ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Computer Sciences Corporation	)	ASBCA No. 56175
	)	
Under Contract No. DAAB07-00-D-E252	)	

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OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
ON GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

This is one of 15 consolidated appeals docketed as ASBCA Nos. 56162 – 56176. The Army has moved for summary judgment; Computer Sciences Corporation (CSC) opposes the motion. At issue is a matter of contract interpretation relating to the payment of $35 million to CSC for intellectual property developed in conjunction with its contract performance. The issue has been extensively briefed. We deny the Army's motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

Contract No. DAAB07-00-D-E252 was awarded to CSC on 29 December 1999 for the Army's Wholesale Logistics Modernization Program (WLMP or LMP contract) for the estimated cost of $680,668,576.00 (R4, tabs 12 to 25). The contract was a firm, fixed-price, multi-year services contract. Contract Section H-13, "RIGHTS IN CERTAIN DELIVERABLES," gave the Army Special Purpose License Rights (SPLRs) to intellectual property (IP) developed by CSC for six specified deliveries:

> (1) Status reports in accordance with the WLMP [Statement of Work] SOW, Paragraph 1.6.

(2) Documentation resulting from Replication, Distribution, Installation and Training (RDIT) in accordance with the WLMP SOW, Paragraph 5.1.

(3) Business Process Re-engineering and Analysis Reports in accordance with the WLMP SOW, Paragraph 4.1.

(4) Description Documents in accordance with the WLMP SOW, Paragraph 4.3.

(5) Implementation Plans in accordance with the WLMP SOW, Paragraph 4.4.

(6) ERP [Enterprise Resource Planning] Selection, The Solution Demonstration Lab and Release Descriptions, in accordance with the WLMP SOW, Paragraph 4.2.

(R4, tab 12 at 2354-55)

In 2004, CSC and the Army began Integrated Program Review (IPR) negotiations to reform and restructure the LMP Contract. On 18 October 2004, CSC and the Army executed a Memorandum of Agreement (MOA) relating to expanded rights to the IP developed by CSC which provided in relevant part:

1. The Army wishes to obtain Special Purpose License Rights to certain Intellectual Property ("IP") developed by CSC and used by it for delivery of services under the Logistics Modernization Program ("LMP") contract No. DAAB07-00-D-E252 (the "Contract") using a phased approach, the initial phase of which is a limited license;

2. the Army acknowledges that CSC has made investments in the development of the LMP IP;

3. the parties have agreed that the IP to which the Army wishes to acquire Special Purpose License Rights is generally within the scope of the categories listed in Attachment 1;

4. the parties have agreed to negotiate the terms of the limited licensing of the IP by October 26, 2004;

5. the parties recognize that adequate and fair consideration is to be made to CSC for the IP. Consideration could include any monetary or non-monetary compensation that is not prohibited by law or DoD regulation; and

6. the parties have entered into discussions to resolve all potential requests for equitable adjustment; discussions may include restructure of the Contract, and

7. the parties will enter into good faith negotiations to accomplish the foregoing immediately.

(R4, tab 397 at 10144)

Attachment 1 provided:

INTELLECTUAL PROPERTY

1. End user application software including configurations, settings, user exits, and supporting documentation. This includes the Question Answer Data Base, CI Template, and Business Process Master List (BPML), and the ERP Configuration with SAP Transaction Setting (IMG) and Technical Objects as well as developed code and configuration settings/documentation for *all* components of the LMP solution (e.g., Business Warehouse (BW), Advanced Planning and Optimizer (APO), etc.).

2. Data base designs, structures, data translations, data conversion, and data loading software

3. Enhanced/custom reports to include, but not limited to, coding/configuration settings and documentation to include both functional and technical specifications

4. All LMP Hierarchy, including, but not limited to Organization and Plan structures (e.g., master data structures, financial structure, etc.)

5. Tools, process and methodologies utilized to support the solution lifecycle

6. Interface software, including technical documentation and interface functional and technical specifications

7. SAP configuration and documentation

8. Software, including that provided by third parties, developed to support development and testing of application software upgrades and releases, release procedures, test cases, and documentation

9. Infrastructure documentation including the Technical Architecture and Logical and Physical Infrastructure lay-out

10. Enterprise Architecture Integration (EAI) software solutions

(R4, tab 397 at 10145)

On 1 November 2004, CSC and the Army executed another MOA relating to Specifically Negotiated License Rights (SNLRs) to IP developed by CSC. The November MOA provided in relevant part:

1. The Army wishes to obtain Specifically Negotiated License Rights to certain IP, as that term is defined in Attachment 1, developed by CSC and used by it for delivery of services under the Logistics Modernization Program ("LMP") contract No. DAAB07-00-D-E252 (the "Contract"). The Specifically Negotiated License Rights are set forth in Attachment 1.

2. Consideration for these license rights will be part of the global settlement contemplated by the Memorandum of Agreement signed 18 October 2004 and this Agreement.

3. Should the parties fail to reach agreement on the global settlement and the [Single Arm Logistics Enterprise] SALE Technical Exchange Workshops have been conducted, the Contract will be modified to add the following:

a. Subject to a mutually agreed payment schedule, [REDACTED] for Contract Year 7 and [REDACTED] per year for Contract Years 8, 9, 10, 11, and 12 will be added to the LMP contract.

b. The Installation Fixed Base [IFB] effort, including fielding to all sites and the subsequent sustainment, will be added to the Requirements portion (Subsection H-7A) of the Contract. The IFB effort will maximize utilization of blueprinting already completed in Global Combat Support System — Army (GCSS-Army).

4. Subject to the availability of funds, a time-and-materials delivery order for SALE Technical Exchange Workshops will be awarded no later than 15 November 2004. The effective date of this delivery order shall be the date of execution of this MOA. The workshop content will be in accordance with Attachment 2.

5. The parties will continue good faith negotiations to establish the terms of the global settlement by 19 November 2004. Both parties will make best efforts to obtain all necessary approvals to fully implement the Contract modification memorializing this global settlement.

(R4, tab 402 at 10183) It appears from Attachment 1 that the list of expanded categories of IP to which the Army would have access was similar to that listed in Attachment 1 to the October MOA. However, it also appears from paragraph A of Attachment 1 that, while the scope of the license rights was expanded, it was limited "strictly to the SALE *as currently constituted* using the generic definition" (app. opp'n at 31, ex. H).

Appellant requested, and the Board now grants, leave to supplement its opposition with evidence obtained during discovery after the Army's motion had been briefed and was at issue. Included among the documents provided is an e-mail dated 9 November 2004 authored by the contracting officer that describes the MOA as including "Access to LMP Intellectual Property" for use in support of SALE workshops (app. supp. opp'n, ex. A). The e-mail is consistent with evidence included in slides reflecting the Army's "Wants/Desires" as indicated in "LMP Integrated Program Review" initial discussion slides dated 14 October 2004 (*id.*, ex. B) and other documents related to the 1 November 2004 MOA which appear to reflect the Army's desire to keep expanded IP licenses as part

of restructuring the LMP contract (*id*., exs. C, D, E). There also is deposition evidence from government witnesses who acknowledged the [REDACTED] payment set forth in paragraph 3 of the November MOA was for limited access to the IP for use in the SALE workshop, with expanded IP licenses to be negotiated as part of the global settlement (Thomas Carroll dep. at 76-77, 80).

On 16 November 2004, the contracting officer issued Task Order 67 under the contract pursuant to paragraph 4 of the November 2004 MOA. Among other things, it obligated [REDACTED] for SALE Technical Exchange Workshops. (R4, tabs 405, 497) The workshops commenced on 12 January 2005 (R4, tab 417 at 10431-32).

On 15 December 2004, CSC and the Army executed a Memorandum of Understanding (MOU) regarding a "global settlement of issues arising under and related to the restructuring" of the LMP contract (R4, tab 410 at 10203). Paragraph 1 of the December 2004 MOU stated:

> 1. On October 18 and November 1, 2004, the Parties entered into related Memoranda of Agreement that resulted in a grant from CSC to the Army of Specifically Negotiated License Rights to certain intellectual property developed by CSC and used by CSC for delivery of services under the Contract. These Memoranda of Agreement also are in furtherance of the Parties' intent to settle outstanding issues arising under the Contract and intent to restructure the Contract.

The MOU was not executed by the contracting officer, but rather by an Army negotiator (*id.*). The Army's answer to CSC's Interrogatory 14.6 states that it did not acquire additional rights to CSC's LMP IP from either the 18 October or the 1 November 2004 MOAs (app. opp'n, ex. J).

On 2 May 2005, CSC and the Army executed a MOA documenting a global settlement subject to a number of listed events. The settlement agreement stated in relevant part:

> This Memorandum of Agreement ("MOA") documents the essential elements of the agreement between Computer Sciences Corporation ("CSC") and the United States Department of the Army ("Army") (collectively the "Parties") regarding the Global Settlement ("Global Settlement") of certain business, financial and contractual issues arising under

or related to the Logistics Modernization Program ("LMP") contract number DAAB07-00-D-E252 (the "Contract"):

1. As the result of negotiations conducted by the Parties' Joint Integrated Program Review team since October 2004, the Parties reached agreement on April 12, 2005, regarding certain aspects of a Global Settlement of issues arising under or related to the Contract. The Parties' Global Settlement is subject to:

    a. concurrence by the Command Counsel, U.S. Army Material Command ("AMC");

    b. applicable approvals by various U.S. Department of the Army and U.S. Department of Defense authorities;

    c. funding;

    d. restructure of the Contract;

    e. resolution of DCAA [Defense Contract Audit Agency] findings regarding verification of past and future costs to include February 2005 and March 2005 actuals;

    f. execution of a certificate of current cost and pricing data; and

    g. the mutual release of claims set forth in paragraph 2.c. herein.

The settlement agreement further provided in relevant part:

2. The essential elements of the Parties' agreement are as follows:

    ....

b. Contract extension

i. Subject to required Government approvals, the Contract will be modified to include an award term of eight years which will extend performance to December 11, 2019. The nature of the award term will be deductive; meaning that the Army may reduce the duration of the Contract and do so in the event that it determines that CSC's performance has not met objective and measureable award term criteria to be negotiated by the Parties as part of the Global Settlement. A criterion that may lead to the deduction of the entire eight year extension is acceptance of Deployment 2.

c. Mutual release of claims for the period from December 29, 1999 through April 1, 2005:

i. In consideration of CSC's promise to forgo filing any claims arising under or related to the Contract during the period December 29, 1999 through April 1, 2005, the Army shall pay CSC [REDACTED] in accordance with the following payment schedule

1. on or before December 15, 2005, not less than [REDACTED]; and

2. on or before December 15, 2006, the unpaid balance of the [REDACTED].

ii. In consideration of the terms of the Global Settlement, the Army promises to forgo filing any claims against CSC arising under or related to the Contract that arose during the period December 29, 1999 through April 1, 2005.

iii. The Contract modification implementing this Global Settlement will also include this mutual release of claims.

d. Specifically Negotiated License Rights

i. The Contract will be modified on or about May 6, 2005, to incorporate the consideration and

associated clause for Specifically Negotiated License Rights for the Single Army Logistics Enterprise ("SALE") as specified in the Parties' November 1, 2004, Memorandum of Agreement and as expanded by paragraph d.ii.1 below.

ii. Upon acceptance by the Army of Deployment 2, the Army shall pay CSC $35M for the Specifically Negotiated License Rights.

1. CSC further agrees to extend the Specifically Negotiated License Rights to

a. the U.S. Army General Funds Enterprise Business Systems ("GFEBS") program, without regard to the identity of the awardee, and

b. any U.S Army or Department of Defense Enterprise Integration program for which CSC is the prime contractor.

e. Recovery of unpaid consideration

i. Should the Contract end for any reason, including termination of the Contract or the Army's failure to order its requirements in accordance with the requirements clause of the Contract, as modified, and CSC has not been paid the entire amount agreed to in paragraph 2.c. from December 29, 1999 through April 1, 2005 ([REDACTED]) and in paragraph 2.d.ii. consideration for Specifically Negotiated License Rights ($35M), those unpaid amounts will be due and payable to CSC.

f. Transition Development

i. Definition

1. "Transition" is the period between April 2, 2005 and Deployment 1 acceptance.

ii. The Parties will jointly prepare and, on or about June 15, 2005, agree to acceptance criteria, including a Post Deployment Operational Capability Assessment, the Program Baseline reflected in Solution Manager, the Integrated Program Master Schedule ("IPMS"), the Program Management processes and procedures, and the Organizational Change Management Plan, for Deployment 1.

iii. The Transition ends upon the acceptance of Deployment 1 by the Army using the mutually agreed acceptance criteria.

iv. Transition Development will be subject to the following terms:

1. CSC and the Army will share the cost of development during the Transition on an equal basis (50/50). The total cost of development to be shared by the Parties shall not exceed [REDACTED].

2. CSC shall be paid for its portion of the Transition development costs upon acceptance by the Army of Deployment 1.

3. Performance bonus activities will be suspended during Transition without degradation of services.

....

h. Sustainment (including program governance)

i. For the period April 2, 2005 through September 30, 2005

1. Firm fixed price of [REDACTED] to be paid in monthly installments of [REDACTED] starting at a time mutually agreeable to the parties but no later than 1 June 2005; and

2. Previously unpaid performance bonus in the amount of $14,274,951.94 for the 18th through 21st Contract quarters to be paid on or before May 31, 2005.

3. Performance bonus activities will be suspended during this period without degradation of service.

ii. For the period October 1, 2005 through March 31, 2006

1. Firm fixed price of [REDACTED] to be paid in monthly installments of [REDACTED].

2. Performance bonus activities will be suspended during this period without degradation of service.

iii. For the period April 1, 2006 through March 31, 2007

1. Firm fixed price of [REDACTED] to be paid in monthly installments of [REDACTED].

2. Performance bonus activities will be suspended during this period without degradation of service.

iv. For the period April 1, 2007 through December 31, 2011

1. Firm fixed price of [REDACTED] annually to be paid in monthly installments of [REDACTED]

2. Available performance bonus during this period of [REDACTED] annually, the criteria and payment terms to be negotiated

v. For the period January 1, 2012 through December 31, 2019

1. Firm fixed price of [REDACTED] annually to be paid in monthly installments of [REDACTED].

2. Available performance bonus during this period of [REDACTED] annually, the criteria and payment terms to be negotiated.

i. Additional Incentives

i. Expanded work

1. The Contract will be modified on or about May 6, 2005, to add the Installation Fixed Base efforts to the requirements portion of the Contract and the initial task will be awarded during Government Fiscal Year 2005; and

2. On or before June 30, 2005, a task order will be issued under the Contract for efforts associated with the PD-LMP support to the Product Lifecycle Management program.

ii. Future efforts

1. The Parties will continue to advocate opportunities under the "Related Logistics Services" paragraph of the Statement of Work (Attachment No. 1 to the Contract).

(R4, tab 440 at 10564-70)

A "MEMORANDUM FOR FILE" dated 5 May 2005 over the contracting officer's name relating to the basis for issuing Modification No. P00007 states that the 2 May 2005 MOA global settlement "spells out the language and concepts that are to be incorporated into the global settlement modification" (R4, tab 442 at 10616). Excerpts from the depositions of government witnesses reflect their understandings that the parties reached agreement in the global settlement (Meis dep. at 114, Carroll dep. at 94).

On 10 May 2005, CSC and the Army executed bilateral contract Modification No. P00007. Section A, "SUPPLEMENTAL INFORMATION," revised Clause H-7A to incorporate the IFB effort to the requirements portion of the contract as agreed to in paragraph 2.d. of the 2 May 2005 MOA. It also implemented sustainment payments for the period 2 April through 30 September 2005 consisting of $25 million via installment payments of $4,166,667 as agreed to in paragraph 2.h.i.1 and the $14,274,951.94 performance bonus agreed to in paragraph 2.h.i.2. Clause H-13, "RIGHTS IN LISTED TECHNICAL DATA, COMPUTER SOFTWARE AND OTHER INFORMATION," identified the scope of the LMP IP to be licensed and the scope of the government's use of it, together with specified exclusions. (R4, tab 445 at 10635-36) Paragraph B, "SCOPE OF IP TO BE LICENSED," restated the six IP items deliverable under the original contract. The balance of paragraph B provided as follows, subject to exclusions listed in paragraph C:

> B.2 IP ordered as deliverables under a task order or IP to which access is required pursuant to such task order are subject to this Clause H-13 unless rights in IP are specifically addressed in a specific task order.
>
> B.3 By way of this modification and in addition to the Contract deliverables set forth above, the Contractor will now make available to the U.S. Government and its Permitted Contractors the following categories of IP. At the time of the modification incorporating this clause in the Contract, the Parties agree that the categories set out in the following list are sufficiently broad to encompass all of the IP. Should the U.S. Government, in the future, request additional technical data, computer software, or other information that is not encompassed by any of the categories of IP listed below, but which both the Parties nonetheless reasonably agree is utilized in the configuration and implementation of the LMP solution, the Parties agree that the following list will be modified to add a category inclusive of such additional technical data, computer software, or other information without further consideration owing to the Contractor.
>
> 1) End user application software subject to the exclusions in paragraph C and associated configurations, settings, user exits and supporting documentation. This includes the Question Answer Data Base, CI Template, Business Process Procedure Documents (including blueprints), Process Scenarios,

Integrated Scenarios, Business Process Master List (BPML), Authorization Profiles and the ERP Configuration with SAP Transaction Settings (IMG) and Technical Objects as well as developed code, functional specifications, technical specifications and configuration settings/documentation for all components of the LMP solution (e.g., Business Warehouse (BW), Advanced Planning and Optimizer (APO)).

2) Data base designs, structures, data translation, data conversion, and data loading software and applicable technical documentation to include both functional and technical specifications.

3) Enhanced/custom reports to include, but not be limited to, coding/configuration settings and applicable documentation to include both functional and technical specifications.

4) All LMP Hierarchies, including, but not limited to, Organization and Plant structures (e.g., master data structures, financial structure).

5) Tools, processes and methodologies utilized to support the solution lifecycle (e.g., Cut Over Scorecard, Detailed Cut Over Plan, organizational role assignment process) subject to the exclusions in paragraph C.

6) Interface software subject to the exclusions in paragraph C, including applicable technical documentation to include both functional and technical specifications, SAP configuration and documentation.

7) SAP configuration and associated documentation.

8) Software, subject to the exclusions in paragraph C, developed to support development and testing of application software upgrades and releases, release procedures, test cases, and documentation.

9) Infrastructure documentation including the Technical Architecture and Logical and Physical Infrastructure lay-out.

> 10) Enterprise Architecture Integration (EAI) software solutions subject to the exclusions in paragraph C.

(R4 tab 445 at 10636-37)

Clause H-19, "Payment of Specifically Negotiated License Rights," of Modification No. P00007 stated:

> Upon acceptance of Deployment 2 (the acceptance criteria to be negotiated at a later date), the Government agrees to pay the Contractor the sum of thirty-five (35) million dollars for the Specifically Negotiated License Rights as described in the Section H clause "H-13 Rights in Listed Technical Data, Computer Software and Other Information". This payment is subject to FAR 52.232-18 Availability of Funds.

(R4, tab 445 at 10638) Modification No. P00007 does not contain a release (R4, tab 445).

The parties agree that one or more of the conditions precedent to the 2 May 2005 MOA were not satisfied and that the global settlement in the MOA was not implemented. The Army reached the determination that implementation of the global settlement would not occur sometime in November 2005. (App. sur-reply, ex. A)

On 28 April 2006, CSC submitted its Request for Equitable Adjustment (REA) 14 to the contracting officer. The REA stated:

> REA 14 seeks compensation for the Government's access to and use of the highly-valuable and widely-applicable LMP IP that CSC developed to meet the Government's demands. CSC is entitled to an equitable adjustment because the Government (i) changed the LMP Contract by requiring CSC to develop and deliver the LMP IP, (ii) breached its agreement to compensate CSC for expanded license rights to the LMP IP, and (iii) violated CSC's Constitutional rights by acquiring access to and use of CSC's LMP IP without just compensation. CSC's outside expert has valued the LMP IP using two commonly-accepted valuation methodologies: the cost savings approach and the reasonable royalty approach. Under the former, CSC is entitled to an equitable adjustment in the amount of [REDACTED]; under the latter, CSC is entitled to an equitable adjustment in the amount of [REDACTED].

....

> Moreover, the modification of the LMP Contract to include P00007, by itself, does not adequately compensate CSC for the value of the LMP IP license rights. The amount of the IP payment was a compromise in consideration of all other terms of the failed May MOA and the Government cannot "cherry pick" only those terms of the May MOA that reflect its benefit of the bargain, while depriving CSC of the benefit of its full bargained-for consideration. Thus, the Government has breached the November MOA by refusing to modify the LMP Contract to include all agreed provision as part of a fully-implemented global settlement, of which the LMP IP was only a part.

(R4, tab 559 at 11806, 11848)

On 14 July 2006, CSC converted REA 14 into a Contract Disputes Act (CDA) claim (R4, tab 597). On 14 June 2007, the contracting officer denied the claim (R4, tab 647). A timely appeal followed and REA/Claim 14 was assigned ASBCA No. 56175.

Deployment 2 occurred on 14 May 2009 (gov't proposed finding of fact (PFF) ¶ 18 and app. resp.). It was accepted by the government on 13 November 2009 (gov't PFF ¶ 21 and app resp.).

On 6 August 2009, the contracting officer unilaterally issued Task Order Modification DAAB07-99-D-E252-010125 to provide $35 million for payment of SNLR in accordance with Clause H-19 of contract Modification No. P00007. The Task Order modification had originally been proposed as a bilateral modification to which CSC had objected. (Gov't PFF ¶ 20 and app. resp.) CSC submitted its invoice for the $35 million on 23 November 2009 and was paid on that amount on 23 December 2009 (gov't PFF ¶ 22 and app. resp.).

DISCUSSION

The standards we are to apply in deciding the Army's motion are familiar. Summary judgment is appropriate where there are no genuine issues of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). As the moving party, the Army has the burden of "establishing the absence of any genuine issue of material fact." *Mingus*, 812 F.2d at 1390. We are to view the facts in the light most favorable to CSC, the

non-moving party, accepting its version of the underlying facts as true and drawing all reasonable factual inferences in its favor. *See Liberty Lobby*, 477 U.S. at 255; *C. Sanchez and Son, Inc. v. United States*, 6 F.3d 1539, 1544 (Fed. Cir. 1993).

At issue in this motion is the interpretation of clause H-19 of Modification No. P00007. Questions of contract interpretation are subject to summary disposition where the contract language is unambiguous. *Muniz v. United States*, 972 F.2d 1304, 1309 (Fed. Cir. 1992). A contract provision is unambiguous if there is only one reasonable interpretation. *See C. Sanchez*, 6 F.3d at 1544. In contrast, contract terms that are susceptible to more than one reasonable interpretation are ambiguous. *See Lockheed Martin IR Imaging Systems, Inc. v. West,* 108 F.3d 319, 322 (Fed. Cir. 1997).

The Army first contends that the language of clause H-19 of Modification No. 00007 is clear and unambiguous and that the only reasonable interpretation of it is that CSC agreed to expanded rights in the LMP IP as defined in clause H-13 for the payment of $35 million upon acceptance of Deployment 2 (gov't mot. at 22-23). It is undisputed that Deployment 2 has been accepted and that CSC has been paid $35 million pursuant to a task order issued unilaterally after it objected to the issuance of a bilateral contract modification. CSC dismisses the Army's interpretation as unreasonable because it reads clause H-19 of Modification No. P00007 in isolation, rather than in the context of the contract as a whole and the underlying MOAs memorializing the negotiations leading up to Modification No. P00007.

We are not persuaded that one single sentence in clause H-19 of Modification No. P00007 can be read alone in isolation to provide the only reasonable interpretation of the parties' agreement regarding a $35 million payment for CSC's IP as the Army asserts. This was a multi-million dollar, multi-year contract for the Army's LMP. After five years of performance, the parties spent many months trying to restructure the contract with the apparent goal of reaching a global settlement that would include expanded contractual rights to IP developed by CSC and used for the delivery of contractual services. The negotiations produced three MOAs, one MOU and, ultimately, Modification No. P00007. Expansion of the Army's license rights to CSC's IP was addressed in each.

Thus, we believe it is necessary to consider the MOAs, MOU and other evidence identified by CSC relating to the actions of the parties before execution of Modification No. P00007 to provide context and meaning to its terms. *See Gibbs v. United States*, 358 F.2d 972, 979 (Ct. Cl. 1966); *Rio Construction Corp*., ASBCA No. 54273, 04-1 BCA ¶ 32,534 at 160,912.

The Army contends that we should focus upon the three MOAs and the MOU and conclude that the 1 November 2004 MOA establishes that CSC agreed to payment of $35 million for its IP independent of implementation of a global settlement. Its premise is that

Modification No. P00007 was a stand-alone modification that formalized the earlier agreement reached in the 1 November 2004 MOA. According to the Army, the parties agreed in paragraph 1 of the 15 December 2004 MOU that the 18 October 2004 and 1 November 2004 MOAs resulted in an actual grant of CSC's IP to the Army. It asserts that the parties agreed to "adequate and fair consideration" for SPLR to CSC's IP in the October MOA and then to payment of $35 million consideration for the SNLR and the addition of the IFB effort to the Requirements portion of the contract in the November MOA, if the parties failed to reach agreement on the global settlement and the SALE Technical Exchange Workshops had been conducted. It is undisputed that the workshops were conducted.

The Army's argument continues that CSC would be paid $35 million if the parties were "unable to 'implement' a global settlement" and that the $35 million consideration reflected in the 1 November 2004 MOA was based upon the assumption global agreement would not be reached (gov't mot. at 24-25). It contends that the 2 May 2005 MOA was a conditional global settlement and was not implemented because the conditions were not satisfied.

The Army points out that the $35 million consideration recited in the 2 May 2005 global settlement MOA is the same amount agreed to in the 1 November 2004 MOA and that the other provisions of the global settlement did not specify a time frame for modifying the contract. It concludes that the November MOA was totally independent of the 2 May 2005 MOA and that Clause H-19 of Modification No. P00007 formalized the November agreement as an alternative to the global settlement as contemplated by the parties (gov't reply at 8-10).

CSC also disagrees with this interpretation. It correctly states that the 15 December 2004 MOU was not executed by the contracting officer, and it argues that, in any event, the 18 October and 1 November 2004 MOAs did not transfer any IP rights to the Army. CSC points out that the October MOA reflects the Army's understanding that CSC invested in the LMP IP and its agreement to pay "adequate and fair consideration" with monetary or nonmonetary compensation as part of a global settlement. It reads the November MOA as reinforcing the commitment to a global settlement and as intending the $35 million payment to be compensation for sharing its IP with the government and third parties in conjunction with the SALE Technical Exchange Workshops, rather than as compensation for IP license rights. Thus, if a global settlement was not reached, CSC would receive $35 million for having shared its IP, but the Army would not receive any additional rights to it.

Citing the 2 May 2005 MOA and other documents and deposition transcripts which we are to view in the light most favorable to it, CSC contends a global settlement was reached that included expanded IP license terms. It continues that the global

agreement included a number of interrelated agreements, all of which were to be incorporated into the contract. In particular, CSC points to an eight-year extension of the contract though 11 December 2019; a release of claims payment in the amount of [REDACTED]; addition of IFB efforts to the Requirements portion of the contract; a $35 million payment for its IP, as expanded; cost sharing arrangements during the transition period between 2 April 2005 and acceptance of Deployment 1; and payment of substantial amounts of money for unpaid performance bonuses. Thus, it asserts that the $35 million was only one component of the consideration for the SNLRs and it accepted payment in partial fulfillment of the Army's obligation to provide "adequate and fair consideration." Finally, CSC considers the fact that Modification No. P00007 was issued bilaterally on 10 May 2005, only eight days after the global settlement, tracks the 2 May 2005 MOA and makes specific reference to it to be evidence that it was issued in furtherance of the MOA, and not as an independent stand-alone modification to disavow it. It was not until November 2005 that the Army determined that the global settlement would not be implemented.

CSC interprets Modification No. P00007 as establishing that CSC agreed to grant the Army expanded rights in its IP as an inextricable part of the global settlement embodied in the 2 May 2005 MOA and that the $35 million consideration recited in Modification No. P00007 for its IP cannot stand apart from the remainder of the May global settlement.

CSC also contends that there are genuine issues of material fact in dispute. For example, with respect to the Army's interpretation of the 15 December 2004 MOU as reflecting an agreement that the 18 October and 1 November 2004 MOAs granted IP rights to the Army, CSC points out that the Army's answer to its Interrogatory 14.6 states that it did not acquire additional rights to CSC's LMP IP from either of these MOAs. The Army attempted to explain the reason for its answer. CSC sees disagreement about the scope of the IP license rights identified in the 1 November 2004 MOA and those identified in clause H-13 of Modification No. P00007. CSC contends the SNLRs granted in clause H-13 of Modification No. P00007 are broader than those preliminarily identified in the October and November 2004 MOAs. The Army has a very different view of the matter. In any event, the IP identified in the 1 November 2004 and 2 May 2005 MOAs and clause H-13 has not been explained to the extent that the answer is clear. CSC also sees a dispute about whether agreement was reached in the May MOA, making the November MOA meaningless, or whether the failure to implement the May MOA constitutes a failure to reach agreement. We agree that these matters are disputed. Moreover, disagreements such as these are not amenable to resolution on a motion for summary judgment. *See General Dynamics Corp.*, ASBCA Nos. 32660, 32661, 89-2 BCA ¶ 21,851 (our task is not to resolve factual disputes, but to ascertain whether material facts are in dispute).

We are convinced that the record must be further developed if we are to understand the factual context in which Modification No. P00007 was issued and determine its intended meaning. *See Skanska US Building, Inc.*, ASBCA No. 56339, 10-1 BCA ¶ 34,392 at 169,833. The parties' intent is at the heart of the dispute over the interpretation of clause H-19 of Modification No. P00007. Accordingly, the Army's motion for summary judgment must be denied. *See, e.g., Osborne Construction Co.*, ASBCA No. 55030, 09-1 BCA ¶ 34,083 at 168,514 (controverted issues of intent preclude summary judgment).

CONCLUSION

For the reasons stated above, the Army's motion for summary judgment on Claim 14, ASBCA No. 56175, is denied.

Dated: 1 November 2010

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
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. 56175, Appeal of Computer Sciences Corporation, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals