Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

DENIED: October 1, 2002

GSBCA 15898

FENTRESS BRADBURN ARCHITECTS, LTD.,
f/k/a C.W. FENTRESS J.H. BRADBURN AND ASSOCIATES, P.C.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

G. Henry Seaks of Wells, Love & Scoby, LLC, Boulder, CO; and David E. Leavenworth of Hall & Evans, LLC, Denver, CO, counsel for Appellant.

Dalton F. Phillips and David M. Smith, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **GOODMAN**.

GOODMAN, Board Judge.

This appeal by Fentress Bradburn Architects, Ltd., formerly known as C.W. Fentress J.H. Bradburn and Associates, (appellant) arises from its certified claim in which it asserts that it entered into a binding oral settlement agreement with respondent, the General Services Administration (GSA), with regard to a previous certified claim which was submitted to the respondent's contracting officer in 1996, and denied by the contracting officer's final decision dated July 11, 1997. That decision was appealed to this Board and the appeal was docketed as GSBCA 14143. GSA asserts that no binding settlement was reached. Appellant first filed a motion entitled Motion to Find Settlement and for Judgment in GSBCA 14143, requesting the Board to find that a binding oral settlement agreement exists and enter judgment in its favor in the amount of the alleged oral settlement. Respondent filed a Cross-Motion for Partial Summary Relief, asserting that no settlement agreement existed. Appellant then filed a certified claim dated April 30, 2002, alleging the existence and breach of the oral settlement agreement, which was denied by the contracting officer's decision dated May 22, 2002. The appeal from this certified claim was docketed as GSBCA 15898. A

hearing in GSBCA 15898 was held on June 18-19, 2002. As discussed below, the appeal is denied.[1]

Findings of Fact

The Contract

1. In 1991 appellant entered into contract no. GS-07P-JXC-0062 (the contract) with GSA to design the offices and data processing and laboratory facilities for the National Oceanic and Atmospheric Administration (NOAA) to be constructed in Boulder, Colorado. The building is known as the NOAA Building. Appeal File, GSBCA 14143, Exhibit 1.[2]

2. Appellant performed its design between 1991 and 1996. The NOAA Building has been constructed, and NOAA occupies the building. Complaint, GSBCA 14143.

Claim Appealed as GSBCA 14143

3. On December 31, 1996, appellant submitted a claim to the contracting officer, Steven R. Farrington, pursuant to the Disputes clause of the contract. Complaint, GSBCA 14143, Exhibit A.

4. By final decision dated July 11, 1997, the contracting officer, Mr. Farrington, denied appellant's claim. Appeal File, GSBCA 14143, Exhibit 5.

5. Appellant appealed this contracting officer's decision to this Board in August 1997, and this appeal was docketed as GSBCA 14143. Notice of Appeal, GSBCA 14143.

6. The amount of compensation claimed by appellant in this appeal was $1,421,436. Appellant alleged that it was entitled to an equitable adjustment to the contract in this amount due primarily to respondent's failure throughout the design process to coordinate the Government's design reviews and comments at various stages of the design submittals. Complaint, GSBCA 14143.

7. After GSBCA 14143 was docketed, the parties engaged in discovery. The parties also elected to proceed with an alternative dispute resolution (ADR) proceeding to be conducted by a Board judge which was scheduled to occur in Washington, D.C., in December 1999). Board's Conference Memoranda, GSBCA 14143 (Mar. 11, 1999, and July 8, 1999.

Meeting of August 28, 1999

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[1] The denial of the instant appeal resolves the issues raised in appellant's Motion to Find Settlement and Enter Judgment and respondent's Cross-Motion for Summary Relief in GSBCA.

[2] The record in GSBCA 14143 is referred to in this decision, as that case is the underlying appeal which appellant alleges was settled.

8. The contracting officer, Mr. Farrington, believed that appellant's claim that is the subject of GSBCA 14143 should be settled. Transcript at 30.

9. Mr. Farrington was invested with a contracting officer's unlimited warrant. According to the contracting officer, this meant that he could "spend any money that has been obligated to the contract without prior approval." Transcript at 14. He could also enter into contracts "subject to the amount that is appropriated and obligated to the contract." Id. He knew that if he were to spend funds that were not obligated he would be "expose[ed] . . . to criminal liability." Id. at 77.

10. Mr. Farrington stated that he had held discussions with other GSA personnel concerning settlement of GSBCA 14143 and a dollar amount of $1,200,000 was determined to be offered for settlement to appellant. Transcript at 38-39, 99-100, 116. He stated that it was his understanding that "funding was not going to be an issue," even though only $600,000 remained obligated to the contract. Id. at 39. He testified further:

> Judge Goodman: [E]xplain why that was your understanding that the funding was not going to be an issue[.]
>
> Mr. Farrington: Well, I only had $600,000.00 left on the contract . . . that meant that 600,000 would have to come from somewhere else. . . . I was assured at the time that money would be forthcoming.

Id. at 40-41; see also id. at 62, 73.

11. If the contracting officer had not received assurances that the necessary funding was going to be made available, he would not have made a settlement offer in excess of the funds then available. Transcript at 83.

12. In August 1999, Mr. Farrington had a lunch meeting with Gregory Gidez, an employee of appellant. During that meeting, Mr. Farrington requested a meeting with James Bradburn, a principal of the appellant. Transcript at 93, 94.

13. The contracting officer met with James Bradburn and Gregory Gidez at the offices of appellant on August 28, 1999 (the meeting). Transcript at 31-32, 114.

14. The meeting was not recorded or transcribed. No notes of the meeting were presented to the Board. The participants at the meeting testified during the hearing of the instant appeal as to what was said at the meeting.

15. Appellant's counsel in GSBCA 14143, G. Henry Seaks, Esquire[3], was not present at the meeting, but he had been told that the meeting was going to occur. Transcript at 159-63.

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[3] Mr. Seaks was counsel for appellant in GSBCA 14143. In addition to serving as counsel for appellant, he also testified as a fact witness during the hearing in the instant appeal.

16. Based on his former experience as a GSA trial attorney, Mr. Seaks believed that any settlement that might be reached would have to be approved by the GSA Office of General Counsel (OGC). He described the process as follows:

> Mr. Seaks: I don't remember any deviation from this process, but normally it went like so, the lawyers would begin to discuss the possibility of settlement, and if they reached terms that were in general, mutually acceptable, then as a GSA attorney, I would be responsible for trying to run the approval up the chain of command, to the General Counsel, or to . . . whomever he had delegated authority. If we got approval, then we would draft the settlement agreement and have it executed.
>
> Appellant's counsel[4]: Was approval of the settlement agreements by higher level supervisors at the Office of General Counsel always required?
>
> Mr. Seaks: It [is] my experience it was always required. There were no exceptions.

Transcript at 157-58.

> Appellant's counsel: Mr. Seaks, at the time of that meeting between Mr. Bradburn and Mr. Farrington, did you understand that it was required to obtain General Counsel approval of the settlement agreement reached by the contracting officer during litigation?
>
> Mr. Seaks: That was my belief, yes.
>
> Appellant's counsel: Did you have that understanding throughout the years of 1999 and 2000?
>
> Mr. Seaks: I had that understanding . . . until sometime in [2001] when we actually looked into the matter and at least came up with our own opinion that the Office of General Counsel had no right to [usurp] settlement authority by the contracting officer.

Id. at 160.

17. Before Mr. Bradburn met with Mr. Farrington, Mr. Seaks spoke with Mr. Bradburn but did not tell Mr. Bradburn that he believed that any settlement would have to be approved by GSA OGC. It did not occur to him to tell his client this. Transcript at 162.

18. At the meeting, Mr. Farrington made an offer of settlement to Mr. Bradburn of $1,200,000. Mr. Bradburn stated that payment of this amount would be acceptable if GSA

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[4] When appellant's counsel is quoted in transcript testimony, the reference is to David E. Leavenworth, Esquire, Mr. Seaks's co-counsel and appellant's trial counsel in the instant appeal.

would agree to give appellant a release of all claims arising from the contract. The contracting officer stated that this release would be made if appellant released GSA of all claims, and requested that appellant agree to help GSA in defending against pending claims made by the general contractor and the mechanical subcontractor on the construction of the NOAA Building. The contracting officer testified that Mr. Bradburn agreed to help GSA defend against these claims. Transcript at 41-43, 96-97, 116-17.

19. Mr. Farrington described the end of the meeting as follows:

> Mr. Farrington: Got up, shook each other's hands, and told them I would get the paperwork done and left.
>
> Appellant's counsel: . . . Did you say anything when you shook hands?
>
> Mr. Farrington: Nice doing business with you, I am glad to get this settled, see you soon. Something to that effect.

Transcript at 47.

> Appellant's counsel: So after you shook hands with Mr. Bradburn, and told him that you get it written down, is that what you said?
>
> Mr. Farrington: I would get the paperwork done.

Id. at 48.

> Appellant's counsel: Mr. Farrington, I am going to take you back to the settlement date . . . when you shook hands with Mr. Bradburn, what did that mean to you?
>
> Mr. Farrington: It means to me that I had given my sacred word that this was going to be done.

Id. at 74.

20. Mr. Bradburn testified as to the conclusion of the meeting as follows:

> Mr. Bradburn: Steve [Farrington] stood up and said to me, do we have a deal? I stood up and answered yes, we do. And he stuck out his hand to me and I shook it, looked him in the eye, and we were done.
>
> Appellant's counsel: Were those his exact words, do we have a deal?
>
> Mr. Bradburn: Yes.
>
> Appellant's counsel: Did you think it was done then?
>
> Mr. Bradburn: Yes, I did . . . there was no doubt in my mind.

> Appellant's counsel: What was your intent when you said, we have a deal?
>
> Mr. Bradburn: That we had a deal. That we would [receive] 1.2 million [dollars]. We would get a release, would help them if they needed us.
>
> Appellant's counsel: Did you think any more details were needed?
>
> Mr. Bradburn: No.

Transcript at 119.

21. Mr. Gidez testified that, at the end of the meeting, "Everyone stood up around the table, shook hands and there were some discussions as to having it written down, and documented." Transcript at 98.

22. At the meeting, the contracting officer did not state that the settlement had to be approved by the GSA OGC, or that he did not have the authority to make the settlement. Transcript at 60, 98, 120. Mr. Farrington testified: "My opinion was, is, that it was a done deal at that time." Id. at 60. " My understanding, was, is, that when I stood up and shook the man's hand, that we had a deal and it was going to be honored." Id. at 63.

23. During the hearing, Mr. Farrington was questioned concerning a previous declaration which he had executed and which had been submitted to the Board. The declaration read in relevant part concerning the meeting of August 28, 1999:

> Although we orally outlined terms that formed the basis of a settlement in principle, I never intended that these terms would by themselves constitute a final and binding settlement. Rather, my understanding was that any settlement would be contained in a forthcoming written agreement subject to review by GSA Office of General Counsel, and that any settlement would not be binding until and unless it was signed by Fentress Bradburn, GSA Assistant General Counsel, Sharon Chen, and me.

Declaration of Steven Farrington in Support of GSA's Response to Motion to Find Settlement and for Judgment (June 21, 2001) ¶ 4; Appellant's Hearing Exhibit B.

24. Mr. Farrington testified concerning the above quoted paragraph from his declaration:

> Based on my understanding of the claims process, in terms of regulatory requirements and legal requirements, that is my understanding of the claims process. That is how it always been [sic], that is how is [sic] probably always going to be. But, that is not anything I would have communicated to [the] contractor because I thought we were making a deal.

Transcript at 72.

25. At the time of the meeting, the contracting officer contemplated that the settlement would be finalized in a written document. Transcript at 77-78. He testified that he communicated this to Mr. Bradburn by stating that the "paperwork would need to be done." Id. The contracting officer knew that the settlement could not be paid unless there was a settlement agreement, in writing. Id. at 79.

26. Mr. Bradburn also believed that the settlement agreement would be put in a written document. He testified:

> I thought it would probably have to be, well, I knew it would have to be written down in some fashion, because deals like that need to be and people don't pay 1.2 million dollars unless there is something in writing.

Transcript at 121.

27. Mr. Bradburn did not believe the settlement was contingent on anything. Transcript at 120. The first time he became aware of the issue of lack of appropriated funding was during the hearing of the instant appeal. Id. at 145-46.

28. Appellant's counsel also did not know that there were not sufficient funds appropriated at the time of the meeting to pay a settlement of $1,200,000. Transcript at 184-85. Appellant's counsel was not told about the lack of sufficient funds until some time in 2002. Id. at 185.

Conduct of Parties after Meeting of August 28, 1999

29. Mr. Seaks was told about the meeting of August 28, 1999, by Mr. Bradburn. He spoke with GSA's counsel Sharon Chen by telephone to confirm her understanding of what had occurred at the meeting. Ms. Chen told him that the settlement would have to be approved by the GSA OGC. Mr. Seaks believed that this approval was required, as this had been his experience when he was a GSA trial attorney. Transcript at 163-64.

30. Mr. Seaks wrote the following letter to Ms. Chen, dated September 22, 1999:

> As we discussed on the telephone, our clients have reached a settlement in principle on the Fentress Bradburn appeal. I understand that you will need to obtain approval from your superiors prior to effectuating a full and final settlement.
>
> It is my understanding that the Contracting Officer and Jim Bradburn have agreed to settle this appeal for $1,200,000 with a full and final mutual release. Additionally, the pertinent members of the Design Team will make their employees and representatives available for consultation on matters stemming from any claims made against GSA for faulty or deficient plans and specifications which were developed by the Design Team and put out to bid. In this regard, I request that GSA and its representatives and consultants refrain from contacting members of the Design Team and their past employees until we have finalized the settlement.

> I also understand you will make the first draft of the settlement papers and attempt to get them to me by the end of next week. Please let me know if I can help.

Appellant's Hearing Exhibit F.

31. Mr. Seaks sent a copy of his September 22, 1999, letter to his client. Mr. Bradburn read the letter, including the sentence that read, " I understand that you will need to obtain approval from your superiors prior to effectuating a full and final settlement." When questioned about his reaction to this sentence at the hearing, he stated:

> GSA Counsel: Did you disagree with that when you saw it?
>
> Mr. Bradburn: I had no reason to disagree with that per se. . . . It was actually the first time that I came to be aware of the fact that there was some other signature that needed to be done.

Transcript at 137.

32. By letter dated October 6, 1999, Mr. Seaks sent Ms. Chen documents that were characterized as "backup for our claim." Appellant's Hearing Exhibit G.

33. Ms. Chen testified at the hearing that the purpose of appellant sending her this documentation was to "help me in writing the settlement justification to submit to the General Counsel." Transcript at 195.

34. By letter dated October 29, 1999, Mr. Seaks sent Ms. Chen "current claim numbers which will be considered in connection with our settlement in the above-referenced appeal." Appellant's Hearing Exhibit H.

35. By letter dated November 5, 1999, a draft settlement agreement was prepared by Ms. Chen and transmitted to Mr. Seaks. The transmittal letter read in relevant part:

> Enclosed is the first draft of the proposed Settlement Agreement for the above-referenced appeal. As I have mentioned before in our prior conversations, the execution of this Settlement Agreement is contingent upon approval by GSA's General Counsel.

Appellant's Hearing Exhibit I.

36. On November 15, 1999, at 3:30 pm, the Board convened a conference call with Mr. Seaks and Ms. Chen to discuss procedures for the alternative dispute resolution (ADR) proceeding for GSBCA 14313 that was scheduled for December 7, 1999. During the conference call, representations were made by counsel that the appeal had been settled and that the parties were proceeding with the process to have a settlement of the appeal approved by GSA OGC. Transcript at 176. No representations were made to the Board that a binding oral settlement had been agreed or that GSA OGC approval was not necessary. The Board suspended the ADR proceeding.

37. Mr. Seaks sent a letter to Ms. Chen dated January 5, 2000, which reads in its entirety:

> This is to inquire as to whether we can expect to get our settlement agreement finalized. I know you are out of the office until January 10, 2000; so would you please call me as soon as you get a chance to look into this matter.

Respondent's Hearing Exhibit 3.

38. Mr. Seaks sent a letter to Ms. Chen dated February 16, 2000, which reads in its entirety:

> Thank you for the telephone message updating me on the status of the approval of the settlement agreement by the GSA General Counsel's Office. While I appreciate your keeping me current, the delay in this approval process is becoming intolerable. The Contracting Officer settled this dispute with Fentress Bradburn months ago, and representations have been made to Judge Goodman to that effect.
>
> Please let me know what, if anything, we can do to expedite this approval process. I am perplexed as to why this is taking so long.

Appellant's Hearing Exhibit J.

39. On April 25, 2000, Ms. Chen forwarded a copy of the settlement agreement to Mr. Seaks. Appellant's Motion to Find Settlement and for Judgment, Exhibit D.

40. Mr. Seaks signed the settlement agreement on May 1, 2000, and Mr. Bradburn signed the settlement agreement on May 3, 2000. Appellant's Hearing Exhibit D. The document was returned to Ms. Chen. Transcript at 122.

41. Mr. Seaks wrote a letter dated August 4, 2000, to Ms. Chen, which read as follows:

> I have not heard from you concerning the status of the settlement agreement. Inasmuch as we were given to understand that we would achieve a final settlement this spring, my client is understandably concerned that things do not seem to have moved forward. My client has once again suggested that we apply to the Judge to schedule an ADR proceeding such as we had agreed on sometime ago.
>
> Please contact me and give me some specifics as to when we can expect that this settlement agreement will be executed by the government.

Respondent's Hearing Exhibit 1.

42. On August 14, 2000, Ms. Chen wrote to the Board and advised that the settlement required the approval of the General Counsel and the "parties will forward the settlement documents to the Board once they are complete."

43. By letter dated September 11, 2000, Mr. Seaks advised the Board as follows:

> The contracting officer reached a settlement in principle with the Appellant over a year ago. Since that time, the parties have negotiated the terms of the settlement agreement, and have attempted to obtain the approval of the Office of General Counsel in order to effectuate a full and final settlement. The settlement documents were circulated in April 2000 and the language of the settlement agreement was agreed upon between trial counsel at that time. The Appellant executed the settlement agreement several months ago; however, no progress appears to have been made in the Office of General Counsel.
>
> In light of the foregoing, the Appellant is left with little choice but to request that the ADR, according to the terms agreed upon previously, be rescheduled. Additionally, the Appellant anticipated commencing discovery, and requests leave of the Board to initiate this discovery prior to the ADR proceedings.

Respondent's Hearing Exhibit 2.

44. Mr. Seaks sent a letter to Ms. Chen dated September 13, 2000, which read in relevant part:

> While Fentress Bradburn continues to be willing to settle this dispute in the amount of $1.2 Million, we have begun to have serious doubts as to whether the GSA Office of General Counsel will approve this settlement. I am sure that you can understand that after months of waiting for this approval process to occur, we now feel that we have no choice but to proceed. I would appreciate your continuing to move our settlement forward; however, since we have no time limits to consider, we must begin to prosecute our appeal.
>
> GSA is welcome to audit the . . . claim. Apparently, I have been under the mistaken impression that the audit had been completed. Please have your auditor contact me so that I can arrange for the audit to continue.
>
> I would like to schedule the ADR presentation, as well as Mr. Farrington's deposition, for times in December, 2000. I would like to take Mr. Farrington's deposition prior to the ADR proceeding. Please give me dates that the GSA is available for these two matters.

Appellant's Hearing Exhibit K.

45. On October 2, 2000, the Board convened a conference call with Mr. Seaks and Ms. Chen. The Board's memorandum of the conference call reads in relevant part:

> The Board had been advised previously that this matter had been settled. However, Government counsel stated during the conference call that the approval process had not been completed and she could not offer an opinion as to when or if the settlement would be approved.
>
> Appellant's counsel advised the Board that his client is willing to wait for a reasonable period of time to allow the approval process to continue. However, appellant reserved its right to request reinstatement of proceedings. Accordingly, the Board directed respondent's counsel to advise the appellant and the Board when the settlement is approved or if a determination is made that the settlement would not be approved. If no action is taken by the Government by November 15, 2000, the Board will schedule another conference call to discuss the status of the settlement approval process and whether appellant will request reinstatement of proceedings.

Appellant's Hearing Exhibit L. Neither party objected to the Board's synopsis of the conference.

Reinstatement of GSBCA 14143

46. On November 15, 2000, the Board convened a conference call with Mr. Seaks and Ms. Chen. The Board's Conference Memorandum and Order reads in relevant part:

> The Board had been advised previously that this matter had been settled. However, Government counsel stated during a previous conference call that the approval process had not been completed and she could not offer an opinion as to when or if the settlement would be approved.
>
> During this conference call, respondent's counsel advised the Board that the settlement in this case has not been approved, and that respondent is awaiting the issuance of a decision in a related case before deciding whether to approve and pay the settlement.
>
> Appellant's counsel requested in writing by letter dated November 15, 2000, and verbally during the conference call that proceedings in this matter be reinstated and that the Board authorize discovery. Respondent's counsel stated that respondent had no objection to this request.
>
> Accordingly, this case is reinstated and the parties are authorized to proceed with discovery.

Board's Memorandum of Conference and Order (Nov. 20, 2000). Neither party objected to the Board's synopsis of the conference.

47. On May 22, 2001, appellant submitted a Motion to Find Settlement and For Judgment in GSBCA 14143. On June 26, 2001, respondent filed a Motion for Partial Summary Relief.

Submission of Claim

48. By letter dated November 30, 2001, appellant submitted a request to the contracting officer for a final decision stating whether GSA "intends to honor . . . [the] settlement."

49. On February 20, 2002, appellant submitted a notice of appeal, alleging that the request stated in its November 30, 2001, letter was deemed denied by the contracting officer's failure to issue a written final decision. This appeal was docketed as GSBCA 15780.

50. A hearing on the merits in GSBCA 15780 was scheduled for June 18, 2002.

51. Respondent filed a motion to dismiss the appeal for lack of jurisdiction, for appellant's failure to certify the claim.

52. After the instant appeal was filed, the Board dismissed GSBCA 15780 for lack of jurisdiction. Fentress Bradburn Architects, Ltd. v. General Services Administration, GSBCA 15780, 02-2 BCA ¶ 31,908.

Submission of Certified Claim

53. The appellant submitted a certified claim dated April 30, 2002, alleging GSA's failure to honor an oral settlement agreement in GSBCA 14143.

54. The certified claim was denied by GSA's contracting officer by final decision dated May 22, 2002, and this decision was appealed by appellant's Notice of Appeal on June 3, 2002, and docketed as GSBCA 15898 (the instant appeal).

55. The Board deemed the hearing previously scheduled for GSBCA 15780 to be the hearing in the instant appeal. The hearing was held on June 18-19, 2002. Respondent filed a posthearing brief on July 26, 2002. Appellant filed a posthearing brief on September 6, 2002.

Discussion

Jurisdiction

Appellant filed a claim alleging an enforceable contract of settlement of a pending Contract Disputes Act appeal. Pursuant to the Contract Disputes Act, 41 U.S.C. §§ 601-613 (2000) (CDA), appellant certified its claim, requested a contracting officer's decision, and appealed the contracting officer's final decision denying the claim to this Board as a separate appeal.

In TDC Management Corp., DOTCAB 1802, 90-3 BCA ¶ 23,099, that board held that it had CDA jurisdiction over a dispute arising from a settlement agreement of a procurement contract, as the settlement agreement itself, if it exists, is a modification of a procurement contract. There are many decisions in which the issue of whether a settlement agreement

existed as to a CDA appeal has been decided by boards of contract appeals. See, e.g., Barnes, Inc., AGBCA 97-111-1, 97-112-1, 97-2 BCA ¶ 29,237, and cases cited therein.

In Barnes, the board stated:

> While we can exercise jurisdiction over the disputed [settlement] agreement, the dispute before us must still meet the other jurisdictional requirements of the CDA. Specfically, there must be a cognizable CDA claim and a demand for a C[ontracting] O[fficer's] decision on the breach issues.

97-2 BCA at 145,440.

In the instant appeal, we have all requisites of CDA jurisdiction - an alleged settlement agreement of a procurement contract, a certified claim, a demand for a contracting officer's final decision, and an appealable final decision. Accordingly, we have jurisdiction in this appeal.

The Merits

Factual Summary

Appellant contends that a binding contract to settle a pending appeal, GSBCA 14143, was created when respondent's contracting officer, Mr. Farrington, and appellant's principal, Mr. Bradburn, met on August 28, 1999. Appellant's position is that Mr. Farrington had an unlimited warrant as a contracting officer, that he made an offer to settle the appeal for a specific dollar amount, that he and Mr. Bradburn discussed and agreed to all the material terms of a contract of settlement, and that the agreement was not contingent on any other occurrence. Therefore, according to appellant, an enforceable oral contract of settlement of GSBCA 14143 came into existence at that meeting, and no written document was required then or is required now to memorialize or enforce that contract.

Respondent's position is that an enforceable contract was not created at that meeting. Rather, Mr. Farrington and Mr. Bradburn discussed terms of the settlement, but this discussion did not create an enforceable, binding contract. GSA contends that the result of the meeting was an agreement to enter into a settlement agreement in the future, and there could be no binding contract of settlement until the terms of settlement were approved by the GSA OGC and a written settlement agreement was executed. Since the GSA OGC did not approve the settlement, and a written agreement was not fully executed, GSA asserts that no settlement agreement exists in GSBCA 14143.

Mr. Farrington is a GSA contracting officer with an unlimited warrant. Finding 9. In August 1999 he was of the opinion that a certified claim previously submitted by appellant and appealed to this Board as GSBCA 14143 should be settled. Finding 8. He discussed this matter with other GSA personnel. Finding 10. They decided on a dollar amount that would be paid by GSA to settle the appeal. Mr. Farrington and others at GSA knew that sufficient funds were not available to pay the settlement from agency funds, and believed that he would be exposed to criminal liability if he obligated funds in excess of those available. Findings 9, 10. Mr. Farrington received assurances from his superiors that there would be sufficient funding. Finding 10. Mr. Farrington knew from his experience as a GSA contracting officer that GSA's OGC must approve any settlement before it became final. Findings 23, 24.

Mr. Farrington had lunch with Gregory Gidez, an employee of appellant, and requested to meet with Mr. Bradburn to discuss settlement. Finding 12. Henry Seaks, appellant's attorney, was made aware that Mr. Farrington wanted to meet with Mr. Bradburn to discuss settlement. Finding 15. Mr. Seaks had considerable experience as a former GSA trial counsel. It was his understanding at that time that settlement of matters in litigation must be approved by the GSA OGC before a final written settlement agreement was executed and the settlement became final. Finding 16. While he spoke with Mr. Bradburn before the meeting, Mr. Seaks did not inform Mr. Bradburn of his understanding that this was a requirement. Finding 17.

Mr. Farrington met with Mr. Bradburn and Mr. Gidez in appellant's offices. Finding 13. At that meeting, Mr. Farrington proposed that GSA would pay appellant $1,200,000. Mr. Bradburn said that appellant would also want itself and GSA to enter into mutual releases of liability. The contracting officer also stated that the Government would want an

agreement from appellant to aid in the Government's defense of claims made by other contractors on the project. Finding 18. Mr. Farrington and Mr. Bradburn shook hands, and both said words acknowledging that they had "made a deal." Mr. Farrington felt that this meant he had "given his sacred word that this was going to be done." Mr. Bradburn felt that this meant that the parties "had a deal" and no one else was required to agree to it. Findings 19-22.

During the meeting, Mr. Farrington did not state that approval of the settlement by the GSA OGC would be required before the settlement could be paid. Finding 22. If he had not received assurances that funding would be forthcoming, he would not have offered to settle the appeal. Finding 11. Mr. Farrington believed that the settlement would have to be finalized in a written document, and he did state at the meeting that "paperwork" had to be prepared before the settlement could be paid. Finding 25. Mr. Bradburn also believed that the agreement had to be put in writing before it could be paid. Finding 26.

Shortly thereafter, Mr. Seaks was informed by Mr. Bradburn as to the terms of settlement discussed in the meeting. Finding 29. Mr. Seaks then contacted Sharon Chen, respondent's counsel, by telephone, to confirm that they both understood the terms discussed by Mr. Farrington and Mr. Bradburn. During that conversation, Ms. Chen told Mr. Seaks that the settlement must be approved by GSA's OGC. Based on his former experience as a GSA trial attorney, Mr. Seaks also believed that GSA OGC approval was required. Finding 29. Mr. Seaks confirmed the conversation in a letter to Ms. Chen, with a copy to his client. Finding 30. Mr. Bradburn read the letter, including the reference to the necessity for GSA OGC approval. Finding 31. Concerning this letter, and specifically the sentence referencing GSA OGC approval, Mr. Bradburn testified that "I had no reason to disagree with that per se . . . . It was actually the first time I became aware of the fact that there was some other signature that needed to be done." Id.

From September 1999 through October 2000, both parties, through counsel, corresponded with one another and exchanged information in order to obtain approval of the GSA OGC. Findings 32-34. On November 15, 1999, when the Board convened a conference call to discuss procedures for the ADR proceeding scheduled for December 7, 1999, counsel represented to the Board that the appeal had been settled and that the approval process was being pursued. Finding 37.

A draft settlement agreement was forwarded to Mr. Seaks from Ms. Chen in November 1999. Finding 35. In April, 2000, a settlement agreement was sent by Ms. Chen to Mr. Seaks. Mr. Seaks and Mr. Bradburn signed the agreement in May 2000, and the agreement was returned Ms, Chen. Findings 39, 40.

In October 2000, the Board convened a conference call at which Mr. Seaks advised the Board that his client was willing to wait for a reasonable period of time for the approval process to continue. Finding 45.

The GSA OGC determined not to approve the settlement. In November 2000, it became clear to counsel that GSA OGC was not going to approve the settlement and the settlement agreement executed by Mr. Bradburn would not be signed by respondent. Counsel

advised the Board of these occurrences, and appellant, through Mr. Seaks, asked for reinstatement of GSBCA 14143. The appeal was reinstated. Finding 46.

Appellant then filed its Motion to Find Settlement and for Judgment, and respondent filed its Cross Motion for Partial Summary Relief. Finding 47. In its motion, appellant for the first time asserted that Mr. Farrington had full authority to enter into a settlement without GSA OGC approval, that GSA OGC approval was not a condition of the settlement, and that a written settlement agreement was not necessary in order for the settlement to be effective. Appellant thereafter filed a certified claim, and the contracting officer issued a decision denying the claim. The appeal was docketed as GSBCA 15898. A hearing on the merits was held on June 18-19, 2002. Findings 53-55.

The Parties' Actions Indicate that They Agreed that GSA OGC's Approval of the Settlement was Required

The focus of appellant's argument is the fact that Mr. Farrington did not inform Mr. Bradburn during their meeting of August 28, 1999, that GSA OGC must approve the terms of any settlement of GSBCA 14143. In order to determine the parties' agreement concerning the settlement of GSBCA 14143, we must review not only what was said during the meeting on August 18, 1999, but also the actions and representations of the parties after that meeting until the dispute that is the subject of the instant appeal arose.

It is certain that Mr. Farrington did not say to Mr. Bradburn at the August 28, 1999, meeting that the settlement terms which they discussed had to be approved by GSA OGC. Even so, based on his testimony at the hearing, it is clear that Mr. Farrington never intended to settle the pending appeal without approval of GSA OGC. It was his understanding that such approval was necessary to settle a claim in litigation. It was also his understanding that there were insufficient funds obligated to the contract to pay the settlement, and he believed he would expose himself to criminal liability if he obligated funds in excess of those available. He testified that because he was "assured of funding," he did not find it necessary to specifically mention the need for GSA OGC approval in his discussions with Mr. Bradburn at the meeting of August 28, 1999. Apparently, Mr. Farrington equated "assurances of funding" with his belief that OGC GSA would approve the settlement, because he also testified that he never would have made the offer of settlement had he not received such assurances.

Even though Mr. Farrington testified that he had given Mr. Bradburn "his sacred word" at the August 28, 1999, meeting, and that he "thought we were making a deal," his failure to mention the requirement of GSA OGC approval was not an indication that he intended to settle the appeal based on his unlimited warrant. Rather, Mr. Farrington's apparent certainty that the transaction was concluded was his reaction to assurances he had received from others in GSA before the meeting that led him to believe that all necessary contingencies would be removed.

While Mr. Bradburn was not made aware during the August 28, 1999, meeting that GSA OGC approval of the settlement was required, Mr. Seaks, appellant's counsel, was so informed by Ms. Chen, respondent's counsel, when he called her shortly after being informed by his client that the meeting had taken place. Since Mr. Seaks was a former GSA attorney,

Ms. Chen's statement confirmed his understanding of settlement procedures that he had experienced while employed at GSA. He wrote a letter to Ms. Chen which explicitly confirmed this requirement, and sent a copy to his client. Mr. Bradburn read Mr. Seaks' letter, including the sentence which read, "I understand that you will need to obtain approval from your superiors prior to effectuating a full and final settlement." Thus, it was clear to Mr. Bradburn that appellant's own attorney and government counsel were proceeding in accordance with their mutual understanding that GSA OGC approval of the settlement was required. Neither Mr. Bradburn nor Mr. Seaks communicated to GSA or this Board at that time that they believed GSA OGC approval was not necessary.

Instead, for more than thirteen months, the parties acted in accordance with this mutual understanding that GSA OGC's approval was necessary. Mr. Seaks and Ms. Chen communicated with each other in order to further the approval process. Mr. Seaks sent documents to Ms.Chen to help her in the settlement approval process. When counsel first informed the Board that the parties had reached a settlement, representations were made to the Board, with no objection by appellant's attorney, that the settlement was contingent on GSA OGC approval. When the Board requested status reports, counsel again made representations to the Board that the approval process was continuing. Ultimately, when it became certain that GSA OGC would not approve the settlement, counsel informed the Board, and Mr. Seaks requested that the appeal process be reinstated.

The doctrine of concurrent interpretation, or contemporaneous construction, holds that great, if not controlling, weight should be given to the parties' actions before a dispute arises in order to interpret an agreement. J.W. Bateson Co., GSBCA 4816, 80-1 BCA ¶ 14,265. Even though Mr. Farrington had not specifically stated to Mr. Bradburn during the meeting that GSA OGC approval of the settlement was required, the actions of Mr. Bradburn and Mr. Seaks after the August 28, 1999, meeting, including their communication to each other and representations to the Board, clearly indicate that it was appellant's understanding that the parties had agreed that settlement was indeed contingent on such approval. This understanding was the same as that of Mr. Farrington and Ms. Chen, their GSA counterparts.

The Parties' Actions Indicate They Agreed that a Written Agreement was Required to Finalize the Settlement

There was another contingency that the parties agreed must occur before the settlement was finalized -- the execution of a written settlement agreement. After the meeting of August 28, 1999, there is no dispute that both parties believed and acted as if it were necessary to execute a written settlement agreement. Mr. Farrington stated that "paperwork" needed to be accomplished and Mr. Bradburn stated that he believed a written agreement had to be signed before he could receive $1,200,000. This is understandable, because in addition to payment of $1,200,000 by respondent to appellant, Mr. Farrington and Mr. Bradburn discussed mutual releases of liability and an agreement by appellant to aid respondent in the defense of another claim.

Mr. Seaks and Ms. Chen drafted a written settlement agreement, which was ultimately signed by Mr. Bradburn. The document contained terms concerning the payment of the settlement amount of $1.2 million and mutual releases, but no mention of the agreement of appellant to aid GSA in defense of the claim by the prime contractor. After Mr.

Bradburn signed the document, it was sent to respondent's counsel, but was never fully executed.

If the parties do not intend an agreement to be binding until it is reduced to writing, the agreement is not binding until such time as it is reduced to writing. Mahboob v. Department of the Navy, 928 F.2d. 1126 (Fed. Cir. 1991). In the instant case, the statements and actions of the parties clearly indicate that they did not intend the settlement agreement to be binding until it was reduced to writing and signed by both parties.

As the Two Agreed Contingencies were Never Removed, the Settlement was Never Finalized

It is clear that the parties made an agreement that was contingent upon two future occurrences -- GSA OGC's approval and a signed, written settlement agreement. Their actions over the period of thirteen months indicated that they believed that they had agreed that these contingencies must be removed before the settlement became final, and they acted to remove these contingencies. Despite their efforts to submit information to successfully conclude the approval process and draft a written settlement agreement, GSA OGC did not approve the settlement and the written settlement agreement was not fully executed. When the approval and the writing did not occur, the agreement did not become final.

It was not until GSA informed appellant that GSA OGC would not approve the settlement that appellant disavowed that GSA OGC approval and a written, executed settlement agreement were agreed contingencies. Eighteen months after the August 28, 1999, meeting, appellant asserted for the first time that Mr. Farrington's statements in that meeting, together with his contracting officer's unlimited warrant, resulted in a binding oral contract of settlement which needed neither GSA OGC approval nor a written contract in order to be enforced. Such assertions are clearly contrary to the mutual understanding of the parties as evidenced by their actions, written communications to each other, and representations to this Board.

There is no settlement agreement with regard to the appeal docketed as GSBCA 14143. That appeal remains pending on the merits.

Decision

The appeal is **DENIED.**

_____
ALLAN H. GOODMAN
Board Judge

We concur:

_____
STEPHEN M. DANIELS
Board Judge

_____
CATHERINE B. HYATT
Board Judge