, which referenced "Delay Claim with additional letters of SVL REA Legal Opinion." The certification stated:

> In regards to SVL Overhead and Interest Request for Equitable Adjustment Claim W91BN-11-D-7016, submitted on December 20, 2017. This claim is being presented as an Overhead claim of $6,112,348.80 [US dollars]. We had submitted documentation on letters Named SVL Delay Claim with additional letters of SVL REA Legal Opinion.

(R4, tab 87)[6] We find that at a minimum, the certification incorporates by reference the December 20, 2017 email and attachments. Further, an email dated September 12, 2018 to the contracting officer shows the following as attachments: SVL DELAY CLAIM, SVL REA LEGAL OPINION, SVL EXTENDED OVERHEAD CALCULATIONS, SVL Certification Letter, and SVL OVERHEAD spreadsheets (R4, tab 1058). The parties do not dispute that these documents comprised the claim (gov't reply at 5-7; app. statement of material facts at 19-20).

25. On October 10, 2018, the parties entered into another settlement agreement concerning the July 19, 2017 demurrage and mission complete/no pay missions claims (R4, tab 88). The October 2018 settlement agreement states, in pertinent part:

> WHEREAS, the Contractor has represented that it also intends to submit an additional claim seeking $6,112,348.80 in Overhead beyond the termination for convenience that occurred on 28 Jan 2013.
>
> . . . .
>
> 2. This Settlement Agreement constitutes a full release and accord and satisfaction by [SVL] of any and all claims, demands, or causes of action, actual or perceived, known or unknown, arising under or related to this contract, *with the sole exception of the Overhead claim submitted 12 September 2018*[.]

[6] The certification was dated December 20, 2017, but the agency marked it "received" on September 12, 2018 (R4, tab 87). According to the contracting officer, SVL had backdated the certification and therefore the actual claim was not received by the agency until September 12, 2018 (R4, tab 1059).

> 3. [SVL] remises, releases, and discharges the Government, its officers, agents, and employees of and from all civil liabilities, obligations, claims, appeals and demands which it now has or hereafter may have, whether known or unknown, administrative or judicial, legal or equitable, including attorney's fees, arising under or in any way related to this contract, *with the sole exception of the Overhead claim submitted 12 September 2018*.

Id. at 2-3 (emphasis added).

26. On December 12, 2018, the agency asked SVL for clarification and additional information on its overhead claim (R4, tab 89 at 2). In response, SVL stated, in relevant part:

> Did you receive the package that we sent to [the contracting officer] on September 10th?[] This package had all of the back-up documentation, bank records, receipts, payroll records, invoices. Also, we used the Eichleay formula[] when we submitted this which takes into account number of contract days and number of delay days.
>
> . . . .
>
> 4) I would not pay too much attention to the worksheet as this is using Eichleay Formula and we offered to settle just our payroll and life support. . . . The end date of the contract where SVL was still conducting missions was at the end of 2013 almost a year after the [termination for convenience].
>
> 5) Please see above. []I would concentrate on just our payroll expenses and life support as we want to settle the overall claim. In lieu of Eichleay method, we want to look at the hard costs which [were] mentioned in my last email for settlement purposes. These are payroll for the staff and life support which is in the worksheet. . . . Eichleay method spreads the overhead for the company with other contracts and due to the fact that there are no other contracts. . .

(*Id.* at 1) We find that SVL's email informs the contracting officer to look not just at the Eichleay method or formula, but to consider SVL's unabsorbed overhead costs in resolving this dispute.

27. On February 15, 2019, the contracting officer issued a final decision denying the September 12, 2018 claim for overhead (R4, tab 101). The COFD focused on the Eichleay formula and concluded that there was no extension of the contract performance period and SVL was required to stop work after the termination (R4, tab 101 at 2). Although the contracting officer acknowledged in the COFD that SVL had requested the government to '"not pay too much attention to the worksheet' (using the Eichleay formula)," the contracting officer nonetheless relied on the consultant's memorandum submitted with the REA and claim by appellant and decided the claim was based solely on the Eichleay formula for unabsorbed overhead (R4, tab 101 at 2).[7]

28. On May 13, 2019, SVL filed a notice of appeal with the Board.

DECISION

The government has moved for dismissal arguing the Board lacks jurisdiction, and summary judgment arguing appellant has released the government from the claims, and has made three arguments in support of its motions. Appellant has cross-moved for partial summary judgment contending it is entitled to judgment as a matter of law that the claims underlying this appeal are not barred by release and waiver, as the government asserted in its Answer. We deny the government's motions, and address each of the government's arguments below. We grant appellant's cross-motion for partial summary judgment.

1. *Motion to Dismiss: Claims Presented to the Contracting Officer*

The Contract Disputes Act states that "[e]ach claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision." 41 U.S.C. § 7103(a)(1). The purpose of presenting a claim to the contracting officer first is "to create opportunities for informal dispute resolution at the contracting officer level. . ." *Tolliver Grp., Inc. v. United States*, 20 F.4th 771, 776 (Fed. Cir. 2021) (quoting *Raytheon Co. v. United States*, 747 F.3d 1341, 1354 (Fed. Cir. 2014)). Because '"[t]he scope of [an] appeal is determined by the claim originally submitted to the contracting officer for a final decision'. . . . we do not possess jurisdiction over new claims that were not previously presented to the contracting officer." *Parwan Grp. Co.*, ASBCA No. 60657, 18-1 BCA ¶ 37,082 at 180,495 (quoting

[7] The COFD refers to an email from SVL dated January 9, 2019 (R4, tab 101 at 2), but we did not see that email in the file. We believe this reference is erroneous and the agency is referring to the December 13, 2018 email as it contains the same language and was sent in response to a request from the contracting officer (R4, tab 89 at 2). Also, the COFD references SVL's December 13, 2018 email in the first paragraph (R4, tab 101 at 1).

MACH II, ASBCA No. 56630, 10-1 BCA ¶ 34,357 at 169,673).

SVL bears the burden of establishing jurisdiction by a preponderance of the evidence. *CCIE & Co.*, ASBCA Nos. 58355, 59008, 14-1 BCA ¶ 35,700 at 174,816 (citing *Hanley Indus., Inc.*, ASBCA No. 58198, 14-1 BCA ¶ 35,500 at 174,015). "The facts supporting jurisdiction are subject to our fact-finding upon a review of the record." *Id.*

In its complaint, SVL set forth the following three allegations: (1) SVL is entitled to reasonable charges under the contract's termination for convenience clause for administrative expenses associated with settling outstanding amounts (Count 1); (2) the agency breached its duty of good faith and fair dealing because it failed to diligently resolve outstanding claims and disputes (Count 2); and (3) the agency directed SVL to perform work past the termination for convenience date which resulted in a constructive change and SVL suffered losses in the form of continued administrative costs (Count 3) (compl. ¶¶ 38-54). The government argues that SVL failed to present its breach of duty and good faith and fair dealing (Count 2), and constructive change (Count 3) claims to the contracting officer for a decision, which deprives the Board of jurisdiction (gov't mot. at 15-20). According to the government, SVL only presented an Eichleay-based overhead claim to the government.

SVL disputes this assertion and argues that it submitted an overhead claim which encompassed several documents such as additional cost detail on spreadsheets, and correspondence in connection with the REA and certified claim that presented several legal theories for recovery (app. opp'n at 9-12, 17 n.22). SVL asserts that the cost spreadsheets to the government showed direct costs in connection with the closing of the contract after the termination, which were costs for maintaining personnel, facilities, and equipment after the termination (app. opp'n at 11-12). SVL also argues that the breach and constructive change legal theories arise from the same operative facts and seek the same recovery as the Eichleay-based legal theory (app. opp'n at 22-23).

"A claim need not be submitted in any particular form or use any particular wording, but it must provide a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim." *Tolliver Grp., Inc.*, 20 F.4th at 776 (quoting *K-Con Bldg. Sys., Inc. v. United States*, 778 F.3d 1000, 1005 (Fed. Cir. 2015)). A claim presented to the Board may be considered the same as the one presented to the contracting officer if it "derives from the same set of common or related operative facts" and "seeks the same or similar relief." *Anthony and Gordon Constr. Co.*, ASBCA No. 61916, 21-1 BCA ¶ 37,887 at 184,001 (quoting *Parwan Grp. Co.*, 18-1 BCA ¶ 37,082 at 180,495). In general, we look at the "operative facts" of the claim submitted to the contracting officer, which are "the essential facts that give rise to the cause of action." *M.A. DeAtley Constr., Inc. v. United* States, 75 Fed. Cl. 575, 579 (2007) (quoting *Kiewit Constr. Co. v. United States*, 56 Fed. Cl. 414, 420 (2003)).

In addition, a claim that introduces "additional facts which do not alter the nature of the original claim" or asserts "a new legal theory of recovery, when based upon the same operative facts as included in the original claim" does not constitute a new claim. *Trepte Constr. Co. Inc.*, ASBCA No. 38555, 90-1 BCA ¶ 22,595 at 113,385-86. The claimant is free to change its legal theory as long as it is not materially different from what was presented in the claim. *Wilwood Eng'g*, ASBCA No. 62773, 22-1 BCA ¶ 38,116 at 185,144.

"In determining a claim's scope, we are not limited to the claim document but can examine the totality of the circumstances." *Dawson-Alamol JV, LLC*, ASBCA No. 60590, 19-1 BCA ¶ 37,357 at 181,645 (quoting *Sauer, Inc.*, ASBCA No. 60366, 16-1 BCA ¶ 36,565 at 178,101). Further, at this stage, appellant's claim must merely allege facts that could plausibly support each element of the new legal theory, not prove the new theory. *Dawson-Alamol JV, LLC*, 19-1 BCA ¶ 37,357 at 181,645.

As noted, Count 2 of SVL's complaint argues the government breached the duty of good faith and fair dealing when it failed to administer appropriately the contract and resolve diligently the claims and disputes and this resulted in the need to retain staff, among other things (compl. ¶¶ 44-47; *see also* compl. ¶¶ 16, 29-32). The duty (or covenant) of good faith and fair dealing, also referred to as the "implied duty not to hinder and the implied duty to cooperate" "is inherent in every contract. *Planate Mgmt. Grp., LLC v. United States*, 139 Fed. Cl. 61, 71-2 (2018) (quoting *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 827-28 (Fed. Cir. 2010)). It requires each party "not to interfere with the other party's performance and not to act so as to destroy the reasonable expectations of the other party." *Id.* at 72 (quoting *Metcalf Constr. Co. v. United States*, 742 F.3d 984, 991 (Fed. Cir. 2014)).

SVL argues that the breach of good faith and fair dealing theory of recovery was evident in the claim when, for example, it stated in its December 20, 2017 email that the basis of the claim included several bad faith events by the government such as failing to pay SVL on time, and stated in its December 19, 2017 REA letter that the government failed to address SVL's issues in closing out the project in a timely manner (app. opp'n at 29). SVL also argues it stated in the December 20, 2017 email that SVL had to maintain all operations after termination without anywhere to bill the overhead as a result of these "delays" by the government in diligently resolving the claims and the government requiring SVL perform missions one year past the termination (app. opp'n at 26-27).

Although SVL did not specifically articulate, or use the words, "breach of the covenant of good faith and fair dealing" in its certified claim, the facts set forth in the claim submitted to the contracting officer describe the Army's alleged failure to engage in reasonable contract administration. *See Planate Mgmt. Grp., LLC*, 139 Fed. Cl. at 72 (appellant's claim did not specifically use the words breach of good faith and fair dealing,

however the claim's factual recitations described the agency's alleged failure to engage in reasonable contract administration). Accordingly, we conclude that SVL did present this theory of recovery in its claim to the contracting officer.

Count 3 of SVL's complaint argues there was a constructive change when the government ordered SVL to perform work past the date of the termination for convenience (compl. ¶¶ 49-54). A constructive change occurs when "a contractor performs work beyond the contract requirements without a formal order, either by an informal order or due to the fault of the Government." *Agility Public Warehousing Co. KSCP v. Mattis*, 852 F.3d 1370, 1385 (Fed. Cir. 2017) (quoting *Int'l Data Prods. Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007)). Specifically, appellant must show that it performed work beyond the contract requirements, and that the government ordered, either expressly or impliedly, the additional work. *Id*. (quoting *Bell/Heery v. United States*, 739 F.3d 1324, 1335 (Fed. Cir. 2014)).

SVL argues that the constructive change claim was presented to the contracting officer when, for example, it stated that the Army required SVL to finish all of the work even after termination of the contract; that SVL had to manage an office, staff, yard, GDMS, and trucks containing United States government goods which all occurred well beyond the termination for convenience; that SVL performed missions at the request of the government over a year past the termination; and that SVL maintained all operations without anywhere to bill the overhead due to closing out the contract (app. opp'n at 31-32).

Again, although SVL did not specifically articulate, or use the words, "constructive change" in its certified claim, the claim submitted to the contracting officer argues the Army required SVL to perform work beyond the contract's requirements and continue performance even after the contract and orders were terminated for convenience. Even the COFD addresses this allegation when it finds the claim erroneously states contract performance ended December 2016 and the government requested SVL to remain on standby (R4, tab 101 at 2). Accordingly, we conclude that SVL did present this theory of recovery in its claim to the contracting officer. *See Chugach Fed. Sols., Inc.*, ASBCA No. 61320, 19-1 BCA ¶ 37,380 at 181,720 (allegations that agency required contractor to increase staffing and arbitrarily established enhanced performance requirements were sufficient to support the Board's jurisdiction regarding constructive change claim).

Finally, the government argues that the claims for breach of good faith and fair dealing and constructive change seek remedies different than the Eichleay-based claim and the legal theories are therefore different. Here, however, the COFD itself acknowledged that SVL had informed the government to "not pay too much attention to the worksheet (using the Eichleay formula)" (SOF ¶ 27). In this regard, SVL's email to the agency, after the claim was submitted and in response to questions posed by the

agency regarding the claim, showed that SVL was seeking its hard costs--the payroll expenses and life support (*id.* ¶ 26). It is not clear how the agency can claim SVL's arguments were never presented to the agency when the COFD itself acknowledges, but ignores, these other arguments.

Further, when read in its entirety, it appears the crux of SVL's claim is that the government required SVL to perform missions after the contract and orders were terminated, the government failed to work with SVL in a timely manner to address this and other issues, and SVL had nowhere to bill its overhead (*see* SOF ¶ 21). Therefore, we conclude that the appeal filed with the Board is based on the same set of common or related operative facts, and seeks the same or similar relief to the claim submitted to the contracting officer. *See Anthony and Gordon Constr. Co.*, 21-1 BCA ¶ 37,887 at 184,001 (complaint calculating damages based on distinct periods of delay caused by the government is based on same operative facts as claim calculating damages based on a total cost method); compare *Tolliver Grp., Inc.*, 20 F.4th at 777 (holding a claim seeking recovery of expended legal fees as allowable costs under FAR 31.205-47 is materially different than a claim seeking recovery for a breach of implied warranty of performance due to government-provided defective design specification). Accordingly, the government's motion to dismiss for lack of jurisdiction must fail.

2. *Cross-Motions for Summary Judgment: Release of Claims in Settlement Agreements*

The government also argues that prior settlement agreements have barred SVL's claims here. First, the government argues that SVL's Count 1 claim for administrative charges resulting from the government's termination for convenience clause is barred by the parties' March 2016 settlement agreement (gov't mot. at 9-13; gov't resp. at 5-8). According to the government, SVL was required to submit all unabsorbed overhead costs in its termination settlement proposal (gov't mot. at 10-11; gov't reply at 16).

Second, the government contends that in the parties' October 2018 settlement agreement, SVL released the government from all claims except its Eichleay-based claim and therefore appellant's claims are all barred (gov't mot. at 13-15; gov't resp. at 9-14). As noted, the October 2018 settlement agreement explicitly stated in two separate paragraphs that there was a release by SVL of any and all claims arising under or related to this contract "with the sole exception of the Overhead claim submitted 12 September 2018" (SOF ¶ 25).

SVL asserts that any release in the March 2016 settlement agreement was superseded by the October 2018 settlement agreement excepting the overhead claim from a release (app. opp'n at 7, 13-16; app. mot. at 22). SVL further argues that the release in the October 2018 agreement specifically refers to an overhead claim submitted in September 2018 and does not reference or limit the overhead claim's legal theories (app.

opp'n at 8-13). Thus, SVL contends that it is entitled to partial summary judgment on the government's affirmative defenses that the claim was barred by release and waiver.

The Board has before it cross-motions for summary judgment. Summary judgment is proper when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). A fact is "material" if it might affect the outcome of the case under the governing law, and a dispute is "genuine" if there is sufficient evidence for a reasonable trier of fact to decide in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In deciding summary judgment motions, the Board does not resolve controversies, weigh evidence, or make credibility determinations. *Conquistador Dorado Joint Venture*, ASBCA No. 60042, 20-1 BCA ¶ 37,628 at 182,678 (citing *Liberty Lobby*, 477 U.S. at 255).

"The moving party bears the burden of establishing the absence of any genuine issue of material fact and all significant doubt over factual issues must be resolved in favor of the party opposing summary judgment." *Mingus Constructors v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987) (citations omitted). With respect to cross-motions, we "must evaluate each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Id.* at 1391.

We note that in our prior decision, *Shneez Veritas, LLC*, the Board held that there were genuine issues of material fact regarding the interpretation and scope of the release language in the October 10, 2018 settlement agreement. In that decision, the Board explained that the *government* argued there were genuine issues of material fact in dispute requiring discovery and adjudication at a hearing to resolve regarding the October 2018 settlement agreement release language. According to the government, it meant the agreement to be "'narrow and limited to a claim for unabsorbed overhead under the Eichleay formula' but that appellant wanted to expand the exception to cover other subjects." *Shneez Veritas, LLC*, 21-1 BCA ¶ 37,799 at 183,572 (quoting government's response to appellant's motion for partial summary judgment). The Board ruled that "the nonmoving government demonstrated sufficient evidence of the existence of genuine issues of material fact" "regarding the overhead issues in this claim that expanded the issue in the certified claim referenced in the release exception of the October 12, 2018 settlement agreement." *Id.* at 183,573.

Now, the government moves for summary judgment stating "there are no issues of material fact disputed by the parties" (gov't mot. at 1), and arguing the "appeal is ripe for summary judgment in the government's favor" (gov't resp. to sur-reply at 1). Appellant also contends that the record is now sufficiently developed to address the interpretation of the scope of the release language set forth in the October 2018 settlement agreement and cross-moves for partial summary judgment (app. mot. at 4).

A settlement agreement is a contract and, therefore, its interpretation is a matter of law. *Supreme Foodservice Gmbh*, ASBCA No. 57884 *et al.*, 16-1 BCA ¶ 36,387 at 177,394. In addition, where the agreement can be construed within its four corners, its interpretation presents a question of law that can be decided on summary judgment. *See JAAAT Tech. Servs., LLC*, ASBCA No. 61792, 21-1 BCA ¶ 37,878 at 183,966. At this time, the parties have agreed on several material facts--the documents comprising the REA and claim, and the specific language of the release and its exception.

a. The March 2016 Settlement Agreement

As noted, the government contends that the express terms of the March 2016 settlement agreement released the government from claims resulting from appellant's termination (gov't reply at 16; gov't resp. at 5-8). The government contends that SVL "necessarily knew" of the alleged administrative charges it now pursues at the time it entered into its March 2016 settlement agreement (gov't mot. at 12).

When interpreting a settlement agreement, we must look to the "plain meaning of its express terms." *AmBase Corp. v. United States*, 112 Fed. Cl. 179, 185 (2013) (quoting *Barron BancShares, Inc. v. United States*, 366 F.3d 1360, 1375 (Fed. Cir. 2004)); *see also Cubic Def. Applications, Inc.*, ASBCA No. 58519, 18-1 BCA ¶ 37,049 at 180,371 (a release is a contract where one party abandons a claim or relinquishes a right that could be asserted against another and its scope is a question of contract interpretation where the first step is to examine the language). "In fact, if the language of the contract is unambiguous, so that there is only one reasonable interpretation of it, the plain language . . . is controlling." *Information Sys. and Networks Corp. v. United States*, 68 Fed. Cl. 336, 341 (2005) (citation omitted). Ultimately, we must give the language in the agreement the meaning that a "reasonably intelligent person acquainted with the contemporaneous circumstances" would give. *Id.* (quoting *Allied Tech. Group, Inc. v. United States*, 39 Fed. Cl. 125, 138 (1997)).

As relevant here, the March 2016 settlement agreement stated that it "constitutes a full release and accord and satisfaction of any and all claims, demands, or causes of action, actual or perceived, known or unknown, arising under or related to the termination of the Contract for convenience or ASBCA Nos. 59844-59850, with the exception of any breach of this Settlement Agreement that may arise following its execution by both Parties" (SOF ¶ 11). The settlement agreement also stated that effective upon payment by the government, "SVL remises, releases, and discharges the Government. . . from all civil liabilities, obligations, claims, appeals, and demands which it now has or hereafter may have, whether known or unknown, administrative or judicial, legal or equitable to include any amounts presently owed SVL, attorney's fees, interest and costs under the Equal Access to Justice Act, arising under or in any way related to the termination of the Contract for convenience or ASBCA Nos. 59844-59850" (*id.*).

The language is clear--SVL released the government from all civil liabilities, obligations, claims, appeals, and demands which it now has or hereafter may have, whether known or unknown in any way relating to the termination for convenience. In Count 1 of SVL's complaint, SVL alleges it is entitled to reasonable charges under the contract's termination for convenience clause for administrative expenses associated with settling outstanding amounts (compl ¶¶ 39-42).

Even if we were to conclude the Count 1 claim for administrative expenses is barred by the March 2016 settlement agreement releasing the government from all claims relating to the termination for convenience, our analysis would not end there. "Although a general release typically forecloses a contractor from later seeking compensation for acts that took place before it was executed, there are circumstances in which a contractor's release does not bar subsequent claims. These include situations involving fraud, duress, mutual mistake, and the parties' continued consideration of a claim that indicates it was not abandoned by the release." *Satterfield & Pontikes Constr., Inc.*, ASBCA Nos. 59980, 62301, 21-1 BCA ¶ 37,873 at 183,911 (citations omitted).

Despite the language in the March 2016 settlement agreement, the government considered and resolved additional claims filed *after* March 2016, including the claim at issue here. This resolution of SVL's claims *after* the March 2016 settlement agreement could manifest an intent that the parties never construed the release in the settlement agreement as an abandonment of certain SVL's other claims. *See A & K Plumbing & Mech., Inc. v. United* States, 1 Cl. Ct. 716, 723 (1983). To determine whether the government's actions after the March 2016 settlement agreement manifested an intent to entertain the claim at issue here, we must look at the October 2018 settlement agreement.

b. The Exception to the October 2018 Settlement Agreement

It is true that "general language . . . indicates an intent to make an ending of every matter arising under or by virtue of the contract. If the parties intend to leave some things open and unsettled, their intent so to do should be made manifest." *T.H.R. Enterprises, Inc. v. United States*, 160 Fed. Cl. 236, 240 (2022) (quoting *Augustine Med., Inc. v. Progressive Dynamics, Inc.*, 194 F.3d 1367, 1373 (Fed. Cir. 1999)). The parties entering into the settlement agreement bear the burden of expressly reserving "any rights that they wish to maintain beyond the date of the settlement agreement." *Id.* Exceptions explicitly reserved by a release in a settlement agreement are strictly construed in favor of the Government. *IMS Engineers-Architects, P.C. v. United States*, 92 Fed. Cl. 52, 64 (2010) (citations omitted).

The parties agree that the October 2018 settlement agreement included a release for all claims arising under or related to this contract. The parties also agree that the release included a "sole exception of the Overhead claim submitted 12 September 2018"

(SOF ¶ 25; gov't reply at 17). The government contends the October 2018 release is a general release which much be construed broadly, and any exception to the general release must be construed narrowly (gov't reply at 17-19). Further, the government contends the single exception of the general release did not include the legal theories now presented by appellant, and only included the Eichleay-based overhead claim (gov't reply at 1, 19-20; gov't resp. at 3-6).

It is not reasonable to read the exception in the settlement agreement to apply only to an Eichleay-based claim. There is no mention of the word Eichleay in the settlement agreement. The exception references the September 12, 2018 overhead claim and the agreement specifically references a claim for "[o]verhead beyond the termination for convenience" (SOF ¶¶ 23-25). And, as previously addressed, both parties agree that the overhead claim encompassed several documents. These documents presented more than just the one theory for recovery. *See e.g.*, SOF ¶ 17 (December 19, 2017 email stating SVL had to finish work as requested by the contracting officers far beyond the termination for convenience, and SVL had to manage an office, staff, yard, GDMS, and trucks containing US government goods which all occurred well beyond the termination for convenience, and the agency never addressed claims in timely manner). Even the contracting officer acknowledged this fact in the COFD, but ignored it.

As the plain language of the agreement is unambiguous, we do not need to look at extrinsic evidence. *Information Sys. & Networks Corp. v. United* States, 148 Fed. Cl. 356, 364 (2020). Accordingly, we conclude the exception to the release in the October 2018 settlement agreement, which the parties entered into *after* the March 2016 settlement agreement, manifested an intent to entertain the claims at issue here. We deny the government's motion for summary judgment and grant appellant's partial motion for summary judgment.

CONCLUSION

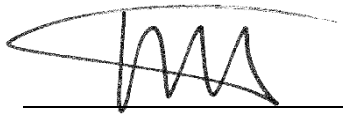
For the foregoing reasons, the Board denies the government's motions and grants appellant's motion for partial summary judgment.

Dated: March 1, 2023

LAURA EYESTER
Administrative Judge
Armed Services Board
of Contract Appeals

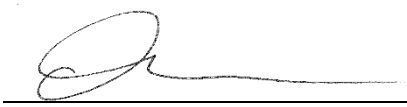
(Signatures continued)

I concur



RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



OWEN C. WILSON
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 62067, Appeal of Shneez Veritas, LLC, rendered in conformance with the Board's Charter.

Dated: March 1, 2023

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals