ARMED SERVICES BOARD OF CONTRACT APPEALS

| | | |
|---|---|---|
| Appeal of - | ) | |
| | ) | |
| Sauer Incorporated | ) | ASBCA No. 62295 |
| | ) | |
| Under Contract No. N69450-09-D-1277 | ) | |

APPEARANCES FOR THE APPELLANT:

Lawrence M. Prosen, Esq.
Benjamin L. Williams, Esq.
Brian E. Doll, Esq.
Cozen O'Connor
Washington, DC

Wendy Klein Keane, Esq.
Cozen O'Connor
Philadelphia, PA

Michael Filbin, Esq.
Doug Mackin, Esq.
Cozen O'Connor
Boston, MA

APPEARANCES FOR THE GOVERNMENT:

Allison M. McDade, Esq.
Navy Chief Trial Attorney
David M. Ruddy, Esq.
Trial Attorney

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

This appeal involves a contract between the Navy and Sauer Incorporated (Sauer) for the rehabilitation of the Explosive Handling Wharf No. 2 at the Naval Submarine Base, Kings Bay, Georgia. The contract involves the design, repair, coating, construction, and inspection to repair and restore the cover and structure of the wharf.

The Navy requests partial summary judgment against Sauer's pass-through claim on behalf of its subcontractor, Tri-State Painting, LLC (TSI). The pass-through claim, in the amount of $8,965,299, represents a portion of Sauer's larger $21,662,027.35 certified claim against the government. The government argues that this pass-through claim is barred by the *Severin* doctrine, established in *Severin v.*

*United States*, 99 Ct. Cl. 435, 442 (Ct. Cl. 1943). The *Severin* doctrine limits Sauer's recovery to the extent that Sauer is actually liable to TSI for the claimed damages. In support of its argument, the government points to a separate lawsuit in the United States District Court for the Southern District of Georgia, where Sauer's surety was defending against claims made by TSI. Because the surety effectively stands in Sauer's place in the S.D. Georgia litigation, and has taken positions that contradict the basis of Sauer's current pass-through claim, the government asserts that Sauer cannot demonstrate the required liability under the *Severin* doctrine.

As an alternative basis for summary judgment, the government contends that the doctrine of judicial estoppel bars Sauer from taking a position in this appeal that is contrary to the position it advanced in the litigation between TSI and its surety. Because Sauer and its surety are represented by the same law firm and some of the same counsel, the Navy asserts that Sauer is judicially estopped from arguing a position contrary to its surety's stance in the S.D. Georgia matter.

For the reasons stated below, we deny the government's motion for partial summary judgment.

## STATEMENT OF FACTS FOR PURPOSES OF THE MOTION

### I. *The Contract*

On June 29, 2011, the Naval Facilities Engineering Command SE (government or Navy) issued Request for Proposal No. N69450-11-R-865740 for the rehabilitation of Explosives Handling Wharf No. 2 (EHW2) at Naval Submarine Base, Kings Bay, Georgia (R4, tabs 3.0, 3.1). On September 23, 2011, the government awarded Contract No. N69450-09-D-1277/Delivery Order No. 6 to Sauer in the amount of $28,126,400 for the project (R4, tab 5 at 711-13). The project involved removing existing paint on the entire cover structure and components, rehabilitating and refinishing the same surfaces, and removing and replacing the exterior panels and roof of the handling wharf. *Id*. at 715.

On September 23, 2011, Federal Insurance Company (Federal) issued a Miller Act payment bond on behalf of Sauer for $28,126,400 (gov't mot., ex. A at ¶¶ 2, 7, 10). On June 15, 2012, TSI and Sauer executed a subcontract for TSI to perform the blasting and painting work required on the project (the subcontract) (*id*. at ¶ 18). TSI alleged that it encountered unanticipated lead in the paint to be blasted and removed on the project, causing it to incur additional performance costs and delays (app. opp'n, ex. A at 13-15).

On September 20, 2013, the government issued a unilateral modification to Sauer's Contract recognizing the unanticipated lead as a differing site condition and providing partial compensation and additional performance time for Sauer and its subcontractors (R4, tab 7.12). TSI also alleged that it encountered other adverse and unanticipated impacts at the jobsite, as well as substantial delays to its work, which it claimed caused it to incur unanticipated additional performance costs (app. opp'n, ex. A at 25-32).

II. *TSI's Miller Act Case in the Southern District of Georgia*

Disputes arose between TSI and Sauer concerning the additional performance costs and delays encountered by TSI on the project. TSI timely asserted a claim for its additional performance costs and delays under Federal's payment bond pursuant to the provisions of the Miller Act, 40 U.S.C. § 3133(b)(3)(B), to recover on a payment bond (app. opp'n, ex. A at 32-33). On August 2, 2016, TSI filed a complaint against Federal in the United States District Court for the Southern District of Georgia (app. opp'n at 3, ex. A). Federal filed a counterclaim against TSI on claims asserted by Sauer, including back charges and damages incurred by Sauer on the project (the S.D. Georgia litigation) (gov't mot., ex. F).

The same law firm, including Sauer's current counsel, represented Federal Insurance Company in the Georgia litigation with TSI (gov't mot., ex. B at 30).

In the litigation, both parties filed cross-motions for summary judgment (gov't mot., exs. C, F). The main issue in the cross-motions was the scope of a bilateral change order in the contract between Sauer and TSI, known as Change Order No. 10. The bilateral change order stated that Sauer and TSI:

> Acknowledge[] and agree[] that the adjustment to the Subcontract Price, if any, and extension of the Subcontract Completion Date and Milestones, if any, include all schedule adjustments and direct and indirect costs of the change and all associated delay costs, overhead costs, general and administrative expenses, and profits, and that they constitute full and equitable adjustment for the change described herein and any associated delay, acceleration, rescheduling, disruption, impact and cumulative impact with other changes.

(Gov't mot. at 8, ex. I at 10)

Counsel for the surety contended that the change order was a full and equitable settlement for all of TSI's claims against Sauer related to the lead paint discovery. They emphasized that TSI did not reserve any rights to bring claims against Sauer or Federal in the change order and that TSI's acceptance of the payment associated with the change order constituted an accord and satisfaction, releasing Sauer from any further liability related to the lead paint issue. (Gov't mot. at 12-15)

In response, TSI argued that Change Order No. 10 does not represent an accord and satisfaction of its claims. TSI claimed there was no "meeting of the minds" because: (1) the signature on Change Order No.10 was a clerical error during ongoing negotiations; and (2) Sauer acknowledged the lack of agreement by continuing negotiations afterward. TSI further argued that Change Order No. 10 lacks consideration because it offered no additional compensation to TSI beyond what was already agreed upon in a previous change order, instead only seeking to modify the terms of payment to TSI's detriment. (App. opp'n at 10-12)

On May 10, 2022, the District Court ruled, denying summary judgment and holding that there is a genuine issue of material fact regarding whether there was mutual assent between the parties for the change order. *See United States for Use and Benefit of TSI Tri-State Painting, LLC v. Federal Insurance Co.*, No. 2:16-cv-00113, 2022 WL 1477441, at *6 (S.D. Ga. May 10, 2022) (hereinafter the S.D. Georgia matter, or *Federal*) ("[t]hese arguments both have merit and show a clear and lively dispute about a material fact: whether Change Order 10 was agreed to or not.") (gov't mot., ex. J at 18-19).

III. *Sauer's Certified Claim and Complaint in this Appeal*

On August 6, 2018, Sauer submitted a certified claim to the contracting officer (R4, tab 7.0). Sauer's certified claim includes requests for relief under the differing site conditions clause and a theory of constructive change from defective specifications relating to the discovery of lead paint, as well as compensation relating to the government's directive to proceed with work unrelated to the discovery of lead paint (R4, tab 7.0 at 848-60).*

Sauer's certified claim includes a pass-through claim on behalf of its subcontractor TSI in the amount of $8,965,299 (R4, tab 7.0 at 810-45). Sauer attached the cost certification and supporting documentation for TSI's claim against Sauer to Sauer's certified claim as exhibit 33 (R4, tab 7.33). By letter dated December 3, 2019,

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

Sauer filed a notice of appeal with the Board on a deemed denial basis, which was docketed as ASBCA No. 62295.

On January 6, 2020, Sauer filed its complaint in this appeal. Sauer's complaint includes requests for relief under the differing site conditions clause (compl. ¶¶ 83-93), a theory of constructive change, including from alleged defective specifications relating to the discovery of lead paint (compl. ¶¶ 72-82), acceleration due to the government's actions (compl. ¶¶ 94-102), delays (compl. ¶¶ 103-16), and subcontractor pass-through claims (compl. ¶¶ 117-23).

Specifically, Count 5 of the complaint is entitled "PASS-THROUGH CLAIMS." (compl. at 17). The complaint averred that "Sauer's Certified Claim included claims from many of Sauer's subcontractors" (compl. ¶ 119). The complaint further averred that "Sauer's Claim and demand for $21,662,027.35 includes those portions of the subcontractors' claims properly allocated to the Navy" (compl. ¶ 122). The Complaint averred that "Sauer will distribute the portions of the award to the subcontractors as is appropriate" (compl. ¶ 123).

IV. *Settlement of the S.D. Georgia Litigation*

On September 2, 2022, Sauer and TSI entered into a settlement agreement. In exchange for TSI dismissing with prejudice its lawsuit against Federal, Sauer agreed to pay TSI the amount of $7,850,000 and to take over and pursue TSI's claims against the government. The settlement agreement states, in relevant part:

> TSI has asserted and has outstanding [C]laims for which Sauer believes the Government is responsible. This Agreement is not intended to compromise and settle TSI's Claim as to amounts Sauer asserts are owed by the Government. Rather, by entering into this Agreement, Sauer is taking control of TSI's Claim through resolution with the Government and providing payment to TSI in advance, in exchange for Sauer's prosecution of TSI's Claim.

(App. sur-reply, ex. A at 1-2)

The settlement agreement further states that:

> Sauer shall not be obligated to make any additional payment or distribution of any nature to TSI unless it

> receives recovery from the Government on its CDA Claim/ASBCA Appeal.

(*Id*. at 2)
The settlement agreement states that Sauer will pursue TSI's claims in the ASBCA appeal:

> Sauer will vigorously pursue its CDA Claim/ASBCA Appeal, including those claims relating to TSI's work, and provide TSI via its counsel with regular updates as to the status of the CDA Claim/ASBCA Appeal.

(*Id*. at 3)

If Sauer recovers money from the government, it agrees to pay up to $1,150,000 of the proceeds to TSI:

> As a result of the payment specified in Paragraph 1, Sauer shall not be obligated to make any additional payment or distribution of any nature to TSI unless it receives recovery from the Government on its CDA Claim/ASBCA Appeal. Solely in that event, in addition to the payment schedule set forth in paragraph l, Sauer will also pay to TSI 11.5% of any recovery it receives on its CDA Claim/ASBCA Appeal, whether by settlement or otherwise, up to a maximum payment of $1,150,000.

(*Id*. at 2)

On September 7, 2022, pursuant to the settlement agreement, TSI and Federal dismissed with prejudice their claims and counterclaims asserted in the S.D. Georgia litigation (app. sur-reply, ex. B). Thereafter, Sauer proceeded to make payments according to the settlement agreement, including a payment as recent as July 1, 2024 (app. sur-reply, ex. C).

## DECISION

Our decision turns on the interpretation of the settlement agreement between TSI, Sauer, and the surety, which resolved TSI's claim against the Miller Act payment bond. The agreement's impact on the pass-through claim in this appeal depends on whether it also releases the prime contractor (Sauer) from underlying liability in a way that triggers the *Severin* doctrine.

The *Severin* doctrine, first articulated in *Severin v. United States*, 99 Ct. Cl. 435 (1943), cert. denied, 322 U.S. 733, 64 S. Ct. 1045, 88 L. Ed. 1567 (1944), prevents a prime contractor from recovering on behalf of a subcontractor unless the prime contractor has reimbursed, or is liable to reimburse, the subcontractor. As narrowly construed, the doctrine now applies only when the prime contractor is completely shielded from liability to the subcontractor by an "iron-clad" release or contract provision. *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1552 n.8 (Fed. Cir. 1983) (citing *Blount Bros. Const. Co. v. United States*, 346 F.2d 962, 965 (Ct. Cl. 1962); *Lockheed Martin Corp.*, ASBCA No. 53798, 03-2 BCA ¶ 32,279 at 159,708. The government bears the burden of proving such a release exists to invoke the *Severin* doctrine. *Metric Constructors, Inc. v. United States*, 314 F.3d 578, 581-82 (Fed. Cir. 2002).

I. *Whether the Settlement Agreement Preserves TSI's Pass-Through Claim*

To determine whether the *Severin* doctrine applies, we must determine whether the settlement agreement is structured to preserve the ability to file a pass-through claim and whether it establishes that Sauer remains conditionally liable to TSI for the damage allegedly caused by the government. *See W.G. Yates & Sons Constr. Co., v. Caldera*, 192 F.3d 987, 991-92 (Fed. Cir. 1999) (holding that conditional liability on the part of the prime contractor to the subcontractor based on future payment by the government to the prime contractor is "considered sufficient liability to avoid application of the *Severin* Doctrine.") (citing *Kentucky Bridge & Dam, Inc. v. United States*, 42 Fed. Cl. 501, 527 (1998).).

We first focus on the release language in the settlement agreement to determine whether it expressly carves out liability to the extent that the prime contractor recovers funds from the government for the subcontractor's claim.

Under the settlement agreement, Sauer agrees to pay TSI a total of $7,850,000 to resolve TSI's claims against Sauer. In exchange, TSI agrees to release all of its existing and potential claims against Sauer *except* for those claims against the government, including any and all pass-through rights and related payment obligations. The operative release language in the settlement agreement states:

> Notwithstanding the foregoing, the Parties *reserve from this release all claims* and claim rights that exist *as against the Government, including any and all pass-through rights and related payment obligations*, which are reserved for the sole and express purpose of satisfying any legal requirements necessary to preserve such claims for Sauer

> to pursue the CDA Claim and ASBCA Appeal as contemplated herein. *It is the express intent of this paragraph to preserve only such claims, rights, and obligations as are necessary to satisfy the existing requirements of the Severin doctrine* consistent with its most recent interpretations by applicable authority.

(App. sur-reply, ex. A at 5) (emphasis added).

This language clearly and unequivocally carves out an exception to the general release for Sauer's potential liability to TSI for any claims against the government. A settlement agreement under which the prime contractor remains conditionally liable to the subcontractor only as and when the prime contractor receives payment from the government suffices to permit the prime contractor to proceed against the government. *W.G. Yates,* 192 F.3d at 991; *Kentucky Bridge & Dam*, 42 Fed. Cl. at 527; *801 Market Street Holdings, L.P. v. General Services Administration*, CBCA No. 425, 08-1 BCA ¶ 33,853 at 167,567-68. Likewise, the prime contractor may bring suit against the government on behalf of its subcontractor "only when the prime contractor has reimbursed its subcontractor for the latter's damages or remains liable for such reimbursement in the future." *See George Hyman Constr. Co. v. United States,* 30 Fed. Cl. 170, 174 (1993) (quoting *J.L. Simmons,* 304 F.2d at 888–89). Here, Sauer has reimbursed TSI for TSI's damages and also remains liable to pay TSI should Sauer recover additional monies from the government.

We next examine whether the settlement agreement requires Sauer to pursue TSI's claim against the government and pay over any recovery to TSI. The agreement expressly creates such an obligation by including a litigation cooperation clause, stating that "Sauer will vigorously pursue its CDA claim [and] ASBCA [a]ppeal, including those claims relating to TSI's work," and that it will cooperate with TSI in all aspects of the ASBCA litigation (app. sur-reply, ex. A at 3-4). The agreement further provides that Sauer will pay to TSI 11.5 percent of any recovery it receives on its CDA claim up to a maximum payment of $1,150,000 (*id.* at 2).

We conclude that the settlement agreement between TSI, Sauer, and the surety preserves Sauer's conditional liability to TSI for claims against the government by specifically carving out an exception to the general release and obligating Sauer to pursue TSI's claim and remit a portion of any recovery. Therefore, the agreement satisfies the requirements to avoid application of the *Severin* doctrine and allows the pass-through claim to proceed.

II. *Whether The Release In TSI's Subcontract With Sauer Precludes TSI's Pass-Through Claim*

The government attempts to get around the clear language of the settlement agreement by falling back upon the release language in Change Order No. 10 of the contract between Sauer and TSI. According to the Navy, the change order release was an "iron clad" release sufficient to absolve Sauer of all liability to TSI for any damages stemming from the discovery of lead paint (gov't reply at 3-5). With the extinguishment of all liability to TSI, there would be no remaining subcontractor claims to "pass-through" to the government.

The government contends that the settlement agreement is an invalid attempt to "revive" liability solely to avoid the *Severin* doctrine, which prohibits a prime contractor from sponsoring a subcontractor's claim absent a continuing obligation to the subcontractor (gov't sur-reply resp. at 7-8). According to the government, Change Order No. 10 released Sauer from liability to TSI, making the settlement agreement irrelevant, because the "the law does not allow parties to revive the prime's liability to a subcontractor to 'fix' a *Severin* problem." (Gov't sur-reply resp. at 6) The Navy speculates that the agreement may violate the Anti-Assignment Act (gov't sur-reply resp. at 6 n.4).

A. *The Settlement Agreement Creates a New and Enforceable Obligation*

We are not persuaded by the government's arguments. The settlement agreement expressly creates a new liability and obligation to pay $7,850,000 to TSI, because the agreement obligates Sauer to pursue recovery of at least that amount by pursuing TSI's pass-through claims against the government. It is settled that a prime contractor may bring suit against the government on behalf of its subcontractor "only when the prime contractor *has reimbursed its subcontractor for the latter's damages* or remains liable for such reimbursement in the future." *George Hyman,* 30 Fed. Cl. at 174 (quoting *J.L. Simmons Co.,* 304 F.2d at 888–89) (emphasis added). By making an advance payment to TSI, Sauer has reimbursed TSI for TSI's damages and, therefore, retains the right to bring a pass-through claim against the government on TSI's behalf.

Moreover, the government's contention that the settlement agreement attempts to "revive" Sauer's previously released liability is illogical, because there is no incentive for Sauer to "revive" its liability to TSI by agreeing to pay a sum in settlement that is nearly equal to the amount of its pass-through claim. If Sauer believed that Change Order No. 10 absolved it of all liability, it arguably would not have agreed to pay such a significant amount to settle TSI's claims, nor would it have agreed to pay additional monies recovered from the government to TSI.

B. *The Anti-Assignment Act Does Not Apply*

The government's reliance on the Anti-Assignment Act is similarly unavailing. A pass-through claim is not an assignment under 41 U.S.C. § 6305 or 31 U.S.C. § 3727. Rather, it is a recognized procedural mechanism in which a prime contractor, maintaining privity with the government and liability to the subcontractor, asserts the subcontractor's claim on the subcontractor's behalf. *W.G. Yates*, 192 F.3d at 991.

An assignment involves the transfer of rights to a third party, typically a financial institution, and creates no privity with the government. A pass-through claim does not sever legal relationships and is not subject to the Act's formal requirements. As established in *George Hyman*, 30 Fed. Cl. at 174, a prime may bring such a claim if it has either reimbursed the subcontractor or remains liable to do so. Sauer's advance payment to TSI satisfies this standard.

C. *The Government Fails to Establish That Change Order No. 10 Is an "Iron-Clad" Release*

Even if we were to look past the terms of the settlement agreement to the contract between Sauer and TSI, the government has not established that the change order is a binding release. As Sauer observes, in the S.D. Georgia litigation, the government was unable to prove the absence of a genuine issue of material fact as to whether Change Order No. 10 was ever agreed to by the parties. In denying the parties' cross-motions for summary judgment, the District Court concluded that there was "a clear and lively dispute about a material fact: whether Change Order 10 was agreed to or not." *Federal*, 2022 WL 1477441 at *6.

It is established that mutual assent is a threshold requirement for contract formation. *Anderson v. United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003). Because the factual dispute over mutual assent remains unresolved, we cannot conclude on the facts before us that Change Order No. 10 operates as a valid release.

D. *Conclusion*

The Government has not demonstrated that Change Order No. 10 extinguished Sauer's liability to TSI, nor has it shown that the settlement agreement violates the *Severin* doctrine or the Anti-Assignment Act. The record reflects that Sauer retains a present and enforceable liability to TSI and has taken steps consistent with that liability, including a substantial settlement payment and a contractual obligation to pursue and remit any recovery. Accordingly, we conclude that Sauer is entitled to assert TSI's claim against the Government as a valid pass-through claim.

III. *Whether Judicial Estoppel Bars Sauer From Pursuing TSI's Pass-Through Claims in this Appeal*

As an alternative basis for summary judgment, the government contends that the doctrine of judicial estoppel bars Sauer from taking a position in this appeal that is contrary to the position it advanced in the litigation between TSI and its surety (gov't mot. at 11-15). Specifically, the government argues that judicial estoppel should prevent Sauer from pursuing claims on behalf of TSI, because Sauer's lawyers (also representing Sauer's surety) previously argued in the S.D. Georgia litigation that TSI had waived its rights to such claims in Change Order No. 10. The government contends that Sauer is taking an inconsistent position, that the S.D. Georgia court accepted the prior argument, and that allowing Sauer to now pursue these claims would give them an unfair advantage (gov't mot. at 12-13). The government emphasizes imputation of the surety's arguments to Sauer, arguing Sauer should not benefit from a pass-through claim when its lawyers previously argued the subcontractor wasn't entitled to the funds (gov't mot. at 14-15).

Sauer counters that judicial estoppel is inapplicable, because the government cannot demonstrate Sauer is taking an inconsistent position regarding liability to TSI. Sauer emphasizes that the subsequent settlement agreement in that S.D. Georgia litigation expressly preserves Sauer's liability for TSI's claims in this appeal. Moreover, the S.D. Georgia court found a genuine issue of material fact regarding Federal's potential liability to TSI, precluding any finding that the court adopted the surety's position. Therefore, Sauer argues, there is no inconsistency that prejudices the government, undercutting any reason to apply judicial estoppel. (App. sur-reply at 4-5)

Judicial estoppel "is an equitable doctrine invoked by a court at its discretion." *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (citations omitted). Courts typically apply three factors: (1) whether a party's earlier and later positions are "clearly inconsistent"; (2) whether the party "succeeded in persuading a court to accept" the earlier position; and (3) whether failing to estop the party would create "an unfair advantage or impose an unfair detriment" on the opposing party. *Columbia Sportswear North America, Inc. v. Seirus Innovative Accessories, Inc.*, 80 F.4th 1363, 1375 (Fed. Cir. 2023) (citing *New Hampshire*).

The government's argument falters on the second factor. Sauer persuasively argues that the District Court did not accept the surety's position. Specifically, the District Court denied the parties' cross-motions for summary judgment, concluding that there was a clear dispute about a material fact regarding whether the parties mutually assented to Change Order No. 10. *See Federal*, 2022 WL 1477441 at *6. Although the "prior success" requirement does not require the party to have prevailed

on the merits, it does require the first court to have adopted the party's position. *SkyHawke Techs., LLC v. Deca Int'l Corp.*, 828 F.3d 1373, 1376 (Fed. Cir. 2016). Here, the District Court's denial of summary judgment demonstrates that it did not adopt the surety's argument regarding Change Order No. 10.

The government attempts to circumvent this clear failing by relying upon cases from other Federal Circuit Courts of Appeal (gov't reply at 15), particularly relying on *Hall v. GE Plastic Pacific PTE Ltd.*, 327 F.3d 391 (5th Cir. 2003), which suggests judicial estoppel applies when a party argues "with the explicit intent to induce the district court's reliance." 327 F.3d at 399 (citing *Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036, 1047 (5th Cir.1998)). According to the government, the fact that the surety made arguments in the S.D. Georgia successfully opposing summary judgment should be sufficient to preclude Sauer from making a contrary argument in this appeal (gov't reply at 15). We disagree.

First, the cases cited by the government are from other jurisdictions and are not binding on the Board. The Board operates independently and its decisions are final on factual matters unless appealed to the Federal Circuit. While the Federal Circuit reviews ASBCA decisions *de novo* on legal questions, other circuits lack binding authority. 28 U.S.C. § 1295; *Lockheed Martin Aeronautics Co. v. Secretary of Air Force*, 66 F.4th 1329, 1335 (2023).

Second, the government misses the point that the District Court, in denying summary judgment, never adopted the surety's position that Change Order No. 10 was a full and complete release. Instead, the District Court ruled that there was a genuine issue of material fact regarding whether the change order was a valid contract and never addressed the interpretation of the change order. *Federal*, 2022 WL 1477441 at *6. This falls short of the necessary acceptance of the surety's position.

Finally, the settlement of the S.D. Georgia litigation fatally undermines the government's claim of prior success. *See JAAAT Tech. Servs.*, ASBCA No. 62373, 20-1 BCA ¶ 37,719 at 183,098. As the Federal Circuit has clearly stated, "[a] settlement neither requires nor implies any judicial endorsement of either party's claim or theories, and thus a settlement does not provide the prior success necessary for judicial estoppel." *Water Techs. Corp. v. Calco, LTD.*, 850 F.2d 660, 666 (Fed. Cir. 1988) (quoting *Konstantinidis v. Chen*, 626 F.2d 933, 939 (D.C. Cir. 1980)). As a result, "'[i]f the initial proceeding results in settlement, the position cannot be viewed as having been successfully asserted' and estoppel is inapplicable." *Id.* (quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982)). Because the S.D. Georgia litigation concluded with a settlement, the government cannot establish the "prior success" element required for judicial estoppel.

We decline to apply the doctrine of judicial estoppel as the government urges. The District Court denied summary judgment and the parties subsequently settled, demonstrating that there was no judicial endorsement of the surety's argument. Consequently, the essential element of prior success required for judicial estoppel is absent and the doctrine is therefore inapplicable.

## CONCLUSION

For the foregoing reasons, we hold that the settlement agreement preserves Sauer's conditional liability to TSI, thereby satisfying the requirements to avoid application of the *Severin* doctrine, and that judicial estoppel does not bar Sauer from pursuing TSI's pass-through claims. We deny the government's motion for summary judgment.

Dated: August 13, 2025

KENNETH D. WOODROW
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
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. 62295, Appeal of Sauer Incorporated, rendered in conformance with the Board's Charter.

Dated:

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