UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

APPELLANT'S MOTION FOR SUMMARY RELIEF DENIED; RESPONDENT'S MOTION FOR SUMMARY RELIEF GRANTED IN PART AND DENIED IN PART:
August 18, 2015

CBCA 4176

FORTIS NETWORKS, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

David A. Rose of Moser Rose Attorneys, Valdosta, GA, counsel for Appellant.

John C. Doney, Office of the Solicitor, Department of the Interior, Boulder City, NV, counsel for Respondent.

Before Board Judges **VERGILIO**, **DRUMMOND**, and **SULLIVAN**.

SULLIVAN, Board Judge.

The parties have filed cross-motions for summary relief regarding the claims presented by appellant, Fortis Networks, Inc. (Fortis). Fortis seeks relief on four claims arising from its contract with the Department of the Interior, Bureau of Reclamation (BOR): (1) fuel costs for work performed under task orders; (2) costs of additional work to excavate increased quantities of material; (3) delay costs incurred while waiting for BOR to decide upon and issue modifications; and (4) costs for a differing site condition claim. For the reasons that follow, the Board denies the motion filed by Fortis and grants in part and denies in part the motion filed by BOR.

Statement of Facts

I. The Contract

A. Contract Terms

The parties executed on July 20, 2012, an indefinite delivery/indefinite quantity (IDIQ) contract for canal repair and replacement services in Yuma County, Arizona. Exhibit 1 at 7.[1] The contract contained schedules for three consecutive years that set forth the prices for the various activities that could be required to perform the work. The prices in the schedules were good for the year in which the task orders were placed. The prices did not include fuel costs. Instead, as noted at the top of each of the schedules, "[t]he fuel costs will be negotiated at the time of issuance" of each task order.[2] *Id*. at 11, 13, 14(back).[3]

The contract provided for the issuance of task orders for the projects to be accomplished on the canals. The contract limited the payment to those items covered by task orders:

> The Government will not be obligated to reimburse the Contractor for work performed, items delivered, or any costs incurred, nor shall the contractor be obligated to perform, deliver, or otherwise incur costs except as authorized by duly executed Task Orders.

Exhibit 1 at 22. The Task Order clause further advised that the task orders were firm, fixed-price orders and reiterated that "[f]uel prices shall be negotiated prior to execution of each task order." *Id*.

With regard to the pricing of task orders, the contract explained that the contracting officer had the obligation to identify items required for performance not listed on the schedules:

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[1] The exhibits are found in the appeal file, unless otherwise noted.

[2] The terms task order and delivery order both appear in the contract and are used interchangeably. For the sake of clarity, the Board uses the term task order in its opinion.

[3] Although the pages in the appeal file are double-sided, respondent only numbered one side of the page. Accordingly, "back" indicates the back side of the page indicated.

> The Government contemplates firm-fixed price task orders using agreed upon line item pricing for specific work to be performed in all instances.
>
> For labor, material and/or equipment, and bonds not listed in the schedule, but determined, by the Contracting Officer to be necessary for the accomplishment of the work required under the proposed task order, the Contractor shall submit documentation to support the price proposed, e.g. quotes, overhead, G&A [General and Administrative expenses] and other indirect rates.

Exhibit 1 at 22-22(back).

Finally, the contract contained Federal Acquisition Regulation (FAR) clause 52.216-18, 48 CFR 52.216-18 (1995), which provided the order of precedence in case of a conflict between the terms of the contract and the task orders:

> (b) All delivery orders or task orders are subject to the terms and conditions of this contract. In the event of conflict between a delivery order or task order and this contract, the contract shall control.

Exhibit 1 at 28.

B. Execution of Task Orders and Modifications

1. Task Orders

The parties executed four task orders, the first three of which are at issue in this appeal. The first task order, executed on July 20, 2012, the same day as the underlying contract, provided for work on drainage pump outlet channels (DPOC) 1 and 2. Exhibit 7. The task order included line item costs drawn from the first schedule of the contract, but did not include a line item for fuel costs. *Compare* Exhibit 1 at 11-12 *with* Exhibit 7. The work on the task order was to be completed by April 15, 2013.

The second and third task orders were executed on September 25, 2012, and provided for work on DPOC 3 and in the Imperial Wildlife Refuge, respectively. Exhibits 25, 28. These task orders included line item costs from the first schedule of the contract, but neither order included a line item for fuel costs. Fortis was to begin work on task order two on the same day the task order was executed and complete work by June 15, 2013. Exhibit 25. Fortis was to begin work on task order three on June 15, 2013, and complete the work by September 15, 2013. Exhibit 28.

The parties executed the fourth task order on August 6, 2014. Exhibit 29. This task order did include a line item for "reimbursable fuel costs" in the amount of $32,093.75. The period of performance of this task order was September 8 to November 7, 2014. *Id.*

Claim for Fuel Costs. The parties' failure to negotiate a line item for fuel costs in the first three task orders gives rise to one of Fortis' claims on appeal. As part of its claim to the contracting officer, Fortis asked that BOR negotiate its fuel costs for the task orders covering work performed at DPOC 1, 2, and 3. Second Amended Complaint, Exhibit 11 at 18.[4] The contracting officer denied Fortis' request, explaining that "Fortis proposed and the Government accepted Fortis' proposal as final compensation for all work under the terms and conditions of the contract task order at the time of award." Exhibit 13 at 4. The parties have not provided in the record on appeal any requests for proposals issued by the contracting officer, any proposals submitted by Fortis in response to those requests, or documentation relating to the payment of the completed task orders. In briefing on the pending motions, BOR states that, "for unknown reasons, both parties simply ignored or forgot about fuel costs and the applicable Master Contract clauses when negotiating" the task orders. Respondent's Motion for Summary Relief at 18. BOR does not dispute that Fortis incurred fuel costs in performing the work on the contract.

2. Modifications

In the course of performance of task order one, the parties identified three changes to the contract that led to the modifications at issue in this appeal: additional quantities for excavation, installation of reinforced concrete piping, and use of open cut methodology.

Additional Quantities. On January 28, 2013, Fortis submitted a change request because the quantity of material it excavated under the first task order was approximately 2000 cubic yards greater than the estimate set forth in the contract. Exhibit 14 at 2. Fortis stated that the price increase would be $32,661. *Id.* Fortis derived this figure by multiplying the increased quantity by the unit price of $17.19 per cubic yard set forth in the first schedule of the underlying contract. *Id.* Through an email exchange among BOR employees on January 29 and 30, 2013, BOR acknowledged that "the differing quantities were due to an estimation bust" and "the difference was correct." *Id.* at 1.

[4] Although Fortis attached to its complaint a document titled, "Recap of Fuel Costs," Second Amended Complaint, Exhibit 12, Fortis did not provide a sum certain for its fuel costs in its claim to the contracting officer.

On April 11, 2013, the parties executed modification 0002 to the first task order to increase the contract price by $32,661, for the additional quantity of excavation that was required. Exhibit 9. The modification also authorized an extension of the completion date from April 15 to May 27, 2013, two weeks for the additional work covered by the modification and an additional four weeks "toward future negotiated modifications." *Id*. The description of the modified line item contained the following release language:

> The Contractor hereby accepts the adjustments in the task order price and/or task order performance period set forth in this [modification] No. 0002 to Task Order No. R12PD34184 as the complete, equitable and final adjustment for the changed requirements/conditions authorized herein and agrees that the Government has no further liability whatsoever, directly or indirectly, in regard to any claims, known or unknown, including claims for delay and/or disruption, for any additional adjustments to the task order by reasons of these changed requirements/conditions.

Id. at 3.

Fortis alleges that it "required additional time for installation and removal of the additional materials" that were the subject of the modification and seeks compensation for the additional work. Exhibit 12 at 104 (Letter from Fortis to BOR contracting specialist (Jan. 10, 2014)). Fortis seeks the costs of ten days of delay at $858.75 per day and of a traffic barrier, plus the applicable overhead, profit, and insurance and bond costs. *Id*. at 106. The contracting officer denied Fortis' claim, asserting that the release in the modification barred Fortis' claim. Exhibit 13 at 2.

Reinforced Concrete Pipe/Open Cut Methodology. Initially, the contract required the installation of box culverts and the use of the "jack and bore" method for installation at a road crossing. Respondent's Statement of Uncontested Facts ¶¶ 17-18. After the first task order was executed, BOR began to consider changes to these contract requirements. *Id*. ¶¶ 19-20. BOR asked Fortis to submit cost proposals for the use of reinforced concrete pipe instead of box culverts and for an open cut methodology rather than jack and bore. *Id*. ¶¶ 20, 25. From BOR's evaluation of these proposals, it appears that Fortis provided only the direct costs of the changed work. Exhibits 20, 24. While these changes were being considered, Fortis notified BOR on March 21, 2013, that it had "completed all work on the site with the exception of those areas involved in possible modifications." Respondent's Statement of Uncontested Facts ¶ 24. BOR gave a verbal authorization to proceed with the changes on May 16, 2013. *Id*. ¶ 28.

To implement these changes, the parties executed two modifications, modification 0003 to the contract and modification 0003 to the first task order. On June 18, 2013, the parties executed modification 0003 to the contract to incorporate contract line item number (CLIN) 1-48 to provide for the installation of a forty-eight inch reinforced concrete pipe (RCP) with the corresponding price. Exhibit 4. The contract price increased by the amount of this line item. This modification further provided that "Contractor shall submit a request for equitable adjustment if appropriate within 30 calendar days," but also contained the following release language in the description of the new line item:

> The Contractor hereby accepts the adjustments in the contract price and/or contract performance period set forth in this [modification] No. 0003 as the complete, equitable, and final adjustment for the changed requirements/conditions authorized herein and agrees that the Government has no further liability whatsoever, directly or indirectly, in regard to any claims, known or unknown, including claims for delay and/or disruption, for any additional adjustments to the task order by reasons of these changed requirements/conditions.

Exhibit 4 at 2.

By email message dated June 18, 2013, the contracting specialist forwarded to Fortis for review draft task order modification 0003 to incorporate these changes. In the forwarding email message, the contracting specialist described what the modification was intended to cover and the items that would remain open for discussion:

> This mod takes care of the differing site condition,[5] open cut work, 48" pipe, etc. Basically everything except the "pause/eject" extended overhead item we had been discussing. I anticipate being able to talk to my [contracting officer] about the extended overhead within the next week.

Exhibit 12 at 43(back). Three days later, the contracting specialist sent another email message to Fortis explaining the scope of the modification and the release language:

> The release of claims refers to the changed estimated quantities, the current pricing for the open cut work, the current pricing for the labwork/traffic

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[5] It appears that Fortis discovered two differing site conditions. One was at issue at the time of modification 0003 to the first task order. The other was at issue in Fortis' fourth claim to the contracting officer and is discussed below.

> control, the current pricing for the differing site condition at DPOC2 and the changed delivery dates for all the work. The intent is not to silence any other changes unrelated to those items or still in process.

Id. at 46. In the same email message, the contracting specialist reiterated his intent to address the "pause/eject" pricing in an "upcoming mod." *Id*.[6]

On July 2, 2013, the parties executed modification 0003 to the first task order to incorporate the reinforced concrete pipe and change in methodology as well as other changes. Exhibit 10. The modification described the changes as "full and complete equitable adjustment . . . [of] any and all claims, requests for equitable adjustment or other disputes associated with this contract." *Id*. With this modification, the task order price decreased by $246,357.21, and the time required for performance of the task order was extended by six weeks to July 26, 2013. *Id*. The modification contained the following release language:

> E. Contractor's Release: The Contractor hereby accepts the adjustments in the contract price and/or contract performance period set forth in this [modification] No. 0003 to Task Order No. R12PD34184, as the complete, equitable and final adjustment for the changed requirements/conditions authorized herein and agrees that the Government has no further liability whatsoever, directly or indirectly, in regard to any claims, known or unknown, including claims for delay and/or disruption, for any additional adjustments to the contract by reason of these changed requirements/conditions.

Id. at 3. On August 23, 2013, Fortis submitted its request for equitable adjustment for thirty days of delay experienced while waiting for BOR to execute the modification 0003 to the task order. Second Amended Complaint, Exhibit 7. The record is silent as to whether BOR considered this request.[7]

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[6] Neither party has explained what the term "pause/eject" pricing means or how that pricing relates to Fortis' claims on appeal, but Fortis' request for equitable adjustment for the delay describes the daily charge as the "pause rate." Second Amended Complaint, Exhibit 7.

[7] Fortis has attached to its reply a series of email messages between the contracting officer and Fortis' senior project manager regarding the status of BOR's review of the remaining change requests. Appellant's Reply, Exhibit 4. The Board is unable to discern from these documents whether the change requests referenced include Fortis' request for equitable adjustment or what, if any, substantive review of that request BOR undertook.

Claim for delays. Fortis seeks to recover costs it incurred while awaiting government action on the changes to the contract and task order. Exhibit 12 at 3. According to Fortis' claim and complaint, it completed the work on the remainder of task order one in March 2013, and was required to wait for a total of fifty-nine days for the contract amendment that permitted the change and work to proceed. Although Fortis states in its claim that the modification to the contract "required a different methodology to complete the work," Fortis' claim appears to be for stand-by costs for the time it was awaiting the modification of the contract and the direction to proceed. *Id*.

Fortis sought thirty days of delay with its request for equitable adjustment, but apparently revised this number downward when it submitted its claim. Fortis states that it was delayed fifty-nine days, but only seeks twenty-two days of delay damages, which it calculates to be $18,892.50 (at a daily rate of $858.75). Fortis also seeks costs for subcontractors' equipment totaling $16,838.75, mobilization and demobilization costs totaling $13,136.20, and costs for a traffic barrier of $6000, plus the applicable overhead, profit, and insurance and bond costs. In total, Fortis seeks $72,004.87 for BOR's alleged delays in issuing task order modification 0003. The contracting officer denied Fortis' claim, asserting that the release language in task order modification 0003 barred Fortis' claim. Exhibit 13 at 3.

Differing Site Condition. Fortis' final claim on appeal involves additional costs arising from a differing site condition discovered while working on the first task order. This claim was not the subject of any modifications to the task order. Fortis encountered the differing site condition when it discovered phone lines in the area in which it was to construct a new channel. According to Fortis' claim, it was delayed from July 22 to July 30, 2013, while the lines were moved. Although this delay totals eight days, Fortis seeks five days of delay costs (at the daily rate of $858.75), costs for traffic control and site equipment plus the applicable overhead, profit, insurance and bond costs. Fortis seeks a total of $16,461.16.

The contracting officer granted Fortis' claim in part, finding that the Government owed Fortis $10,658 for the five days of delay. Exhibit 13 at 4. The contracting officer determined that the agency could not reimburse Fortis bond or insurance costs absent evidence that Fortis paid additional amounts for these items as a result of the delay. The contracting officer also took issue with the items included in the daily rate for Fortis. Other than the time for the supervisory/quality control functions and the rental costs for portable bathroom facilities, the contracting officer stated that the costs Fortis sought were all included in Fortis' overhead rate and disallowed them as direct charges. *Id*. The contracting officer also excluded the costs for traffic control, finding that the Government had already paid for thirty days of traffic control as part of the task order and Fortis could not establish that the delay extended the need for traffic control beyond the days already paid for in the

task order. Finally, the contracting officer did not include the amount for interest, but noted that it was allowable and would be part of the negotiation and final adjustment amount.

On appeal, Fortis has not provided any additional support for its claimed costs. Instead, it seeks to have a hearing on the costs at issue and "requests an opportunity to present these factual matters to the Board." Appellant's Reply at 13.

Discussion

I. Standard of Review

Summary relief is appropriate where there is no genuine issue of material fact (a fact that may affect the outcome of the litigation) and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). "Only disputes over facts that might affect the outcome of the case under governing law will preclude the entry of summary judgment." *Id*. 477 U.S. at 248. The moving party has the initial burden of informing the court of the basis for its motion and identifying those portions of the pleadings, depositions and affidavits, admissions, and answers to interrogatories, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The non-moving party is required to point to "specific facts showing that there is a genuine issue for trial." *Id*. at 324. Although the onus is on the moving party to persuade the tribunal that it is entitled to summary relief, the movant may obtain summary relief, if the non-movant bears the burden of proof at trial, by demonstrating that there is an absence of evidence to support the non-moving party's case. *Id*. at 325. If both parties move for summary relief, each party's motion will be evaluated on its own merits and all reasonable inferences will be resolved against the party whose motion is under consideration. *Charleston Marine Containers, Inc. v. General Services Administration*, CBCA 1834, 10-2 BCA ¶ 34,551, at 170,398.

In considering summary relief, the tribunal will not make credibility determinations or weigh conflicting evidence. *Anderson*, 477 U.S. at 249. "All reasonable inferences and presumptions are resolved in favor of the non-moving party." *Id.* at 255. The purpose of summary relief is not to deprive a litigant of a hearing, but to avoid an unnecessary hearing when only one outcome can ensue. *Vivid Technologies, Inc. v. American Science & Engineering, Inc*., 200 F.3d 795, 806 (Fed. Cir. 1999).

The parties' motions require the Board to decide two issues of contract interpretation –namely, (1) whether the duty or the ability to negotiate fuel costs ended when the task orders were executed, and (2) whether the language of the releases in the modifications bars Fortis' claims for the costs of additional work and delay. Contract interpretation is a legal question

that is often amenable to summary disposition. *JAVIS Automation & Engineering, Inc. v. Department of the Interior*, CBCA 938, 09-2 BCA ¶ 34,309, at 169,478 (citing *Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 798 (Fed. Cir. 2002)). The answer to these questions permits the Board to decide the parties' motions on three of Fortis' four claims. The fourth issue is decided by the standards for adjudicating motions for summary relief–namely, whether Fortis should be permitted to reserve for further development its claims for additional costs which the contracting officer deemed to be unsupported without specific allegations as to what Fortis expects to be able to prove.

II. BOR Cannot Be Required to Negotiate Fuel Costs Now

Fortis, with its claim submitted on July 24, 2014, asked BOR to negotiate fuel costs for the task orders for work on DPOC 1, 2, and 3. It is undisputed that neither party sought to negotiate the fuel costs prior to the issuance of these task orders. According to BOR, "the undisputed factual record, therefore, indicates that neither party negotiated or sought to negotiate fuel costs in connection with Task Order One or Task Order Two before they were negotiated." Respondent's Motion for Summary Relief at 18. BOR contends that, because Fortis did not seek to negotiate these costs before the execution of the task orders, the time has passed for Fortis to seek these costs by operation of the task order provision.

Fortis asserts two bases for its entitlement to these costs: one, the obligation of good faith and fair dealing requires BOR to negotiate these costs now; and, two, the failure to include these costs constitutes a mutual mistake by the parties.

Duty to Negotiate. As noted above, the contract provided that fuel costs would be negotiated at the time of execution of each task order. This provision is an "agreement to agree" regarding a term of the contract. *Folk Construction Co.*, ENG BCA 5839 et al., 93-3 BCA ¶ 26,094, at 129,726 ("Where the parties mutually demonstrate an intent to be bound, the agreement will be enforced."). Such provisions carry with them a duty to negotiate in good faith. *City of Tacoma, Department of Public Utilities v. United States*, 31 F.3d 1130, 1132 (Fed. Cir. 1994) (citing *Aviation Contractor Employees, Inc. v. United States*, 945 F.2d 1568, 1572 (Fed. Cir. 1991)). "The obligation to negotiate in good faith has been described generally as preventing one party from 'renouncing the deal, abandoning the negotiations, or insisting on conditions that do not conform to the earlier agreement.'" *Folk Construction*, 93-3 BCA at 129,726-27. In the face of a refusal to negotiate, the tribunal can find a breach has occurred and impose "a reasonable price." *Aviation Contractor*, 945 F.2d at 1573.

Fortis' motion on this issue poses a contract interpretation question: do the parties have an obligation to negotiate the fuel costs after the execution (and completion) of the task

orders? The terms of the contract establish that BOR intended to pay for fuel costs and that the parties intended to negotiate a line item for these fuel costs prior to execution of the task orders. The task order provision imposes an obligation upon both parties to negotiate the fuel costs. BOR acknowledges this joint responsibility. Respondent's Motion at 18 (contractual requirement "applies equally to both parties"). Moreover, the task order provision gives the contracting officer the responsibility to identify supplies that will be necessary for performance of the task order that are not otherwise accounted for on the schedules in the base contract and Fortis the responsibility to supply quotes or prices for those items. Fuel costs explicitly were not included on those schedules so it was incumbent upon both parties to address the issue of fuel costs before issuing or agreeing upon a task order.

BOR contends that its obligation to negotiate ceased at the time the task order was entered into, because the terms of the contract required that the fuel costs be negotiated prior to entry of task orders and because the contract stated that task orders were to be firm-fixed price. BOR asserts that it denied the request to negotiate because "there is no provision in the Master Contract that authorizes or requires negotiation of fuel costs after the issuance of task orders." Respondent's Reply at 9.

The Board agrees. The agreement to negotiate prior to the execution of task orders is found in four places in the contract. To impose a requirement that the parties negotiate now would read that agreement out of the contract. Given that the requirement was set forth specifically in the terms agreed to by the parties, the Board cannot now impose a duty to negotiate that renders those provisions superfluous.

Fortis asserts that BOR's refusal to negotiate constitutes a breach of the duty of good faith and fair dealing. BOR responds that Fortis cannot establish that there was any intent to injure Fortis, therefore Fortis cannot establish a violation of the duty of good faith and fair dealing. Respondent's Reply at 10 (citing *Metcalf Construction Co. v. United States*, 742 F.3d 984, 993 (Fed. Cir. 2014)). "The covenant of good faith and fair dealing . . . imposes obligations on both contracting parties that include the duty not to interfere with the other party's *performance* and not to act so as to destroy the *reasonable expectations* of the other party regarding the *fruits of the contract*." *Metcalf*, 742 F.3d at 991 (quoting *Centex Corp. v. United States*, 395 F.3d 1283, 1304 (Fed. Cir. 2005) (emphasis added)). "What is promised or disclaimed in a contract helps define what constitutes 'lack of diligence and interference with or failure to cooperate in the other party's performance.'" *Id*. (citing *Malone v. United States*, 849 F.2d 1441, 1445 (Fed. Cir. 1988)).

By the terms of the contract, the parties were obligated to negotiate the fuel costs for the task orders and were required to do so in good faith. *City of Tacoma*, 31 F.3d at 1132. But that duty to negotiate was temporally limited to the time before execution of the task

orders. Fortis raised the fuel costs issue for the first time in its July 2014 claim. Work on the task orders without the fuel costs line item was already complete. Moreover, the parties executed the fourth task order after the submission of Fortis' claim and that task order included a line item for fuel costs. BOR's response to Fortis' claim did not constitute a refusal to negotiate or a violation of the duty of good faith and fair dealing.

Mutual Mistake. Fortis argues in the alternative that the failure to negotiate fuel costs at the time of award of the task orders constitutes a mutual mistake and asks the Board to reform the contract on this basis. A court may reform a contract to express the parties agreement based upon a showing of mistake:

> Where a writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake of both parties as to the contents or effect of the writing, the court may at the request of a party reform the writing to express the agreement . . . .

Restatement (Second) of Contracts § 155 (1981). The purpose of reformation is to "make a mistaken writing conform to antecedent expressions on which the parties agreed." *Marine Metal, Inc. v. Department of Transportation*, CBCA 537, 07-1 BCA ¶ 33,554, at 166,176 (quoting *Atlas Corp. v. United States*, 895 F.2d 745, 750 (Fed. Cir. 1990)). To establish a mutual mistake of fact, Fortis must establish four elements:

> (1) the parties to the contract were mistaken in their belief regarding a fact;
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> (2) that mistaken belief constituted a basic assumption underlying the contract;
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> (3) the mistake had a material effect on the bargain; and
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> (4) the contract did not put the risk of the mistake on the party seeking reformation.

Dairyland Power Cooperative v. United States, 16 F.3d 1197, 1202 (Fed. Cir. 1994) (quoting *Atlas Corp.*, 895 F.2d at 750). To reform a contract based upon an allegation of mutual mistake, the court must find "clear and convincing evidence" that the "written instrument [does] not . . . reflect the real agreement between the parties." *Howmedica Osteonics Corp. v. Wright Medical Technology, Inc.*, 540 F.3d 1337, 1349 (Fed. Cir. 2008).

While Fortis may or may not be able to establish the required elements for a showing of mutual mistake, the Board is without jurisdiction to consider Fortis' claim of mutual mistake in this appeal because Fortis has not yet presented a claim to the contracting officer based upon a theory of mutual mistake or containing a sum certain necessary to decide such

a claim. "[W]hen a new claim is asserted that was not directly addressed in the appellant's original claim submission, the tribunal must examine whether the newly posed claim derives from the same operative facts, seeks essentially the same relief, and, in essence, merely asserts a new legal theory for the recovery originally sought." *Ketchikan Indian Community v. Department of Heath & Human Services*, CBCA 1053-ISDA, et al., 13 BCA ¶ 35,436, at 173,808-09 (citing *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003)). "If the court will have to review the same or related evidence to make its decision, then only one claims exists . . . . On the other hand, if the claims as presented to the [contracting officer] will necessitate a focus on a different or unrelated set of operative facts as to each claim, then separate claims exist." *Kinetic Builder's Inc. v. Peters*, 226 F.3d 1307, 1312 (Fed. Cir. 2000) (quoting *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990)). In a claim seeking monetary relief, the contractor also must assert a demand for "the payment of money in a sum certain." 48 CFR 2.101 (2014). If a monetary claim is not stated in a sum certain, it does not qualify as a claim and the Board is without jurisdiction to consider it. *Gatekeepers Internet Marketing, Inc. v. General Services Administration*, CBCA 3915, 15-1 BCA ¶ 35,855, at 175,314.

Fortis, in its claim to the contracting officer, only requested that the contracting officer negotiate its fuel costs.[8] Fortis did not assert that the parties had made a mutual mistake by omitting the fuel costs. Fortis also did not set forth a sum certain for its fuel costs that could be inserted into the task orders, should the Board find that the contract should be reformed based upon a finding of mutual mistake. As set forth above, a claim based upon mutual mistake requires the Board to examine facts such as the parties' beliefs regarding what was included in the task orders. Those facts are different from the facts or issues to be examined to adjudicate Fortis' request that BOR be required to negotiate its fuel costs. Fortis must first present its claim based upon mutual mistake to the contracting officer to provide the contracting officer the opportunity to consider and resolve that claim. *Ketchikan*, 13 BCA at 173,808. The Board lacks jurisdiction to consider Fortis' claim based upon the theory of mutual mistake until the contracting officer has been provided that opportunity.

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[8] The first time Fortis alleged that the failure to include fuel costs in the first three task orders constituted a mutual mistake was in its cross-motion for summary relief. Appellant's Motion at 20. BOR, in responding to Fortis' cross-motion, did not argue that the Board lacked jurisdiction to consider Fortis' alternative theory, but the Board has the authority and the responsibility to examine sua sponte the jurisdictional basis for the claims it is asked to decide. *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,969.

III. The Release Language Bars One but not Both of Fortis' Claims

With its second and third claims, Fortis seeks to recover the costs of the work required to move the additional quantities of soil that were the subject of modification 0002 and its costs for the time it spent waiting for BOR to issue modification 0003 to the first task order. BOR does not dispute that Fortis "experienced delays while the Government considered possible changes" to the task orders and discussed those changes with Fortis or that Fortis stopped work and resumed work on the days Fortis alleges. Respondent's Motion at 13. BOR also acknowledges that Fortis required an additional ten days to excavate the additional quantities of soil. *Id*. at 11. BOR insists, however, that Fortis released its claims for these delays and additional work when it signed the modifications that addressed these issues and its claims should be denied on this basis.

Fortis responds that the releases contained in the modifications do not preclude its claims for two reasons. One, the contracting officer failed to meet the requirements of FAR 43.204(c), which requires the contracting officer to "ensure that all elements of the equitable adjustment have been presented and resolved." Appellant's Motion at 8. Therefore, BOR cannot establish the requisite "meeting of the minds" regarding the scope of the release. Two, the contracting officer's representative either affirmatively misrepresented the scope of the releases in the negotiations leading to the execution of the modifications or expressed an understanding that a subsequent contracting officer has disavowed. Fortis asserts that BOR should be estopped from advocating a different position regarding the scope of the releases. *Id*. at 9, 12.

When a contractor executes a release that is complete on its face and reflects the contractor's unqualified acceptance and agreement with its terms, the release will be binding on both parties. *Turner Construction Co. v. General Services Administration*, GSBCA 15502, et al., 05-1 BCA ¶ 32,924, at 163,097. "When a bilateral contract modification does not contain any reservation of claims, the modification constitutes an accord and satisfaction as to the subject matter of the modification and the contractor cannot later narrow the scope of the modification." *Trataros Construction, Inc. v. General Services Administration*, GSBCA 15344, 03-1 BCA ¶ 32,251, at 159,459.

In considering BOR's argument, the Board first examines the language of the release. "If the provisions of a release are 'clear and unambiguous, they must be given their plain and ordinary meaning.'" *Holland v. United States*, 621 F.3d 1366, 1378 (Fed. Cir. 2010) (quoting *Bell BCI Co. v. United States*, 570 F.3d 1337, 1341 (Fed. Cir. 2009)). However, there are "special and limited circumstances" in which a claim will survive the execution of a general release. *J.G. Watts Construction Co. v. United States*, 161 Ct. Cl. 801, 806 (1963) (per curiam). These limited circumstances are (1) mutual mistake, (2) conduct of the parties

in continuing to consider the claim after the execution of the release, (3) claim was included in release by mistake or oversight, or (4) evidence of fraud or duress. *Id*. at 806-07; *Walsh/Davis Joint Venture v. General Services Administration*, CBCA 1460, 11-2 BCA ¶ 34,799, at 171,262 (holding that the Federal Circuit's decision in *Bell* did not disturb the holding in *J.G. Watts* and subsequent decisions that a broad release could be overcome in specific circumstances).

The language of the release at issue in the modifications is the same and very broad. With this release, Fortis accepted the "adjustments in the contract price and performance period" as the "final adjustment for the changed requirements/conditions authorized" by the modifications. Fortis further agreed that BOR had "no further liability for any claims . . . including claims for delay . . . for any additional adjustments" arising from the changes set forth in the modifications. Exhibit 2 at 30; Exhibit 9 at 3; Exhibit 10 at 3.

On its face, the language of this release would bar both of Fortis' claims. Fortis seeks the additional costs of moving the extra quantities of soil. But the modification changed the quantity of soil to be excavated under task order one and added ten days for performance. The release to which Fortis agreed bars any claims arising from the changed conditions at issue in the modification, which was the change in soil quantities. In response to BOR's motion, Fortis has brought forth no evidence to establish the "special and limited circumstances" necessary to overcome this broad release. And, although Fortis highlights the requirements in FAR 43.204(c), Fortis has cited no case in which a purported failure to meet the requirements of this FAR provision have overcome the broad release outside the "special and limited circumstances" set forth in *J.G. Watts*. Having not found a material fact in dispute, the Board finds that Fortis' claim related to the additional quantities is barred by the language of the release.

By contrast, with regard to its delay claim, Fortis has come forth with sufficient evidence in the record regarding the scope of the modification and whether the parties intended it to include Fortis' delay claims to create a material fact in dispute. As noted, the contracting specialist made representations in email messages that the modification did not cover "pause/eject overhead." Although neither party has explained what the "pause/eject overhead" claim was or whether it was Fortis' claim for delay, this issue requires further development. Moreover, Fortis submitted its request for equitable adjustment for its delay claim after the execution of the modification, but there is no evidence in the current record or explanation from the parties regarding BOR's evaluation, if any, of that request. Although the language of the release is very broad and specifically mentions delay costs, the Board finds that Fortis has raised sufficient evidence with regard to its delay claim to preclude the granting of BOR's motion. The Board denies BOR's motion with regard to this aspect of Fortis' claim pending a further development of this issue.

IV. Fortis Has Failed to Identify a Material Fact in Dispute With Regard to Its Claim for Delay Costs Due to a Differing Site Condition

In its fourth claim, Fortis seeks to recover costs incurred as the result of a differing site condition. BOR does not dispute the existence of the differing site condition that gave rise to Fortis' claim or that Fortis was delayed while the condition was addressed. Respondent's Motion at 14. Instead, BOR asserts that Fortis has not provided sufficient documentation to prove entitlement to and the amount of the costs not already agreed to by the contracting officer. *Id*. at 15-16. On this basis, BOR urges the Board to deny Fortis' remaining claim for costs arising from the differing site condition. *Id*. at 17.

Fortis replies that it did not have all the documentation of the costs at issue "because these costs could not be determined prior to completion of the project and resolution of other matters at issue." Appellant's Reply at 13. Fortis "requests an opportunity to present these factual matters to the Board," but does not identify what factual matters are in dispute or what it expects to be able to prove if it were to present factual evidence. *Id*. In its complaint, Fortis only alleges that it is entitled to bond and insurance costs, the costs of the project manager's time, and the additional traffic costs, costs that the contracting officer denied for lack of proof that they had increased as a result of the differing site condition. Second Amended Complaint at 13.

Fortis, as the claimant, "bears the burden of proving the fact of loss with certainty, as well as the burden of proving the amount of loss with sufficient certainty so that the determination of the amount of damages will be more than mere speculation." *Willems Industries, Inc. v. United States*, 295 F.2d 822, 831 (Ct. Cl. 1961). In response to a motion for summary relief, it is incumbent upon a party to come forth with sufficient evidence to "show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient." *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390-91 (Fed. Cir. 1987). Fortis must provide sufficient evidence to establish that there is a genuine issue for trial. *Partnership for Response & Recovery, LLP v. Department of Homeland Security*, CBCA 3566, 14-1 BCA ¶ 35,805, at 175,114.

In response to BOR's motion, Fortis has failed to even allege facts to support its entitlement to the additional costs. Instead, Fortis states that it seeks an opportunity to develop these costs. But these are costs Fortis allegedly incurred. Fortis should know what the costs are or at least be able to articulate how it intends to prove these increased costs. Moreover, Fortis does not articulate how the "resolution of other matters at issue" is necessary before it is able to explain its entitlement to the additional costs. In response to BOR's motion, Fortis has failed to establish that there is a material issue of fact with regard

to the increased costs of the differing site conditions. For this reason, the Board grants BOR's motion for summary relief on this issue.

Decision

The Board **DENIES** Fortis' motion for summary relief with regard to its claim to entitlement to fuel costs. The Board **GRANTS-IN-PART** BOR's motion with regard to the release of the additional quantities claim but **DENIES** the motion with regard to the delay claim. The Board also **GRANTS** BOR's motion with regard to Fortis' inability to prove additional costs arising from the differing site condition. Under separate order, the Board will issue a schedule for further proceedings in this matter.

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MARIAN E. SULLIVAN
Board Judge

We concur:

_____
JOSEPH A. VERGILIO
Board Judge

_____
JEROME M. DRUMMOND
Board Judge