UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND IS BEING PUBLICLY RELEASED IN ITS ENTIRETY ON OCTOBER 17, 2025

RESPONDENT'S MOTION FOR PARTIAL
SUMMARY JUDGMENT GRANTED: September 23, 2025

CBCA 7539

HAWAIIAN DREDGING CONSTRUCTION COMPANY, INC.,

Appellant,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

Erik D. Eike, Mililani, HI; and Michael A. Branca, Michael C. Zisa, and Abyselle Bello Salinas of Peckar & Abramson, P.C., Washington, DC, counsel for Appellant.

Jack F. Gilbert and Emma R. Vyncke, Office of the Chief Counsel, Federal Highway Administration, Department of Transportation, Lakewood, CO, counsel for Respondent.

Before Board Judges **SHERIDAN**, **SULLIVAN**, and **KANG**.

KANG, Board Judge.

Appellant, Hawaiian Dredging Construction Company, Inc. (HDCC), appeals a final decision by a contracting officer of respondent, Department of Transportation (DOT), Federal Highway Administration (FHWA), denying its claim arising from a contract to replace two bridges in Hawaii. DOT filed a motion seeking partial summary judgment on HDCC's claim for additional non-compensable delay associated with the handling of

hazardous materials encountered during the removal of the existing bridges, arguing that a release bars HDCC's claim. Based upon the plain language of the release, we grant DOT's motion.

Background

I. Contract Award and Performance

In November 2017, DOT issued a solicitation for the removal and replacement of the Hilea Stream Bridge and Ninole Stream Bridge on Mamalahoa Highway (State Route 11) in the District of Ka'u, Hawaii. Appeal File, Exhibit 7 at 64-65;[1] Respondent's Revised Statement of Undisputed Material Facts (RSUMF) ¶¶ 1-2, 4. The solicitation sought bids for the award of a fixed-price contract. Exhibit 7 at 96.

Relevant here, solicitation section 203 stated that the contractor would be required to remove the existing bridges and to "[d]ispose of construction debris, waste products, vegetation and/or dredged material removed from the construction site." Exhibit 7 at 183-84. The solicitation further specified that the contractor would be required to "[p]repare a hazardous waste determination for anticipated waste whether the waste is classified as hazardous waste, universal waste, excluded waste, wastewater, or solid waste;" to "[o]btain all applicable permits prior to removal, demolition, and rehabilitation activities related to hazardous materials if present;" and to handle hazardous waste "in accordance with applicable State and Federal regulations." *Id.* at 184. In response to bidder questions about surveys of potential hazardous materials and anticipated costs for handling them, DOT advised bidders, "For the purposes of bidding on this contract, it is assumed hazardous waste material will not be generated. Please refer to [48 CFR 52.243-4 (2017) (Federal Acquisition Regulation (FAR))] 52.243-4 [C]hanges." Exhibit 210 at 3867; *see id*. at 3865.

In April 2018, DOT awarded HDCC the contract for a fixed price of $16,204,000. Exhibit 14 at 357. The contract included solicitation section 203 regarding removal of the existing bridges and disposal of waste. *Id.* at 463-64.

In September 2018, HDCC provided DOT with reports stating that the two bridges to be removed contained hazardous materials, including lead paint, asbestos, and creosote. Exhibit 129 at 3415-3463. Also in September 2018, DOT replied that it had "reviewed the

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[1] All exhibits are found in the appeal file, unless otherwise noted. Page citations to the VA's exhibits are to the bates numbers added by the agency.

hazardous materials survey and is in agreement with the assertion that a change is warranted in accordance with FAR Clause 52.243-4 Changes." Exhibit 131 at 3466. Additionally, DOT directed HDCC to "develop a plan according to the known extent of hazardous materials," with the understanding that "[a]ny additional hazardous materials that have yet to be identified will be addressed in a future contract modification." Respondent's Motion for Partial Summary Judgement, Exhibit 12 at 16278. From September 2018 to February 2019, the parties exchanged information regarding the work and proposals for an adjustment to the contract.

In February 2019, DOT issued unilateral contract modification P00002 (modification 2), which "authorize[d] the immediate commencement of work associated with item 20304-1000 Removal of Structures and Obstructions (Hazardous Materials)." Exhibit 17 at 702. The modification authorized HDCC to incur costs not to exceed $240,000 and stated that "[a]ny remaining work will require a subsequent contract modification." *Id.* The modification further stated that the final price for the work would be determined as follows:

> A Lump Sum definitive contract modification is anticipated in accordance with Subsection 109.06, pricing of Adjustments. Final costs and time impacts associated with this Change Order will be definitized in a bilateral contract modification, if agreement can be achieved. The definitization schedule is 30 calendar days from the issuance of this Change Order.
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> In the event that a definitive bilateral modification cannot be reached within the timeframe indicated, the [contracting officer] may proceed with the work and establish pricing in accordance with Subsection 109.06(b), Post-Work Pricing.

Id.

In April 2019, DOT transmitted to HDCC proposed bilateral contract modification P0004 (modification 4), which definitized pricing for the handling of hazardous material as follows:

> This modification definitizes pricing for the work associated with the removal of hazardous materials present in the Hilea and Ninole Stream Bridges, which FHWA directed the Contractor to perform via change order in Contract Modification 0002 (CM0002). The modification also revises pricing for the

> existing Removal of Structures and Obstructions and adds a pay item for Special Labor, Hired Technical Services (Industrial Hygienist).

Exhibit 19 at 707; *see* RSUMF ¶ 28.

Modification 4 increased the value of the contract by $309,383.76 and added fifty calendar days to the contract schedule. Exhibit 19 at 707. The modification included the following release of claims: "By signature below, the Contractor agrees that payment and time adjustments as provided herein release the Government from any and all liability under this Contract for further compensation or adjustments relating to this modification." *Id.* at 705.

HDCC's vice president signed the modification on April 26, 2019. *Id.* On May 1, 2019, HDCC's project engineer sent an email to DOT's project engineer, stating, "[j]ust a FYI the actual impact to the schedule due to the hazardous materials turns out to be significantly more than the days we agreed to. Hope we can work out some additional consideration in a future mod[ification]." Appellant's Opposition, Exhibit 3 at 2. On May 3, 2019, the contracting officer signed the modification. Exhibit 19 at 705.

In June 2019, HDCC sent DOT a letter, titled "Actual schedule impact for Hazardous Materials at Hilea and Ninole Bridges." Appellant's Opposition, Exhibit 4 at 2. The letter acknowledged that "[t]hrough negotiations of [modification 4][2] . . . HDCC conceded to accepting a 50 calendar day time extension." *Id.* The letter stated, however, that "the actual durations exceeded the durations included in the contract modification," with schedule impacts of 54 days for the Hilea Bridge and 67 days for the Ninole Bridge. *Id.* For those reasons, HDCC advised that "the intent of this letter is to memorialize the actual impacts caused by the Hazardous Materials at the Hilea and Ninole Bridges." *Id*.

The final revised completion date in the contract was December 3, 2019. Exhibit 1 at 29. HDCC achieved substantial completion on May 27, 2021, and final completion on July 2, 2021.[3] *Id.* The agency imposed on HDCC 541 days of full-rate liquidated damages

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[2] The letter refers to "Contract Mod[ification] P0005" but clearly refers to the fifty-day schedule adjustment in modification 4. *See* Appellant's Opposition, Exhibit 4 at 2.

[3] The parties' accounts of the substantial completion date and total days of liquidated damages in the certified claim and contracting officer's final decision differ slightly, but the differences are not material for purposes of this decision. *Compare* Exhibit 1 at 29 *with* Exhibit 29 at 1529-30.

based on late performance up to the substantial completion date and thirty-six days of reduced-rated liquidated damages based on late performance after substantial completion through the final completion date. *Id*. In total, the agency imposed $2,848,560 in liquidated damages. *Id.* at 5.

II. HDCC's Claim

After final contract completion, HDCC submitted a certified claim seeking equitable adjustments to the contract. Exhibit 29. Among other claims, HDCC stated that the handling of hazardous materials caused a ninety-nine-day delay in the contract schedule. *Id.* at 1530. HDCC therefore requested an adjustment of forty-nine days of excusable delay to the schedule, which was the difference between the claimed delay impact and the fifty days of schedule adjustment provided in modification 4. *Id.* at 1519, 1530. HDCC argued that the delays stemmed from DOT's failure to "perform, or require within the base contract, advance hazardous material testing to identify the amount of remediation required." *Id.* at 1530.

HDCC acknowledged that "[t]he costs were settled for less than required and less than originally requested by HDCC before [DOT] and HDCC executed [modification 4] for both time and costs." Exhibit 29 at 1519. HDCC further acknowledged that "[t]his 49 day delay is not compensable as the cost was negotiated when [modification 4] was settled." *Id*. at 1530. HDCC nonetheless argued that the "actual delay resulting from [DOT's] actions was 99 days and is excusable." *Id.* For these reasons, HDCC contended that the forty-nine days of non-compensable delay based on the hazardous materials claim should offset forty-nine of the 541 days of full-rate liquidated damages imposed by DOT. *Id.* at 1616.

On July 15, 2022, DOT denied the claim in its entirety. Exhibit 1. With respect to the claimed delay for the handling of hazardous materials, the contracting officer found that no additional days were allowable because the release in modification 4 precluded any further recovery of costs or time. *Id.* at 25-26.

III. Proceedings Before the Board

HDCC filed this appeal of the contracting officer's final decision with the Board on October 7, 2022. HDCC's complaint alleged that DOT breached the contract in three ways: (1) by failing to recognize HDCC's entitlement to additional time and compensation due to delays that arose during contract performance; (2) by failing to release payments due to HDCC; and (3) "by improperly withholding liquidated damages." Complaint at 7. In May 2025, DOT filed the instant motion for partial summary judgment with regard to

HDCC's request for additional days of non-compensable delay associated with the handling of hazardous materials.

Discussion

I. Standard of Review

Summary judgment is appropriate when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986); Rule 8(f) (48 CFR 6101.8(f) (2024)). Genuine issues of material fact exist where a rational finder of fact could resolve an issue in favor of either party and the resolution of that issue would impact the outcome of the case under governing law. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). We must view all inferences in a light most favorable to the non-moving party. *Matsushita Id.* at 587-88. The party opposing summary judgment, however, "must 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).

II. The Release Language Bars HDCC's Claim for Additional Non-Compensable Delay

A. Plain Language and Scope of the Modification

HDCC seeks forty-nine days of non-compensable delay that would partially offset the liquidated damages imposed by DOT. HDCC argues that the delays stemmed from DOT's failure to either perform a survey of hazardous materials in advance or require the contractor to do so as part of the base contract. DOT argues that the release in modification 4 bars HDCC's claim for non-compensable delay arising from the handling of hazardous materials.

Interpretation of contract language is primarily a matter of law, and disagreements concerning the legal interpretation of contract documents do not create factual disputes that preclude summary judgment. *Troop Contracting, Inc. v. Department of Veterans Affairs*, CBCA 8000, 25-1 BCA ¶ 38,869 at 189,164 ; *see M.A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1205-06 (Fed. Cir. 2004). To resolve an issue of contract interpretation, we must look first to the plain language of the contract. *Foley Co. v. United States*, 11 F.3d 1032, 1034 (Fed. Cir. 1993). Where a contract "is unambiguous, we follow the plain meaning without considering extrinsic evidence or related arguments." *Purple Heart Heroes LLC v. Department of Veterans Affairs*, CBCA 7186, 22-1 BCA ¶ 38,063, at 184,805 (quoting *P.K. Management Group, Inc. v. Secretary of Housing & Urban Development*, 987 F.3d. 1030, 1033 (Fed. Cir. 2021)).

Modification 4 definitized the pricing for the handling of hazardous materials and adjusted the schedule by fifty days. The modification included a release of claims, which stated that "payment and time adjustments as provided herein release the Government from any and all liability under this Contract for further compensation or adjustments relating to this modification" and did not include a reservation of rights to seek additional adjustments or file claims. The term "adjustments" encompasses schedule adjustments, as the preceding sentence in the release refers to the "payment and time adjustments" provided by the modification. HDCC's claim for additional non-compensable time is barred by this release.

HDCC does not contend that the delay was caused by new and unforeseeable circumstances that arose after the modification was executed and were therefore outside the scope of the modification's release. Instead, the alleged failures by DOT to identify the amount of hazardous materials to be handled, and any information deficiencies stemming from such alleged failures, were matters HDCC knew or should have known at the time the parties executed the modification. In fact, as discussed below, HDCC argues that both parties were aware that the full amount of hazardous materials to be handled was not and could not have been known at the time modification 4 was executed. Despite what HDCC contends was an informational deficiency regarding the amount of hazardous materials to be handled, it executed a bilateral modification that released the Government from "any and all liability under this Contract for further compensation or adjustments relating to this modification." HDCC's claim seeking schedule adjustments based on non-compensable delay concerns the exact subject matter of the modification—the time for performing the hazardous materials work—and is squarely within the scope of the release.

B. Meeting of the Minds

HDCC contends that modification 4 does not bar its claim for additional non-compensable delay because there was not a meeting of the minds between the parties that satisfies the elements of an accord and satisfaction. DOT argues that the claim is barred because the modification contained a release, rather than an accord and satisfaction, and further contends that HDCC's arguments improperly conflates these two affirmative defenses.

Release and accord and satisfaction are related but distinct doctrines. *See Holland v. United States*, 621 F.3d 1366, 1377 (Fed. Cir. 2010); *McLain Plumbing & Electrical Service, Inc. v. United States*, 30 Fed. Cl. 70, 78-79 (1993); *Perry Bartsch Jr. Construction Co. v.*

Department of the Interior, CBCA 4865, et al., 16-1 BCA ¶ 36,576, at 178,133-34. A release is a contract whereby a party abandons a claim or relinquishes a right that could be asserted against another. *Holland*, 621 F.3d at 1377. In contrast, an accord and satisfaction occurs when "some performance other than that which was claimed to be due is accepted as full satisfaction of the claim." *Id.* The party seeking to bar a claim bears the burden to prove the elements of the defense, which are: "(1) proper subject; (2) competent parties; (3) a meeting of the minds of the parties; and (4) consideration." *Id.* at 1382; *Bell BCI Co. v. United States*, 570 F.3d 1337, 1341 (Fed. Cir. 2009). While a release bars a claim immediately upon execution, an accord and satisfaction bars a claim upon completion of the alternative performance. *McLain Plumbing*, 30 Fed. Cl. at 78-79. Despite this distinction, several decisions have recognized the overlapping natures of these doctrines and found that agreements may be both an accord and satisfaction and a release. *E.g.*, *Holland*, 621 F.3d at 1377*; McLain Plumbing*, 30 Fed. Cl. at 78-79. Regardless of whether modification 4 is construed as a release or an accord and satisfaction, we must look first to the plain language of the written agreement that effectuates it. *Holland*, 621 F.3d at 1383; *Bell*, 570 F.3d at 1341; *see Walsh/Davis Joint Venture v. General Services Administration*, CBCA 1460, 11-2 BCA ¶ 34,799 at 171,261-62. If the plain language of the modification is clear and unambiguous, there is no basis to consider extrinsic or parol evidence. *Bell*, 570 F.3d at 1341.

HDCC does not contend that the terms of modification 4 are unclear or ambiguous. Instead, HDCC argues that there is a "genuine issue of material fact as to whether HDCC and DOT reached a meeting of the minds relating to the full extent of the 'time impact' of the hazardous materials abatement work." Appellant's Opposition at 10. HDCC asserts that "both parties were aware that the full extent of the delays caused by the hazardous materials could not be determined until the abatement work was underway and the full extent of the hazardous materials present was determined." *Id.* In support of its assertion, HDCC cites the solicitation, the terms of modification 2, and the parties' correspondence prior to the execution of modification 4 for the proposition that the parties understood that the extent of the work was not known and would be addressed through a future modification. *Id.* The future modification, however, was issued in April 2019, and this bilateral modification 4 definitized the pricing for handling hazardous materials, provided a schedule adjustment, and contained a release of the government from "any and all future liability." HDCC does not cite any evidence that the parties agreed to an ongoing, open-ended process for issuing modifications after the execution of modification 4.

The undisputed facts show that bilateral contract modification 4 clearly and unambiguously described the work to be performed, definitized the pricing for the work to be performed, and adjusted the schedule. Exhibit 19 at 705-07. The modification further provided a release that, as we have already found, clearly and unambiguously bars further claims regarding the work described in the modification, and HDCC does not argue otherwise. Thus, regardless of whether the modification is reviewed under the doctrine of release or accord and satisfaction, there is no basis to look beyond the plain language of the release and consider extrinsic or parol evidence regarding the parties' meeting of the minds.

Even if we were to consider the extrinsic evidence that HDCC cites, HDCC's arguments would still fail because they do not allege an actual lack of a meeting of the minds that was required to make modification 4 effective. HDCC contends that there is a genuine issue of material fact as to whether the parties agreed on "the full extent of the time impact of the hazardous materials abatement work." Appellant's Opposition at 10. Modification 4, however, did not state that the full extent of the work was known, nor did it specify particular types or amounts of hazardous materials to be handled. Instead, the modification simply required the handling of all hazardous materials encountered during the removal of the bridges, as required by the contract. HDCC cannot demonstrate that there was a lack of a meeting of the minds that was material to the release.

C. Continued Negotiations

HDCC argues that the parties continued to negotiate regarding the delay impact of the handling of hazardous materials after executing modification 4, thereby showing that they did not intend for the waiver in the modification to bar future claims. There are two "special and limited situations" that allow a claim to proceed notwithstanding a clear and unambiguous release: (1) a mutual mistake by both parties that demonstrates the parties did not intend for the release to bar a particular claim; and (2) the parties continued to negotiate regarding the claim after execution of the release in a manner that shows that the parties did not intend for the release to bar the claim. *See Walsh/Davis*, 11-2 BCA at 171,262.

HDCC cites two instances where the parties "engaged in further communications about additional excusable delays related to the hazardous materials removal." Appellant's Opposition at 11. First, HDCC cites its June 2019 letter concerning the "[a]ctual schedule impact for Hazardous Materials at Hilea and Ninole Bridges." This letter, however, was simply a document submitted by HDCC to DOT concerning its updated estimates of the

"time impact" of the work and its view that additional adjustments were merited. HDCC does not cite any response from DOT to this letter indicating a willingness to consider further claims. Second, HDCC cites the submission of its certified claim. There is no evidence, however, of negotiations between the parties regarding the claim, and the only record of DOT's response to the claim is the contracting officer's decision denying it.

The decisions cited by HDCC regarding continuing negotiations, such as *Walsh/Davis*, all involve bilateral exchanges between the Government and a contractor regarding the claim, rather than unilateral assertions by one party regarding entitlement. HDCC does not cite any authority for the proposition that the submission of its letter concerning the "time impact" on work constituted bilateral negotiations concerning entitlement to additional adjustments. Similarly, HDCC does not cite any authority for the proposition that the mere submission of a claim constituted bilateral negotiations. Finding that a party's unilateral submission of a notice or claim constitutes ongoing bilateral negotiations would render all releases meaningless because a party could avoid an otherwise clear and unambiguous release by simply continuing to seek additional consideration.

D. Reservation of Rights

HDCC acknowledges that modification 4 did not contain a reservation of rights that would allow it to pursue a claim. HDCC's Statement of Genuine Issues at 12. Additionally, HDCC does not specifically contend that its May 1, 2019, email to DOT's project engineer (after HDCC executed the modification but before the contracting officer executed the modification) was a reservation of rights. Instead, HDCC argues generally that the email reflects HDCC's intention not to forego the right to make future claims, despite the plain and unambiguous language of the release.[4]

To the extent that HDCC's arguments could be construed to contend that the May 1, 2019, email set forth a separate reservation of rights, that argument fails for two independent reasons: (1) the parol evidence rules bars consideration of the email for the purpose of

[4] In September 2025, DOT filed a motion to supplement its motion for partial summary judgment with a declaration by the contracting officer concerning whether he was aware of the email. Because the Board concluded that the motion for partial summary judgment should be granted without consideration of the issues raised in the declaration, we denied DOT's motion to supplement. *See* Order (Sept. 16, 2025).

contradicting the clear and unambiguous release in modification 4; and (2) the email is not, in any event, a clear reservation of rights.

The parol evidence rule prohibits the use of external evidence to modify, supplement, or interpret the terms of a written agreement "where the written agreement has been adopted by the parties as an expression of their final understanding." *Systems Management & Research Technologies Corp. v. Department of Energy*, CBCA 4068, 16-1 BCA ¶ 36,333, at 177,131-32 (quoting *Barron Bancshares, Inc. v. United States*, 366 F.3d 1360, 1375 (Fed. Cir. 2004)). As a result, "[i]f the terms of a contract are clear and unambiguous, they must be given their plain meaning—extrinsic evidence is inadmissible to interpret them." *Id.* at 177,132 (quoting *Barron Bancshares*, 366 F.2d at 1375). Where a party seeks to introduce additional terms that contradict the plain language of the document, it does not matter whether the document is fully integrated or partially integrated—the contradictory terms may not be considered. *Id*. (citing *McAbee Construction, Inc. v. United States*, 97 F.3d 1431, 1433-34 (Fed. Cir. 1996)).

HDCC asks us to consider and accept as true for purposes of this motion that the May 1, 2019, email expressed to DOT its understanding that the clear and unambiguous language of the release did not bar additional claims for delay. We find, however, that the parol evidence rule bars consideration of the email for the purpose of modifying or supplementing the release's clear and unambiguous bar on such claims.

Even if the parol evidence did not bar our consideration of the email, HDCC does not demonstrate that the email was a reservation of its rights to pursue a claim. The May 1, 2019, email states that although the parties agreed to a specific number of days, the "actual impact" of the hazardous materials "turns out to be significantly more." Appellant's Opposition, Exhibit 3 at 2. The email did not state that HDCC withdrew its acceptance of modification 4 nor did it state that it sought to modify or supplement the language of the modification. Instead, HDCC expressed the "[h]ope we can work out some additional consideration in a future mod[ification]." *Id.*

The purpose of a reservation of rights in a contract modification is to "avoid subsequent controversies that may result from a supplemental agreement containing an equitable adjustment as the result of a change order." FAR 43.204(c). To avoid such controversies, contracting officers are directed to include releases in contract modifications that release the Government from liability, aside from any specific reservations noted. FAR 43.204(c)(2). Although the FAR does not prescribe specific language for reserving

rights in a release, HDCC's expression of "hope," particularly in the context of its acknowledgment of the parties' agreement in modification 4, did not clearly assert a right to submit future claims. At best, the statement suggested that the parties could agree to a future modification, notwithstanding the clear and unambiguous language in the release.

Decision

DOT's motion for partial summary judgment is granted.

Jonathan L. Kang
JONATHAN L. KANG
Board Judge

We concur:

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge