Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

DISMISSED IN PART AND DENIED IN PART:
June 8, 2006

GSBCA 16404

GILDERSLEEVE ELECTRIC, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Willis J. Gildersleeve, President of Gildersleeve Electric, Inc., Oakland, CA, appearing for Appellant.

M. Leah Wright, Office of Regional Counsel, General Services Administration, Auburn, WA, counsel for Respondent.

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

HYATT, Board Judge.

Gildersleeve Electric, Inc. filed this appeal in connection with the terms of a termination settlement agreement it entered into with the General Services Administration (GSA) following GSA's decision to terminate for its convenience a contract under which appellant was to reconfigure a parking lot and replace exterior lights for the Social Security Administration Building in Richmond, California.

Findings of Fact

1. On February 26, 1998, GSA awarded to Gildersleeve Electric, through the Small Business Administration, a contract to reconfigure the parking lot at the Social Security Administration Building in Richmond, California. The contract also required appellant to replace the exterior lights in the lot. Appeal File, Exhibits 3-5.

2. The contract estimated that the work would require 120 calendar days to perform. Gildersleeve Electric received a notice to proceed on April 2, 1998, with a proposed date of May 1, 1998, for work to commence. Under this schedule, completion of the contract work was planned for August 1998. Appeal File, Exhibits 2, 5.

3. The parking lot repair work was divided into two sections, Phase I and Phase II, in order to accommodate the SSA's need for the continued availability of some parking for employees during the renovation process. The contractor repaired the first section, Phase I, while employees parked in the second section; when Phase I was reasonably complete, the employees parked in that section while the remainder of the lot, Phase II, was reconfigured. *See* Transcript at 50-52; Supplemental Appeal File, Exhibit 9.

4. The contract incorporated by reference the Federal Acquisition Regulation's (FAR's) standard clause for Payments Under Fixed-Price Construction Contracts (May 1997). This clause provided in pertinent part:

> (e) *Retainage*. If the Contracting Officer finds that satisfactory progress was achieved during any period for which a progress payment is to be made, the Contracting Officer shall authorize payment to be made in full. However, if satisfactory progress has not been made, the Contracting Officer may retain a maximum of 10 percent of the amount of the payment until satisfactory progress is achieved. When the work is substantially complete, the Contracting Officer may retain from previously withheld funds and future progress payments that amount the Contracting Officer considers adequate for the protection of the Government and shall release to the Contractor all of the remaining withheld funds. Also on completion and acceptance of each separate building, public work, or other division of the contract, for which the price is stated separately in the contract, payment shall be made for the completed work without retention of a percentage.

Appeal File, Exhibit 5; 48 CFR 52.232-5(e) (1998).

5. The contract award was in the amount of $842,847. Appeal File, Exhibit 5. Several modifications were issued to the scope of the work, increasing the cost of performance and affecting the schedule, as well. By December 1998, the total contract price was increased to $1,036,417.13. *Id.*, Exhibits 6-18.

6. By letter dated October 22, 1998, the contracting officer notified appellant that she was considering terminating the contract for default because Gildersleeve Electric was some two months behind schedule. The letter requested that Gildersleeve Electric provide any excuses it had for not performing the work to that point. Appeal File, Exhibit 26.

7. In testimony, the contracting officer stated that she did not want to terminate Gildersleeve Electric's contract for default if there was an alternative because she did not want to harm the company's reputation. Transcript at 61. She entered into discussions with appellant's president, Willis J. Gildersleeve, who asked her if she knew of any contractors that could help complete the job. The tenant agency, SSA, recommended Paragon Construction, which had done work on that building. *Id.* at 67.

8. On December 7, 1998, Gildersleeve Electric contracted with Paragon Construction to perform work on a portion of the project for the amount of $213,000. This work included complete landscape installation, installation of concrete walks and curbs, complete installation of new electrical site lighting (labor only), application of slurry seal in the parking lot, and installation of concrete bollards. Appellant's Supplemental Appeal File, Exhibit 4.

9. Prior to December 1998, payments to Gildersleeve Electric under the contract totaled $899,846.92. On December 29, 1998, Paragon Construction submitted two invoices to Gildersleeve Electric. One invoice asserted that ninety percent of Paragon Construction's work was completed and billed Gildersleeve Electric for $191,700. The second, corrected invoice claimed that seventy percent of the work was completed and billed Gildersleeve Electric for the amount of $149,100. Appellant's Supplemental Appeal File, Exhibit 3.

10. On January 15, 1999, GSA terminated Gildersleeve Electric's contract for the convenience of the Government. GSA's termination letter to Gildersleeve Electric advised appellant to contact its subcontractors immediately and instruct them to stop work under the contract. Further, appellant was instructed to have its subcontractors promptly submit settlement proposals for any unpaid work. The letter also reminded appellant that it was liable to the subcontractors for their settlement proposals and should settle with the subcontractors and then submit costs to GSA under its own settlement proposal. Appellant's Supplemental Appeal File, Exhibit 8.

11. Also on January 15, 1999, Paragon Construction sent its second progress billing to Gildersleeve Electric, asserting that it had completed ninety percent of its work under its contract with Gildersleeve Electric and claiming it was due an additional $42,600, bringing the total stated to be owed to $191,700. Appellant's Supplemental Appeal File, Exhibit 3.

12. In a progress payment report dated January 19, 1999, appellant showed Phase I of the project as largely completed, with only ten percent of the value of landscaping labor and materials, and fifteen percent of the cost of sign installation, remaining as work to be done. A lesser percentage of work had been completed on Phase II. Appellant's Supplemental Appeal File, Exhibit 9.

13. On January 22, 1999, the contracting officer and project manager met with Gildersleeve Electric to discuss the terms of the termination settlement. The contracting officer told appellant that there was a shortfall of money for the project. It was agreed, however, that Gildersleeve Electric would complete the punchlist items for Phase I by January 29, 1999. Following this meeting, a representative of GSA's construction management firm, Abide International Inc., and Gildersleeve Electric assessed which items on the punchlist were appellant's responsibility. Appellant's Supplemental Appeal File, Exhibit 10.

14. On January 22, 1999, the contracting officer and GSA's construction managers met with representatives of Gildersleeve Electric and its bonding company to discuss the terms of the convenience termination settlement. The contracting officer advised appellant that there was a shortfall of money on the project and that appellant would not be receiving any settlement money. Appellant asked to be allowed to complete the punchlist items for Phase I. It was agreed that appellant could do this, with a deadline established of January 29, 1999, after which Paragon Construction would complete the work at appellant's expense. After this meeting, GSA's construction manager and appellant's representatives assessed which items on the punchlist would be Gildersleeve Electric's responsibility. Appellant's Supplemental Appeal File, Exhibit 10.

15. The contracting officer testified that when this meeting occurred, appellant had already been paid for the completion of the work items on the punchlist, minus retainage amounts which were withheld to ensure the contractor would complete the work. Transcript at 90. At the time of this meeting, the contracting officer understood that the parties would enter into a no-cost termination for convenience settlement. *Id.* at 91.

16. On January 28, 1999, GSA issued a letter contract, together with a notice to proceed, to Paragon Construction to complete the work on this project. The letter contract was issued for the not-to-exceed amount of $125,000. Appellant's Supplemental Appeal

File, Exhibit 10. The amount of this letter contract was based on the approximately $136,000 in funds remaining on the project. Transcript at 101.

17. On February 9, 1999, GSA's construction management firm notified appellant that many items on the punchlist for Phase I were still incomplete. These included items such as repairing damage to picket fencing, installing missing stop signs, replacing a missing down spout, planting trees, and rewiring the lighting override switch. Appellant's Supplemental Appeal File, Exhibit 13.

18. On February 12, 1999, Paragon Construction contacted appellant's bonding company and made a claim for $213,000 against appellant's bond, alleging that it had completed most of the work provided for in its contract with Gildersleeve Electric within thirty days. Paragon Construction also claimed that it had previously invoiced for this work and that the invoice had been approved by appellant and GSA. Respondent's Supplemental Appeal File, Exhibit 28.

19. On February 17, 1999, the contracting officer sent appellant a letter stating that, in accordance with discussions she had had with Mr. Gildersleeve, appellant was released from any further liability with respect to the punchlist items remaining for Phases I and II. She added that in accordance with their discussions, Paragon Construction would complete the punchlist items and that all monies that the Government would have negotiated with appellant for additional modifications would be used to correct the deficiencies. She asked that Mr. Gildersleeve sign the letter, have it notarized, and return it to GSA. Respondent's Supplemental Appeal File, Exhibit 15.

20. On March 4, 1999, GSA and Gildersleeve Electric met again to discuss the termination of the contract. The contracting officer testified that she understood from this meeting that Gildersleeve Electric would settle with all of its subcontractors and that GSA would use the retainage from the project to complete Phase II and correct deficiencies. Transcript at 48.

21. The contracting officer also attested that based on the amount of money then left in the contract and the percentage of completion recorded in progress payment applications, she was not anticipating many subcontractor claims under the termination for convenience. Transcript at 77.

22. On March 11, 1999, following this meeting, the contracting officer sent appellant a letter requesting that a written settlement proposal be provided on the settlement proposal form previously supplied to appellant for that purpose. Appeal File, Exhibit 21.

23. On March 16, 1999, appellant sent the following written proposal to the contracting officer:

> Pursuant to the terms and conditions of the termination for convenience of the Government issued to Gildersleeve Electric, Inc. on January 15, 1999, this letter hereby releases Gildersleeve Electric, Inc. from any further liability pertaining to completion of the punch list items still remaining on Phase I, and the completion of Phase II. Furthermore it exonerates Gildersleeve's performance bond. This letter also releases the Government from any liabilities arising from this termination in the form of settlements to Gildersleeve Electric, Inc.
>
> As per our previous discussions, any deficiencies in Phase I or Phase II will be completed by Paragon at the Government's expense. In accordance with this agreement all monies held [b]y CDS [Contractor Disbursement Services, Inc.] for Gildersleeve Electric, Inc. will be retained by CDS to resolve disputes with Gildersleeve's subcontractors, Allen Landscaping Inc., CPM, and Environmental Construction. All monies due and owing to Gildersleeve Electric, Inc. by the Government will be retained by the Government to correct any deficiencies in Phase I and Phase II and to pay Paragon Construction any and all monies due for work on this project.
>
> This offer is for the purpose of settlement only and should not be used against the parties in the event it is not accepted. Please accept this agreement by signing on the line below.

Appeal File, Exhibit 22.

24. The contracting officer did not believe this letter was different from the letter she had sent to appellant on February 17, 1999. Transcript at 95.

25. Gildersleeve Electric also provided a signed release of "any and all claims arising under or by virtue of said contract or any modification or change thereof." The release of claims contained no exceptions. Appeal File, Exhibit 23.

26. GSA issued contract modification PS16 as a settlement agreement for the termination for convenience. The modification provided as follows:

> This is a no cost termination settlement agreement which releases the Government from any further liability from any settlement claims arising from this termination for convenience (dated Jan. 15, 1999). This hereby closes out the contract between the Government and Gildersleeve Electric and absolves Gildersleeve Electric from any responsibilities to correct the deficiencies in Phase 1 (punchlist items and the completion of Phase 2). A release of claims must be sent with this modification to close out the contract. This settlement agreement is in accordance with your settlement proposal dated March 17, 1999.

Appellant's settlement proposal letter, set forth in Finding 23 above, was attached to the modification. The modification was signed by Gildersleeve Electric and the contracting officer on March 30, 1999. Appeal File, Exhibit 24; Appellant's Supplemental Appeal File, Exhibit 20.

27. After the issuance of the contract modification providing for a no-cost termination for convenience, Paragon Construction filed a Miller Act suit in the United States District Court for the Eastern District of California contending that Gildersleeve Electric owed it $213,000, the amount of its subcontract with Gildersleeve Electric. In this lawsuit, Paragon Construction alleged that it had performed work under its contract with Gildersleeve Electric from December 1998 through March 26, 1999, and that appellant had paid nothing to Paragon. Appellant's Supplemental Appeal File, Exhibit 21.

28. In a memorandum to the file dated May 19, 1999, the contracting officer memorialized a telephone conversation she had with Mr. Gildersleeve, in which he requested that GSA pay Paragon Construction the money owed to that company by Gildersleeve Electric in connection with Paragon Construction's subcontract to perform work required under appellant's contract. The contracting officer responded that she did not understand the settlement agreement to obligate the Government to pay Paragon Construction for any work performed under its contract with Gildersleeve Electric. Appeal File, Exhibit 25.

29. In a letter dated June 14, 1999, responding to an inquiry from Gildersleeve Electric's bonding company, the contracting officer stated that:

> The General Services Administration had released Gildersleeve Electric on a No Cost Termination Settlement Agreement which attached his proposal settlement agreement. According to our interpretation of this agreement, the Government would not hold Gildersleeve Electric responsible for any future work in Phase

> 1 or Phase 2 of his contract. He was, however, still responsible to pay all of his subcontractors which included Paragon Construction for the work performed before the Termination Settlement Agreement.

Respondent's Supplemental Appeal File, Exhibit 34.

30. In November 1999, appellant filed a certified claim with the contracting officer seeking $213,000 with interest, costs, and related expenses in defending against Paragon Construction's lawsuit. Appellant further requested declaratory relief that any monies the district court found due to Paragon Construction were the responsibility of the Government and asked that the Government indemnify Gildersleeve Electric against any and all claims of Paragon Construction in connection with the contract work. Appellant's Supplemental Appeal File, Exhibit 1.

31. On July 30, 2002, the district court entered judgment against Gildersleeve Electric in the amount of $108,000. Appellant's Supplemental Appeal File, Exhibit 21. On April 3, 2004, the attorney who represented appellant in the district court suit submitted an invoice to Gildersleeve Electric in the amount of $76,666.38 for legal services in connection with that matter. *Id.*, Exhibit 22.

32. By letter dated December 14, 2003, appellant wrote to the Assistant Regional Administrator for GSA's Public Buildings Service requesting his assistance in getting the issues raised in the November 1999 letter resolved. A copy of that letter was attached. The Assistant Regional Administrator referred the matter to the contracting officer to issue a contracting officer's final decision. Appellant's Supplemental Appeal File, Exhibit 1.

33. On February 23, 2004, the contracting officer issued a final decision taking the position that Gildersleeve Electric had been paid for work completed prior to the termination of its contract and that under the negotiated no-cost termination settlement agreement, Gildersleeve Electric was no longer held responsible for completing remaining punchlist items in Phase I or the work in Phase II. The Government retained the right to contract directly with Paragon Construction for completion of the work, using the leftover contract funds. Gildersleeve Electric remained responsible for paying its subcontractors for work performed prior to the termination. Respondent's Supplemental Appeal File, Exhibit 35.

34. Appellant appealed this decision. In its complaint, Gildersleeve Electric alleged that GSA effectively required it to subcontract with Paragon Construction using Paragon's proposed subcontract document; that it had expected GSA to pay Paragon Construction for all work performed on this project; and that there were sufficient funds left in the contract to complete the rest of the construction required under the contract, including

retention amounts from progress payments made to Gildersleeve Electric. Finally, in the complaint, appellant demanded $76,666.38 in attorney fees, reimbursement of the $108,000 judgment issued by the district court in favor of Paragon Construction, and payment of the alleged retention in the contract in the amount of $77,299.35.

Discussion

Appellant maintains that under its termination agreement with GSA, GSA was required to directly reimburse its subcontractor, Paragon Construction, for work it had performed under the subcontract it held with Gildersleeve Electric. When this subcontractor was not paid by GSA, as Gildersleeve Electric maintains it had expected, Paragon Construction successfully sued Gildersleeve Electric in United States District Court under the Miller Act, 40 U.S.C. §§ 270a-270d (2000), for the amounts it was due under its contract. As a result, Gildersleeve Electric incurred $76,666.38 in attorney fees to defend against the lawsuit and was required to pay Paragon Construction the amount of $108,000. In its appeal, appellant seeks reimbursement of both the judgment amount and the attorney fees, as well as $77,299.35, the amount it states was retained under its contract with GSA, in damages to compensate for GSA's breach of the termination settlement agreement. The Board has already granted GSA's motion for partial summary relief in this matter, finding that as a matter of law, appellant cannot recover from GSA the attorney fees it incurred in defending the District Court lawsuit. *Gildersleeve Electric, Inc. v. General Services Administration*, GSBCA 16404, 05-2 BCA ¶ 33,011. Remaining for resolution are appellant's claim for the $108,000 judgment Gildersleeve Electric was required to pay Paragon Construction and the claim for the retainage or residual amount of $77,299.35 under its contract with GSA.

Motion to Dismiss the Claim for Release of Retention Monies

During the merits hearing in this matter, respondent raised the issue that appellant's certified claim, as presented to the contracting officer, did not seek or mention recovery of the retainage amount allegedly withheld under Gildersleeve Electric's contract. As such, the Government maintains that the Board should dismiss this portion of the appeal for lack of jurisdiction.

In arguing that the Board does not have jurisdiction to consider appellant's claim for retention amounts under its contract, respondent points out that appellant did not actually claim that the retainage amounts should be released to it until it filed its complaint at the Board in June 2004. Thus, the contracting officer was never asked, or given the opportunity, to consider whether appellant was entitled to retainages.

Under the Contract Disputes Act of 1978 (CDA), "all claims by a contractor against the Government relating to a contract shall be in writing and shall be submitted to the

contracting officer for a decision." 41 U.S.C. § 605(a) (2000). In order for the Board to have jurisdiction over appellant's claim that it is entitled to the money held as retention under the contract, appellant must have submitted a written demand for that amount to the contracting officer. The FAR defines a claim as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising or relating to the contract." 48 CFR 2.101 (1999). There is no requirement that the claim be presented in any particular form or use any particular wording, but the submission does need to provide the contracting officer with "a clear and unequivocal statement that gives the contracting officer adequate notice of the basis and amount of the claim." *Kevin J. Lemay v. General Services Administration*, GSBCA 16093, 03-2 BCA ¶ 32,345 (citing and quoting *Contract Cleaning Maintenance, Inc. v. United States*, 811 F.2d 586, 592 (Fed. Cir. 1987)). The reason for this requirement is to allow the contracting officer to receive and pass judgment on the contractor's entire claim. *Scott Timber Co. v. United States*, 333 F.3d 1358, 1366 (Fed. Cir. 2003) (citing *Croman v. United States*, 44 Fed. Cl. 796, 801-02 (1999)).

In evaluating respondent's contention that we lack jurisdiction to consider Gildersleeve Electric's entitlement to pursue its claim for the amounts that were retained under its contract, we must decide whether the matters raised in appellant's claim can reasonably be viewed as encompassing its claim to be paid amounts held as retainage. An action brought under the CDA must be "based on the same claim previously presented to and denied by the contracting officer." *Scott Timber Co.*, 333 F.3d at 1365 (quoting *Cerberonics, Inc. v. United States*, 13 Cl. Ct. 415, 417 (1987)). The Court further pointed out that this standard does not require rigid adherence to the exact language or structure of the original administrative claim. Rather, when a new claim is asserted that was not directly addressed in appellant's claim submission, the tribunal must examine whether the newly posed claim derives from the same operative facts, seeks essentially the same relief, and, in essence, merely asserts a new legal theory for the recovery originally sought. *Id.*; *see also Thomas D. McCloskey v. General Services Administration*, GSBCA 15901, 02-2 BCA ¶ 32,006; *Contel Advanced Systems, Inc.*, ASBCA 49073, 02-1 BCA ¶ 31,809; *J. S. Alberici Construction Co.*, ENGBCA 6178, 98-2 BCA ¶ 29,875.

As respondent contends, a careful review of Gildersleeve Electric's 1999 claim letter, coupled with the subsequent letter submitted to the Assistant Regional Administrator, requires the conclusion that appellant never raised or addressed retained amounts under the contract. Rather, these letters demanded only reimbursement of the amount that Gildersleeve Electric was sued for by Paragon Construction in the Miller Act suit, along with its attorney fees to defend against that action. Appellant's entitlement to retained amounts would seem to be completely independent of its claim that GSA was required, under the termination settlement agreement entered into with appellant, to pay Paragon Construction directly for work it had already completed under appellant's terminated contract. Thus, to the extent that

appellant believes it is also entitled to payment of the retained amounts, the operative facts to be proven with respect to retainage would be entirely different from those that underlie the claim that was actually presented to the contracting officer for her consideration. After carefully reviewing appellant's claim and the contracting officer's decision denying that claim, we must conclude that a request for recovery of the retainage amounts that appellant now appears to maintain it is owed was not included in the claim that was certified and presented to the contracting officer. Consequently, we lack jurisdiction to consider whether appellant can recover this amount in addition to its claim for the Miller Act damages it incurred and we therefore dismiss this portion of Gildersleeve Electric's complaint.

Claim for Monies Paid to Paragon Construction

What remains before us is the question whether Gildersleeve Electric is entitled to be reimbursed for the amounts it had to pay Paragon Construction as a result of the Miller Act suit. Appellant maintains that under the terms of the settlement agreement, the Government had agreed to pay Paragon Construction all amounts it was owed for work it did on the project, whether it was purportedly done under the subcontract with Gildersleeve Electric or directly under the contract with GSA. Thus, Gildersleeve Electric argues that GSA breached the terms of the termination settlement agreement when it did not pay Paragon Construction for amounts claimed pursuant to appellant's subcontract.

Respondent counters that a "no-cost" termination for convenience settlement agreement is precisely what the name implies and that the settlement agreement did not contemplate any further payments would be made by GSA to any contractors that had performed under a subcontract with Gildersleeve Electric.

A settlement agreement is a contract and disputes arising from settlement agreements are governed by contract principles. *See Musik v. Department of Energy*, 339 F.3d 1365, 1369 (Fed. Cir. 2003); *Kasarsky v. Merit Systems Protection Board*, 296 F.3d 1331, 1336 (Fed. Cir. 2002); *see also Fentress Bradburn Architects, Ltd. v. General Services Administration*, GSBCA 15898, 02-2 BCA ¶ 32,011, at 158,164 (settlement agreement is a modification of a procurement contract). In the context of another dispute arising from a no-cost settlement agreement, it has been recognized that, "[a]s with any contract, the court's inquiry into the scope of the settlement agreement begins with an examination of the document's own language." *East Coast Security Services, Inc. v. Department of Homeland Security*, DOTBCA 4469R (May 16, 2006).

The primary objective in contract interpretation is to discern the parties' intent at the time the contract was executed. *See, e.g., King v. Department of the Navy*, 130 F.3d 1031, 1033 (Fed. Cir.1997); *Beta Systems v. United States*, 838 F.2d 1179, 1185 (Fed. Cir. 1988); *Alvin, Ltd. v. United States Postal Service*, 816 F.2d 1562, 1565 (Fed. Cir. 1987). In this

regard, our appellate authority has stated that "provisions of a contract must be so construed as to effectuate its spirit and purpose . . . an interpretation which gives a reasonable meaning to all of its parts will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result." *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991) (citing *Arizona v. United States*, 575 F.2d 855, 863 (1978)); *accord NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004); *M. A. Mortenson Co. v. Brownlee*, 363 F.3d 1203, 1206 (Fed. Cir. 2004); *Jowett, Inc. v. United States*, 234 F.3d 1365, 1368 (Fed. Cir. 2000). Further, it is not the subjective intent of any one of the parties that is controlling. *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547 (Ct. Cl. 1971). Rather, the language of the agreement "must be given that meaning that would be derived from the contract by a reasonable intelligent person acquainted with the contemporaneous circumstances." *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1975); *see also Blake Construction Co. v. United States*, 987 F.2d 743, 746 (Fed. Cir.), *cert. denied*, 510 U.S. 963 (1993).

A written agreement is ambiguous when a plain reading of the contract could result in more than one reasonable interpretation. *See Metric Constructors, Inc. v. National Aeronautics & Space Administration*, 169 F.3d 747, 751 (Fed. Cir. 1999); *City of Tacoma Department of Public Utilities v. United States*, 31 F.3d 1130 (Fed. Cir. 1994) (citing *Hills Materials Co. v. Rice*, 982 F.2d 514, 516 (Fed. Cir. 1992)). To the extent that the language of the settlement agreement is susceptible of more than one reasonable interpretation, it is ambiguous. Our task in that circumstance is to determine which party's interpretation should prevail.

Although this settlement agreement is termed a "no-cost" agreement, the analysis does not automatically end there. Each settlement agreement must be considered in its entire context. It is not unheard of for contractors and agencies to enter into "no-cost" convenience termination settlement agreements that preserve certain claims and rights. *See, e.g.*, *Fanning, Phillips & Molnar*, VABCA 3586, 96-1 BCA ¶ 28,214; *Terry & Sons, Inc.*, ASBCA 44378, 93-1 BCA ¶ 25,461 (1992). The use of the "no-cost" terminology by itself thus does not rule out the possibility that Gildersleeve Electric might have a claim for the monies owed under its subcontract with Paragon Construction.

We turn, then, to an examination of the subject settlement agreement, which attached Gildersleeve Electric's response to the Government's request for a termination settlement proposal, to determine first, whether the agreement is clear on its face or ambiguous, and, if it is ambiguous, to ascertain if the Government's interpretation is reasonable. The modification setting forth the agreement provided for a "no cost termination settlement agreement which releases the Government from any further liability from any settlement claims arising from this termination for convenience." The modification further stated that

this agreement was in accordance with appellant's written proposal dated March 17, 1999, and attached that letter to the modification. Finding 26. Appellant's letter also released the Government from "any liabilities arising from this termination in the form of settlements to Gildersleeve Electric, Inc." The issue upon which this claim turns is what meaning should be attributed to appellant's subsequent statement, in that letter, that:

> All monies due and owing to Gildersleeve Electric, Inc. by the Government will be retained by the Government to correct any deficiencies in Phase I and Phase II and *to pay Paragon Construction any and all monies due for work on this project.*

Finding 23 (emphasis added). Appellant maintains that this language was intended to reflect its intent that the Government would directly discharge all of Gildersleeve Electric's potential liability to Paragon Construction under the subcontract.

GSA responds that it construed the statement in appellant's letter to refer to the fact that the Government would use remaining project funds to pay Paragon Construction for work it was performing under its separate prime contract with GSA, which had been in place since January 28, 1999, and was being performed concurrently with Gildersleeve Electric's efforts to complete punchlist work. *See* Finding 16.

In arguing that appellant is not entitled to relief, GSA makes several cogent points. First, it notes that, as a general rule, contracting officers lack authority to agree to pay a subcontractor directly for work performed for a prime contractor. This is because there is no privity of contract between the Government and the subcontractor; the Government may not enforce a subcontractor's rights against the prime contractor and the subcontractor may not make a claim directly against the Government. *See United States Fidelity & Guaranty Co. v. United States*, 475 F.2d 1377, 1381-82 (Ct. Cl. 1973). In addressing a promise made by a contracting officer to compensate a subcontractor directly for an inspection it made under its prime contract, the Comptroller General stated that there is "no legally permissible way for the government to enforce the subcontractor's rights against the prime contractor by using funds due the prime contractor to pay the subcontractor directly." *Panama Canal Commission*, B-224953, 87-1 CPD ¶ 45 (Jan. 9, 1987). In rare instances, if all of the parties are in agreement, and are fully informed of the circumstances, the contracting officer may pay a subcontractor directly with funds retained from amounts due the contractor. GSA points out, however, that in this case, Paragon Construction was not involved in the termination settlement discussions conducted between GSA and Gildersleeve Electric and did not expect payment from GSA. Rather, Paragon Construction first sought payment from appellant's bonding company and then filed the Miller Act suit. Under these circumstances, GSA argues, the contracting officer had no authority to enter into an agreement such as appellant alleges was made. As such, the settlement agreement should be deemed

unenforceable and the Government should have no liability for the amounts sought by appellant.

Additionally, the Government argues that when the settlement agreement is viewed as a whole and a reasonable meaning is ascribed to every term, the agreement clearly and unambiguously should be construed to mean that GSA had no further liability to appellant. This was a no-cost settlement agreement, with each party fully releasing the other from any further liability and GSA had no reason to suspect that appellant had not fully settled with all of its subcontractors, including Paragon Construction.

On balance, the agreement read alone and in its entirety does give rise to sufficient ambiguity to require us to consider the document in its context and with regard to earlier actions of the parties and their negotiations. That is, the agreement is susceptible to both the interpretation advanced by GSA and the interpretation that Mr. Gildersleeve states was the one he intended. The initial question to be resolved, then, is whether both interpretations are reasonable.

When we look at the context of the agreement, the negotiations leading up to its execution, and the various actions of the parties, we are led to conclude that GSA's interpretation reflects by far the more reasonable understanding of this sentence when the context of settlement negotiations is considered. The progress payments made by that point gave GSA reason to believe that subcontractor claims for the work performed by appellant would be relatively modest and funds had been provided to appellant's disbursement service such that the subcontractors would be paid. The parties actively discussed a no-cost termination based on the fact that insufficient funds were left in the contract to pay additional amounts to appellant and still pay for the remaining work that needed to be completed. GSA's letter asking for a settlement proposal specifically instructed that the appellant must settle up with its subcontractors and GSA had no specific knowledge that Paragon Construction had not been paid for work it performed pursuant to the Gildersleeve Electric subcontract. *See* Finding 10. When appellant sent its proposal letter to GSA, it mostly repeated the understandings that had been previously reached. The added sentence appeared to the contracting officer simply to confirm that GSA would release Gildersleeve Electric from further punchlist obligations and pay Paragon Construction for any additional work that was required under the prime contract that GSA held with that company. This was an eminently reasonable interpretation considering that there was further work to be performed and GSA's contract with Paragon Construction was ongoing at that time. Correspondence and documentation authored by the contracting officer shortly after the settlement agreement was executed also corroborate that GSA did not construe the agreement to obligate the agency to pay Paragon Construction for work it did under its subcontract with Gildersleeve Electric. Findings 28-29. Finally, this interpretation is consistent with the Government's point that the contracting officer had no authority to agree to pay Paragon Construction

directly for work performed under the subcontract with Gildersleeve Electric and would not likely have signed the agreement had she understood it in the manner appellant's president contends was his intent.

Although we have no doubt that appellant's president intended the final sentence of his letter to convey the interpretation he has asserted, unfortunately, the language he used did not suffice to communicate this intent clearly to GSA. Under well-established rules of contract interpretation, as the drafter of the letter, appellant bore the risk of expressing its intent clearly and comprehensively. *See WPC Enterprises, Inc. v. United States*, 323 F.2d 874 (Ct. Cl. 1963). Appellant's subjective intent cannot trump a manifestly reasonable interpretation held by the Government, which was the nondrafting party. As such, appellant's claim cannot be sustained.

Decision

The motion to dismiss this appeal in part for lack of jurisdiction is granted. The remainder of the appeal is denied. Accordingly, the appeal is **DISMISSED IN PART** and **DENIED IN PART**.

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CATHERINE B. HYATT
Board Judge

We concur:

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STEPHEN M. DANIELS
Board Judge

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MARTHA H. DeGRAFF
Board Judge