UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

CROSS-MOTIONS FOR SUMMARY JUDGMENT GRANTED
IN PART AND DENIED IN PART: August 13, 2020[1]

CBCA 6049

TRANSWORLD SYSTEMS INC.,

Appellant,

v.

DEPARTMENT OF EDUCATION,

Respondent.

Paul A. Debolt and Chelsea B. Knudson of Venable LLP, Washington, DC; and James Y. Boland of Venable LLP, Tysons Corner, VA, counsel for Appellant.

Michael S. Taylor and Megan R. Nathan, Office of the General Counsel, Department of Education, Washington, DC, counsel for Respondent.

Before Board Judges **HYATT**, **LESTER**, and **RUSSELL**.

LESTER, Board Judge.

Appellant, Transworld Systems Inc. (TSI), challenges a final decision issued by a contracting officer for the Department of Education's Office of Federal Student Aid (FSA),

[1] The Board issued a prior version of this decision under seal on July 14, 2020, and directed the parties to submit proposed redactions. Although the Board, by separate order, has denied respondent's request to redact dollar figures from the decision, this reissued decision incorporates other minor modifications, made at respondent's request, that do not affect the decision's substance.

demanding the return of $1,334,873.13, plus accrued interest. FSA believes that it overpaid TSI's predecessor-in-interest by that amount under the predecessor's contract for student debt collection services. TSI asks us to find on summary judgment that FSA's claim is barred by an accord and satisfaction between the parties, which is reflected in a bilateral contract modification defining how much money TSI's predecessor was to receive, or, in the alternative, that FSA has waived its claim. FSA has filed a cross-motion, seeking summary judgment on the existence and amount of the alleged overpayment (a fact that TSI questions), that the modification was not an accord and satisfaction and did not waive FSA's right of recovery, that FSA is entitled as a matter of law to recoup mistaken overpayments regardless of the bilateral modification, and that TSI breached either an implied-in-fact contract or the implied duty of good faith and fair dealing by failing to tell FSA of its calculation error before executing the contract modification.

For the following reasons, we grant FSA's motion for summary judgment regarding TSI's waiver, estoppel, and laches arguments, but otherwise deny it. We grant summary judgment to TSI on FSA's implied-in-fact contract argument, but otherwise deny TSI's motion, although we limit the elements of accord and satisfaction that TSI will need to establish in future proceedings.

Statement of Undisputed Material Facts

The Contract

TSI's predecessor-in-interest, NCO Financial Systems, Inc. (NCO), held a contract with the General Services Administration (GSA) for private collection services, as part of GSA's Financial and Business Solutions (FABS) Schedule, under which individual federal agencies could issue task orders. TSI Statement of Undisputed Material Facts (TSI-SOF) ¶ 1.[2]

On April 7, 2009, as part of its student loan debt collection program, FSA awarded performance-based, firm-fixed-price task orders to twenty-three different private collection agencies (PCAs). FSA Statement of Undisputed Material Facts (FSA-SOF) ¶¶ 1, 3. NCO was one of those task order awardees. NCO's award of task order no. ED-FSA-09-O-0014 (task order 0014) encompassed an initial twenty-four-month ordering period beginning July 1, 2009, a period that was later extended through April 21, 2015, as a result of FSA's

[2] Unless otherwise noted, any paragraph from either party's statement of undisputed material facts to which the Board cites in this decision was identified in the opposing party's statement of genuine issues as uncontested.

exercise of options. Under task order 0014, NCO was to collect defaulted student debt and, depending upon the type of collection activity, would receive either a percentage of the payment that it recovered or a fixed fee for each collection. *Id.* ¶¶ 1, 4, 5. As NCO performed, a record of each collection was to be recorded on an electronic FSA system, and FSA would use those records to prepare a monthly invoice for each of the PCAs, including NCO. *Id.* ¶¶ 7-9; TSI-SOF ¶ 7. The task order language provided that the FSA-prepared invoice would be processed as follows:

> Payments under this Task Order are based on data maintained in [FSA's] systems. Each month, the Government will prepare and send an invoice to the Contractor. The Government will also send detailed documentation supporting the amounts on the invoice. The Contractor shall review these materials and return the invoice via e-mail in order to be paid for products and/or other services rendered under this Task Order.

Appeal File, Tab 1 at 11.[3] The amount of a PCA's monthly compensation depended on the type of collection services that the PCA accomplished and the type of repayment that was obtained. *See* FSA-SOF ¶ 6; TSI-SOF ¶ 4; Tab 1.

From the date of the task order awards through September 15, 2011, FSA used a portfolio management system known as the "Legacy system" to track and record all financial activity on defaulted borrowers' student loan accounts. TSI-SOF ¶ 9. During that time, all loan payments were logged into the Legacy system for FSA's use in determining the appropriate method and amount of payment to each of the PCAs holding task orders. *Id.*

FSA's Change in Invoicing Practices

On September 16, 2011, FSA transitioned from the Legacy system to a new electronic system for recording collection activity, the Debt Management Collection System (DMCS), although, according to FSA, the new DMCS system did not actually come on-line until October 1, 2011. TSI-SOF ¶ 10; FSA-SOF ¶ 10. Because the DMCS could not generate invoices when it was first launched, FSA instructed NCO and the other PCAs to generate their own invoices, something that NCO and the other PCAs did until August 2013, although no contract modification was issued to reflect the change in requirements. FSA-SOF ¶¶ 11, 13; TSI-SOF ¶ 12. FSA did not ask the PCAs to provide support for their invoices when they

[3] Citations to a "Tab" number in this decision refer to documents in the Rule 4 appeal file.

were submitted, but informed them that FSA would eventually verify the accuracy of all invoiced sums during a later "reconciliation period." TSI-SOF ¶ 15.

The first invoice that NCO prepared and submitted was dated October 13, 2011, and sought payment of $1,355,737.46 for collection services for the month ending September 30, 2011. Tab 2 at 1-2; FSA-SOF ¶ 32. Nevertheless, the invoice, as submitted, indicated that $174,568.85 of the billed amount covered collections under 2000 and 2004 student debt collection contracts that are not at issue in this appeal. *See* Tab 2 at 1; Transcript at 61 (oral argument held on December 9, 2019). FSA paid, and NCO received payment of, the full amount of that invoice. *See* TSI's Request for Admission Responses at 2-3.

FSA's Invoice Reconciliation Process

In July 2013, as FSA was preparing to begin issuing monthly invoices using its DMCS system, FSA started the reconciliation process for performance from September 16, 2011, to August 31, 2013. TSI-SOF ¶ 15; FSA-SOF ¶ 15. Instead of trying to verify the accuracy of or obtain supporting data for the PCAs' prior invoices, FSA decided to calculate from the ground up what each PCA was owed for that period. Deposition of Michael Bryant (Jan. 17, 2019) at 32 (Mr. Bryant was the FSA business specialist associated with the negotiation at issue). The ultimate purpose of the process was to compare what PCAs had billed during the reconciliation period when PCAs were responsible for preparing invoices with what FSA determined the PCAs were owed. TSI-SOF ¶ 16.

Because FSA's DMCS data for the period from September 2011 to August 2013 contained a large number of errors, FSA and the PCAs worked to establish a new set of procedures and business rules that FSA would apply to calculate the commission amount to which each PCA was entitled for that period. TSI-SOF ¶¶ 17, 18; FSA-SOF ¶ 16. FSA's business operations specialist met with the PCAs on a weekly basis for approximately six months to share the results of FSA's findings and ask for input about problems from the PCAs. FSA-SOF ¶ 17; Bryant Deposition at 33-34. While FSA was putting a lot of time and effort into resolving problems in its system of recording collections for purposes of calculating commissions, FSA was also demanding a great deal of time and effort from the PCAs to support that process. According to FSA, "there [were] a lot of teleconferences between the parties regarding the reconciliation process, how to deal with it, how to address certain issues that came up, and . . . how they were going to calculate these total fees that were either underpaid or overpaid or properly paid during that process or during that time period." Transcript at 74.

One of the biggest areas of discussion was compensation for rehabilitations, which involved loan resolutions wherein the borrower had made nine monthly payments and was

no longer considered to be in default, allowing transfer to a federal loan servicer as a non-defaulted loan. Tab 5 at 4. Rehabilitations are typically the biggest source of revenue for the PCAs, and, for a period of about seven months, the DMCS had failed to record them. Bryant Deposition at 36, 69-70. FSA had to "come up with an equitable way to pay [the PCAs] for the work that they had done in getting a borrower to a point where he was eligible for rehabilitation, not penalize the PCA for the fact that [FSA's] system didn't effect [or record] that rehabilitation when it was supposed to occur." *Id.* at 36. By March 6, 2014, FSA was giving PCAs the option of opting out of an individualized review of their commission situation in favor of a "systematic approach" that would relieve the PCA of some of the time requirements that FSA had been imposing. Tab 75. NCO opted for the systematic approach. *Id.*

On March 20, 2014, FSA emailed NCO what FSA said was an accounting of NCO's payment entitlements under the new reconciliation business rules:

> Attached is the summary information for the final results of the invoice reconciliation. The detailed data will be coming soon, hopefully this week.
>
> Please review this information and return any comments to Mike Bryant.
>
> At the bottom of the spreadsheet is the FSA total and then your invoice total and a Difference value. If the value is BLACK, we owe you. If the value is RED you owe us.

Tab 4 at 1. On April 18, 2014, FSA sent another email "[a]ttach[ing] the final version of [NCO's] summary report," which appears to have been the same as the one sent on March 20, 2014. *Id.* In the accounting, FSA calculated that it owed NCO a total of $69,935,693.92 for performance during the period covered by the reconciliation, that it had already paid NCO $68,783,348.48 based upon invoices that NCO had submitted to FSA, and that FSA therefore owed NCO an additional $1,152,345.44. *Id.* at 8-9. There is nothing in the record showing that, between its March 20 and April 18, 2014, emails, FSA provided NCO with the "detailed data" that it promised in its March 20, 2014, email. Further, FSA's statement of undisputed material facts failed to address whether NCO looked at its records to confirm FSA's "already paid" calculation or made any representations to FSA about whether that figure was correct, and FSA has provided no evidence on that point.

In determining that NCO had already been paid $68,783,348.48, FSA did not include the $1,355,737.46 that it had previously paid NCO for September 2011. *See* FSA-SOF ¶¶ 27, 30; Tab 9 at 1, 5. Although TSI contends that it cannot confirm how FSA calculated NCO's total payments from September 2011 to August 2013, the evidence makes clear that FSA

added together the amounts in all NCO invoices for that period, but, for whatever reason, excluded the September 2011 invoice amount. *See* Tab 9 at 5. Nevertheless, the current record does not show that, during this time, FSA ever provided NCO with a breakdown of how FSA had calculated the amounts that it believed NCO had already been paid. Further, various contemporaneous emails during the six-month period in which FSA, NCO, and the other PCAs were negotiating suggest that FSA was telling the PCAs to focus on commissions earned beginning October 2011, rather than September 2011. *See* Tab 49 (email in which FSA defined "the entire reconciliation period" for payment purposes as "October, 2011 - August, 2013" and the transactions pilot period as "October, 2011 - December, 2011"); *see also* Tabs 19, 23, 25.

The Contract Modification

On April 23, 2014, the FSA contracting officer and a representative of NCO executed bilateral modification 0052 (mod-52), the stated purpose of which was "to incorporate Invoice Reconciliation Procedures . . . [that] are hereby effective for performance occurring from September 16, 2011 through August 31, 2013." Tab 5 at 1; TSI-SOF ¶ 35. The other twenty-two PCAs executed substantially similar contract modifications at about the same time. The modifications all provided that, "[i]n the event the Invoice Reconciliation Procedures conflict with a term of the contract, the Invoice Reconciliation Procedures shall take precedence during the aforementioned period of performance. See following pages for Invoice Reconciliation Procedures." Tab 5 at 1-2.

The first two pages of NCO's twenty-two-page modification contained a Standard Form 30 (SF 30), which included the parties' signatures and identified the stated purpose of mod-52. Tab 5 at 1-2. Box 12 of the SF 30, entitled "Accounting and Appropriation Data," stated: "Modification Amount: $0;" "Modification Obligated Amount: $0." *Id.* at 1.

The next twelve pages, under the heading "Invoice Reconciliation Procedures," contained specific written procedures and rules regarding how to calculate each PCA's commissions for each of the following types of activities: regular payments, rehabilitations, consolidations, administrative resolutions, reversals, and refunds. Tab 5 at 3-14. For regular payments, "[t]he applicable commission rate for a given payment [would] depend[] on three factors": the payment's effective date, the contract code of the PCA holding the account on that date, and "[t]he program type of the debt(s) to which the payment applied." *Id.* at 3. At the end of the section defining the applicable commission rate for regular payments, the following language was added: "The table in Appendix 1 shows the applicable rates for each contract code over time." *Id.*

Appendix 1, titled "Historical Commission Rates," began with a half-page chart listing NCO's historical commission rates for collections that NCO had performed under earlier FSA contracts awarded in 1997, 2000, 2004, and 2009. Tab 5 at 15. After that chart, however, the parties added a *second* chart to Appendix 1, one without any kind of introductory title or description. *Id.* at 15-18. That three-and-a-half-page chart was identical to the accounting chart that FSA had emailed NCO on April 18, 2014. *See* Tab 4 at 1, 8-9. The chart listed the same accounting numbers that FSA had included in its April 18, 2014, email and, at its end, indicated a "FSA Total Invoice Value" of $69,935,693.92, a "PCA-Created Invoices" number of "($68,783,348.48)," and a "Difference" of $1,152,345.44. Tab 5 at 18.

In that second chart, there were forty-six line items for "Regular Collections," sixty-one for "Rehabilitations," three for "Administrative Resolutions," two for "Consolidations," one for "Litigation Referrals," and one for "Performance Incentive." Tab 5 at 15-18. There were also line items for "Aug-11 Titanium Invoice" and "Sep-11 Legacy Invoice." *Id.* at 18. Nowhere in mod-52 is there any explanation of why an invoice from August 2011, which predates the September 16, 2011, commencement of the invoice reconciliation period, is included in the chart.[4] As for the "Sep-11 Legacy Invoice," FSA included the following language as a "Special Scenario" in the "Regular Payments" part of the "Invoice Reconciliation Procedures," which appears to address how FSA, for purposes of reconciliation, would handle student debt payments with an effective date after September 15, 2011, but said nothing about payments with an effective date from September 1 to 15:

> Payments received in September, 2011 after Legacy shutdown (9/15/2011). Payments received during this period would normally have an effective date ("date entered") [for commission calculation purposes] in September, 2011. DMCS assigned them an effective date in October, 2011. For compensation purposes, FSA will use the system-assigned effective date and actual posting date.

[4] An email dated September 5, 2013, conveying PCA invoice reconciliation meeting minutes indicates that, during negotiations, PCAs requested inclusion of the August 2011 Titanium activity "because PCAs were instructed to include that activity in a subsequent invoice," and FSA agreed. Tab 40. We can find no language in mod-52 consistent with that agreement.

Id. at 4. Nothing in mod-52 explains why the second chart contains a reference to a September 2011 invoice based on the Legacy system that shutdown on September 15, 2011.[5]

In the entirety of the twelve-page "Invoice Reconciliation Procedures" portion of mod-52, the only reference to Appendix 1 is the one identified above, which was contained in the description of "Regular Payments" procedures and read, "The table in Appendix 1 shows the applicable rates for each contract code over time." Tab 5 at 3. That portion does not indicate that Appendix 1 would also contain a listing of current accountings of monies paid (or not paid) or that should be paid under the existing contract. The parts of the "Procedures" addressing invoice reconciliation for rehabilitations, consolidations, administrative resolutions, reversals, or refunds do not refer to Appendix 1. *Id.* at 4-14.

The largest portion of the invoice reconciliation procedures set out new business rules for rehabilitations, which were necessitated by and were the result of a lack of reliable DMCS data on rehabilitations for the first seven months after PCAs began creating invoices. TSI-SOF ¶ 26. The new rules for rehabilitations referenced "Appendix 2: Rehabilitation Scenarios," which identified twenty different rehabilitation scenarios and defined a rehabilitation fee, or rate, that would be applied to each scenario. *Id.* ¶ 27; *see* Tab 5 at 19-22. The parties' agreement on these fees resulted from extensive analysis and discussion between the parties. TSI-SOF ¶ 27.

At the bottom of each of the twenty pages constituting mod-52 (except for the SF 30), including every page of Appendix 1 and Appendix 2, is a footer with the words "Invoice Reconciliation Procedures." Tab 5 at 3-20.

FSA's Reconciliation Payment to NCO

On May 16, 2014, NCO submitted an invoice seeking payment of the $1,152,345.44 listed in the second (untitled) chart in mod-52's Appendix 1. Tab 6 at 4. FSA paid the invoice. FSA-SOF ¶ 24. No other contract modification or authorization document, other than mod-52, was issued to support payment of the invoice. Transcript at 71.

[5] Nonetheless, FSA indicated in meeting minutes from a September 5, 2013, PCA invoicing reconciliation meeting that "[t]he September [2011] legacy activity is going to be part of this reconciliation." Tab 40. Mod-52 contains no language reflecting that.

FSA's Demand for Repayment

On May 4, 2015, one of the twenty-three PCAs that held a student debt collection task order and, like NCO, had entered into an invoice reconciliation procedures contract modification notified FSA that it had been overpaid through the reconciliation process. Tab 82. Specifically, the PCA informed FSA that FSA had failed to include in its calculation of past payments for the period from September 2011 to August 2013 an invoice that the PCA had previously submitted covering student loan debt collections in September 2011. *Id.* The PCA also indicated that it had previously disclosed the error to FSA during the reconciliation process, but that FSA had not acted on the information. *Id.*

After review, FSA confirmed that the PCA-created invoice for September 2011 was not, but should have been, included in the reconciliation as part of the calculation of "what the PCA has previously been paid." FSA-SOF ¶ 27. None of the other PCAs had notified FSA of any issues associated with the absence of PCA-created invoices covering September 2011. *See* Transcript at 80-81.

In response to that notification, FSA began to question the manner in which it had calculated the amounts owed to the other PCAs in the reconciliation process and retained an accounting firm to review all of the PCA invoices. TSI-SOF ¶ 43. On January 13, 2017, after more than a year-and-a-half of review, the auditor reported that FSA had overpaid NCO and the other PCAs during the reconciliation process because, "[f]or every PCA, FSA had erroneously excluded the September 2011 invoice payment amounts from the [calculation of total commissions previously paid to each PCA] in its PCA reconciliation. Tab 11 at 21; *see* TSI-SOF ¶ 43.

By letter dated March 6, 2017, FSA notified TSI, which had become NCO's recognized successor-in-interest,[6] that, as a "result of the payment of duplicate invoices for the month of September 2011," FSA had "overpaid [NCO] $1,355,737.84 in September 2011, the final month of the Legacy system," under task order 0014. Tab 7 at 1; *see* FSA-SOF ¶ 33; TSI-SOF ¶ 44. In the letter, FSA described the mistake as follows:

> During the reconciliation process, FSA used invoice data based on information from the Legacy Invoice Database. PCAs were instructed to include the amount paid from the Legacy Invoice Database as a line item on their self-

[6] TSI acquired NCO on November 1, 2014, and FSA recognized TSI as NCO's successor through a contract novation on November 23, 2015. Complaint ¶ 8; Amended Answer ¶ 8.

> generated invoices for October, 2012. However, the PCAs were also instructed to submit an estimated invoice for September 2011. This overpayment has been confirmed during a recent independent audit.

Tab 7 at 1. FSA requested repayment of the identified amount "in accordance with the Federal Acquisition Regulation (FAR) 32.604." *Id.*

On March 8, 2017, the FSA contracting officer emailed TSI a further explanation of the repayment calculation, indicating that "[t]he overpayment stems from confusion at FSA about how the September, 2011 invoices were handled." Tab 9 at 1. According to the contracting officer, the FSA business operations specialist who coordinated the reconciliation process "believed PCAs did not submit a PCA-created invoice for September, 2011" and thought that they had been "instructed to include the total for the September, 2011 invoices generated out of the Legacy Invoice Database as a line item on their PCA-generated invoices for October, 2012." *Id.* FSA explained the problem as follows:

> 1) Put simply, the purpose of the reconciliation was to compare how much each PCA had billed FSA for to how much FSA actually owed the PCA
>
> a. The "how much the PCA had billed FSA for" number was the sum total of all the invoices each PCA created using its own information—we call those "PCA-generated" invoices
> b. The "how much FSA actually owed" number was the result of all our work in the reconciliation process—identifying all the payments that had actually posted, what rehabs to give credit for, etc.
>
> 2) One of the line-items we included in "what FSA actually owed" was the final Legacy Invoice Database-generated invoice for September, 2011. Recall that there was no operating system for the second half of September, 2011, so that final Legacy invoice reflected *all* of the actual verified activity that posted during the month of September, 2011.
>
> 3) What FSA should have done to offset that line item was to include your PCA-created invoice for September, 2011. Due to a misunderstanding, [the FSA business operations specialist] did not realize PCAs had submitted a PCA-created invoice for that month; he wrongly believed that it was entirely being dealt with on the October, 2012 invoices. As a result, when he totaled up the "how much the PCA had billed FSA

> for" number, it did not include your PCA-created invoice for September, 2011.
>
> 4) If you had included this as a line item in your October, 2012 invoice, that would already have been accounted for in the original reconciliation make whole adjustment we made on your Mar, 2014 invoice (i.e., it would have made your "how much the PCA had billed for" number larger). Again, though, whether you included it as a line item or not does not change the fact that FSA wrongly omitted your PCA-created invoice for September, 2011 from the reconciliation.
>
> Attached, please find your original reconciliation summary, showing:
>
> a) That FSA gave you credit for the "Sept-11 Legacy Invoice" (this will usually be near the end of the list of line items), and
>
> b) The amount FSA used as the total of your "PCA-Created Invoices"
>
> Also attached is a listing of the PCA-Created invoices for which you were paid. You will see that the total we used in the original reconciliation omitted the invoice for September, 2011.

Tab 9 at 1. According to the accounting attached to the March 8, 2017, email, the total amount that FSA *should* have calculated as having been paid to NCO between September 2011 and August 2013 was $70,139,085.94, an amount that was $1,355,737.46 more than what FSA had listed as previously paid to NCO in mod-52. Tab 9 at 5.

TSI rejected FSA's demand for repayment, asserting that "the parties previously settled issues regarding outstanding invoices from September 2011 through August 2013 by jointly executing Amendment Modification No. 0052." Tab 10 at 1; *see* TSI-SOF ¶ 46. TSI contended that, "to the extent the Agency is seeking to renegotiate the Amendment, TSI requests the following information to conduct a detailed account-level reconciliation: [a] list of rehabilitated accounts placed with NCO that [were] funded during the period from September 2011 to August 2013; [a] list of payments received during the period September 2011 to August 2013 from borrowers placed with NCO; and [a]ny other information used by the agency's independent auditors to conclude that $1,355,737.84 is due and owing by TSI." Tab 10 at 1.

FSA responded by emailing TSI a copy of the auditor's report and reiterating its demand for payment. *See* Tabs 11, 12. On April 14, 2017, TSI again informed FSA that TSI

disagreed with FSA's asserted entitlement to payment, reiterated its contention that mod-52 constituted a settlement, and asserted that the audit report did not provide the account level details that it had requested. Tab 13 at 1-2; TSI-SOF ¶ 48.

On December 22, 2017, the FSA contracting officer issued a final decision demanding that TSI repay $1,334,873.13, which FSA asserted was the value of the September 2011 invoice less $20,864.71 in chargebacks that TSI paid FSA after FSA's audit was completed. Tab 14 at 2; FSA-SOF ¶ 35; TSI-SOF ¶ 49.

Proceedings Before the Board

On February 26, 2018, TSI filed a notice of appeal with the Board, challenging the FSA contracting officer's decision. In response to TSI's request, and recognizing that the claim at issue here is the Government's, the Board directed FSA to file the complaint. *See Transworld Systems Inc. v. Department of Education*, CBCA 6049, 18-1 BCA ¶ 36,987. In its answer, as subsequently amended, TSI alleged several affirmative defenses, including accord and satisfaction and a right of offset.

A short time before TSI filed its notice of appeal, Collecto, Inc. (Collecto), another of the PCAs from which the FSA contracting officer had demanded repayment for reasons similar to the demand to TSI, had filed its own notice of appeal, which the Board docketed as CBCA 6001.[7] Although FSA requested that the Board consolidate this appeal and the *Collecto* appeal, we declined to do so, but agreed to coordinate discovery in the two appeals. *Collecto, Inc. v. Department of Education*, CBCA 6001, et al., 18-1 BCA ¶ 37,104. The parties in this appeal and in *Collecto* completed discovery, except for discovery in this appeal relating to an offset defense that TSI wishes to preserve for future proceedings, if they are needed. TSI and Collecto have both filed summary judgment motions in their respective appeals, and FSA has filed cross-motions in both appeals. The Board conducted a joint oral argument on the parties' motions in both this and the *Collecto* appeal on December 9, 2019. This decision is limited to TSI's appeal.

[7] The parties represent that a third PCA has challenged another contracting officer's repayment demand in a case currently pending before the Court of Federal Claims.

Discussion

Standard for Summary Judgment

"[T]he function of summary judgment is to avoid a useless trial." *United States Steel Corp. v. Vasco Metals Corp.*, 394 F.2d 1009, 1011 (CCPA 1968). "'Useless' in the context of this case means that more evidence than is already available in connection with this motion could not be reasonably expected to change the result herein." *Exxon Corp. v. National Foodline Corp.*, 579 F.2d 1244, 1246 (CCPA 1978). Nevertheless, summary judgment is appropriate only where the moving party is entitled to judgment as a matter of law based on undisputed material facts. *See, e.g., Anderson v. Liberty Lobby*, Inc., 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). When both parties move for summary judgment, "each party's motion must be evaluated on its own merits and all reasonable inferences must be resolved against the party whose motion is under consideration." *Government Marketing Group v. Department of Justice*, CBCA 964, 08-2 BCA ¶ 33,955 (citing *Anderson*, 477 U.S. at 248). Simply because both parties "have cross-moved for summary relief does not impel a grant of one of the motions; each motion must be independently assessed on its own merit." *Id.* (citing *California v. United States*, 271 F.3d 1377, 1380 (Fed. Cir. 2001)).

FSA's Overpayment Argument

As an initial matter, the parties dispute whether there was any overpayment at all, and FSA wants us to resolve that issue on summary judgment. FSA asserts that, through error, the FSA business operations specialist responsible for developing the reconciliation procedures excluded the PCAs' invoices for September 2011 from his calculation of how much each PCA had already been paid for September 2011 through August 2013. TSI asserts that it lacks sufficient information to know how FSA made its calculations and whether NCO was overpaid.

The record is clear that, when originally applying the invoice reconciliation procedures, FSA did not include the NCO invoice covering September 2011 in its prior payment calculations for September 2011 through August 2013. FSA has presented a chart showing how it originally calculated its already-paid figure of $68,783,348.48, a figure that matches the total of NCO's invoices covering commissions from October 2011 through August 2013. NCO's invoice in the amount of $1,355,737.46 for commissions in September 2011 is clearly, for whatever reason, not included in that calculation. Because FSA included commissions due for September 2011 in its calculation of what NCO *should* have been paid for that period, FSA is correct that there is an inconsistency in its inputs into the should-have-been-paid and already-paid calculations. The amount that FSA is seeking to recover clearly

mirrors the September 2011 invoice payment amount, less some adjustments arising from other factors that FSA has identified. To the extent that TSI argues that it does not know how FSA calculated the "already paid" figure, it presents nothing but conjecture, which is insufficient to contest summary judgment.

Nevertheless, although FSA has established how it calculated what it had already paid, that does not mean it has proven that TSI was overpaid and the amount of overpayment, for three reasons:

First, the basis for part of FSA's calculations is inconsistent with the actual language of mod-52. The NCO invoice for September 2011 encompasses commissions from September 1 through 30, 2011, but the invoice reconciliation procedures in mod-52 were supposed to encompass a period that did not begin until September 16, 2011. FSA's September figures do not break out the amount applicable only to September 16 to 30. Although FSA argues that everyone understood that commissions for the entirety of September 2011 were part of the reconciliation process, FSA has not explained how it can require TSI to adhere to that verbal agreement, which conflicts with the plain language of mod-52, while simultaneously arguing that it is not bound by verbal agreements about *other* amounts that are not supported by mod-52's language. FSA cannot pick-and-choose which side agreements, outside the actual language of mod-52, it will enforce. Restatement (Second) of Contracts § 383 cmt. a (1981) (A party "cannot disaffirm part of the contract that is particularly disadvantageous to himself while affirming a more advantageous part, and an attempt to do so is ineffective as a disaffirmance.").

Second, we question FSA's inclusion, in its accounting of NCO's prior task order payments, of commissions identified on NCO's September 2011 invoice as having been earned under two predecessor contracts, rather than under this task order. At least on its face, it does not appear appropriate to include in NCO's "already paid" figure commissions paid on other contracts.

Third, TSI believes that FSA miscalculated what TSI was owed for rehabilitations and that FSA may have significantly undercalculated that amount during the invoice reconciliation process. The Board agreed to suspend discovery on that issue, and to defer ruling on it, so that, if the Board were to deny TSI's motion for summary judgment on accord and satisfaction, TSI would still be able to conduct discovery to learn more about, and potentially challenge, FSA's calculations. Although we deferred this issue, TSI has included in the record a significant number of contemporaneous email communications showing problems in FSA's ability during the six-month negotiation period to identify and calculate the PCAs' commissions. Because the FSA contracting officer's final decision at issue here demands repayment of what the contracting officer views as FSA's overpayment to TSI, it

will be FSA's burden, assuming that mod-52 (as FSA argues) did not constitute an accord and satisfaction, to show that TSI received an overpayment that FSA is entitled to recoup. *See JBG/Federal Center, L.L.C. v. General Services Administration*, CBCA 5506, et al., 18-1 BCA ¶ 37,120 ("The assertion of a right to recoup funds paid in error is a government claim upon which the Government bears the burden of proof."). To prove overpayment, FSA will have to establish that the "should have been paid" amount exceeds the "already paid" amount, without reference to any prior verbal agreements that did not result in an accord and satisfaction.

In summary, FSA has established that it excluded the September 2011 commission invoice from its calculation of NCO's already-paid figure when negotiating the invoice reconciliation procedures leading to mod-52. However, inconsistencies between the written invoice reconciliation procedures themselves and the manner in which FSA applied them, as well as the deferred issue of whether FSA miscalculated TSI's commissions for rehabilitations, preclude FSA from proving overpayment or its amount on summary judgment.

TSI's Accord and Satisfaction Argument

A. The Legal Standard

TSI asserts that, even if FSA overpaid TSI, mod-52 constituted an accord and satisfaction that "terminates any previous right that a party may have had to assert a claim of the same subject matter." Appellant's Motion for Summary Judgment at 17. Both parties seek summary judgment on TSI's accord and satisfaction argument.

An accord and satisfaction terminates an otherwise existing right and constitutes a "perfect defense in an action for the enforcement of a previous claim, whether that claim was well founded or not":

> An "accord" is "an agreement by one party to give or perform and by the other party to accept, in settlement or satisfaction of an existing or matured claim, something other than that which is claimed to be due." "Satisfaction" means "the execution or performance of the agreement, of the actual giving and taking of some agreed thing."

Chesapeake & Potomac Telephone Co. v. United States, 654 F.2d 711, 716 (Ct. Cl. 1981) (quoting 1 Am. Jur. 2d *Accord & Satisfaction* § 1 (1962)). "Accord and satisfaction occur 'when some performance different from that which was claimed as due is rendered and such substituted performance is accepted by the claimant as full satisfaction of his claim.'" *Bell*

BCI Co. v. United States, 570 F.3d 1337, 1340-41 (Fed. Cir. 2009) (quoting *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1581 (Fed. Cir.1993)). "[T]he presence of a release . . . is not necessary to effectuate an accord and satisfaction." *Trataros Construction, Inc. v. General Services Administration*, GSBCA 15344, 03-1 BCA ¶ 32,251.

A valid accord and satisfaction requires four elements: (1) proper subject matter; (2) competent parties; (3) consideration; and (4) a meeting of the minds of the parties. *A-Son's Construction, Inc. v. Department of Housing & Urban Development*, CBCA 3491, et al., 15-1 BCA ¶ 36,184 (quoting *O'Connor v. United States*, 308 F.3d 1233, 1240 (Fed. Cir. 2002)). FSA adds a fifth requirement: that the parties' agreement resolve "a bona fide dispute between the parties." Respondent's Motion for Summary Judgment at 8; Respondent's Opposition Brief at 2. Although the Court of Appeals for the Federal Circuit has not expressly mandated that fifth requirement, *see Meridian Engineering Co. v. United States*, 885 F.3d 1351, 1363 (Fed. Cir. 2018) (describing test for finding an accord and satisfaction as a "four-part test"); *O'Connor*, 308 F.3d at 1240 (same), several trial court and board decisions, including this Board in *National Housing Group, Inc. v. Department of Housing & Urban Development*, CBCA 340, 09-1 BCA ¶ 34,043, have identified a bona fide dispute as a necessary fifth element. *See, e.g., CYR Construction Co. v. United States*, 27 Fed. Cl. 153, 157 (1992); *American Telephone & Telegraph Co., Federal Systems Advanced Technologies*, DOT BCA 2479, 93-3 BCA ¶ 26,250. The court decision that is most often cited as the original basis of that fifth "element" describes a bona fide dispute as the most common *form* of the four elements, rather than a separate element, of an accord and satisfaction: "And its most common pattern is a mutual agreement between the parties in which one pays or performs and the other accepts payment or performance in satisfaction of a claim or demand which is a bona fide dispute." *Nevada Half Moon Mining Co. v. Combined Metals Reduction Co.*, 176 F.2d 73, 76 (10th Cir. 1949); *see O'Connor*, 308 F.3d at 1240 ("In its most common form, an accord and satisfaction exists" as an agreement that resolves "a bona fide dispute.").

Concerns about whether a bona fide dispute existed are not truly a separate "element" of an accord and satisfaction, but play into whether there was adequate consideration to support an accord. *See, e.g., Lowrance v. Hacker*, 866 F.2d 950, 953 (7th Cir. 1989) (bona fide dispute requirement "is designed to insure that the necessary consideration is present to create the contract"); *Supply & Service Team GmbH*, ASBCA 59630, 17-1 BCA ¶ 36,678 ("The reason for the [bona fide] dispute requirement appears to be rooted in the need for consideration. After all, if one party were to simply reduce its obligations under the contract and the other received nothing in return, there would be no consideration to the short-changed party for having waived its contractual expectations." (citations omitted)). We will address FSA's concerns about the alleged absence of a bona fide dispute when the parties executed mod-52 as part of our analysis of consideration.

B. Substituted Contract v. Executory Accord

In arguing that mod-52 did not create *any* accord and satisfaction, FSA asserts that it is still entitled to rely on and enforce the written portion of the invoice reconciliation procedures contained in mod-52 and that it is entitled to recalculate the amounts owed by reference to those written procedures. It argues that only specific dollar figures identified in mod-52 require an accord and satisfaction to be enforceable. We do not understand the manner in which FSA has dissected the accord and satisfaction doctrine.

Generally, a bilateral modification in which the parties agree to add or substitute a new performance obligation in exchange for discharging an original contract duty constitutes an 'accord,' which is satisfied when the new performance, typically payment, is rendered. *Brock & Bevins Co. v. United States*, 343 F.2d 951, 954-55 (Ct. Cl. 1965). In some agreements, though, the "additional performance" is actually a part of and is "satisfied" within the terms of the modification itself, making both the "accord" and the "satisfaction" complete upon execution of the "substituted contract":

> [A]n accord and satisfaction may occur in two ways: (1) the agreement itself may be considered a new or "substituted contract" comprising both the accord and the satisfaction, extinguishing the subject claims and permitting suit only to be brought on the "substituted contract" or, (2) the parties may enter into an "executory accord" that discharges the claims only if the agreement is later performed and, if not performed, the original claims may be reopened.

Edward H. Foran, ASBCA 51596, et al., 01-1 BCA ¶ 31,323.

The Restatement (Second) of Contracts distinguishes between a "substituted contract" and an "executory accord." It defines an enforceable "substituted contract" as follows:

> A substituted contract is one that is itself accepted by the obligee in satisfaction of the original duty and thereby discharges it. A common type of substituted contract is one that contains a term that is inconsistent with a term of an earlier contract between the parties. If the parties intend the new contract to replace all of the provisions of the earlier contract, the contract is a substituted contract.

Restatement (Second) of Contracts § 279 cmt. a (1981). Unlike a substituted contract, "which immediately discharges a prior obligation, an [executory] accord discharges the prior obligation only after the performance of the new agreement." *GE Capital Mortgage Services, Inc. v. Pinnacle Mortgage Investment Corp.*, 897 F. Supp. 854, 865 (E.D. Pa.

1995). "The accord entitles the obligor to a chance to render the substituted performance in satisfaction of the original duty," and, once he does, "his performance discharges both his original duty and his duty under the accord." Restatement (Second) of Contracts § 281 cmt. b. Nevertheless, "[i]t is the essence of an [executory] accord that the original duty is not satisfied until the accord is performed." *Id.* § 281 cmt. a. If the obligor fails to perform the substituted obligation, the obligee "is no longer bound by the accord" and "may then choose between enforcement of the original duty and any duty under the accord." *Id.* cmt. b.

The parties are interpreting mod-52 in different ways, with FSA defining it as a "substituted contract" that needs no actual payment to render it binding and TSI defining it as an executory accord. "The determination of whether the modification is in the nature of a substituted contract or an accord and satisfaction, operating as an immediate discharge, or is an executory accord, where substituted performance was meant as a future discharge, is a question of the intention of the parties and of reasonable interpretation of the expressions of the parties." *TMW, Joint Venture, Inc.*, ASBCA 23115, 84-2 BCA ¶ 17,250; *see* Restatement (Second) of Contracts § 281 cmt. e (1981) ("Whether a contract is an accord or a substituted contract is a question of interpretation."). A tribunal is "less likely to find a substituted contract and more likely to find an accord if the original duty was one to pay money [or] if it was undisputed." Restatement (Second) of Contracts § 281 cmt. e (1981). Nevertheless, the mere fact that FSA is arguing in favor of interpreting mod-52 as a substituted contract rather than an executory accord does not mean that the elements of accord and satisfaction do not apply.

C. The Elements As Applied in This Case

1. Proper Subject Matter

FSA asserts that, because the parties disagree as to the subject matter of mod-52, the "proper subject matter" element of an accord and satisfaction is not satisfied. We disagree. Certainly, TSI and FSA are at odds about what the subject matter of mod-52 is, whether it should be limited to the establishment of written reconciliation procedures or, instead, encompasses a defined final payment amount. Their dispute, though, is about the *scope* of the relevant subject matter. "The subject matter of a [modification] 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)." *Trataros Construction, Inc.* (citing *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908)). Subject matter is proper where it addresses "matters that had arisen during the course of the performance of the contract." *Id.* No matter which party is correct in its interpretation of mod-52, each party's proposed interpretation involves "proper" subject matter. Questions about the proper *scope* of the

modification relate to whether there was a "meeting of the minds" between the parties, which we will discuss below.[8]

2. Competent Parties

Neither party disputes that NCO and FSA were both competent to enter into and execute a contract modification.

3. Consideration

FSA argues that it received no consideration for mod-52 because NCO was performing the same student debt collection services both before and after the modification: mod-52 "does not require TSI or the Agency to perform any new or different responsibilities nor is there a promise bargained for," says FSA. Respondent's Motion for Summary Judgment at 15. We disagree.

"[T]o constitute consideration, a performance or a return promise must be bargained for." *National Housing Group, Inc. v. Department of Housing & Urban Development*, CBCA 340, et al., 09-1 BCA ¶ 34,043. "Under a traditional benefit/detriment analysis, consideration is sufficient if there is *any* benefit to the promisor or detriment to the promisee," but, "in the context of a Government contract, [consideration] must render a benefit to the Government and not merely a detriment to the contractor." *Turner Construction Co. v. General Services Administration*, GSBCA 15502, et al., 05-1 BCA ¶ 32,924; *see Metzger, Shadyac & Schwarz v. United States*, 12 Cl. Ct. 602, 605 (1987) (consideration requires a benefit to the Government). Nevertheless, "[n]either the benefit nor detriment need be actual; it is a sufficient legal detriment if the promisee agrees to perform any act, no matter how slight, and so long as he does so at the request of the promisor and in exchange for the promise. The term 'benefit' means the receipt as the exchange for a promise some performance or forbearance which the promisor was not previously entitled to receive." *Turner Construction*.

Even though the substance of NCO's debt collection services was the same before and after mod-52, that contract modification plainly memorialized a significant change to the

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[8] To the extent that some tribunals may view the "proper subject matter" element as requiring agreement between the parties as to the scope of a modification, *see Thomas Creek Lumber & Log Co. v. United States*, 36 Fed. Cl. 220, 238 (1996), we elect, in light of our predecessor board's decision in *Trataros Construction*, to consider that matter as part of the "meeting of the minds" element of an accord and satisfaction.

original task order that the parties negotiated for months, creating a series of new rules defining how PCAs would receive commissions to deal with the fact that, for almost two years, FSA had been unable accurately to record a basis for them. That is sufficient consideration to support mod-52. *See Edo Corp.*, ASBCA 2622, 56-2 BCA ¶ 1141 (rejecting the Government's argument that a contract modification failed for lack of consideration because, even though the Government alleged that the modification required the contractor to furnish "only that which was already required by the original contract," the modification actually changed some of the contractor's performance obligations, even if minimally).

Although FSA broadly states its "no consideration" argument, it appears, looking at FSA's briefs as a whole, that FSA really means to argue only that the portion of mod-52 dealing with the actual dollar amounts to be paid NCO, if it is interpreted as an enforceable part of the modification, lacks consideration. This is because FSA relies upon and seeks to enforce as binding the written invoice reconciliation procedures that are contained in mod-52. If mod-52 truly lacked consideration, the entire modification, including the procedures adopted therein, would be ineffective. *See* Restatement (Second) of Contracts § 279 cmt. b. Yet, we cannot split the modification into pieces in the manner that FSA appears to request. Unless a contract modification is divisible, we do not require separate consideration for each part of the modification unless the language of the agreement specifically calls for it: "Where consideration is shown for an obligation as a whole, any particular part of the obligation cannot be extracted and said to be inoperative because particular consideration is not assigned to it." *Denver Steel & Iron Works*, ENG BCA 2204, 1963 WL 164 (Mar. 8, 1963); *see Brown-Forman Distillers Corp. v. Northwest Liquor Co.*, 171 F.2d 255, 256 (7th Cir. 1948) (for an indivisible contract, the consideration for the whole is the consideration for each part); *Philipp Brothers Inter-Continent Corp. v. United States*, 17 A.F.T.R. 2d 1072, 1966 WL 14651 (S.D.N.Y. May 18, 1966) ("[O]nce there is consideration for the contract as a whole, . . . there need not have been separate consideration for every stipulation, promise or provision in the contract. . . .").

If TSI is correct that mod-52 includes not only the invoice reconciliation procedures, but also the dollar amount derived from those procedures, we cannot find that the procedures and the resulting dollar amount are divisible. Absent express language to the contrary, "a contract is generally construed to be divisible [only] where the articles of the contract are entirely distinct and not in their nature connected with one another." 77A C.J.S. *Sales* § 15; *see In re Payless Cashways*, 203 F.3d 1081, 1085 (8th Cir. 2000) (a divisible contract is, in legal effect, a series of independent agreements about different subjects that just happen to be made at the same time and to have been incorporated into the same written contract document). The invoice reconciliation procedures and the resulting amount to be paid to the PCAs are not so distinct and separate as to permit us, in the absence of other evidence of a contrary intent, to find the two to be entirely unrelated. To the extent that FSA is arguing that

relieving it of liability for not maintaining better rehabilitations completion records and for not performing its invoicing obligations was an insufficient benefit to support a modification, tribunals "ordinarily 'do not inquire into the adequacy of consideration,' especially 'when one or both of the values exchanged are uncertain or difficult to measure.'" *Moore v. United States Department of State*, 351 F. Supp. 3d 76, 89 (D.D.C. 2019) (quoting Restatement (Second) of Contracts § 79 cmt. c. (1981)). FSA has no valid basis for arguing that there was no consideration to support mod-52, regardless of its scope.

FSA also argues that, because the parties agreed that new invoice reconciliation procedures were necessary to allow for proper payment to the PCAs, there was no bona fide dispute between the parties, an argument that, as we previously discussed, amounts to a challenge to the adequacy of consideration. We disagree with FSA's definition of a "bona fide dispute" for purposes of the accord and satisfaction doctrine. "The requirement of a bona fide dispute presupposes both parties' knowledge that there exists a particular issue as to a greater liability that is settled by the accord." *Flowers v. Diamond Shamrock Corp.*, 693 F.2d 1146, 1152 (5th Cir. 1982). That requirement is important to ensure that a party does not *unknowingly* create an accord and satisfaction, such as where an individual receives and deposits a check without realizing that the sender intended it to constitute payment in full for work performed. *See, e.g., IFC Credit Corp. v. Bulk Petroleum Corp.*, 403 F.3d 869, 872-73 (7th Cir. 2005); *Neal H. Howard & Associates v. Carey & Danis, LLC*, 244 F. Supp. 2d 1344, 1347-48 (M.D. Ga. 2003). In the context of a bilateral contract modification, a "bona fide dispute" means that there are "accompanying expressions sufficient to make the creditor understand, or to make it unreasonable for him not to understand, that the performance is offered to him as full satisfaction of his claim and not otherwise." *Chesapeake & Potomac Telephone*, 654 F.2d at 716 (quoting 6 Arthur L. Corbin, *Corbin on Contracts* § 1276 (1962)).

Contrary to FSA's position, mod-52 resolved a dispute between the parties. Both parties knew during the six months that they spent negotiating mod-52 that they were working to resolve a change in FSA's original task order obligation to prepare and issue invoices and to agree upon a method by which the PCAs' commissions would be calculated and paid. They knew that FSA's DMCS system had not properly recorded payment dates associated with, at a minimum, rehabilitations, making it impossible for FSA to satisfy its underlying task order obligations. The contemporaneous emails that TSI has added to the record reflect the extent of FSA's recordation problems and the extensive compromises that the PCAs had to make with FSA, over the course of several months of negotiations, to resolve the lack of reliable data from which to calculate their commissions. We disagree with FSA's position that the PCAs' agreement to substitute the invoice reconciliation procedures for FSA's original obligations and to excuse FSA's failures properly to track student debt payments and issue appropriate invoices was not a change to the task order.

FSA cannot validly argue that the PCAs did not significantly compromise what, without mod-52, would have been a breach of contract by FSA.

FSA has no basis for contesting that mod-52 was supported by consideration.

4. Meeting of the Minds

"An accord and satisfaction does not operate as a bar in regard to matters not contemplated by an agreement . . . ." *John A. Volpe Construction Co.*, GSBCA 2570, 70-1 BCA ¶ 8070. "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.'" *Trataros Construction, Inc.* (quoting *McLain Plumbing & Electrical Service, Inc. v. United States*, 30 Fed. Cl. 70, 81 (1993)). In considering a meeting of the minds for purposes of an accord, we look first to the language of the agreement. *Saturn Construction Co.*, VABCA 3229, 91-3 BCA ¶ 24,151. When the contract language is unambiguous, a tribunal's inquiry ends, and the plain contract language controls. *Textron Defense Systems v. Widnall*, 143 F.3d 1465, 1469 (Fed. Cir. 1998).

In this case, reading mod-52 in its entirety, there is nothing that explains why FSA included its dollar calculations in the bilateral modification. As FSA notes, the stated purpose of the modification, as set forth on its first page, is "to incorporate Invoice Reconciliation Procedures," rather than specific dollar amounts, that "are hereby effective for performance occurring from September 16, 2011 through August 31, 2013." Tab 5 at 1. Mod-52 includes several pages of written procedures that describe how FSA will calculate the commissions owed to each PCA for that reconciliation period. The "regular payments" section of those procedures refers to Appendix 1 as containing historical commission rates, and those historical rates are set forth on the first page of Appendix 1. *Id.* at 3, 15.

Seemingly inexplicably, though, Appendix 1 *also* includes three-and-a-half pages of something *other* than historical commission rates: the entirety of FSA's breakdown of what it then viewed as the amounts owed to the PCA for its work from September 2011 to August 2013; the amount that FSA thought it had previously paid the PCA; and FSA's calculation of the difference between the "should have been paid" and "already paid" numbers. Nowhere in mod-52 is there any explanation of why those amounts are contained in Appendix 1 or in the modification. TSI submitted an invoice to FSA in the amount of that calculated difference, and FSA paid it.

At oral argument, FSA could not explain why the detailed dollar figures were included in Appendix 1. All that FSA could say was that FSA was "trying to have a place in the record that reflects the emails that were being exchanged without incorporating the emails,"

and "that was just a simple way for them to do so." Transcript at 70-71. Yet, when interpreting a contract, the Board must attempt to interpret it in a manner that "give[s] reasonable meaning to all of its parts." *NVT Technologies, Inc. v. United States*, 370 F.3d 1153, 1159 (Fed. Cir. 2004). Such an interpretation "is to be preferred over one that leaves a portion of the contract useless, inexplicable, void, or superfluous." *Id.*; *see Fortec Constructors v. United States*, 760 F.2d 1288, 1292 (Fed. Cir. 1985) (interpretation "that leaves portions of the contract meaningless" is not preferred). In interpreting mod-52, we cannot view the inclusion of detailed dollar figures as meaningless. Their inclusion has to mean *something*. FSA's assertion that their inclusion was simply for purposes of convenience, as a storage mechanism, and that only the written paragraphs detailing invoice reconciliation procedures were intended to bind all parties makes no sense. FSA's interpretation of mod-52 renders a significant portion of it superfluous and meaningless.

Nevertheless, TSI's assertion that the three-and-a-half pages of dollar figures in Appendix 1 constituted a binding resolution of the dollar amount that FSA owed TSI is equally unsupported by contract language. As noted above, the purpose of including dollar figures is not expressly stated anywhere in mod-52. The only reference to Appendix 1 in the entirety of mod-52 indicates that it identifies historical commission rates under previous contracts. The modification says *nothing* indicating that a detailed calculation defining what TSI was actually owed would *also* be found there. And, as we now know, the dollar figure calculated in Appendix 1 is inconsistent with the invoice reconciliation procedures set forth in mod-52, given that it fails to account for NCO's receipt of the September 2011 payment. Further, if the inclusion of dollar calculations in Appendix 1 was intended to define TSI's precise final payment amount for the period from September 16, 2011, to August 30, 2013, why bother to include the actual invoice reconciliation procedures in the contract modification at all, since the parties only needed to insert a final dollar figure? Should we find that the actual written procedures override the stated dollar amount or, instead, that the dollar amount overrides the written procedures? The absence of a reference anywhere in mod-52 to the fact that there would be a detailed dollar calculation in Appendix 1 or why it is there creates an irreconcilable ambiguity.[9]

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[9] We also note, without deciding what it means, that the first page of mod-52 included Box 12, entitled "Accounting and Appropriation Data," that stated "Modification Amount: $0" and "Modification Obligated Amount: $0." Tab 5 at 1. FSA appears to suggest that this notation evidences the parties' intent that the modification did not reflect an agreement for FSA to pay any specific dollar amounts to NCO. Subsequently, though, FSA paid NCO's invoice in the specific dollar amount identified in mod-52, without, as far as we can tell, issuing any additional modifications or supplemental funding documents to cover the payment, making it appear that the modification did not have to add money to the

Where the existence of an accord and satisfaction is unclear from the language of the contract modification itself, we must examine evidence surrounding the development of the modification to understand the parties' intent. *See Merritt-Chapman & Scott Corp. v. United States*, 458 F.2d 42, 44-45 (Ct. Cl. 1972) (approving of the board's examination "at great length [of] the negotiations preceding acceptance of the . . . proposal, for any evidence of such exceptions or reservations"). "The [tribunal] therefore must examine the totality of the circumstances to determine whether a meeting of the minds occurred concerning an accord—whether there were 'accompanying expressions sufficient to make the [obligee] understand, or to make it unreasonable for him not to understand, that the performance is offered to him as full satisfaction of his claim and not otherwise.'" *Kanag'iq Construction Co. v. United States*, 51 Fed. Cl. 38, 47 (2001) (quoting *Chesapeake & Potomac*, 654 F.2d at 716); *see Texas Instruments Inc. v. United States*, 922 F.2d 810, 815 (Fed. Cir. 1990) ("Whether a legally enforceable contract has been formed by a meeting of the minds depends upon the totality of the factual circumstances."). At least one court has recognized that "[t]he fact-intensive nature of the court's inquiry into the scope of the meeting of the minds is a poor candidate for summary judgment. Although common sense strongly suggests that the bilateral modifications constitute accords regarding any equitable adjustments arising out of the changed work, common sense cannot resolve a genuine issue of material fact, particularly when that fact is the intent of the parties." *Kanag'iq Construction*, 51 Fed. Cl. at 47.

Comparing the parties' competing evidence regarding their negotiations, we cannot resolve the scope of the parties' "meeting of the minds" on summary judgment. TSI cites deposition testimony from the FSA business operations specialist who negotiated mod-52 with the PCAs, who indicated that the entire purpose of the negotiations was to "come up with what we called a make whole number" for each PCA, which was the number included in the modification:

> So the reconciliation process was to compare what the PCAs had billed us for during that period to what we agreed with the PCAs they were owed during that period, and then come up with what we called a make whole number, which was to say either the PCAs have billed us for and been paid for more than what we now realize they were owed, or less than what we now realize they were owed.

Bryant Deposition at 31-32. Similarly, the FSA contracting officer who executed mod-52 on FSA's behalf testified that "[i]t was my understanding that they were bilateral

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contract for payment to be authorized. As a result, it is unclear what this notation in Box 12 was intended to convey. The parties should address this matter in future proceedings.

modifications that memorialized the performance of the PCAs for that period of time" and "[t]he purpose was to pay them the correct amount . . . for their performance." Deposition of John E. Ramsey, III (June 10, 2019) at 36, 38. He also testified as to his belief that, by executing mod-52, TSI was certifying the dollar amounts set forth therein. *Id.* at 46, 60. In addition, FSA's "should have been paid" dollar calculations in Appendix 1 include items that are not mentioned in the written procedures, but to which the parties agreed during mod-52 negotiations (Tab 40)—commissions billed in the "Titanium" and "Legacy" invoices covering August and early September 2011—providing at least some support for interpreting the Appendix 1 dollar calculations as more representative of the totality of the parties' agreements than the written procedures alone. The cited testimony, coupled with additional evidence in the record, provides some support for TSI's interpretation of mod-52.

Nevertheless, FSA cites other portions of those witnesses' testimony, as well as testimony of another witness, in which the witnesses disclaim any understanding that the dollar numbers in the PCAs' modifications were binding or final, although the testimony generally lacks specifics about *why* the dollar figures were included into the actual bilateral modifications. The evidence that FSA cites is enough to create a genuine issue of material fact that will require us to resolve the parties' intent through a hearing or, if the parties so elect, on a written record under Board Rule 19 (48 CFR 6101.19 (2019)). On summary judgment, we cannot weigh evidence or evaluate credibility, but must, in reviewing each party's summary judgment motion, make all justifiable inferences and presumptions in the non-moving party's favor. *Navigant SatoTravel v. General Services Administration*, CBCA 449, 08-1 BCA ¶ 33,821. Based upon that standard, we cannot decide the scope of the parties' agreement or their "meeting of the minds" on summary judgment.

Mistake, The Duty of Good Faith, and Misrepresentation

FSA argues that, as a matter of law, it is entitled to reclaim monies that it overpaid by mistake and that an accord and satisfaction cannot preclude recovery if based upon a mistake that would require the Government to overpay a contractor. That right of recovery is not dependent, says FSA, on any fault or knowledge of the mistake by the contractor, but, even if it were, NCO was not innocent in dealing with FSA's mistake, and the underlying contract and task order created an implied duty of good faith and fair dealing requiring NCO to recognize and tell FSA of its failure to include the September 2011 invoice in its "already paid" calculation. According to FSA, NCO could easily have "determine[d] how much [it was] paid during the reconciliation period by simply adding all the payments [it] received during that time," and its failure to "ma[k]e a good faith effort to maintain and review its own records in order to evaluate the Agency's claim," and to tell FSA of FSA's error, constitutes a breach of that good faith duty. Respondent's Motion for Summary Judgment at 13.

It is well-settled that the Federal Government is entitled to recover funds that "its agents have wrongfully, erroneously, or illegally paid." *United States. v. Wurts*, 303 U.S. 414, 415 (1938). An erroneous payment is one "made as a result of an unauthorized agreement, or one not authorized by the terms of the parties' agreement." *Maykat Enterprises, N.V.*, GSBCA 7346, 84-3 BCA ¶ 17,510. As defined in the FAR, an erroneous payment "to a contractor to which the contractor is not currently entitled under the terms and conditions of the contract," including an overpayment, is considered a contract debt that the Government can recoup. 48 CFR 32.601(a), (b)(8), (b)(12). It matters not that the Government was responsible for the error at issue. *Lodge 2424, International Association of Machinists & Aerospace Workers v. United States*, 564 F.2d 66, 71 (Ct. Cl. 1977).

Yet, in the face of a bilateral contract modification, FSA is not necessarily entitled to recoup any amount that it thinks it overpaid simply because it made a mistake when negotiating: "The Government is bound by those agreements of its agents that are within the scope of their actual authority, even if those agreements were the result of a unilateral mistake of law or fact," and "the Government enjoys no special status permitting it to disavow those agreements." *Maykat Enterprises, N.V.* In some ways, the arguments that FSA is raising here mirror those of the Government in *Airmotive Engineering Corp.*, ASBCA 15235, 71-2 BCA ¶ 8988, a case in which the Government, through a bilateral contract modification, had accepted and defined the dollar amount for a Value Engineering Change Proposal (VECP). The Government later discovered that the employee who had accepted the VECP had relied on faulty information in calculating the cost savings resulting from the VECP and recomputed the amount to which the contractor was entitled, resulting in a significantly lower award. On appeal, the board determined that, although the Government used terms like "mistake," "mutual mistake," and "misapprehension" to describe the reasons that its contract negotiator had miscalculated the dollar figure for the contract modification, the real basis of the Government's complaint was "some shortcoming in its own negotiating efforts." Rejecting the notion that contracting officers only have the authority to make good bargains for the Government, the board held that, if it turns out that a bilateral contract modification results in a bad bargain, the Government has no right simply to rescind the agreement or to reform its terms. Instead, the Government has to live with the mistake that it made if the agreement in which it is contained is otherwise binding. *See Applied Cos. v. United States*, 37 Fed. Cl. 749, 757 (1997) ("The government's failure to protect itself . . . from liability to the bank when it easily could have, was not reason to allow it to renege on its commitment under the agreement."), *aff'd*, 144 F.3d 1470 (Fed. Cir. 1999).

Nevertheless, "[i]n many situations, if one party knows that the other is mistaken as to a basic assumption, he is expected to disclose the fact that would correct the mistake." Restatement (Second) of Contracts § 161 cmt. d (1979). "[E]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement,"

Restatement (Second) of Contracts § 205 (1981), and that good faith duty requires "honesty in fact in the conduct or transaction concerned." *Id.* § 205 cmt. a. "Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified." *Id.* § 205 cmt. d. Although the Restatement (Second) of Contracts, in discussing the concept of "[g]ood faith in negotiations," makes clear that this good faith duty "does not deal with good faith in the formation of a contract," *id.* § 205 cmt. c, it can apply in appropriate circumstances to the "negotiation for modification of an existing contractual relationship," *id.*, like the negotiation between NCO and FSA that resulted in mod-52. *See 6800 Corp.*, GSBCA 5880, 83-2 BCA ¶ 16,581 (applying duty of good faith to negotiations for modifications to existing contractual relationships). "Whether a party is chargeable with an overall failure to bargain in good faith 'involves a finding of motive or state of mind,' which must be inferred from the evidence viewed as a whole." *National Labor Relations Board v. Columbia Tribune Publishing Co.*, 495 F.2d 1384, 1391 (8th Cir. 1974) (quoting *National Labor Relations Board v. Reed & Prince Manufacturing Co.*, 205 F.2d 131, 139-40 (1st Cir. 1953)).

"[An] action to recover mistaken overpayments [embodied within a contract modification] may . . . be maintained on the theory that the mistake was induced by misrepresentation on the part of the contractor." *Coral Petroleum, Inc.*, ASBCA 27888, 86-1 BCA ¶ 18,533 (1985). "[T]o prevail on a claim of misrepresentation, the [Government] must show that the [contractor] made an erroneous representation of a material fact that the [Government] honestly and reasonably relied on to the [Government's] detriment." *T. Brown Constructors, Inc. v. Pena*, 132 F.3d 724, 729 (Fed. Cir. 1997). "To justify reformation of a contract on the ground of misrepresentation, the evidence must be clear and convincing." *Timber Investors, Inc. v. United States*, 587 F.2d 472, 475 (Ct. Cl. 1978). "Extrinsic evidence is admissible to prove that a [party] entered a contract [modification] based on a misrepresentation . . . ." *C&H Commercial Contractors, Inc. v. United States*, 35 Fed. Cl. 246, 256 (1996).

In its summary judgment briefing, FSA does not tell us whether it believes that NCO made any *affirmative* statements misrepresenting its "already paid" amount. Nevertheless, a misrepresentation "may also be inferred from conduct other than words," Restatement (Second) of Contracts § 159 cmt. a (1981), such that, in certain circumstances, "[c]oncealment or even non-disclosure may have the effect of a misrepresentation." *Id.* § 159 cmt. a. "Concealment is an affirmative act intended or known to be likely to keep another from learning of a fact of which he would otherwise have learned," which "is always equivalent to a misrepresentation." *Id.* § 160 cmt. a. "Non-disclosure without concealment is equivalent to a misrepresentation only in special situations." *Id.* § 161 cmt. a. "A person's non-disclosure of a fact known to him" could constitute a "misrepresentation" in the following circumstances:

> (a) where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation, [or]
>
> (b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

Id. § 161. Nevertheless, "[a]ctual knowledge is required for the application of the rule stated in Clause (b)." *Id.* § 161 cmt. d.

We cannot tell from the current record whether NCO actually knew of FSA's mistake before executing mod-52. Although we might want to assume that NCO, as a good business practice, would likely have checked its records against FSA's "already paid" calculation, FSA has placed virtually nothing from the period of the parties' negotiations into the evidentiary record, and we cannot know exactly what FSA was telling NCO and the other PCAs about its calculations, what it was asking them to do, or what information FSA was providing.[10] We do not know whether NCO verified FSA's numbers against its records, whether it discovered an error and said nothing, or, if it conducted a verification, exactly what NCO thought it was verifying. As a result, we cannot find on the record before us that NCO actually knew of FSA's mistake.

FSA instead appears to ask us to find that, even if NCO had no actual knowledge, NCO *should* have known of FSA's mistake and that FSA is automatically entitled to reformation of the agreed-upon mod-52 dollar amount. "The case of a party who does not know but has *reason* to know of a mistake is governed" not by Restatement (Second) of Contracts § 161, but "by the rule stated in § 153(b)," *id.* § 161 cmt. d (emphasis added), which provides as follows:

> Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in

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[10] Although the record contains an email from the FSA business operations specialist indicating that he would be providing TSI and the other PCAs a detailed breakdown of how he calculated the "already paid" number, nothing in the current record indicates that FSA provided the PCAs with that breakdown prior to executing mod-52.

> [Restatement (Second) of Contracts] § 154, and . . . the other party had reason to know of the mistake or his fault caused the mistake.

Restatement (Second) of Contracts § 153 (1979). "'Reason to know' is the Restatement's analytically more precise term for 'constructive knowledge.'" *Bowen-McLaughlin-York Co. v. United States*, 10 Cl. Ct. 223, 224 (1986), *rev'd on other grounds*, 813 F.2d 1221 (Fed. Cir. 1987). "A person has reason to know a fact, present or future, if he has information from which a person of ordinary intelligence would infer that the fact in question does or will exist." Restatement (Second) of Contracts § 19 cmt. b; *see Chernick v. United States*, 372 F.2d 492, 496 (Ct. Cl. 1967) (test for determining what a party "'should' have known must be that of reasonableness, i.e., whether under the facts and circumstances of the case there were any factors which reasonably should have raised the presumption of error"). "[T]he words 'reason to know' are used both where the actor has a duty to another and where he would not be acting adequately in the protection of his own interests were he not acting with reference to the facts which he has reason to know." Restatement (Second) of Contracts § 19 cmt. b. With regard to defining which party bears the risk of a particular mistake, a party bears that risk when "(a) the risk is allocated to him by agreement of the parties, or (b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or (c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so." *Id.* § 154.

In its reply brief, FSA argues that FAR 4.703 (48 CFR 4.703) requires NCO "to maintain and review its own records in order to evaluate the Agency's claim," Respondent's Reply Brief at 11, and suggests that, based upon that duty, we should infer constructive knowledge by NCO of FSA's mistake, even if NCO elected to accept FSA's word about the "already paid" number and either did not actually check its records or misunderstood what FSA was asking it to check. That FAR provision, though, only requires contractors to retain certain records for specific periods of time and to make them available to the Government for audit. It does not impose an affirmative obligation on the contractor to verify the Government's numbers, at least absent evidence that the contractor knowingly was attempting to deceive the Government. We cannot find that the cited FAR provision creates automatic inferred knowledge.

Beyond that FAR citation, FSA merely asserts, without citing any evidence, that TSI has engaged in "lack of diligence, negligence, and/or subterfuge" and that NCO "should have known," if it did not actually know, of FSA's miscalculation. FSA's Summary Judgment Motion at 10, 13. Again, though, FSA asks us to make assumptions without presenting any evidence. NCO's level of knowledge and intent are crucial in determining not only the extent to which there was an actionable "misrepresentation," but also the remedy for it. If

one party induces assent through a *fraudulent* misrepresentation, the harmed party may seek reformation of the parties' agreement. Restatement (Second) of Contracts § 166 (1981). "[W]here only one party is mistaken and the other, although [actually] aware of the mistake, says nothing to correct it," reformation may be appropriate in certain circumstances. *Id.* § 166 cmt. a. Under the Restatement, reformation is *not* available for a mistake about which a party only had "reason to know" or "should have known," but did not *actually* know. In that circumstance, "the contract [action] may be *voidable* . . . , but reformation is not appropriate." *id.* § 166 cmt. b (emphasis added), although, in limited circumstances, some board decisions have permitted reformation for a clear-cut "clerical or arithmetical error" by the Government, not involving a mistake of judgment, "of which the [contractor] was aware or should have been aware," applying a rule similar to that for contractors who make a unilateral mistake in bid. *See, e.g., Cresto & Lanphere, Inc.*, AGBCA 84-208-1, 84-3 BCA ¶ 17,653; *Burnett Electronics Laboratory, Inc.*, ASBCA 23938, 80-2 BCA ¶ 14,619.

We are hesitant to decide what NCO "should have known" on summary judgment based upon the record before us. NCO was far from the only PCA that did not recognize a problem with FSA's "already paid" numbers at the end of the invoice reconciliation procedures negotiations. Although FSA alleges that it overpaid all twenty-three PCAs holding task orders like NCO's, only one of those PCAs originally noticed any problem with the numbers that FSA provided. There is some evidence in the record suggesting that, for at least portions of the negotiating period, the FSA business operations specialist was telling the PCAs that he was only counting commissions from October 2011 onward. *See, e.g.*, Tabs 19, 23, 25, 49. The record also shows that, when FSA notified the PCAs that it was demanding refunds, all of the PCAs were initially skeptical that there had been any overpayment and disagreed with FSA's assessment before most finally agreed, for whatever reason, to return the demanded money. That twenty-two of twenty-three PCAs did not notice the error that FSA made during negotiations and expressed surprise when FSA later identified an error does not support FSA's argument that its error was obvious in the circumstances of this negotiation.

Absent evidence about the details of the parties' negotiations and mutual understandings during those negotiations, we are not in a position to grant FSA's request for summary judgment on its good faith and fair dealing and misrepresentation argument. Further, we cannot identify what the appropriate remedy would be—whether it be to reform mod-52 to fix FSA's error or to render mod-52 voidable in its entirety—without more

information about NCO's actual knowledge or "reason to know" of FSA's error. We deny FSA's summary judgment request on this issue.[11]

We also note that, "to justify reformation of a contract and damages on the ground of misrepresentation, innocent or not, the evidence must establish not only the existence of a misrepresentation, but also that the party seeking relief both relied upon such misrepresentation, and was damaged thereby." *Roseburg Lumber Co. v. Madigan*, 978 F.2d 660, 667 (Fed. Cir. 1992). The record contains evidence that the PCA which identified the missing September 2011 commissions invoice first notified the FSA negotiators of that error during the negotiation process and that FSA took no action, executing the PCAs' modifications after that disclosure. The evidentiary record on this point, however, is ill-developed, consisting of a single comment by the PCA in a post-modification communication to FSA. The parties can explore in further proceedings this aspect of the misrepresentation doctrine.

FSA's Implied-in-Fact Contract Argument

FSA asks us to find on summary judgment that it had an implied-in-fact contract with NCO, TSI's predecessor-in-interest, that obligated NCO, when negotiating mod-0052, to notify FSA of any errors in FSA's calculation of the amounts that FSA had previously paid to NCO for the September 2011 to August 2013 time period. We deny FSA's request and enter summary judgment for TSI on this issue.

"An implied-in-fact contract is founded on a meeting of the minds, which, *though 'not embodied in an express contract*, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.'" *Parsons Brinckerhoff Quade & Douglas, Inc.*, DOT CAB 1299, 84-2 BCA ¶ 17,309 (quoting *Baltimore & Ohio Railroad Co. v. United States*, 261 U.S. 592, 597 (1922)) (emphasis added). FSA asserts that NCO "had actual or constructive knowledge that [FSA's calculation

[11] To the extent that FSA might have attempted to disclaim mod-52 on the basis of a mutual mistake of fact, it did not raise such an argument in its complaint or in its motion for summary judgment. In its reply brief, FSA for the first time mentioned mutual mistake, but, in response to a motion to strike the late-raised argument that the appellant in *Collecto* filed, FSA disclaimed that it was alleging a mutual mistake or relying on that defense. In light of FSA's disclaimer, we do not further address this legal theory. *See Novosteel SA v. United States*, 284 F.3d 1261, 1273-74 (Fed. Cir. 2002) (declining to consider legal arguments first raised before the trial court in a reply brief). Further, we do not know NCO's level of knowledge about FSA's mistake when it executed mod-52.

of the amounts previously paid to NCO as set forth in] Appendix 1 to [mod-52] was not an accurate calculation of the payments received for PCA-created invoices during the reconciliation period." Respondent's Motion for Summary Judgment at 12. Because NCO "was explicitly requested to notify the Agency of any errors in the reconciliation calculations and [NCO] failed to do so," NCO breached the parties' implied-in-fact contract, which should bar enforcement of any possible agreement on dollar amounts in mod-52. *Id.* at 13.

For at least two reasons, no basis exists for finding an implied-in-fact contract:

First, FSA identifies no offer or acceptance that created any type of "contract" requiring NCO to comply with FSA's request for the PCAs' voluntary input, precluding the formation of an implied-in-fact contract. *See Howard v. United States*, 31 Fed. Cl. 297, 312 (1994) ("To prove the existence of an implied-in-fact contract, plaintiffs must show the same elements required to constitute an express contract, that is, mutuality of intent, consideration, and lack of ambiguity in offer and acceptance."). No contract with mutually binding obligations can arise simply because FSA made a request to someone for assistance.

Second, FSA had an express written contract with NCO covering NCO's student loan debt collection work. "The existence of an express contract precludes the existence of an implied contract dealing with the same subject, unless the implied contract is entirely unrelated to the express contract." *Atlas Corp. v. United States*, 895 F.2d 745, 754-55 (Fed. Cir. 1990). Because negotiations for mod-52 were far from "entirely unrelated" to the underlying express student debt collections contract, no separate implied-in-fact contract could arise. In arguing for an implied-in-fact contract separate and distinct from its express contract, FSA asserts that neither its task order nor mod-52 "cover assurances regarding overpayments." Respondent's Reply Brief at 10. Given that TSI performed debt collection work only because of its FSA task order and is entitled to receive *any* payment only because of that task order, FSA cannot validly assert that its effort to reclaim an alleged overpayment under its task order is somehow "entirely unrelated" to the task order. If FSA wants to find a contract obligation that required NCO to notify FSA of FSA's calculation defects, it has to find support for that obligation in the terms of its actual written contract.

TSI's Waiver, Estoppel, and Laches Defenses

TSI argues that, even if mod-52 did not create an accord and satisfaction entitling it to retain FSA's prior payment, FSA has separately waived any right to repayment. Each party seeks summary judgment on this argument in its favor.

Waiver is "an intentional relinquishment of a known right," *Alliance Business Enterprises LLC v. General Services Administration*, CBCA 1101, 08-2 BCA ¶ 33,994

(citing *United Technologies Corp.*, ASBCA 46880, et al., 97-1 BCA ¶ 28,818), that "must be 'supported by clear, decisive, and unequivocal conduct or statements of [authorized] government officials,'" *id.* (quoting *Adelaide Blomfield Management Co. v. General Services Administration*, GSBCA 12851, 95-1 BCA ¶ 27,514). TSI's waiver argument depends upon the same facts and is largely duplicative of its accord and satisfaction argument. TSI has not shown how, if FSA did not agree by contract modification to an accord and satisfaction as to TSI's reconciliation period payment amount, FSA somehow intentionally waived its right to object to the amount of that payment. Further, to establish waiver, TSI must show that it detrimentally changed its position in reliance on the supposed waiver. *Sam's Electric Co.*, GSBCA 9359, 90-3 BCA ¶ 23,128; *Towncenter Management Corp.*, GSBCA 4574-R, 80-1 BCA ¶ 14,363. In response to FSA's summary judgment motion, TSI has shown nothing that could constitute detrimental reliance. The mere fact that three years passed before FSA raised the issue is insufficient, in and of itself, to satisfy that burden. *Futuronics, Inc.*, DOT CAB 67-15, 68-2 BCA ¶ 7079.

TSI further alleges that it would be "patently unfair" to allow FSA to recover an overpayment because of FSA's three-year delay after signing mod-52 in demanding repayment, essentially raising an equitable estoppel or laches defense. Appellant's Motion for Summary Judgment at 29. To the extent that equitable estoppel may apply against the Government, the party seeking to invoke it must show, at a minimum, detriment to the contractor as a result of reliance on the Government's misleading conduct, *Mabus v. General Dynamics C4 Systems, Inc.*, 633 F.3d 1356, 1359 (Fed. Cir. 2011), as well as some form of affirmative misconduct by the Government. *Zacharin v. United States*, 213 F.3d 1366, 1371 (Fed. Cir. 2000). "The inability to retain money that should have never been received is not a detriment that gives rise to estoppel." *United States v. Board of Education of City of Union City*, 697 F. Supp. 167, 178 (D.N.J. 1988). As discussed above, TSI has not identified a basis for finding detrimental reliance, and it has not alleged affirmative misconduct. With regard to laches, the Government's claim is timely under the Contract Disputes Act's limitations period, having been asserted within six years after the overpayment was made, 41 U.S.C. § 7103 (2018), and TSI has not alleged, much less supported with factual evidence, the necessary prejudice resulting from an unreasonable government delay. *See JANA, Inc. v. United States*, 936 F.2d 1265, 1269-70 (Fed. Cir. 1991) (discussing laches claims against the Government).

FSA is entitled to summary judgment on TSI's waiver, estoppel, and laches claims.

Decision

FSA's motion for summary judgment on TSI's waiver, estoppel, and laches arguments is **GRANTED**, and the remainder of its summary judgment motion is **DENIED**. TSI's

motion for summary judgment on FSA's implied-in-fact contract argument is **GRANTED**, but is otherwise **DENIED**, although, in further proceedings, TSI need not establish proper subject matter, consideration, or competent parties in support of its accord and satisfaction argument.

Future proceedings will focus on whether TSI can establish a binding "meeting of the minds" in mod-52 defining the specific dollar amount that NCO was to be paid for the period covered by the invoice reconciliation procedures. If TSI meets that burden, FSA must then establish that NCO knew or should have known when it executed mod-52 that FSA had made a mistake in calculating its "already paid" dollar figure and, if so, that NCO, either affirmatively or by silence, misrepresented that figure. If a misrepresentation occurred, we must then decide whether FSA relied upon the misrepresentation and, if so, whether the proper remedy is to reform the price in mod-52 or to find the entire modification voidable. The extent to which we must address TSI's argument about the miscalculation of its commissions for rehabilitations will depend upon the resolution of its accord and satisfaction and FSA's duty of good faith and misrepresentation arguments.

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge

We concur:

Catherine B. Hyatt
CATHERINE B. HYATT
Board Judge

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge