Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

GRANTED IN PART AS TO ENTITLEMENT: April 22, 2003

GSBCA 15344

TRATAROS CONSTRUCTION, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Joel S. Rubinstein of Bell, Boyd & Lloyd, Washington, DC, counsel for Appellant.

Jeremy Becker-Welts, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **NEILL, WILLIAMS,** and **DeGRAFF.**

DeGRAFF, Board Judge.

An accord and satisfaction discharges part of the claim at issue in this appeal. Because the remainder of the claim is not discharged, we grant the appeal in part as to entitlement. We make no award of damages at this time.

Findings of Fact

On September 26, 1996, the parties entered into contract GS-02P-DTC-0033(N) for renovations and alterations to the United States Post Office and Courthouse in San Juan, Puerto Rico. Exhibit 1.[1] According to the contract, if Trataros encountered site conditions that differed materially from those indicated in the contract, the contract price would be equitably adjusted if the conditions caused an increase in the "cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions." Exhibit 1 at 154. Part of the contract work included drilling for and

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[1] "Exhibit __" and "Supp. Exhibit __" refer to appeal file exhibits submitted by General Services Administration (GSA) and by Trataros, respectively.

placing minipiles, and Trataros subcontracted this work to Structural Preservation Systems, Inc. (SPS). Exhibit 1; Supp. Exhibit 1.

On February 13, 1998, SPS submitted a claim to Trataros, stating it had encountered a differing site condition during the performance of its work. SPS divided its claim into six sections. Exhibit 6.

The first three sections of SPS's claim explain the purpose of the claim, provide an overview of the work SPS performed, and set out the conditions SPS expected to encounter and the conditions it actually encountered. Exhibit 6 at 1-7. The contract drawings showed SPS it would encounter obstructions when it installed some of the piles, and SPS said it encountered obstructions in addition to those shown on the drawings. Exhibit 6 at 5-7. The fourth section of the claim explains the procedures SPS planned to use and the procedures it actually used in order to perform its work. Exhibit 6 at 8-13. SPS said that when it encountered unanticipated obstructions, this had a "significant impact on the productivity of drilling operations." Exhibit 6 at 10. Also, encountering the unanticipated obstructions "interrupted the flow of work" and caused SPS to demobilize its crews in some locations and remobilize elsewhere. Exhibit 6 at 12. In addition, encountering the obstructions resulted in increased maintenance and spoils control requirements. Exhibit 6 at 12.

The fifth section of SPS's claim is headed, "Cost and Schedule Impacts Due to Differing Site Conditions." Exhibit 6 at 14-22. The first paragraph of this section reads in part as follows:

> The unanticipated obstructions encountered on this project severely impacted the productivity of the primary work item, pile installation. This impact resulted in additional costs for labor, supervision, equipment, materials and extended jobsite overhead and support due to increased project duration. The following analysis clearly indicates the scope of these impacts and their effects on the productivity of this project.

Exhibit 6 at 14.

The fifth section of the claim divides the project into four phases. The first phase includes some preliminary construction activities, casing installation, and the beginning of pile installation activities. The second, third, and fourth phases of the project consist of pile installation. Exhibit 6 at 14-15.

During the second phase of the project, the claim says SPS "generally" installed unobstructed piles and piles with obstructions that SPS anticipated based upon the information contained in the contract drawings. Also during the second phase, it appears SPS installed some piles with obstructions that were not anticipated. During this phase of its work, SPS installed thirty-five "planned obstructed, unobstructed, and unplanned obstructed piles." Exhibit 6 at 14, 17, 19.

During the third phase of the project, the claim says, SPS encountered unanticipated obstructions that "had a variety of negative impacts on productivity." Exhibit 6 at 15. SPS's claim goes on to categorize the piles installed during the third phase "in accordance with the

[e]ffects on productivity of the pile installation due to the unplanned obstructions." Exhibit 6 at 15. The first category of piles includes those that were obstructed, even though the contract drawings showed no obstructions. The second category of piles includes those that were obstructed, just as SPS anticipated based upon the contract drawings. The third category of piles includes those that were not obstructed. SPS's claim says the unexpectedly obstructed piles required additional drill rigs, additional manpower and supervision, additional drill steel and drill bits, and additional spoils control equipment and disposal lines. SPS's claim says installation of the piles in the second and third categories was "negatively impacted" due to "interferences" caused by the installation of the piles with unanticipated obstructions. Exhibit 6 at 15-16. SPS's claim explains these interferences, which "led to a decrease in productivity," included deterioration and disruption of the soil structure and surface conditions, and "[i]mpacts to productivity due to site logistics." Exhibit 6 at 15-16. Regarding the site logistics, the installation of piles that were unexpectedly obstructed caused "extreme site congestion and safety hazards. These hazards, working in a congested muddy site with high-powered equipment in conjunction with the increased amounts of manpower equipment and materials, had a negative impact on the productivity" of the installation of the piles that SPS anticipated would be obstructed and the installation of piles that were not obstructed. SPS installed 102 piles during the third phase of the project. Exhibit 6 at 15-16, 19.

During the fourth phase of the project, SPS installed seventy-seven unobstructed piles. Exhibit 6 at 15-17, 19. SPS's claim says the unanticipated obstructions it encountered during the third phase of the project adversely affected its ability to plan the casing and pile installation of the fourth phase of the project. Exhibit 6 at 17.

The claim contains estimates of the labor productivity rates SPS achieved during the second and fourth phases of the project when it worked largely as it anticipated working, and uses those estimates to arrive at productivity rates SPS believes it should have been able to achieve during the entire project installing piles that were unobstructed and piles with anticipated obstructions, if it had not encountered the unanticipated obstructions. SPS takes the productivity rates it believes it should have been able to achieve and uses them to estimate the number of labor hours it believes it should have expended on phases two, three, and four of the project. Exhibit 6 at 18.

SPS's claim then looks at the labor productivity rates it actually achieved during phases two, three, and four. During phase two, when SPS generally worked as planned, its actual labor productivity rate was somewhere between the rate it believes it should have been able to achieve installing unobstructed piles and the rate it believes it should have been able to achieve installing piles with anticipated obstructions. During phase three, when SPS installed piles that were unexpectedly obstructed as well as piles that were unobstructed and piles with anticipated obstructions, its actual labor productivity rate was lower than either the rate it believes it should have been able to achieve installing unobstructed piles or the rate it believes it should have been able to achieve installing piles with anticipated obstructions. During phase four, when SPS installed unobstructed piles, its actual labor productivity rate was considerably lower than the rate it believes it should have been able to achieve installing unobstructed piles. SPS's claim attributes the lower productivity rates to the effects of the unexpected obstructions it encountered during phase three. SPS takes the productivity rates

it actually achieved and uses them to develop the number of labor hours it claims it actually expended on phases two, three, and four of the project. Exhibit 6 at 18-19.

The fifth section of SPS's claim concludes by discussing how SPS's schedule was affected by the unanticipated obstructions. SPS asks for a thirty-three day extension of its subcontract completion date. Exhibit 6 at 20-22. This is the number of days SPS took to perform its work in excess of the number of days it anticipated taking to perform its work. Transcript at 127.

The sixth section of SPS's claim is headed, "Cost Analysis Proposal." Here, the claim asks to recover the costs of "direct and indirect impacts" to SPS, including costs of direct field labor; field supervision; project support; lodging, transportation, and per diem expenses; rental equipment; SPS's equipment; small tools and consumables; and engineering and consulting services. Exhibit 6 at 23-28. In addition, the claim asks to recover a percentage of these claimed costs to compensate for general and administrative expenses, profit, and bond costs. Exhibit 6 at 28.

Regarding direct field labor, the claim takes the number of labor hours SPS claims it actually expended on phases two, three, and four of the project and subtracts the number of labor hours it believes it should have expended on phases two, three, and four of the project, as explained in the fifth section of SPS's claim. For each phase of the project, SPS claimed the hours it actually expended exceeded the hours it should have expended. The claim then multiplies the excess hours by an hourly labor rate and arrives at what SPS claims were its additional direct field labor costs. Exhibit 6 at 23. This method of quantifying a loss of labor productivity, by comparing actual productivity during a period in which work was not affected by a differing site condition to a period in which work was affected by a differing site condition, is referred to as a "measured mile" approach to measuring productivity. Transcript at 131-32.

To calculate its additional costs of field supervision, project support, lodging, transportation, per diem expenses, rental equipment, SPS's equipment, and small tools and consumables, SPS relies upon its request for a thirty-three day extension to its subcontract completion date. The claim multiplies thirty-three by an average cost per day for each of these items in order to arrive at what SPS claims were its additional costs.[2] Exhibit 6 at 23-26.

Regarding engineering and consulting services, the claim explains SPS spent more than it planned for inspection services and engineering consulting services. The claim attributes the increase in the cost of inspection services to "[t]he increased duration of the project and double shifts" and says it needed inspectors on site for an additional month. It attributes the increase in the cost of engineering consulting services to additional

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[2] What the claim calls the average cost per day for SPS's equipment does not reflect the actual costs SPS incurred for its equipment. Instead, the cost figure used in the claim is the amount SPS would have spent if it had rented the equipment it brought to the job site. Exhibit 6 at 25.

consultations "to overcome drilling difficulties that were being experienced due to the unplanned obstructions in order to get the project back on schedule." Exhibit 6 at 27.

SPS installed approximately 214 piles. Exhibit 6 at 19. SPS's claim was based upon encountering unanticipated obstructions during the installation of forty-four piles. Exhibit 6 at 5, 21.

On March 19, 1998, Trataros forwarded SPS's claim to O'Brien Kreitzberg, GSA's construction manager, and sent a copy to the person who was then the GSA contracting officer. Trataros asked to recover the amount claimed by SPS plus a percentage of that amount for Trataros's profit and bond costs. Trataros did not ask to extend the contract's completion date. Exhibit 6; Transcript at 27.

In June 1998, O'Brien Kreitzberg completed a review of the SPS claim and concluded SPS encountered some unanticipated obstructions. O'Brien Kreitzberg sent its review to the contracting officer's technical representative. Supp. Exhibit 3. GSA completed an audit of the SPS claim and issued an audit report on October 13, 1998. Exhibit 14.

On March 26, 1999, Trataros submitted to the contracting officer a preliminary time impact analysis that was prepared by a Trataros consultant. The consultant's analysis listed eight delays for which the consultant concluded GSA was responsible. Based upon the analysis, Trataros asked GSA to extend the contract completion date by 254 calendar days, from the current completion date of January 19, 1999, to September 30, 1999.[3] Supp. Exhibit 6. The contracting officer did not read this document, which she viewed as "basically technical." Instead, she forwarded it to other GSA employees for their review of the technical issues raised. Transcript at 35-36. Two months later, Trataros submitted to the contracting officer's technical representative a time impact analysis, prepared by the same Trataros consultant, of a ninth delay. The consultant concluded GSA might have delayed the contract completion date by another thirty-four work days. The SPS claim was not addressed in either analysis. Supp. Exhibit 6; Transcript at 68.

On April 8, 1999, GSA, O'Brien Kreitzberg, Trataros, SPS, and a consultant hired by GSA met to discuss the SPS claim. GSA hired the consultant to make a review of the technical merits of the SPS claim to see whether SPS had encountered unanticipated obstructions. The meeting attendees discussed their views of the information shown on the contract drawings regarding obstructions and they talked about SPS's claimed costs. The result of the meeting was that SPS would provide additional information regarding the costs that resulted from encountering obstructions. Supp. Exhibit 7; Transcript at 51, 58.

On August 30, 1999, Trataros sent O'Brien Kreitzberg a revision to the SPS claim that SPS agreed could be used for the purposes of attempting to settle the claim. Although the revised claim contains adjustments to some figures contained in the original SPS claim, the

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[3] As the consultant's report notes, GSA had previously agreed to extend the contract's completion date by twenty-eight days due to a weather-related delay. Thus, the contract's actual completion date was February 16, 1999, and any extension of the contract's completion date would run from that date. Supp. Exhibit 6.

revised claim does not contain any change in the theory upon which the original claim was founded. Exhibit 18.

On September 16, 1999, O'Brien Kreitzberg wrote to Trataros regarding the revised SPS claim. The letter said SPS could be reimbursed "only for the actual added obstructions encountered during pile installation," and also said the revised SPS claim contained costs that did not result from encountering obstructions. Supp. Exhibit 9.

In September 1999, the project was not complete and was significantly behind schedule. Transcript at 87, 135. Liquidated damages of approximately $1.4 million had accrued. Transcript at 140. The parties met in September to try to reach an agreement regarding the schedule, compensation for Government-caused delay, and liquidated damages. Several telephone conversations followed this meeting. Transcript at 48, 82-83, 137-38, 152.

The result of the parties' discussions was contract modification 82, which Trataros signed on November 4, 1999, and GSA signed on November 12, 1999. The modification reads as follows:

> This Modification will revise the contract completion date by 318 calendar days from February 16, 1999 to December 31, 1999.
>
> The Government agrees that no liquidated damages will be assessed against Trataros Construction for the period beginning February 17, 1999 through December 31, 1999. The Government reserves its right to assess and withhold liquidated damages pursuant to the contract beginning on January 1, 2000 and continuing until substantial completion of the entire Project is achieved.
>
> In consideration for the release of all claims known and unknown by Trataros Construction and its subcontractors and suppliers relating to: impact; delay; extended or unabsorbed overhead (both direct and indirect); and any other claims for time extensions and related costs for the period beginning with the Contract Award Date and ending December 31, 1999, the contract value will be increased in the amount of $200,000.00, such amount to be invoiced on the first payment application following the completion of the Project. Trataros Construction and the GSA do hereby mutually agree that the $200,000.00 increase in the Contract amount provides full, fair and just compensation for any and all costs which may have been incurred as a result of any delay which has occurred to the Project schedule since Contract Award Date through December 31, 1999 and further compensates Trataros Construction and its subcontractors and suppliers completely for any and all extended or unabsorbed overhead costs through the period ending December 31, 1999.
>
> Trataros Construction and the GSA pledge to cooperate with one another at all levels.

Exhibit 16.

At a hearing held October 16, 2002, the president of Trataros, Costas Trataros, testified that no specific claims were discussed during the negotiations that led up to the signing of modification 82. Transcript at 64, 84-85, 98-99, 107-08. He also testified he thought he was negotiating to settle the nine claims mentioned in the two preliminary time impact analyses that were prepared by the Trataros consultant in mid-1999. Transcript at 69, 70. Two years before giving this testimony at the hearing, Mr. Trataros signed an affidavit stating that when he negotiated modification 82, he thought he was negotiating only eight specific claims. He said the same thing in his deposition approximately one year before the hearing. Transcript at 71, 80, 87-88. At the hearing, Mr. Trataros said he mentioned only eight claims in his affidavit and in his deposition testimony because he forgot about the ninth claim and did not remember it until he searched his records and found the second time impact analysis. Transcript at 71, 80.

Mr. Trataros testified he would have spoken to SPS if he had considered including the SPS claim in the negotiations that led up to modification 82, because the claim belonged to SPS, a Trataros subcontractor. Transcript at 70. He was not sure how many of the claims mentioned in the time impact analyses were subcontractor claims. At least one of the claims was a subcontractor claim, however, and Mr Trataros did not speak to that subcontractor or to any other subcontractors about their claims before agreeing to the modification. Transcript at 78-80.

Mr. Trataros testified he thought he had approximately 318 days "on the table" when he negotiated modification 82. Upon a closer review of the two time impact analyses, which asked for the contract completion date to be extended by a total of 288 days, he corrected his statement to say that Trataros had asked for 288 days and received an extension of 318 days. Transcript at 68-69. He also testified he thought he was asking for somewhere in the range of $500,000 to $600,000. Transcript at 69. He testified he gave up some dollars in order to get more days, and he wanted the additional days to complete the project as a sort of "insurance," in order to make sure Trataros would not have a problem finishing its work by the completion date. Transcript at 86. He also testified the parties did not discuss the number of days associated with any particular claim when they negotiated modification 82. Transcript at 108.

One of GSA's negotiators testified there were no discussions of any individual claims during the negotiations for modification 82. The discussions about extending the contract completion date did not involve a discussion of a particular number of days associated with a particular event. Instead, the discussions involved setting a completion date. He recalled Mr. Trataros suggested the December 31, 1999 completion date. He also recalled Mr. Trataros asked for approximately $400,000. At the time of the negotiations, the GSA negotiator had not reviewed the two time impact analyses that had been prepared by the Trataros consultant. Transcript at 136-39. He understood modification 82 to resolve all known and unknown time-related issues from the date the contract was awarded until December 31, 1999. He was the person who wanted to insert the "known and unknown" language into the modification because he did not want to revisit the issues of time and time-related costs at a later date. He thought both parties "felt that way." Transcript at 139-41. In his view, a differing site condition claim should not be a claim for time or time-related costs. Transcript at 145.

A second GSA negotiator testified there were no discussions regarding any individual claims, because the settlement was meant to be a global settlement that set a new date for completion of the project. Individual claims were not reviewed during the discussions in order to calculate the number of days by which the project would be extended. He believed Mr. Trataros suggested December 31, 1999, as the completion date. The parties discussed that GSA would not assess liquidated damages through the new completion date. Also, they discussed the dollar amount that would be paid to Trataros in order to "wipe the slate clean" for Government-caused delays. He recalled the parties ended their September meeting with Trataros asking for $250,000 and GSA offering $150,000, and the $200,000 figure was arrived at later. Transcript at 153, 157-58. At the time of the negotiations, he had not seen the two time impact analyses that were prepared by the Trataros consultant. Transcript at 150. He also thought that a differing site condition claim would be separate from a delay claim. Transcript at 158-59.

A third GSA negotiator testified he and Trataros's representative did not discuss exchanging days for dollars. He recalled Trataros initially asked for $400,000. The parties discussed when Trataros was going to finish construction. He recalled Mr. Trataros thought he could complete construction by November, but he wanted a little "cushion" and asked for a completion date of December 31, 1999. There were no discussions about associating numbers of days with particular claims in order to arrive at the extended completion date. There were no discussions regarding individual claims that were to be either included in or excluded from the settlement. After GSA agreed to extend the completion date to December 31, 1999, the parties continued their negotiations until they arrived at the $200,000 amount by which GSA would increase the contract price. This negotiator viewed the settlement as "global." Transcript at 172-75. He believed that the SPS claim was still alive, although he did not know whether it was affected by modification 82. Transcript at 176-77.

According to the contracting officer, during the negotiation of modification 82, no one mentioned any specific claims that were to be included in the modification, and Trataros did not mention it wanted any specific claims excluded from the modification. Transcript at 47-48. When the contracting officer negotiated modification 82, she did not have in mind that the modification would eliminate the SPS claim or any other claim because there were no claims discussed at that time. Transcript at 25-26, 52-53. The contracting officer intended for the modification to extend the contract completion date to December 31, 1999, and to include all known and unknown claims that were for time and time impacts. Transcript at 40. She thought the SPS claim was "separate" because it raised an issue of "site conditions" and was not "based on time or time impact." Transcript at 41. Although "it was a known claim based on site conditions," it was not a "known claim dealing with time." Transcript at 41. The SPS claim was being reviewed for technical merit and "we all saw it as a technical claim." Transcript at 41.

After hearing the testimony of Mr. Trataros and the GSA witnesses, we find the parties intended for modification 82 to be a comprehensive settlement. When they negotiated, their intent was to establish a new contract completion date, to relieve Trataros from having to pay a substantial amount of liquidated damages, to provide Trataros compensation for Government-caused delays, and to relieve GSA from having to compensate Trataros for claims for impact, delay, and any other claims for time extensions and related

costs from the date the contract was awarded through December 31, 1999, whether those claims were known or unknown when the parties signed the modification.

On November 10, 1999, the contracting officer's representative wrote to Trataros regarding the SPS claim "for differing site conditions." The letter asked Trataros to "verify that all costs not directly related to unplanned obstructions are removed from the cost pool." Supp. Exhibit 10.

On January 20, 2000, GSA, the consultant GSA hired to review the technical merits of the differing site condition claim, O'Brien Kreitzberg, Trataros, and SPS met to discuss the SPS claim. They discussed how SPS determined what constituted an unanticipated obstruction and how it documented those obstructions, how it determined its costs, what information it reviewed in order to prepare its claim, its productivity rates, and its response to some of the audit report's comments regarding costs that did "not apply to obstructions." Exhibit 18. GSA told Trataros it expected to receive a report from the consultant soon and would review his recommendations. Exhibit 18; Transcript at 50-51, 58.

Trataros certified the revised SPS claim on February 7, 2000, and submitted it to the GSA contracting officer. Exhibit 18. The contracting officer thought the SPS claim was still a "live claim" at this point; she did not think it had been settled. Transcript at 30-31. She did not study the technical issues raised in the SPS claim and she did not look into the nature of the money that SPS, through Trataros, was requesting. She had turned the claim over to others to review for technical merit to see whether SPS had encountered a differing site condition. Transcript at 50-52, 58.

On March 29, 2000, after the GSA consultant completed his technical review and provided his recommendation to GSA, the contracting officer issued a decision denying the claim. The decision says GSA, after reviewing the contract drawings, concluded SPS had not encountered any more obstructions than were shown on the drawings. Therefore, GSA denied the claim. Exhibit 19; Transcript at 50-52. The decision was not based upon modification 82. Transcript at 23, 31.

Trataros filed this appeal from the contracting officer's decision on June 8, 2000. Notice of Appeal. At the suggestion of GSA counsel, the contracting officer reviewed the entire claim and realized it included time and time-impact elements, which led her to conclude the claim was subsumed by modification 82. Transcript at 24-25, 32-33. In its answer to the complaint, GSA raised accord and satisfaction as a defense. Answer at 3. Shortly before the hearing, the parties stipulated that SPS encountered a differing site condition. They also agreed that "[f]or settlement purposes, the number of unanticipated obstructed minipiles is nineteen (19)." Exhibit 20.

Discussion

GSA says the SPS claim was discharged by an accord and satisfaction memorialized in modification 82. Respondent's Brief at 8-13. Trataros says modification 82 does not record an accord an satisfaction of the SPS claim. Appellant's Brief at 2-4. We conclude that the SPS claim was discharged in part by accord and satisfaction. Although the parties asked

us to make an award of damages if we could, no such award is possible based upon the record as it now stands.

I. Accord and Satisfaction

Generally, 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. Kanag'Iq Construction Co. v. United States, 51 Fed. Cl. 38, 46-47 (2001). An accord and satisfaction has the effect of discharging an existing right. The accord occurs when one party to a contract agrees to give or to perform something other than what the second party claims the contract requires, and the second party agrees to accept the alternate thing or performance in satisfaction of the claim. The satisfaction occurs when the parties perform their agreement. Chesapeake & Potomac Telephone Co. of Virginia v. United States, 654 F.2d 711, 716 (Ct. Cl. 1981). The essential elements of an accord and satisfaction are competent parties, proper subject matter, consideration, and a meeting of the minds. Brock & Blevins Co. v. United States, 343 F.2d 951 (Ct. Cl. 1965).

Here, we have a bilateral contract modification, modification 82, in which GSA extended the contract completion date from February 16 to December 31, 1999, a date with which Trataros agreed. GSA agreed not to assess liquidated damages through the revised completion date. In addition, GSA agreed to increase the contract price by $200,000 and, in exchange, Trataros agreed to release all of its claims and its subcontractors' claims, whether known or unknown, relating to impact, delay, extended and unabsorbed overhead, and any other claims for time extensions and related costs, beginning with the contract award date and ending December 31, 1999. The modification was the result of negotiations between the parties and it contains no exceptions or reservations by either party. GSA has established a prima facie case that modification 82 represents an accord and satisfaction of the SPS claim, if the claim is one for impact, delay, extended and unabsorbed overhead, or a time extension and related costs.

Trataros contends, however, that modification 82 does not represent an accord and satisfaction of the SPS claim because (1) the modification does not contain a release that comports with 48 CFR 43.204(c) (1999) (FAR 43.204(c)); (2) the SPS claim falls outside the scope of the modification; and (3) there is a lack of proper subject matter, consideration, and a meeting of the minds. We examine these contentions below.

A. FAR 43.204(c)

Trataros argues that bilateral modification 82, which does not contain any reservation of claims, does not constitute an accord and satisfaction because it does not contain a release that comports with FAR 43.204(c). Appellant's Brief at 3-4.

FAR 43.204(c) reads in part as follows:

> To avoid subsequent controversies that may result from a supplemental agreement containing an equitable adjustment as the result of a change order, the contracting officer should —

> . . . .
>
> (2) Include, in the supplemental agreement, a release similar to the following:
>
> Contractor's Statement of Release
>
> In consideration of the modification(s) agreed to herein as complete equitable adjustments for the Contractor's _____ (describe)_____ "proposal(s) for adjustment," the Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to the "proposal(s) for adjustment" (except for _____).

FAR 43.204(c). The release that Trataros gave to GSA in modification 82 does not list the Trataros proposals that were the subject of the $200,000 equitable adjustment to the contract price and does not list any exceptions to the release.

Relying upon the sixth edition of Black's Law Dictionary and United States v. Orval W. Anderson, 798 F.2d 919 (7th Cir. 1986), Trataros says the word "should" contained in the first sentence of FAR 43.204(c) imposes a requirement upon a contracting officer to utilize a release similar to the one found in FAR 43.204(c)(2). The consequence of not including in modification 82 a release similar to the one contained in the regulation, says Trataros, is that there was no accord and satisfaction. In support of this contention, Trataros relies upon the decision in Kanag'Iq Construction Co. v. United States, 51 Fed. Cl. 38 (2001).

We are not persuaded that the word "should" required the contracting officer to include in modification 82 a release similar to the one set out in FAR 43.204(c)(2). The sixth edition of Black's Law Dictionary defines "should" as:

> The past tense of shall; ordinarily implying duty or obligation; although usually no more than an obligation of propriety or expediency, or a moral obligation, thereby distinguishing it from "ought." It is not normally synonymous with "may," and although often interchangeable with the word "would," it does not ordinarily express certainty as "will" sometimes does.

Black's Law Dictionary 1379 (6th ed. 1990).[4] This definition, which can support either the proposition that "should" is mandatory or the proposition that "should" is permissive, is sufficiently ambiguous to make us unwilling to conclude that modification 82 was required to contain a release similar to the one contained in FAR 43.204(c)(2). In the Anderson case cited by Trataros, the court of appeals concluded that when the Indiana code of judicial conduct stated a judge "should accord to every person . . . full right to be heard," the word "should" imposed a mandatory requirement. In reaching this conclusion, the court took into account Indiana Supreme Court decisions that viewed the code as containing mandatory standards. 798 F.2d at 923-24. In contract cases, however, "should" is frequently read as denoting a preference, not a mandate. McDonnell Douglas Corp. v. Islamic Republic of Iran,

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[4] The seventh edition of this dictionary does not contain a definition of "should."

758 F.2d 341 (8th Cir.), cert. denied, 474 U.S. 948 (1985); Cybertech Group, Inc. v. United States, 48 Fed. Cl. 638, 649-50 (2001) (citing cases). The authorities relied upon by Trataros do not lead us to conclude that the regulation required the contracting officer to use a release similar to that contained in the regulation.

Moreover, the absence of a release similar to the one contained in FAR 43.204(c)(2) does not mean there was no accord and satisfaction. As the court in Kanag'Iq Construction explained, the presence of a release, whether similar or dissimilar to the one contained in FAR 43.204(c)(2), is not necessary to effectuate an accord and satisfaction. This is so because "a release constitutes no condition precedent to discharge by accord and satisfaction." McLain Plumbing & Electrical Service, Inc. v. United States, 30 Fed. Cl. 70, 79 (1993). Thus, even if modification 82 had contained no release whatsoever, it could constitute an accord and satisfaction.

Trataros also argues that if any confusion results because the language contained in modification 82 does not follow FAR 43.204(c)(2), the language should be construed against GSA. There are at least two reasons for rejecting this argument. First, the modification was the product of negotiations between the parties and is signed by both of them. A negotiated, bilateral agreement is not one which is suited to an application of the doctrine of contra proferentem. Cray Research, Inc. v. United States, 44 Fed. Cl. 327 (1999); Parcel 49C Limited Partnership v. General Services Administration, GSBCA 15222, 03-1 BCA ¶ 32,081, at 158,600 (2002). Second, the modification's language is not confusing. The modification encompasses certain types of claims, with no exceptions or reservations. If Trataros intended to reserve a claim, it should have expressed that intent before it signed the modification. Poole Engineering & Machine Co. v. United States, 57 Ct. Cl. 232, 234 (1922) ("It has been frequently said that if a party keeps silent when he ought to speak he will not be heard thereafter to speak when he ought to remain silent."). The absence of a reservation of claims does not make the language of the modification unclear, and does not establish that there was no accord and satisfaction.

B. The SPS Claim and the Scope of Modification 82

Trataros argues that the scope of modification 82 does not extend to the SPS claim because the claim is not one for impact, delay, or a time extension and related costs. Trataros says the claim seeks costs incurred as a "direct result of the differing site condition," and the claim "does not seek a contract time extension and costs related thereto." According to Trataros, the basis for the SPS claim is that the unanticipated obstructions made the contract work more difficult, which resulted in SPS expending additional effort to drill the unanticipated obstructed piles. Appellant's Reply Brief at 3. This characterization of the SPS claim is only partially accurate.

The SPS claim that Trataros presented to GSA did not include a request for a time extension. Although the claim that SPS presented to Trataros asked for a thirty-three day extension of the subcontract completion date, Trataros did not ask for the contract completion date to be extended when it forwarded SPS's claim to GSA. Our record does not explain why Trataros did not pass along SPS's request. Perhaps SPS's work was not on the critical path toward completion of the project. Perhaps Trataros believed there were delays for which it

was responsible that occurred concurrently with the delays SPS experienced. Whatever the reason, Trataros did not ask GSA for any extension of the contract performance period.

The SPS claim that Trataros presented to GSA did, however, ask for an increase in the contract price and the scope of modification 82 includes increases to the contract price related to impact, delay, and time extensions. In order to assess Trataros's argument that the price increase it requested falls outside the scope of modification 82, we first look at the types of costs that can result when a contractor encounters a differing site condition and then we examine the costs requested in the SPS claim.

As the differing site conditions clause contained in our contract recognizes, when a contractor encounters a differing site condition, there are several ways it might incur costs in addition to those it expected to incur when it entered into the contract. First, it might incur additional costs due to the additional effort it must expend in order to perform contract work that is changed due to the differing site condition. These are sometimes referred to as "hardcore costs." Coastal Dry Dock & Repair Corp., ASBCA 36754, 91-1 BCA ¶ 23,324 (1990). Second, a contractor might incur additional costs due to the impact of the differing site condition on contract work that is not changed due to the differing site condition. Such impact costs are caused by a loss of labor efficiency or productivity due to, for example, overcrowding, overtime, shift work, and coping with interference. Haas & Haynie Corp., GSBCA 6638, et al., 84-2 BCA ¶ 17,446; Pittman Construction Co., GSBCA 4897, 81-1 BCA ¶ 14,847 (1980), aff'd, 2 Cl. Ct. 211 (1983). Third, a contractor might incur additional costs when additional time is needed to perform any part of the contract work. If the contractor incurs added costs because it needs additional time to complete the project as a whole, the contractor can present a claim for delay costs to the Government. Baldi Brothers Constructors v. United States, 50 Fed. Cl. 74 (2001); R.C. Hedreen Co., GSBCA 4289, 77-1 BCA ¶ 12,521. If, however, a contractor incurs added costs because one of its subcontractors needs additional time to complete its part of the contract work and no additional time is needed to complete the project as a whole, the contractor cannot pursue a claim for delay costs. But, the contractor can pursue a claim on behalf of the subcontractor for the additional costs the subcontractor incurred because it needed additional time to perform its part of the work; that is, for the additional costs related to the time extension the subcontractor required. See E. R. Mitchell Construction Co. v. Danzig, 175 F.3d 1369 (Fed. Cir. 1999).

Turning to the costs requested in the SPS claim, we look first at the costs claimed for direct field labor. The costs certainly look like impact costs. They are based entirely upon a loss of productivity that SPS quantified by using a "measured mile" approach. In other words, SPS compared its labor productivity during a period in which its work was not affected by the differing site condition to its productivity during a period in which its work was affected by the differing site condition. A loss in labor productivity typically results in an impact cost, not a hardcore cost, and the "measured mile" approach is one method of analysis used to quantify impact costs, not hardcore costs. Clark Concrete Contractors, Inc. v. General Services Administration, GSBCA 14340, 99-1 BCA ¶ 30,280; J.A. Jones Construction Co., ENGBCA 6348, 00-2 BCA ¶ 31,000; Emerald Maintenance, Inc., ASBCA 43929, 98-2 BCA ¶ 29,903.

Looking at the direct field labor costs more closely, we see that SPS asked to recover for productivity losses during phases two, three, and four of the project. The costs are impact

costs to the extent that the productivity losses are attributable to the impact of the differing site condition on unchanged work, i.e., the installation of unobstructed piles and the installation of piles that the contract drawings showed were obstructed. SPS said that during phase two, it generally installed unobstructed piles and piles with obstructions it anticipated based upon the contract drawings. Because SPS generally performed unchanged work during phase two, the claimed direct field labor costs for phase two are generally impact costs. SPS said that during phase four, it installed unobstructed piles. Because SPS performed only unchanged work during phase four, the claimed direct field labor costs for phase four are entirely impact costs. SPS said that during phase three of the project, it installed piles where it encountered unanticipated obstructions and it also installed piles that were unobstructed and that had obstructions shown on the contract drawings. Because SPS, to some extent, performed unchanged work during phase three, the direct field labor costs for phase three are, to some extent, impact costs. We do not know the extent to which the claimed direct field labor costs for phases two and three are attributable to work that changed due to encountering unanticipated obstructions (the hardcore costs of installing unexpectedly obstructed piles) and the extent to which the claimed costs are attributable to unchanged work (the impact costs caused by the productivity losses that occurred during the installation of unobstructed piles and piles the drawings showed were obstructed).

We look next at the costs requested in the SPS claim for field supervision, project support, lodging, transportation, per diem expenses, rental equipment, SPS's equipment, and small tools and consumables. The claim multiplies thirty-three by an average cost per day for each of these items in order to arrive at what SPS claims were its additional costs. SPS chose thirty-three as the multiplier because it asked for an extension of its subcontract completion date of thirty-three days, which was the number of days SPS took to perform its work in addition to the number of days it anticipated taking to perform its work. If the additional time SPS needed to perform had caused Trataros to need additional time to complete the project as a whole, Trataros would have presented a claim for delay costs to GSA. Because, however, the additional time SPS needed did not result in a delay to the project as a whole, this part of the SPS claim is for the additional costs that SPS incurred because it needed additional time to perform its part of the work. The costs requested are based entirely upon SPS's need for a time extension. Thus, the costs claimed for field supervision, project support, lodging, transportation, per diem expenses, rental equipment, SPS's equipment, and small tools and consumables are related to a time extension.

Turning next to the costs requested in the SPS claim for engineering and consulting services, we see the claim attributes the increase in the cost of these items to the increased duration of the project, to double shifts, to inspectors working on site for an additional month, and to the need to overcome drilling difficulties SPS experienced due to the differing site condition in order to get SPS's work back on schedule. To the extent these costs are attributable to the increased duration of the project and to inspectors working on site for an additional month, they are costs SPS incurred because it needed additional time to perform its part of the work. Thus, the claimed costs for engineering and consulting services are, in some unknown part, related to the time extension SPS needed in order to complete its subcontract work.

In summary, some of the costs requested in the SPS claim fall within the scope of modification 82, which includes increases to the contract price relating to impact, delay, or

time extensions. The SPS direct field labor costs are, to some extent, impact costs. The SPS costs for field supervision, project support, lodging, transportation, per diem expenses, rental equipment, SPS's equipment, and small tools and consumables are entirely related to the delay SPS experienced and the time extension SPS requested. The SPS costs of engineering and consulting services are in part related to SPS's delay and request for a time extension. If modification 82 memorializes an accord and satisfaction, it discharges the SPS claim to the extent the claimed costs fall within the scope of the modification.

C. Proper Subject Matter, Consideration, and a Meeting of the Minds

Trataros contends that modification 82 does not discharge any part of the SPS claim because, says Trataros, the modification does not memorialize an accord and satisfaction. According to Trataros, there is no accord and satisfaction because there was no proper subject matter, no consideration, and no meeting of the minds. We examine these contentions below.

1. Proper subject matter

Trataros contends modification 82 does not constitute an accord and satisfaction because proper subject matter is lacking due to the absence of any discussion of the SPS claim during negotiations and due to GSA's belief that the SPS claim was not time-related. Appellant's Brief at 2, 13. Trataros misapprehends the requirement that there be proper subject matter.[5] The subject matter of a contract is not proper if, for example, it is to commit an unlawful act (to restrain trade, to sell illegal drugs, to obstruct justice, to commit treason, or to kill someone) or to contravene public policy (to prevent someone from holding elective office). Hudson County Water Co. v. McCarter, 209 U.S. 349, 357 (1908) ("The contract will carry with it the infirmity of its subject matter."); Trist v. Child, 88 U.S. 441, 448-53 (1874); 5 Samuel Williston & Richard A. Lord, A Treatise on the Law of Contracts § 12:1 (4th ed. 1993); 17 C.J.S. Contracts § 34 (1999).

The subject matter of modification 82 is proper because it was to resolve the parties' differences regarding matters that had arisen during the course of the performance of the contract. Pacific Ship Repair & Fabrication, Inc., ASBCA 49288, 99-1 BCA ¶ 30,222; Safeco Credit v. United States, 44 Fed. Cl. 406 (1999). The lack of discussion regarding the SPS claim during the negotiation of modification 82 and GSA's belief that the SPS claim was not time-related bear upon whether there was a meeting of the minds, which we address below, and do not bear upon whether the subject matter of modification 82 was proper.

2. Consideration

Trataros argues modification 82 does not constitute an accord and satisfaction because it did not include any consideration for discharging the SPS claim. Appellant's Brief at 2, 13. Looking at the modification, we see that in exchange for a release of "all claims known and unknown by Trataros Construction and its subcontractors and suppliers relating to: impact; delay; extended or unabsorbed overhead (both direct and indirect); and any other claims for time extensions and related costs for the period beginning with the Contract Award Date and ending December 31, 1999," Trataros received a contract price increase of $200,000. GSA also extended the contract completion date by 318 days, which gave Trataros additional time to complete its contract work and relieved it from having to pay liquidated damages that amounted to approximately $1.4 million. Certainly GSA's agreement to increase the contract price by $200,000 and its agreement to extend the contract performance period and to forego collecting approximately $1.4 million in liquidated damages provided consideration for the

[5] Trataros is not alone in this regard. See, e.g., King Fisher Marine Service, Inc. v. United States, 16 Cl. Ct. 231 (1989).

parties' bargain. The modification did not tie any part of that consideration to any particular claim because the parties did not discuss any individual claims when they negotiated the modification and because the claims Trataros agreed to give up included unknown claims and future claims. If the SPS claim is one that is encompassed by modification 82, then the modification includes consideration for that claim just as it does for any other claims that fall within the terms of the modification.

3. Meeting of the minds

The intent of the parties is the controlling factor in deciding whether there was a meeting of the minds, and "[t]he contract modification provides the best source of evidence regarding intent." McLain Plumbing & Electrical Service, Inc. v. United States, 30 Fed. Cl. 70, 81 (1993). The intent of GSA and Trataros as expressed in modification 82, which is consistent with the negotiations that led up to the execution of the modification, shows a meeting of the minds.

When the parties negotiated the terms of modification 82, the project was significantly behind schedule. Trataros wanted an extended contract completion date and wanted to be paid for Government-caused delays. GSA wanted a firm contract completion date and was willing to extend the contract completion date far enough into the future to relieve Trataros from having to pay a substantial amount of liquidated damages. In addition, GSA was willing to pay Trataros some amount for GSA-caused delays. The GSA negotiators thought neither party wanted to revisit the issues of time and time-related costs after signing the modification, and thought the modification was supposed to be a global settlement that would wipe the slate clean regarding GSA-caused delays. The views of the GSA negotiators are supported by the fact that the parties did not engage in protracted negotiations linking specific causes of delay to a certain number of either dollars by which the contract price would be increased or days by which the contract completion date would be extended. Instead, they engaged in a general discussion in order to reach a general agreement.

The product of the parties' negotiations is modification 82. There, GSA extended the contract completion date from February 16 to December 31, 1999, which was the date the parties arrived at in their negotiations. GSA agreed not to assess liquidated damages through the revised completion date. GSA agreed to increase the contract price by the negotiated amount of $200,000 and in exchange, Trataros agreed to release all of its claims and its subcontractors' claims, whether known or unknown, relating to impact, delay, extended and unabsorbed overhead, and any other claims for time extensions and related costs, beginning with the contract award date and ending December 31, 1999. The modification does not contain any exceptions or reservations by either party.

Modification 82, which is consistent with the evidence of the parties' intentions during negotiations for the modification, shows a meeting of the minds. The language of the modification is clear and it covers all of the issues the parties put on the table during their negotiation sessions. There is no evidence the parties agreed to some term that was omitted from the modification, or that the modification contains a term to which the parties did not agree. In other words, the modification appears to be a complete and accurate memorialization of the agreement the parties reached during their discussions.

Trataros, however, contends there was no meeting of the minds to include the SPS claim within the scope of the modification. Trataros supports its contention with four arguments, addressed below.

First, Trataros says there could have been no meeting of the minds regarding the SPS claim because the parties dealt with the claim separately from modification 82 and never discussed the claim when they negotiated the modification. Appellant's Brief at 13. Even though the parties did not address the SPS claim when they negotiated modification 82, this does not show the parties failed to come to a meeting of the minds. Trataros and GSA wanted to reach a settlement that resolved their differences regarding the schedule, compensation for Government-caused delay, and liquidated damages. During their negotiations, the parties did not debate the merits of any individual claims and did not discuss the dollars or days associated with any individual claims. Instead, they discussed extending the contract completion date and increasing the contract price, and they negotiated and arrived at a date and an amount that were acceptable to both of them. If the parties had wanted to discuss individual claims, they could have done so. The fact that they chose, instead, to take a global approach during their negotiations does not mean there was no meeting of the minds. Fisher v. United States, 608 F.2d 435, 439 (Ct. Cl. 1979) (lack of discussion about claim did not mean neither party intended for supplemental contract agreement to affect claim).

Second, Trataros says there was no meeting of the minds regarding the SPS claim because Trataros never considered the claim as being subsumed by modification 82. Appellant's Brief at 14. Trataros finds support for this position in the testimony of Mr. Trataros. Mr. Trataros testified at the hearing that he would not have included SPS's claim in modification 82 without first conferring with SPS, because the claim was a subcontractor claim. However, Mr. Trataros did not confer with any subcontractors about their claims before he agreed to modification 82. Even though Mr. Trataros did not confer with SPS before agreeing to modification 82, this does not establish he thought the SPS claim was beyond the scope of the modification. It only establishes he did not confer with SPS before reaching an agreement with GSA.

Mr. Trataros also testified at the hearing that he believed he was negotiating only nine specific claims, not including the SPS claim, when he negotiated modification 82. One year before the hearing, he testified at his deposition that he believed he was negotiating only eight specific claims, and two years before the hearing, he swore in an affidavit that he believed he was negotiating only eight specific claims. None of his testimony is supported by his actions during the negotiations for modification 82. During negotiations, if Mr. Trataros believed he was negotiating only eight or nine particular claims, that belief remained unexpressed. He never discussed any specific claims with GSA and he never asked to exclude any claims from their discussions. The best evidence we have to show what Mr. Trataros believed when he signed modification 82 is his signature on the modification itself, which includes unknown claims and future claims, refers to no specific claims, and contains no exceptions or reservations. Mr. Trataros's conduct during negotiations and his signature on the modification outweigh his inconsistent testimony regarding his thoughts about the SPS claim. We conclude, as did the court in Fisher, "[t]he most that can be said is that he gave no thought to the matter one way or the other." 608 F.2d at 440.

Consequently, we are not persuaded that Trataros intended for the SPS claim to be exempted from modification 82.

Third, Trataros says there was no meeting of the minds regarding the SPS claim because GSA did not believe the SPS claim was a time-related claim and the parties intended for modification 82 to resolve only time and time-related claims. Appellant's Brief at 13; Appellant's Reply Brief at 2.[6] At least three of the GSA negotiators, including the contracting officer, did not believe a differing site condition claim was the same as a claim for time or time-related costs. They did not know the SPS claim included, in part, a claim for time-related costs. As the contracting officer said, although the SPS claim was a known differing site condition claim, it was not a known claim dealing with time. GSA's lack of knowledge as to what costs were requested in the SPS claim does not establish, however, that the parties failed to come to a meeting of the minds when they entered into modification 82. During the negotiations that led to the modification, the parties never discussed the SPS claim or any other claim. And yet, their intentions were clear. As the language of the modification says, the parties mutually agreed that the modification would resolve all claims for time-related costs, whether known or unknown. Their agreement did not depend upon how either of them viewed any particular claim.

Fourth, Trataros says there was no meeting of the minds regarding the SPS claim because after modification 82 was signed, the contracting officer thought the claim was alive, considered the claim, and issued a contracting officer's final decision denying the claim. Appellant's Brief at 4; Appellant's Reply Brief at 13-14. In support of its argument, Trataros relies upon a line of cases beginning with Winn-Senter Construction Co. v. United States, 75 F. Supp. 255 (Ct. Cl. 1948).

The issue in Winn-Senter was whether the scope of a general release, which the contractor provided in order to receive a payment that was due according to the terms of a contract, discharged a claim. A general release discharges all claims except those a contractor specifically exempts from the release. When a contractor provides a general release with no exceptions and later contends it did not intend for the release to discharge a particular claim, the Winn-Senter line of cases tells us to review the Government's conduct after the contractor signed the release and to see whether it "makes plain that [the parties] never construed the release as constituting an abandonment of the claim." J.G. Watts Construction Co. v. United States, 161 Ct. Cl. 801, 807 (1963). Not every post-release action by the Government, however, constitutes such conduct. Mingus Constructors, Inc. v. United States, 812 F.2d 1387, 1395 (Fed. Cir. 1987); Adler Construction Co. v. United States, 423 F.2d 1362 (Ct. Cl. 1970), cert. denied, 400 U.S. 993 (1971). Although the Government's intent is not at issue in a general release case because a release is the product the contractor's

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[6] Trataros's argument proceeds from a slightly incorrect premise. As the modification states, the parties intended for it to resolve impact claims as well as time-related claims. An impact claim is not always a time-related claim. Paul Hardeman, Inc. v. United States, 406 F.2d 1357 (Ct. Cl. 1969) (contractor compensated for effort expended to perform work changed by differing site condition and for cost of impact to unchanged work, but not for delay because there was no delay to contractor's performance). This does not affect our analysis of Trataros's argument.

unilateral intent, the Court of Appeals has applied the Winn-Senter rationale in order to evaluate the Government's intent when it enters into a negotiated, bilateral contract modification. Community Heating & Plumbing v. Kelso, 987 F.2d 1575 (Fed. Cir. 1993).

In Community Heating & Plumbing, the Government argued that several contract modifications constituted an accord and satisfaction of the contractor's claims. The board decision from which the appeal was taken explains that the Government deliberately revisited the modifications because it was not certain they fairly compensated the contractor. The Government negotiated with the contractor and issued subsequent modifications that increased the contract price and the time for performance, even though the Government realized all of the items contained in the contractor's claims had been resolved by the initial modifications. Community Heating & Plumbing Co., ASBCA 38168, et al., 92-2 BCA ¶ 24,870. The continued negotiations regarding the merits of the claims, plus the Government's two and one-half year delay in raising the defense of accord and satisfaction, and its audit of the claims after the initial modifications were signed convinced the Court of Appeals that the Government had not viewed the initial modifications as discharging the contractor's claims. In other words, the Government's subsequent actions plainly showed that when the parties entered into the initial modifications, there was no mutual intent that those modifications would resolve the contractor's claims once and for all.

The facts presented in our case are different in several significant respects from the facts in Community Heating & Plumbing. After Trataros signed modification 82 and before GSA signed the modification, the GSA contracting officer's representative wrote to Trataros regarding the SPS claim and asked Trataros to remove all costs that were not directly related to encountering unanticipated obstructions. The parties met two months later to discuss whether SPS had actually encountered unanticipated obstructions and how it determined the resulting costs. GSA had previously hired a consultant to determine whether SPS had encountered unanticipated obstructions, and GSA told Trataros it was waiting for a report from the consultant. Approximately four months after signing modification 82, the contracting officer issued her decision regarding the SPS claim. The contracting officer had not looked into the nature of the costs that were contained in the SPS claim, and her decision to deny the claim was based solely upon a review of whether SPS had encountered a differing site condition. After this appeal was filed, at the suggestion of GSA counsel, the contracting officer reviewed the costs that made up the claim and concluded they were discharged by modification 82 because they included costs related to time. GSA promptly raised the defense of accord and satisfaction in its answer.

Although GSA reviewed the SPS claim in order to determine whether SPS encountered a differing site condition, this does not plainly show that when the parties entered into modification 82, they intended to resolve fewer than all of Trataros's claims for impact, delay, and time-related costs. The letter from the contracting officer's representative told Trataros to remove all costs from the claim that were not directly related to encountering unanticipated obstructions, which shows no intent to consider anything other than hardcore costs. The parties' subsequent negotiations consisted of one meeting, at which GSA told Trataros it was waiting to receive a report from its consultant regarding the unanticipated obstructions SPS claimed to have encountered. GSA never expressed any intention to increase the contract price in a way that conflicted with the intent expressed in modification 82, which was to resolve finally and completely all impact, delay, and time-related costs.

GSA wasted no time in asserting accord and satisfaction as a defense. The evidence of GSA's actions subsequent to signing modification 82 does not outweigh the evidence leading up to the modification and contained in the language of the modification itself, which shows the parties mutually intended to resolve their differences regarding all impact, delay, and time-related costs.

4. Summary

Trataros and GSA met, bargained, and reached an agreement to resolve issues regarding schedule, liquidated damages, and payment for Government-caused delays. Each agreed to accept from the other some performance different from that due according to the terms of the contract. They reduced their agreement to writing in modification 82, which provided GSA would extend the contract completion date by 318 days, giving up approximately $1.4 million of liquidated damages. In addition, GSA increased the contract price by $200,000 and Trataros agreed to release all of its claims and its subcontractors' claims, whether known or unknown, relating to impact, delay, and any other claims for time extensions and related costs, beginning with the date of contract award and ending December 31, 1999. It is implausible that Trataros could have failed to realize the significance of this modification, or that either GSA or Trataros would have signed such a modification without reservation if they had intended to exclude any specific claims from its scope. Accordingly, the Board concludes that modification 82 memorializes an accord and satisfaction and the SPS claim is discharged to the extent it includes costs that are encompassed within the terms of the modification.

II. Damages

The parties initially asked the Board to resolve only entitlement in this decision. Shortly before the hearing, however, they agreed that if we find modification 82 affected the SPS claim to some extent, then the parts of the claim that are not completely subsumed by the modification could be paid in fractional part. Specifically, 19/44's of the SPS claimed costs as adjusted by the audit could be paid. The 19/44 figure is derived from SPS's claim that it encountered forty-four unanticipated obstructions, and the parties' subsequent agreement that, for settlement purposes, there were nineteen unanticipated obstructed piles.

As explained above in section I.B, modification 82 affected the SPS claim to some extent. The parts of the claim that are not completely subsumed by the modification are some of the costs of direct field labor incurred during phases two and three; some of the costs of engineering and consulting services; and the costs of general and administrative expenses, profit, and bond, which are calculated as a percentage of the other claimed costs that are not subsumed by modification 82.

Unfortunately, we cannot apply the parties' agreement and award damages. Calculating damages in the way the parties suggest is not a principled way of arriving at an award because there is not enough information contained in the record to allow us to distinguish the amount of the claimed costs that were subsumed by modification 82 from the claimed costs that were not subsumed by modification 82. Awarding Trataros 19/44's of its direct field labor costs and its engineering and consulting services costs plus the percentage markups might fairly compensate for the hardcore costs contained in the SPS claim that were

not subsumed by modification 82. Then again, such an award might be unfair to one party or the other. For this reason, we cannot make an award of damages based upon the parties' agreement. Of course, the parties may settle the case upon this basis, if they wish.

Decision

The appeal is **GRANTED IN PART AS TO ENTITLEMENT**. Within thirty days from the date of this decision, the parties will propose further proceedings regarding damages.

MARTHA H. DeGRAFF
Board Judge

We concur:

EDWIN B. NEILL
Board Judge

MARY ELLEN COSTER WILLIAMS
Board Judge