

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -)
)
Sonabend Company) ASBCA No. 63359
)
Under Contract No. M00681-18-D-0009)

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OPINION BY ADMINISTRATIVE JUDGE MCLISH
ON THE GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

The government moves for summary judgment on Sonabend Company's claim for an equitable price adjustment in the amount of \$818,716.47 to a contract with the United States Marine Corps. The government contends that the claims were released or are barred as a result of an accord and satisfaction. Because there are disputed issues of material fact, we deny the motion.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

We find the following facts to be material, undisputed for purposes of the motion (except as noted), and sufficient to resolve the government's motion.

The RFQ and Contract

On July 24, 2018, the Regional Contracting Office, Marine Corps Installation West-Marine Corps Base, United States Marine Corps (USMC) issued a request for quotation (RFQ) for a contract to provide uniform tailoring services for USMC personnel stationed at the base. The contract would be a commercial-item, requirements contract with firm-fixed priced line items. Orders would be placed via task order. The Contract would have a five-month base period and two twelve-month option periods. (Gov't supp. reply, statement of undisputed material facts (GSUMF))

¶ 1; app. supp. statement of genuine issues of material fact and additional material facts (ASGIMF) ¶ 1)

Among the contract line items (CLINs) were 0001AD-2001AD and 0002AD-2002AD, which called for a “second fitting” of uniforms for Regular and Reserve Recruits in the Recruit Training Regiment (RTR Recruits) (R4, tab 5 at 59¹, 76, 94 (CLINs 0001AD, 1001AD and 2001AD for Regular Recruits); *id.* at 61, 79, 96 (CLINs 0002AD, 1002AD, 2002AD for Reserve Recruits); GSUMF ¶ 2; ASGIMF ¶ 2). The second fitting would occur approximately six weeks after the RTR Recruits had received their first fitting (R4, tab 5 at 133; GSUMF ¶ 4; ASGIMF ¶ 4). Quoters were required to develop total and unit prices based on mandatory pricing sheets attached to the RFQ, which included the USMC’s annual estimate of the type and number of alterations for each line item, including the second fitting for RTR Recruits (R4, tab 5 at 59, 61, 76, 79, 94, 96; GSUMF ¶¶ 3, 5; ASGIMF ¶¶ 3, 5).

Sonabend submitted a bid for the contract. In developing its bid, Sonabend relied upon the RFQ’s mandatory pricing sheets and the USMC’s annual estimates for the type and number of alterations for the second fitting for RTR Recruits (Declaration of Zac Shira (Shira Decl.) at ¶ 5; ASGIMF ¶ A1; gov’t resp. to app. statement of facts (GRASF) ¶ A1). The USMC accepted Sonabend’s quotation and awarded Sonabend Contract No. M00681-18-D-0009 (R4, tab 5 at 54; GSUMF ¶ 6; ASGIMF ¶ 6). The Contract provided for unit prices of \$23.36 and \$23.31 for the second fitting alterations for regular recruits (CLINs 0001AD-2001AD) and reserve recruits (CLINs 0002AD-2002AD), respectively (R4, tab 5 at 59, 61, 76, 79, 94, 96; GSUMF ¶ 6; ASGIMF ¶ 6).

The USMC exercised the Contract’s two option periods (Shira Decl. ¶ 8). The parties then agreed to extend the contract by an additional twelve-month period, adding new CLINs 3001AD and 3002AD for the second fitting alterations for the RTR Recruits at the same unit price as the original contract (GSUMF ¶ 7; ASGIMF ¶ 8).

Sonabend’s REA #1

Sonabend submitted a Request for Equitable Adjustment (REA), dated July 27, 2021 (“REA #1”) (app. supp. R4, tab 2 at S11-14²; ASGIMF ¶ A10; GRASF ¶ A10). Arguing that the RFQ’s pricing sheets had severely underestimated alteration quantities for second fittings, Sonabend requested a retroactive adjustment to the unit

¹ The government numbered its pages in its Rule 4 submission with leading zeros, which we omit here.

² Sonabend numbered its pages in its Rule 4 supplement S000001-S000185. We omit the zeros from our citations.

prices for the second fitting alterations completed on the task orders through July 27, 2021, the date of the request (app. supp. R4, tab 2 at S11-14; ASGIMF ¶ A11; GRASF ¶ A11).

In a memorandum accompanying REA #1, Sonabend detailed “[its] position as to why a price adjustment is justified for the RTR Recruits (Regular and Reserve) 2nd Fit and what Sonabend proposes the price should have been and what the new price moving forward should be” (app. supp. R4, tab 2 at S11; ASGIMF ¶¶ A11, A67; GRASF ¶¶ A11, A67). REA #1 argued that the correct unit prices to be applied should be \$42.55 and \$42.89 for regular and reserve recruits, respectively, instead of \$23.36 and \$23.31 (app. supp. R4 tab 2 at S11; ASGIMF ¶ A68; GRASF ¶ A68). Using the revised unit pricing, Sonabend requested “payment for the actual work done” from September 24, 2018 (the Contract’s effective date) through July 27, 2021 (the date of REA #1) of \$695,720.70, noting that the amounts owed “are dynamic and will continue to increase on a weekly basis through the length of [the Contract]” (app. supp. R4, tab 2 at S12-14; ASGIMF ¶ A69; GRASF ¶ A69).

In an email to the government’s contracting officer and contract specialist, Sonabend’s manger Zac Shira explained that “[w]hat we are establishing in the REA [#1] is a new SLIN [sub-CLIN] price for 2nd fit for RTR. Once that is agreed upon, it will not only determine what we are owed for past 2nd fits, it will determine the price going forward for future 2nd fits” (app. supp. R4, tab 13 at S76; ASGIMF ¶ A70; GRASF ¶ A70). In another email to the contracting officer and contract specialist, Mr. Shira stated “[e]ssentially we have submitted that we are owed \$19.19 for each Regular Recruit fitted under [CLINs] 0001AD-3001AD and \$19.58 for each Reserve Recruit fitted under [CLINs] 0002AD-3002AD. Thus, at some point we will create 4 SLINs. 2 SLINs will have a PoP [period of performance] from 9/24/18 through an agreed upon ending date and 2 SLINs reflecting the new price will have a PoP starting the next day” (app. supp. R4, tab 13 at S74-75; ASGIMF ¶ A71; GRASF ¶ A71.).

On September 10, 2021, Sonabend’s principals, USMC contract specialist Carolyn Lynch and a counselor from the Procurement Technical Assistance Center (“PTAC”) held a conference call to discuss REA #1 and how best to approach the situation (app. supp. R4, tab 4 at S27; Shira Decl. ¶ 14; ASGIMF ¶ A13; GRASF ¶ A13). During the call, Ms. Lynch observed that it would be difficult to establish a retroactive total cost adjustment because second fittings were occurring every week and thus any requested amount would need constant readjustment (app. supp. R4, tab 4 at S27; Shira Decl. ¶ 14; ASGIMF ¶ A14; GRASF ¶ A14). She suggested that Sonabend focus on establishing the appropriate unit prices moving forward. Then, once those prices were agreed to and CLINs 3001AD and 3002AD were modified, Sonabend could ask for a retroactive adjustment going back from the date the new pricing was established. (App. supp. R4, tab 4 at S27; Shira Decl. ¶ 14; ASGIMF

¶ A15; GRASF ¶ A15).

Based on this discussion, Sonabend withdrew REA #1 on September 10, 2021 (ASGIMF ¶ A16; GRASF ¶ A16).

Sonabend's REA #2

Sonabend submitted a second REA dated October 4, 2021 (REA #2). As with REA #1, REA #2 requested an adjustment to the unit prices for second fitting alterations for RTR Recruits on the ground that they were significantly underpriced due to the USMC's erroneous underestimation of the number of alterations required. REA #2 requested that the unit prices be increased, on a going forward basis, from \$23.36 to \$43.20 for Regular Recruits on CLIN 3001AD and from \$23.31 to \$43.44 for Reserve Recruits on CLIN 3002AD. (App. supp. R4, tab 3 at S15-17; Shira Decl. ¶ 16; ASGIMF ¶¶ A17-19; GRASF ¶¶ A17-19)

Sonabend maintains that REA #2 did not include a request for a retroactive pay adjustment or a cumulative lump sum payment. The government notes, however, that the supporting tables in REA #2 included dollar amounts dating back to the beginning of the contract in 2018. (ASGIMF ¶ A20; GRASF ¶ A20)

Sonabend and the contracting officer exchanged a series of emails regarding REA #2. In response to questions from the contracting officer regarding the intent behind REA #2, Sonabend explained that contract specialist Lynch:

mentioned that it would be difficult to request a retroactive total cost because 2nd fittings occur every week and thus any requested amount would need to be adjusted and updated weekly. Carolyn suggested that we focus on establishing the appropriate 2nd fit unit prices moving forward. Then, once those prices are agreed to and the subclins are modified, we will have a stop/start date we can use in the event we decide to ask for a retroactive adjustment.

(App. supp. R4, tab 4 at S26-27; Shira Decl. ¶ 19; ASGIMF ¶ A23; GRASF ¶ A23) In a subsequent email, Mr. Shira explained that:

[O]ur intent is to get the 2nd fit prices adjusted immediately. Our current situation continues to be untenable. We are asking to modify the price for CLIN 3001 AD from \$23.36 to \$43.20, and the price for CLIN 3002AD from \$23.31 to \$43.44. The costs

associated with that are \$19.84 and \$20.13, respectively, per recruit, multiplied by the unknown quantity of recruits which remain to be seen for the duration of the contract.

(App. supp. R4, tab 4 at S26; Shira Decl. ¶ 22; ASGIMF ¶ A25; GRASF ¶ A25)

In another email, Mr. Shira also confirmed that REA #2 “is for the current task orders” (R4, tab 12 at 310; ASGIMF ¶ A75; GRASF ¶ A75). The then-current task orders were Task Orders 229 and 233. The USMC had issued twelve previous task orders under the Contract: M0068118F0304 (“304”), M0068118F0071 (“071”), M0068119F0085 (“085”), M0068120F0087 (“087A”), M0068121F0076 (“076”), M0068121F0178 (“178”), M0068118F0308 (“308”), M0068119F0087 (“087B”), M0068119F0064 (“064”), M0068120F0090 (“090”), M0068121F0081 (“081”), and M0068121F0180 (“180”). (App. supp. R4, tab 2 at S47; ASGIMF ¶ A77; GRASF ¶ A77)

Communications Prior to Contracting Officer’s Final Decision on REA #2

The contracting officer issued her final decision on REA # 2 on December 21, 2021 (R4, tab 13 at 334-338; GSUMF ¶ 12; ASGIMF ¶ 14). As discussed in greater detail below, the decision agreed with Sonabend’s claim that the USMC’s estimates for the second fittings for both Regular and Reserve Recruits had been erroneous and agreed with Sonabend’s proposed revised unit prices for the second fittings (app. supp. R4, Tab 7 at S36-37; ASGIMF ¶¶ A43-44; GRASF ¶¶ A43-44).

Before the final decision on REA #2 was issued, the parties discussed modifications to Task Orders 229 and 233 to effectuate the upcoming final decision. The contracting officer had emailed drafts of the Modifications to Sonabend on December 9, 2021, along with a draft of her final decision on REA #2. The contracting officer’s cover email summarized her final decision:

1. The price adjustment increase for CLINs 3001AD and 3002AD will be effective from Dec 2021 through May 2022.
2. Funding for the difference of the current pricing and the new adjusted pricing will be provided after 31 May 2022 when the final number of jobs for CLINS 3001AD and 3002AD are finalized/calculated.

(App. supp. R4, Tab 5 at S29-30; Shira Decl. ¶ 24) Each of the two draft modifications accompanying the draft final decision included this release provision:

In consideration of the modification agreed to herein as complete equitable adjustments for the Contractor's Request for Unit Price adjustment, the Contractor hereby releases the Government from any and all liabilities under this contact for further equitable adjustments attributable to such facts or circumstances giving rise to the price adjustment (except for: N/A).

(App. supp. R4, tab 8 at S39, S43; GSUMF ¶ 9; ASGIMF ¶ 10)

Mr. Shira claims that he understood the draft final decision to mean that the contracting officer: (1) agreed with Sonabend's contention that, as a result of the USMC's erroneous underestimations, the unit pricing for the second fitting alterations was underpriced; (2) agreed to increased, moving-forward unit pricing for the second fitting alterations on Task Order 229 for CLIN 3001AD and Task Order 233 for CLIN 3002AD through the end of the Contract; and (3) determined that Sonabend would be paid the difference between the old and new unit prices for the work performed under these task orders after May 30, 2022 (Shira Decl. ¶ 25 and ex. 1 at 2-3).

On December 14, 2021, Mr. Shira emailed the contracting officer regarding the release language contained in the two draft contract modifications and requested a clarification, stating in part:

As you know, Sonabend's intent was to first establish appropriate 2nd fit unit prices moving forward and then, once those prices are established, to explore and possibly submit an REA for a retroactive adjustment. Please confirm with legal that the language noted above does not prohibit Sonabend from submitting an REA for the period prior to Dec 2021. Furthermore, we request that the following sentence be added to the end of the quoted language; "Notwithstanding the foregoing, the Contractor does not release the Government from any liability under this contract for further equitable adjustments attributable to the period prior to Dec 2021."

(R4, tab 13 at 356-57; Shira Decl. ¶ 28; GSUMF ¶ 10; ASGIMF ¶ 11) The contracting officer responded to this request:

I would not be able to change the wording to the release associate [sic] to the task order. Signing the modification would be a mutual agreement for the costs associated from Dec to the end of the term of the task order CLIN or when

the units have run out whichever comes first. If you do not wish to proceed with this, you will need to submit a claim with the total sum of the amount you are wanted [sic] to claim. Please note that in accordance with FAR 33.207(a) please ensure that you provide a certification when submitting a priced claim exceeding \$100,000.

(R4, tab 13 at 355; GSUMF ¶ 11; ASGIMF ¶ 12)

Mr. Shira asserts that he understood the contracting officer's statement that she would not be able to change the wording of the release language to mean that the release language applied only to the prospective unit pricing for the second fitting alterations on Task Order 229 for CLIN 3001AD and Task Order 233 for CLIN 3002AD through the end of the Contract (Shira Decl. ¶ 30). He claims to have further understood that, because Sonabend's planned retroactive pay claim was outside of the scope of the contract modifications and release language, there was no need to include in the release language the exception requested by Sonabend. He also asserts that he understood that the contracting officer knew and recognized that Sonabend had an additional claim for the work performed on the second fitting alterations from the outset of the Contract through the date of the contract modifications. (Shira Decl. ¶¶ 30-34)

In a telephone conversation with the contracting officer on December 14, 2021, Sonabend manager Tomer Sachar requested that the December 2021 effective date for the new unit pricing be revised to July 24, 2021, the effective date of Task Orders 229 and 233. Mr. Sachar explained that using the July 24, 2021, date would simplify the administrative tasks and burdens in implementing the going-forward price adjustment on Task Orders 229 and 233 and in Sonabend making, and the USMC evaluating, Sonabend's forthcoming retroactive pay claim for the second fitting alterations performed on the prior Task Orders 304, 071, 085, 087A, 076, 178, 308, 087B, 064, 090, 081, and 180. The contracting officer explained that revising the effective date of the Modifications to July 24, 2021, was not permissible because REA #2 did not request a retroactive pay adjustment. The contracting officer said, however, that she could make October 5, 2021, the effective date for increased unit pricing, because that was the date Sonabend submitted REA #2. Ultimately, that is what the parties agreed to. During their conversation, the contracting officer did not express any concerns or surprise when Mr. Sachar stated Sonabend's intent to pursue a two-step adjustment, nor did she object to Sonabend submitting a future retroactive pay claim. (Declaration of Tomer Sachar ¶¶ 6-11)

As noted, the contracting officer then issued her final decision on REA # 2 on December 21, 2021 (R4, tab 13 at 334-38; GSUMF ¶ 12; ASGIMF ¶ 14). The decision described Sonabend's two main assertions and provided the contracting officer's response:

Assertion #1: The government underestimated the number of alterations required to accomplish RTR 2nd fittings (Regular and Reserve) and as a result of these misleading estimates the Unit Prices for SLINs 0001AD-3001AD and 0002AD-3002AD are significantly underpriced.

Contracting Officer Response: I concur the Government underestimated the number of alterations required to accomplish 2nd fittings. Based on examination of the numbers provided at solicitation/award and confirmation of the actual alterations required during the time frame from September 24, 2018, through July 19, 2021, the Government underestimated the amount of alterations required during the 2nd fitting for Regular and Reserve Recruits. The increased length in time from a two-week fitting interval to a six-week fitting interval generated a larger amount of alterations due to the physical body composition changes of the recruits over that extended interval.

(App. supp. R4, Tab 7 at S36; ASGIMF ¶ A43; GRASF ¶ A43)

As to Sonabend's second assertion, the contracting officer wrote:

Assertion #2: Per a clarifying email dated December 6, 2021, the price adjustments should be made to the active Task Orders utilizing SubCLINs 3001AD and 3002AD for the 2nd fitting of the Regular and Reserve Recruits.

Contracting Officer Response: I concur. After reviewing the original estimation for 2nd fittings and the Government's actual numbers, the unit prices of \$43.20 and \$43.44 are commensurate with the schedule change and the required alterations needed during the 2nd fitting.

(App. supp. R4, tab 7 at S37; ASGIMF ¶ A44; GRASF ¶ A44) The final decision concluded:

Based on the information provided above, Sonabend's claim for a unit price increase identified in Table 1 for both the Regular and Reserve Recruits for the 2nd fitting is accepted for CLIN 3001AD and CLIN 3002AD on Task Orders [229 and 233]. This unit price increase will be effective starting October 5, 2021, through May 30, 2022. The total amount as identified in Table 2, will be incorporated into the final pay adjustment, via a funded modification, utilizing the difference in the new unit prices that will be made after May 30, 2022, or when all quantities are exhausted from the CLINS 3001AD and 3002AD. SubCLINs 3001AE and 3002AE are hereby incorporated by modification into the respective Task Orders identified in in this paragraph.

(App. supp. R4, tab 7 at 37; ASGIMF ¶ A45; GRASF ¶ A45)

Along with her final decision the contracting officer included revised draft modifications for Task Orders 229 and 233. The Modifications stated that their purpose was to:

1. Incorporate the Contracting Officers Final Decision [COFD #1] in response to Sonabend's [REA #2].
2. Incorporate SubCLIN [3001AE or 3002AE] for the pricing adjustment at the end of the Task Order performance.

(R4, tab 13 at 360-61; ASGIMF ¶ A53; GRASF ¶ A53) Each of the proposed modifications also contained, unchanged, the release language that was included in the original drafts provided to Sonabend on December 9, 2021 (R4, tab 13 at 360-61).

On December 22, 2021, Mr. Shira executed the two modifications on Sonabend's behalf (*id.*). Mr. Shira claims that he interpreted the proposed modifications as modifying only Task Orders 229 (CLIN 3001AD) and 233 (CLIN 3002AD) (Shira Decl. ¶ 39).

REA #3

On April 15, 2022, Sonabend submitted REA #3, stating:

Now that reasonable RTR 2nd fit Unit Prices have been established and agreed to, Sonabend requests [Agency] reimburse the difference between the original Unit Prices and the agreed to reasonable Unit Prices (difference equals \$19.84 for each Regular Recruit and \$20.13 for each Reserve Recruit) retroactively for the following Task Orders, in the following amounts:

(R4, tab 4 at 6-9; GSUMF ¶ 15; ASGIMF ¶ 15) REA #3 then identifies 14 task orders from the beginning of performance on the Contract, including Task Order 229 and Task Order 233, limited to work prior to October 5, 2021, for which it claims it is owed a total amount of \$818,716.47 (R4, tab 4 at 8; ASGIMF ¶ A61; GRASF ¶ A61). REA #3 requested a retroactive price adjustment for the second fitting uniform alterations performed pursuant to the fourteen task orders from September 24, 2018 (the beginning of performance under the Contract) to October 4, 2021 (the day before the effective date of the increased pricing in the Modifications) (R4, tab 4 at 8; ASGIMF ¶ A94; GRASF ¶ A94).

Contracting Officer's Decision on REA #3

On April 28, 2022, Contracting Officer Evan C. Ewing issued a final decision denying REA #3 on the ground that Sonabend's request that the price adjustment be made retroactive was barred by the releases contained in the Modifications (R4, tab 1 at 2; GSUMF ¶ 16; ASGIMF ¶ 16).

Sonabend timely filed this appeal. The government moved for summary judgment and requested a stay of discovery. Sonabend opposed the government's request for a discovery stay and moved to deny or defer the summary judgment motion until discovery could be taken. The Board denied the government's motion for a stay and directed the parties to conduct discovery limited to the issues raised in the motion for summary judgment and to then file supplemental briefs. The parties conducted limited discovery and filed supplemental briefs and supporting material.

DECISION

I. Standard of Review for Summary Judgment

In deciding summary judgment motions, the Board looks to Rule 56 of the Federal Rules of Civil Procedure for guidance. Board Rule 7(c)(2); *Fluor Intercontinental, Inc.*, ASBCA Nos. 62550, 62672, 22-1 BCA ¶ 38,105 at 185,099. Summary judgment is appropriate when the moving party demonstrates that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Crown Operations Int'l, Ltd. v. Solutia Inc.*, 289 F.3d

1367, 1375 (Fed. Cir. 2002). The applicable substantive law identifies which facts are material and might affect the outcome of the appeal. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

Once the moving party has satisfied its initial burden, the opposing party “‘must set forth specific facts showing that there is a genuine issue for trial.’” *Id.* (quoting *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253 (1968)). Our task at this stage is not “‘to weigh the evidence and determine the truth of the matter,’ but rather to ascertain whether material facts are disputed and whether there exists any genuine issue for trial.” *Holmes & Narver Constructors, Inc.*, ASBCA Nos. 52429, 52551, 02-1 BCA ¶ 31,849 at 157,393 (quoting *Anderson*, 477 U.S. at 249). A dispute is genuine only if, on the entirety of the record, a reasonable factfinder could resolve a factual matter in favor of the nonmovant. *Anderson*, 477 U.S. at 248. The evidence must be viewed in the light most favorable to the party opposing the motion. *Crown Operations*, 289 F.3d at 1375.

II. **Disputed Issues of Fact Preclude Summary Judgment in the Government’s Favor on its Affirmative Defenses**

The government seeks summary judgment on its affirmative defenses of release and accord and satisfaction. The government bears the burden of proof on these defenses. *Optex Sys., Inc.*, ASBCA No. 58220, 14-1 BCA ¶ 35,801 at 175,097. When the movant bears the ultimate burden of proof, “the movant must make a stronger claim to summary judgment by introducing supporting evidence that would conclusively establish movant’s right to a judgment after trial should nonmovant fail to rebut the evidence.” *Enzo Biochem, Inc. v. Applera Corp.*, 599 F.3d 1325, 1337 (Fed. Cir. 2010) (quoting 11 James Wm. Moore, *Moore’s Federal Practice* § 56.13[1] (3d ed. 2009)).

A. **The Government’s Release Defense**

The government argues that the releases contained in the Modifications are unambiguous and should be enforced as written without resort to extrinsic evidence of the parties’ intent. Sonabend contends that there are disputed issues of material fact that preclude summary judgment.

“A release is a contract whereby a party abandons a claim or relinquishes a right that could be asserted against another.” *Holland v. United States*, 621 F.3d 1366, 1377 (Fed. Cir. 2010) (quoting *Koules v. Euro-Am. Arbitrage, Inc.*, 689 N.E.2d 411, 414 (Ill. App. Ct. 1998)). Being contractual in nature, a release is to be interpreted in the same manner as any other contract term or provision. *Sungjee Constr. Co.*, ASBCA Nos. 62002, 62170, 23-1 BCA ¶ 38,400 at 186,598; *Korte-Fusco Joint Venture*, ASBCA No. 59767, 15-1 BCA ¶ 36,158 at 176,455. “[T]he language of a

contract must be given that meaning that would be derived from the contract by a reasonable intelligent person acquainted with the contemporaneous circumstances.” *Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965). Our primary purpose when resolving questions of contract interpretation is “to ascertain the intention of the contracting parties....” *Cascade Designs, Inc.*, ASBCA No. 62378, 22-1 BCA ¶ 38,068 at 184,844 (quoting *Southbridge Assocs., LLC*, ASBCA No. 54628, 05-1 BCA ¶ 32,855 at 162,799). As required by “[e]lementary principles of contract interpretation,” we read the contract “as a harmonious whole,” giving effect to “all provisions” with the goal of rendering none “useless, inexplicable, inoperative, void, insignificant, meaningless or superfluous.” *ECI Const., Inc.*, ASBCA No. 54344, 05-1 BCA ¶ 32,857 at 162,807 (quoting *Hol-Gar Mfg. Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965))

Unambiguous contract language is often well-suited for summary judgment. *Walsh Group Ventures*, ASBCA No. 61222, 20-1 BCA ¶ 37,615 at 182,584. However, “[e]ven where a release is complete on its face and unqualified, as is the case here, we will review the circumstances surrounding its execution in order to effect the true intention of the parties.” *Sedona Contracting, Inc.*, ASBCA No. 52093, 99-2 BCA ¶ 30,466 at 150,513. “[A] cold reading of the document is not the end of the matter.” *Hunt Bldg. Corp.*, ASBCA No. 50083, 97-1 BCA ¶ 28,807 at 143,700 (quoting *Able Prods. Co.*, ASBCA No. 24221, 80-2 BCA ¶ 14,733 at 72,692). Releases are liberally construed and “the circumstances surrounding the signing of the release” will be reviewed to “effect the true intent of the parties.” *Id.* “The inquiry regarding releases should focus on the intent of the parties at the time the release is executed, and this intent should be sought from the whole and every part of the instrument.” *Optex*, 14-1 BCA ¶ 35,801 at 175,097 (quoting *Futuronics Corp.*, ASBCA No. 29324, 85-2 BCA ¶ 18,137 at 91,045).

The parties disagree as to the proper interpretation of the release language included in the Modifications for Task Orders 229 and 233. The government argues that, by releasing all claims “attributable to such facts or circumstances giving rise to the price adjustment,” Sonabend unambiguously released its claims for price adjustments not only to those two task orders but also for the other 12 task orders issued under the Contract. The government further contends that, as to Task Orders 229 and 233, the releases cover not only claims for the time periods addressed by the Modifications (October 5, 2021 to May 30, 2022), but also claims going back to the beginning of the Contract. Sonabend contends that the phrase “attributable to such facts or circumstances giving rise to the price adjustment” should be read narrowly so as to bar only claims specific to the task orders and time periods that were being addressed by the Modifications.

We conclude that the government has not made a sufficient showing that its interpretation reflects the parties’ intent to permit us to grant summary judgment.

The government's interpretation of the release language appears to be inconsistent with the fact that the government required Sonabend to agree to two releases, one for each of the task orders being re-priced. If the government's interpretation is correct – that the release language covers every task order under the contract – then only one release was necessary. If the release language is as broad as the government contends, the release in the modification to Task Order 229 would release potential claims not only on that task order but also claims on Task Order 233 and the other twelve task orders. Under the government's interpretation, therefore, one of the two releases appears to be superfluous.

We are to avoid interpretations that render portions of a contract superfluous. “An interpretation that gives meaning to all parts of the contract is to be preferred over one that leaves a portion of the contract useless, inexplicable, void, or superfluous.” *NVT Techs., Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004). Here, one way to give meaning to both releases is to construe them as Sonabend does, *i.e.*, as releasing only the claims relating to the particular task order containing the release. The government's inclusion of a release in both modifications suggests that the parties intended for Sonabend's claims as to the other twelve task orders to remain viable unless and until Sonabend agreed to releases on each of those task orders. Thus, the fact that the parties executed two releases rather than one tends to support Sonabend's narrower reading of the phrase “attributable to such facts or circumstances giving rise to the price adjustment”.

On the present record, therefore, we conclude that the release language on which the government relies is sufficiently ambiguous as to require examination of extrinsic evidence of the parties' intent. Sonabend has submitted affidavits stating that the company did not intend to release its claims as to any of its claims other than those addressed by the two Modifications and explaining why it understood that the government was in agreement with that view, despite having rejected Sonabend's request to modify the release language to clarify that intent. The contemporaneous email correspondence between the parties suggests that the contracting officer was aware of Sonabend's intent to submit a follow-on claim to apply the new prices retroactively to the already completed second fittings under all of the task orders, except for the post-October 5, 2021 period on Task Orders 229 and 233. Thus, taken in the light most favorable to Sonabend, the evidence in the present record as to the parties' communications surrounding the modifications is sufficient to raise a triable issue of fact as to the parties' intended scope of the two releases.

For its part, the government has not submitted any affidavits or other testimony describing the government's intent or explaining why it required two releases when, under its interpretation, one release would have sufficed. Instead, the government relies on the release language itself and argues that the parties' communications support its

interpretation. We hold that the evidence is inadequate to establish the parties' intent and that there are disputed issues of material fact that preclude summary judgment. See *Kolin Constr., Tourism, Indus. & Trading Co.*, ASBCA Nos. 56941, 57066, 11-1 BCA ¶ 34,670 at 170,798 (summary judgment denied where circumstances made scope of release ambiguous and evidence of the parties' intent would aid the Board in arriving at an appropriate interpretation).

B. The Government's Accord and Satisfaction Defense

The government also contends that it is entitled to summary judgment upon its defense of accord and satisfaction. An accord and satisfaction occurs "when some performance different from that which was claimed as due is rendered and such substituted performance is accepted by the claimant as full satisfaction of his claim." *Bell BCI Co. v. United States*, 570 F.3d 1337, 1340-41 (Fed. Cir. 2009) (quoting *Cnty. Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1581 (Fed. Cir. 1993)). "To prove accord and satisfaction, the government must show '(1) proper subject; (2) competent parties; (3) a meeting of the minds of the parties; and (4) consideration.'" *Bell BCI*, 570 F.3d at 1341 (quoting *O'Connor v. United States*, 308 F.3d 1233, 1240 (Fed. Cir. 2002)); *Pyrotechnic Specialties, Inc.*, ASBCA No. 57890 *et al.*, 17-1 BCA ¶ 36,696 at 178,703.

For the same reasons explained above regarding the government's release defense, we cannot find that the government has met its burden as to the accord and satisfaction defense. At a minimum, there is a dispute of material fact as to whether the parties intended the Modifications to preclude Sonabend's present claim, and thus whether the "meeting of the minds" element is satisfied here. As discussed above, the inclusion of separate releases in the two Modifications is seemingly inconsistent with the government's position. If there was a meeting of the minds that the release language covered all potential claims Sonabend might have on all of the task orders, then there would have been no reason to execute a second, redundant release. This, together with the evidence that Sonabend understood the releases as not precluding its price increase claim, and the absence of evidence clearly establishing that the government intended to preclude such a claim, generates a triable issue of fact sufficient to deny the government's motion for summary judgment.

In addition, the government has not established that Sonabend accepted "some performance different from that which was claimed as due." *Bell BCI*, 570 F.3d at 1340-41. The contracting officer appears to have found Sonabend's REA #2 to be entirely meritorious. She agreed that the government's estimates were erroneous and that those errors resulted in the unit pricing for the second fit alterations to be too low. She also agreed with Sonabend's calculation of the price adjustments to which it was entitled. The Modifications, therefore, do not appear to resolve any dispute between the parties as to what performance was due by the government. Instead, they appear to

correct the Contract to set forth the prices to which both parties agreed Sonabend was entitled. If so, the Modifications do not appear to constitute an accord and satisfaction.

In any event, these circumstances further call into question the parties' intent in agreeing to the Modifications. If the government agreed that the pricing for second fit alterations was wrong from the beginning of the Contract, there would seem to be no basis for it to correct the pricing for only a limited time period and demand that Sonabend accept admittedly inadequate prices for other time periods. Nor would there seem to be any basis for the government to require Sonabend to relinquish admittedly meritorious claims in exchange for the government's agreement to correct the pricing on only two out of 14 task orders and only as to a limited time period.

We have considered the government's remaining arguments in favor of summary judgment and are not persuaded by them.

CONCLUSION

The government has not demonstrated that there are no disputed issues of material fact and that it is entitled to judgment as a matter of law on its affirmative defenses of release and accord and satisfaction. Accordingly, the motion is denied.

Dated: December 19, 2023



THOMAS P. MCLISH
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



MICHAEL N. O'CONNELL
Administrative Judge
Acting 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. 63359, Appeal of Sonabend Company, rendered in conformance with the Board's Charter.

Dated: December 19, 2023



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