ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Colorado River Materials, Inc.	)	ASBCA No. 57751
d/b/a NAC Construction	)	
	)	
Under Contract No. W9124A-05-D-0004	)	

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MAJ K. L. Grace Moseley, JA
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE THRASHER
ON MOTION FOR SUMMARY JUDGMENT

This appeal involves Task Order (TO) No. 0073 under an Army contract for paving and related work at Fort Huachuca, Arizona. The government moves for summary judgment based upon the language of a "Bilateral Settlement Agreement" in a modification relating to TO No. 0073 and two other task orders (gov't mot. at 1). We have jurisdiction under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. Appellant opposes the motion and has submitted the affidavit of the project manager, Mr. Brett Fischer, in support of its opposition (app. supp. R4, tab 99). The motion is granted.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTION

1. The government awarded Contract No. W9124A-05-D-0004 to Colorado River Materials, Inc., d/b/a NAC Construction (NAC) on 24 March 2005. The contract was a requirements contract with a base year and four option years. Under the contract, NAC was to reconstruct/rebuild asphalt pavement at Fort Huachuca, Arizona. (R4, tab 53 at 1, 3, 192, 193)

2. On 30 April 2009, the government issued unilateral TO No. 0073 under the contract in the amount of $1,276,853.66. The TO required NAC to reconstruct PX complex parking lots and service entrances and included striping and concrete work. Work was to be completed by 31 August 2009. (R4, tab 1) The periods of performance

for various parts of the job were eventually extended to 30 April 2010 (R4, tabs 4, 7, 8, 9, 11).

3. The asphalt removal operations began on 19 May 2009 and "pumping" areas in the existing sub base material were discovered (compl. and answer ¶ 11). The government issued unilateral Modification No. 02 on 4 June 2009 with the stated purpose to "add additional funding for unforeseen site conditions" under TO No. 0073 (R4, tab 3). Modification No. 02 added contract line item number (CLIN) 420 to the order which provided for the removal of 643 cubic yards of unsuitable material at $11.50 per yard increasing the contract amount by $7,394.50. However, CLIN 420 did not address payment for import and placement of new materials. (*Id.*)

4. NAC informed the government by letter on 21 October 2009 that the amount of material to be removed from the parking lot was 4923 cubic yards rather than the 643 cubic yards addressed in Modification No. 02. In addition, NAC pointed out that there was no contractual mechanism established under the order to pay for the imported material to fill the excavation. (R4, tab 52) Attached to the letter was an unnumbered Request for Change Order (RCO) that proposed to use material excavated from another section of the project as fill to replace a portion of the amount excavated in the PX parking lot and that the placing and compacting of this material could be paid as "time and material." As a result, the proposal did not state a price for the place and compact import aspect of the job. (*Id.* at 2) Ultimately, NAC was able to salvage material from other projects on base to use as fill in replacing some of the amount excavated (compl. and answer ¶ 17).

5. Addressing the issues raised by NAC's 21 October 2009 letter, the government issued unilateral Modification No. 06 on 13 November 2009 with the stated purpose to address the issue of "new material/repair to replace bad/deterated [sic] subgrade." The modification increased the amount of material removed by 4,923 cubic yards from the original 643 to 5,566 cubic yards and changed the increase in contract price to $64,009.00. (R4, tab 7)

6. Again on 4 February 2010, the government addressed the PX Parking Lot differing site condition by increasing the pricing quantity under CLIN 420 by 1,643 cubic yards to 7,209 cubic yards by unilateral Modification No. 08 (R4, tab 9). The stated purpose of the modification was to add funding due to differing site conditions because the subgrade consisted of unsuitable material which "needs to be removed and replaced." In consequence, the total cost of CLIN 420 was increased by $18,894.50 to $82,903.50. (*Id.*)

7. On 19 February 2010, NAC suggested using lime treatment to stabilize soil in the area of the bank parking lot for a cost of $14.75 per square yard for a total cost of $32,789.25 (R4, tab 51). The government agreed with NAC's proposal, obtained

additional funding and issued unilateral Modification No. 09 on 30 March 2010, with an effective date of 24 March 2010, which stated its purpose was to remove and replace unsuitable subgrade material (R4, tab 11). It also modified the delivery date on several of the TO No. 0073 CLINs, including CLIN 0420, but only the price under CLIN 0420 was increased by $32,785.25 and the quantity was increased from 7,209.00 to 10,059.8913 cubic yards (*id.*).

Direction to Fix Failures in Paving Project

8. By letter dated 22 March 2010, the contracting officer (CO), Lynn Warner, informed NAC that "serious and total failures" had been noted in a number of its paving projects, including TO No. 0073. As to that TO, the government stated that it required "replacement of areas that are showing signs of failure, fatigue and distress." The government's position was that replacement was to be accomplished "at no additional cost" to the government because the failures had occurred during a one year warranty period. (R4, tab 10)

9. NAC responded by email to the CO's 22 March 2010 letter on 1 April 2010, asserting that the failures in roadways were caused by subgrade conditions, not poor workmanship or paving materials. A report from a geotechnical consulting firm, contracted by NAC, was attached to the email. That report opined in its conclusion that the problems encountered with the pavement were caused by subgrade failures. These failures occurred, in part, due to excess water entering the subgrade. It also cast doubt on whether the lime treatment, which it had earlier suggested, would actually solve the subgrade problem and implied the government should consider over-excavation and replacement or a geogrid. The email concluded by stating that NAC would not proceed with replacing the roads, "without some sort of reimbursement guarantee from the Government." (R4, tab 12)

Request for Change Orders (RCO) Nos. 2 and 3

10. On 23 April 2010, NAC submitted two RCOs Nos. 2 and 3. RCO No. 2 requested a change to CLIN 0420 in the amounts of $11,201 and $65,400 for a total of $76,601. The amounts were based on Modification Nos. 02 and 06 that had added CLIN 420 to the order and then increased the total price for the CLIN. RCO No. 2 addressed two issues. First, that NAC asserted it was entitled to $11,201 because the amount of material removed was actually 6,540 cubic yards or 974 more than set out in Modification No. 06.[1] Second, NAC also asserted CLIN 420 only addressed removal and haul off of unsuitable materials and, consequently, there was no provision for payment

[1] This RCO apparently does not take Modification No. 8 into account, for reasons not made clear by the record.

for import and placement of new materials. NAC asserted entitlement to $65,400 for hauling and placement of the 6,540 cubic yards of material generated from other projects, which it priced at $10 per cubic yard. (R4, tab 14) Appellant also submitted RCO No. 3 on 23 April 2010, prospectively seeking $58,095.45 for over-excavation work to be accomplished during the last phase of the project, replacing the lime treatment contemplated by Modification No. 09. The amount sought was net of the $32,785.25 that had been funded in Modification No. 09. (R4, tab 15)

11. On 12 May 2010, the CO issued a final decision (COFD) regarding the correction of problems identified in her 22 March 2010 letter and NAC's 1 April 2010 email (R4, tab 17). The COFD addressed TO No. 0073 and five other task orders under the contract. Concerning the project as a whole, it stated that partial and total failures of the paving projects were identified within six months of their completion dates, and were the "result of poor workmanship and/or defects not discoverable" by the government during performance. The work done on the six TOs was less than a year old and still under warranty. (*Id.* at 1) Specifically as to TO No. 0073, NAC was directed to replace two service roads completely and replace striping and arrows, all at no cost to the government (*id.* at 4). In addition, the COFD addressed appellant's "new proposals" concerning over-excavation, stating:

> The Contractor had encountered unsuitable site conditions (poor subgrade) during the first four phases of the PX project, W9124A-05-D-0004-0073. The Contractor proposed over-excavation to stabilize the subgrade. The Government agreed, obtained additional funding and issued modifications 2, 6, and 8 to the task order. NAC Construction's letter dated February 19, 2010, suggested the use of lime treatment to stabilize the soil in the area of the bank parking lot for a cost of $32,789.25. The Government agreed, obtained the additional funding and issued modification 9 for the NAC Construction's proposed lime treatment. When the Contractor received the letter, dated March 22, 2010, directing them to replace all of the damaged areas on task orders 0049, 0073, 0086, 0087, 0088, 0091, they responded by advising that they would test the bank parking lot area (of the PX area) stating that they had concerns that the lime treatment would not work. NAC Construction submitted new proposals for over-excavation approval for Task Order 0073, PX Parking Area. The Contracting Officer hereby rejects the proposals for over-excavation and directs the Contractor to proceed with the completion of the PX Parking lot (bank area) using the lime treatment as originally

> proposed by NAC Construction. This decision is based on the fact that lime treatment has successfully stabilized the ground and the base has remained stable for the previous paving projects under this contract.

Insofar as the record reflects, appellant did not appeal to the Board or Court of Federal Claims from this decision. (R4, tab 17 at 3)

12. On 29 July 2010, NAC filed three separate RCOs relating to work done in accordance with the 12 May 2010 COFD. As to TO No. 0086, appellant sought $125,611.33 and, as to TO No. 0088, appellant sought $195,512.55. (R4, tabs 20, 22) With regard to TO No. 0073, RCO No. 4 sought $49,279.29 (R4, tab 21). The request was based on work done replacing two service roads on the south end of the PX parking lot. Appellant asserted that the problems with the roads were not the result of poor workmanship but a 25 year rain event that had saturated the subgrade. NAC asked reimbursement for the cost of removing and replacing the two service roads. (*Id.*) TO No. 0073, RCO No. 4 did not explicitly include reimbursement for or identify any of the work addressed under RCO No. 2. The total of the three change order requests was $370,403.17.

13. On 27 December 2010, the CO issued a final decision on the three 29 July 2010 change order requests for TO No. 0086 (RCO No. 2), TO No. 0088 (RCO No. 1), and TO No. 0073 (RCO No. 4). Based on the work of a consultant, the government determined that NAC was entitled to an increase in contract price of $333,362.85 of the $370,403.17 requested. The consultant appears to have concluded that water entering the subgrade and compaction that did not meet the 95 percent requirement led to the roadway failures. The CO stated that funding would be requested "through the appropriate channels and once received" an order would be issued "for payment purposes only." (R4, tab 26)

14. In a series of emails on 24 and 25 January 2011, NAC asked the government about RCO No. 2 regarding "PX Parking Lot Repairs" (i.e. TO No. 0073) (R4, tab 27). The NAC project manager's initial message, referring to the COFD and proposed change order, asked, "Is change order request 02 for the referenced project going to be included in the final change orders? When Susie Montgomery [NAC's president] and I attended a meeting at your facility to discuss the repairs to the failed roadways this issue was brought up and we discussed it with Lynn Warner at the time." The email attached the original RCO with a letter explaining the work done (*id.*). The CO responded that she could not review the documents because she was out of the office and asked whether RCO No. 2 was included in NAC's claim, presumably the 29 July 2010 claim (*id.* at 1). NAC's project manager, Brett Fischer, responded that it "was not part of the claim as we were under the impression that there were no problems with the issue" (*id.*).

15. On 14, 16 February 2011 and 14, 30 March 2011, NAC sent emails to the government asking whether it required any additional information about the over excavation change order request as to the PX parking lot (RCO No. 2) (R4, tabs 29-32).

16. By email dated 5 April 2011, NAC asked, among other things, about "the agreed upon change order requests for...reconstruction of the three failed roadways." It also inquired as to "the status of the over excavation/imported fill change order request originally sent to your office on April 23, 2010 and again on January 24, 2011." (R4, tab 33) The CO responded that she had received $333,362.85 for the claims under TO Nos. 0073, 0086, and 0088 and that she was still waiting for funding on the "option year 3 claim" (*id.*). She stated that she had decided to "issue a task order for payment purposes only to covered [sic] the claim." NAC's project manager, Mr. Fischer, replied, "That is great news Lynn and hopefully #2 will not be too far behind. Concerning the PX Lot over excavation and fill placement request that Charlene was working on, does your office need any more information on this one." (*Id.*)

17. On 15 April 2011, the CO prepared a DD Form 1155, designated TO No. 0096, under the contract (R4, tab 34). The Schedule for TO No. 0096 was entitled "BILATERAL SETTLEMENT AGREEMENT" and provided as follows:

> This task order serves to document the agreement between the Army and Colorado River Materials, Inc., (NAC Construction) regarding all issues and claims for contract W9124A-05-D-0004. This includes NAC Construction's 3 claim letters on 29 July 2010 requesting $370,403.17. The parties agree that a payment of $333,362.85 constitutes an accord and satisfaction of all claims and all potential claims arising from NAC Construction's work under contract W9124A-05-0-0004. The settlement of $333,362.85 includes all claims for attorney fees, other claim preparation costs and interest in any way related to the contract and NAC Construction's 3 claims dated 29 July 2010.

The TO included three CLINs. CLIN 0001 was in the amount of $44,351.36 and was identified as a claim payment on TO No. 0073. CLIN 0002 was in the amount of $113,050.20 and was identified as a claim payment on TO No. 0086. CLIN 0003 was in the amount of $175,961.29 and was identified as a claim payment on TO No. 0088. The total contract adjustment was $333,362.85. (R4, tab 34)

18. A government contract specialist, Mr. Michael Winslow, forwarded TO No. 0096 to NAC, Mr. Fischer, on 18 April 2011 requesting a signature (R4, tab 35 at 3).

The TO was described in the government's email as "payment for the claims that were filed on 29 July 2010 regarding [TOs] 73, 86, and 88" (*id.*). Mr. Fischer states in a sworn statement that when he reviewed the government's 18 April 2011 email with TO No. 0096, he believed that the government intended the TO to be limited "to payment for claims that NAC filed on 29 July 2010, and did not apply to NAC's Change Order Request No. 02, which other Government personnel were telling me was being processed" (app. supp. R4, tab 99, ¶ 34). Mr. Fischer, NAC's representative, responded to the contract specialist on 18 April 2011 asking, in part:

> [W]e have a change order request submitted for some over excavation and import of fill material on the PX Parking Lot Project, Task Order 0073.... Do you have any information regarding the status of this request? Despite a number of inquiries over the past several months regarding this issue I never received a response.... The original request was submitted on April 23, 2010 and was sent again on January 24, 2011."

(R4, tab 35 at 2) Mr. Winslow did not respond but instead forwarded Mr. Fischer's email to the CO on 19 April 2011 asking her how she would like to proceed. The CO responded directly to NAC's on 19 April 2011 stated the following:

> There has been some confusion as to whether or not your request submitted in April 2010 was addressed. After taking a look at the documentation, it was addressed in the attached decision document dated 12 May 2010. Even though the decision document does not specifically reference NACs change order requests submitted in April 2010, the intent of the Final Decision was to cover all claims received prior to the decision date 12 May 2010. In fact, the attached decision specifically rejects NACs proposal for over-excavation and directs the Contractor to proceed with the lime treatment.
>
> NAC submitted additional claims on 29 July 2010, in reference to task orders 0073, Replace PX Parking Lot, 0086, Replace Smith Street, and 0088, Replace Whitside Road. NAC should have included all issues in these claims that they believed were in dispute at that time. A final decision was issued on 27 December 2010.
>
> I consider all issues resolved.

Please sign task order 0096 and return as soon as possible.

(R4, tab 35 at 1)

19. In a memorandum for the record, dated 19 October 2011, the CO stated in pertinent part:

> On or about April 19, 2011, I received a phone call from Brett Fischer who had received Task Order 0096. He asked me about the status of Change Order 02, in the amount of $76,601, for Task Order 0073, PX Parking Lot. I told him that it was my opinion that the issue was resolved and there was no reason to reconsider the KO Decision dated 12 May 2010 or words to that effect.

(R4, tab 49)

20. On 20 April 2011, Mr. Fischer signed TO No. 0096 on behalf of NAC (R4, tab 34). He states in a sworn affidavit that based on his review of the TO and his correspondence with the government, he understood that:

> Task Order No. 0096 only applied to Task Order Nos. 73, 86 and 88 and not the import of material claimed under Change Order Request No. 02. Based upon the communications I received from [Contracting] Officer Warner and Mr. Winslow, I reasonably believed the Government was still considering Change Order Request No. 02. Had I known before signing, and in particular, had [Contracting] Officer Warner or Mr. Winslow informed me in response to my repeated inquiries, that they believed that Task Order No. 0096 settled Change Order Request No. 02, I would not have signed Task Order No. 0096.

(App. supp. R4, tab 99, ¶ 38)

21. In a 25 April 2011 email to the CO, Mr. Fischer said that NAC agreed that there was confusion about the PX parking lot project and RCO No. 2. He stated that the contract provided two methods for dealing with unsuitable subgrade materials: lime stabilization for pavements and removal of unsuitable materials. There was no provision for the import and placement of fill material when the second method was utilized and that resulted in the largest part of RCO No. 2. That request was for work done under the first three phases of the PX parking lot project while the RCO mentioned in the CO's

19 April 2011 email dealt with phase 5 of the project and was not related to RCO No. 2. (R4, tab 39 at 2) On 27 April 2011, the CO reiterated her view that the:

> [C]laim submitted in April 2010 was addressed in the May 2010 decision...and that any and all issues and claims regarding Task Order 0073 (PX Parking Lot) have been settled. If NAC believed that this was not settled then all unresolved issues and claims should have been included in the July 2010 claim letter that you submitted regarding task order 0073, PX Parking Lot.
> NAC knowingly and freely signed the bilateral settlement agreement that the payment and modification terms...addressed and satisfied all claims and all potential claims.

(R4, tab 39 at 1)

22. Mr. Fischer responded to the CO on 28 April 2011 noting that the government (CO Warner, Eric Gabel, and Charlene Neal) and appellant (Brett Fischer and NAC president, Susie Montgomery) met about the April 2010 RCO No. 2 on 22 April 2010. He stated that he was told that if the government needed more information about the request, it would ask, and, since no information was thereafter requested, appellant assumed there were no issues as to RCO No. 2. He also stated that he had sent the government a number of inquiries about RCO No. 2. In July 2010, Ms. Neal had indicated that the government was working on the request and would respond in 30 days but nothing happened. In Mr. Fischer's view, NAC only became aware of the issues regarding RCO No. 2 with the government's response "last week," presumably mid-April 2011. (R4, tab 40 at 1)

23. Ms. Montgomery, NAC's president, wrote to the CO on 3 May 2011. In part, she stated the following:

> I would like to try and further straighten out this confusion regarding our request to be paid on importing material. We had no idea that this was to be a claim. All Brett and I knew is that you and Charlene were trying to figure out how you were going to pay us since there wasn't any CLIN's for importing material. Since you and Eric Gable had directed us to import to replace bad material rather than go the [sic] expense of "over x" or do "lime treated" materials, that's what we did. Had we been directed to send a letter regarding a claim we would have. We have been checking on this over a dozen times and elevn [sic] months. Now this about we

should have included it doesn't make sense when we have been waiting for you to tell us when and how we were to be paid.

(R4, tab 42 at 4) Not having heard back from the CO, Ms. Montgomery followed up with another email seeking a response from the government on 10 May 2011 (*id.* at 2, 3). The CO responded that Mr. Gabel was out of the office that week. Ms. Montgomery then said that she was requesting that the CO reconsider her "May 12th decision of NAC's request to be paid for our time and material on the above project" (*id.* at 1). CO Warner replied that in her opinion "all claim issues have been resolved. I issued a decision in December 2010 in response to your claim submitted in July 2010. I am [sic] see no reason to reconsider the decision issued in May 2010." (*Id.*)

24. On 1 June 2011, NAC submitted a claim dated 26 May 2011 in the amount of $76,601 (R4, tab 43). In explaining the need for RCO No. 2, the claim provided in part as follows:

> As you are aware, the above-referenced contract between NAC and your office contains two provisions for dealing with unsuitable subgrade beneath the areas to receive new asphalt pavement. CLIN C.5.18 is the use of lime treatment of the subgrade which does not require the removal of existing subgrade material while the second option available, CLIN C.5.20 (later changed to CLIN 0420 per Modification 02 dated June 4, 2009) is for the removal and disposal of the unsuitable materials which obviously creates a void in the subgrade that needs to be filled prior to paving. There are no provisions in the contract for the import and replacement of materials required when the second option is selected by your office. This omission is the main reason for Change Order Request No. 02.
>
> ....
>
> Mr. Gabel directed NAC to use CLIN 0420 to capture reimbursement for the removal of the questionable materials and that NAC would keep track of quantities and costs for the import and placement of the fill materials required, and then submit a change order request once the placement operations were completed. The reason for this arrangement was that until all of the unsuitable material had been removed there would be no way to quantify the amount of import material

> required to replace it, and whether NAC would need to purchase material from a commercial pit off The Fort. As it turned out, NAC was able to salvage enough suitable excess material off of other ongoing projects on The Fort to keep said expenses to a minimum.

(R4, tab 43, 26 May 2011 claim at 2-3)

25. CO Warner sent a copy of the claim to Eric Gabel, the contracting officer's representative (COR), on 1 June 2011 (R4, tab 44). She asked him to review the claim stating that it was NAC's position that Mr. Gabel had directed appellant to remove unsuitable material instead of using a lime treatment. She said that she had made her final decision but went on to state the following:

> [T]here may be some other facts out there that I may not be aware of, it [sic] that is the case you need to let me know before this gets to litigation. If there is any validity to their claim I need to know in order to address this claim properly.
>
> There have been so many changes to the contract administration in my office it has been difficult to keep up with changes and requests so if there is something I have missed please let me know.

(R4, tab 44)

26. Mr. Gabel responded as follows to the CO on 3 June 2011 stating, "I did not direct them to do anything unless there were funds available first.... I am unaware of where they did this work. My recollection is that this claim appeared around the same time that they were experiencing failures on several of their projects." (R4, tab 45 at 1)

27. A new CO, Anna R. DeLozier, addressed NAC's claim on 21 June 2011 in response to a 26 May 2011 letter from NAC. She stated that the issues "included in your letter were previously addressed in the Final Decision issued by Contracting Officer Lynn E. Warner dated 12 May 2010. Accordingly, no additional review or response to your correspondence is necessary or appropriate." (R4, tab 47)

28. NAC filed a notice of appeal from the deemed denial of its claim for $76,601 on 29 August 2011 and the appeal was docketed as ASBCA No. 57751. Following submission of the Rule 4 file and the pleadings, the government moved for summary judgment based upon TO No. 0096.

DECISION

The government's motion for summary judgment argues appellant knowingly waived its rights to pursue the subject claim by executing TO No. 0096, the "Bilateral Settlement Agreement" on 20 April 2011 (gov't mot. at 1). The government describes the agreement as both a release and an accord and satisfaction of all appellant's "claims and all potential claims." The crux of the government's argument is that because the language of the agreement is clear and unambiguous and RCO No. 2 was either an actual claim or a potential claim in April 2011 appellant's claims in RCO No. 2 are now barred. (Gov't mot. at 5, 6) Specifically, the government argues that the plain language of TO No. 0096 is clear and it bars "all claims and all potential claims" arising from appellant's work under the contract. It goes on to argue that the CO advised appellant that RCO No. 2 would be barred by TO No. 0096 "in telephone and email communications immediately preceding its execution." (Gov't mot. at 5)

In response, appellant argues that there is a genuine issue of material fact as to whether there was a meeting of the minds between the parties regarding the scope of TO No. 0096 (app. resp. at 4). Appellant points to the circumstances surrounding the execution of TO No. 0096 arguing that the record reflects there are genuine issues of fact whether there was a meeting of the minds between the parties related to RCO No. 2. In addition, appellant argues that the government should be estopped from relying on an accord and satisfaction defense because it repeatedly assured NAC that it was still considering RCO No. 2 and this material misrepresentation induced appellant to sign the settlement agreement (app. resp. at 9, 10).

Summary judgment is properly granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987). As moving party, the government has the burden of proving that there are no genuine issues of material fact and any doubt about factual issues is to be resolved in appellant's favor. *DTC Engineers & Constructors, LLC*, ASBCA No. 57614, 12-1 BCA ¶ 34,967 at 171,898-99. The Board's task here is not to resolve factual issues, but to determine whether disputes of material fact exist. *Advanced Business Concepts, Inc.*, ASBCA No. 55002, 06-1 BCA ¶ 33,271 at 164,893.

The government's motion relies upon the plain language of the modification, and refers to TO No. 0096 as both an accord and satisfaction and a release, using the terms interchangeably (gov't mot. at 5-8). Accord and satisfaction has been defined as:

> [T]he discharging of a contract or cause of action by an agreement of the parties to give and accept something in settlement of the claim or demand of the one against the

> other, and by performing such agreement; the "accord" being the agreement, and the "satisfaction" its execution or performance.

Southern Defense Systems, Inc., ASBCA Nos. 54045, 54528, 07-1 BCA ¶ 33,536 at 166,135 (citing *Optimum Designs, Inc.*, ASBCA No. 16986, 74-1 BCA ¶ 10,622 at 50,395). A release is a contract whereby a party abandons a claim or relinquishes a right that could be asserted against another. Although release and accord and satisfaction are separate contract defenses, an agreement may constitute both an accord and satisfaction and a release, and that is the case here. *Holland v. United States*, 621 F.3d 1366, 1377 (Fed. Cir. 2010), *cert. denied*, 132 S. Ct. 365 (2011).

The elements of proof that the government must prove to find an accord and satisfaction are: (1) proper subject matter; (2) competent parties; (3) a meeting of the minds of the parties; and (4) consideration. *DTC Engineers*, 12-1 BCA ¶ 34,967 at 171,898-99 (citing *Brock & Blevins Co. v. United States*, 343 F.2d 951, 955 (Ct. Cl. 1965)). The only element at issue here is whether there was a meeting of minds; whether the parties intended execution of TO No. 0096 to discharge the RCO No. 2 claims. The task order was entitled a "Bilateral Settlement Agreement," it used the term "accord and satisfaction," it explicitly conditioned discharge of "claims and all potential claims" on the payment of an agreed-upon amount, and it was signed by both parties (SOF ¶ 17). The RCO No. 2 claims arise out of work under TO No. 0073. However, the claims under RCO No. 2 are not explicitly addressed by any of the 29 July 2010 claim letters specifically referenced in TO No. 0096 (SOF ¶ 12). As a result, we read the government's position to be that the plain language of the modification referring to "all claims and potential claims" establishes a meeting of the minds between the parties that the claims under RCO No. 2 were covered within the agreement establishing an accord and satisfaction and released by the agreement.

The scope of TO No. 0096 is a question of contract interpretation and "[l]egal questions of contract interpretation are amenable to summary resolution, unless there is an ambiguity that requires the weighing of extrinsic evidence." *Dixie Construction* Co., ASBCA No. 56880, 10-1 BCA ¶ 34,422 at 169,918. However, extrinsic evidence may only be considered if there is such an ambiguity. *Dixie Construction* (citing *Coast Federal Bank, FSB v. United States*, 323 F.3d 1035, 1040 (Fed. Cir. 2003) (en banc)). We find the language of the agreement referring to "all claims and all potential claims" to be unambiguous and therefore will not resort to extrinsic evidence to interpret the agreement to determine if there was a meeting of the minds regarding RCO No. 2. We conclude a plain reading of the language of the agreement evidences there was a meeting

of the minds between the parties forming an accord and satisfaction and a release that bar appellant's RCO NO 2 claim.[2]

Misrepresentation

However, as appellant correctly argues, the binding effect of an accord and satisfaction or release may be voided if "a party's manifestation or assent was induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient was justified in relying." *Tzell Airtrak Travel Group Corp.*, ASBCA No. 57313, 11-2 BCA ¶ 34,845 at 171,409 (citing RESTATEMENT (SECOND) OF CONTRACTS § 164 (1981)). In order for appellant to prevail it must establish that the government made an erroneous representation of material fact that appellant honestly and reasonably relied on to its detriment. *T. Brown Constructors, Inc. v. Pena*, 132 F.3d 724, 729 (Fed. Cir. 1997). Appellant argues the government should be estopped from raising the defense of accord and satisfaction because the government materially misrepresented to appellant that it was continuing to process RCO No. 2 in order to induce appellant to sign TO No. 0096 (app. resp. at 9). Appellant, in support of its argument, asserts that the facts establish that the government made numerous representations to appellant leading up to execution of the settlement agreement that it was still considering RCO No. 2. Appellant points out that in response to reviewing the draft agreement it specifically asked about the status of RCO No. 2, as it had a number of times previously, stating "Do you have any information regarding the status of this request? Despite a number of inquiries over the past several months regarding this issue I never received a response..." (SOF ¶ 18). The CO responded that RCO No. 2 had been addressed in her final decision dated 12 May 2010 which "specifically rejects NAC's proposal for over-excavation and directs the Contractor to proceed with the lime treatment" and "I consider all issues resolved" (SOF ¶ 18). Appellant submitted a sworn affidavit in support of its response which states that based upon its review of the language of TO No. 0096 and its contemporaneous communications with the contracting officer and Mr. Winslow (the assigned contract specialist) appellant reasonably believed the government was still considering RCO No. 2 (SOF ¶ 20). The government counters that nothing in the record supports this conclusion (gov't reply at 16-17).

Based upon the record and drawing all reasonable inferences in favor of the appellant, we fail to find any evidence in the record that reasonably supports appellant's conclusion that the government was still considering RCO No. 2 and, as a result, induced appellant to execute the settlement agreement. Prior to executing the settlement agreement, appellant specifically inquired about the status of RCO No. 2 based upon its

[2] It is not necessary for purposes of ruling on this motion for us to address whether RCO No. 2 was a claim or a potential claim when filed or whether it was included within the scope of the COFD of 12 May 2010.

review of the draft agreement and the contracting officer's communication in response unambiguously stated the government was no longer considering the claim because it had been disposed of by a prior COFD and that she considered "... all issues resolved" (SOF ¶ 18). We cannot conclude anything in the government's response would reasonably lead appellant to conclude the government was still considering its claim. In addition, the language of the settlement agreement unambiguously stated it settled "all claims and all potential claims arising from NAC Construction's work under the contract..." and RCO No. 2 was either a claim or potential claim at the time of execution of TO No. 0096. Armed with this information, appellant executed the settlement agreement without reserving any claims from its coverage. Therefore, based upon the record before us, we cannot conclude there is a genuine issue of a material fact whether appellant's execution of the agreement was induced by misrepresentations of the government.

CONCLUSION

For the reasons set out above, the government's motion for summary judgment is granted. The appeal is denied.

Dated: 4 February 2013

JOHN J. THRASHER
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. 57751, Appeal of Colorado River Materials, Inc. d/b/a NAC Construction, rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals