UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS FOR SUMMARY RELIEF AND
FOR SANCTIONS DENIED: November 7, 2007

CBCA 413

ACQUEST GOVERNMENT HOLDINGS, OPP, LLC,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Richard F. Greenleaf, Julie M. Earnest, and Daniel M. Gross of Berg Hill Greenleaf & Ruscitti LLP, Boulder, CO, counsel for Appellant.

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

Before Board Judges **PARKER**, **GILMORE**, and **GOODMAN**.

GILMORE, Board Judge.

This appeal involves claims submitted by appellant, Acquest Government Holdings, OPP, LLC (Acquest), on behalf of itself and its subcontractor, Colorado Jaynes Construction Company (CJCC), allegedly stemming from design changes and delays under a lease and construction contract between appellant and the General Services Administration (GSA). The construction work for the project was performed by Acquest's subcontractor, CJCC. The total amount being claimed by Acquest, for itself and its subcontractor, is approximately $2,900,000.

Respondent, GSA, filed a motion for summary relief contending that the subcontract claims sponsored by appellant should be denied because appellant was released from liability for such claims under the final change order and final release provisions of the subcontract. Respondent contends that under the *Severin* doctrine, *Severin v. United States*, 99 Ct. Cl. 435 (1943), the Government is not liable for claims brought by the contractor on behalf of the subcontractor if the prime contractor has been completely exonerated from liability for such claims. Respondent contends that the facts are undisputed and show that appellant was completely exonerated from liability for the subcontractor's claims; thus, those claims should be denied.

Appellant responded that the *Severin* doctrine does not apply because Acquest and CJCC had agreed in the release that Acquest would present CJCC's claims to the Government, cooperate in the presentation of the claims, and pay any award it received in the manner they had agreed upon, and that Acquest had not been released from that obligation.

Appellant, in its response to the motion for summary relief, attached a document to the affidavit of the president of Acquest that it had not produced earlier in the proceedings. This newly produced document is purported to be an agreement between appellant and its subcontractor, CJCC, entered into in August 2004, to modify the terms of an earlier agreement dated September 5, 2003, in which appellant agreed to present CJCC's claims to the Government and to pay any amounts recovered to CCJC according to a stated formula. This newly produced document is not dated.

On June 25, 2007, respondent filed a motion for sanctions, asking the Board to impose sanctions on appellant for its failure to produce the August 2004 document earlier than its May 31, 2007, Board filing, by disallowing its admission into the record for purposes of ruling on respondent's motion for summary relief.

For reasons below, we deny respondent's motion for summary relief and motion for sanctions.

Statement of Facts for Purposes of the Motion for Summary Relief

1. On April 3, 2001, GSA awarded lease no. GS-08P-13658 to Acquest for the lease and construction of an outdoor pen facility at the National Wildlife Research Center (NWRC) in Fort Collins, Colorado ("the contract"). The lease was for twenty years with an annual rent of $2,358,651. The project is commonly referred to as the "Outdoor Pen Project" or "OPP." Appeal File, Exhibit 12.

2. The facility consists of a shop maintenance warehouse; an aviary building; outdoor aviary, bird, waterfowl, predator, raptor, and mammal pens; rodent breeding and testing enclosures; and supporting site development. Appeal File, Exhibit 1. The facility is used as a wildlife research facility for the Animal and Plant Health Inspection Service of the Department of Agriculture.

3. Acquest, the lessor, entered into a contract with a construction company, CJCC, on May 6, 2001 ("the subcontract"). The subcontract, in the amount of $15,147,658, required the construction of the outdoor pen facility to be completed by June 4, 2002. Acquest is identified in the subcontract as the "Owner" and CJCC is identified as the "Contractor." Motion for Summary Relief, Exhibit 1.

4. On October 29, 2002, GSA warned Acquest that liquidated damages might be assessed because of project delays. Appeal File, Exhibit 32, Tab 3.

5. On January 23, 2003, Acquest issued change order no. 3 under the CJCC subcontract, which noted that it was the "Final Contract Change Order." The change order contained the following language:

> The following change order covers all issues known and unknown between Acquest and Colorado Jaynes but, excludes all claims as shown on the P.C.O. [Proposed Change Order] Log that are claims against the original documents and specifications provided for the purpose of estimating the project. The P.C.O. Log represents items to be claimed against the NWRC, GSA and the Government.
>
> This change order represents full and final payment for all issues outstanding between Acquest and Colorado Jaynes but excludes issues claimed against the GSA/NWRC and the Government which Acquest will not have any further liability for.
>
> . . . .
>
> Colorado Jaynes agrees not to file a lien against the project regardless of the outcome of the claim against GSA/NWRC/Government. Both parties agree that the execution of this change order does not negate the claims against GSA/NWRC/Government or limit in any way the other provisions or rights of Colorado Jaynes contract other than the stated above. Colorado Jaynes will diligently complete punch list items. Colorado Jaynes owes Acquest a $50,000.00 landscaping allowance.

The change order contained the following payment information:

The original Contract Value was	$15,147,658.00
Sum of changes by prior Prime Contract Change Orders	$ 740,389.00
The Contract Value prior to this Prime Contract	
Change Order was	$15,888,047.00
The Contract Value will be changed by this Prime Contract	
Change Order in the amount of	$ 270,758.00
The new Contract Value including this Prime Contract	
Change Order will be	$16,158,805.00
The Contract duration will be changed by	0 days

The change order was signed on January 23, 2003, by Jon Renhowe, on behalf of the contractor's architect; John Chivers, vice-president of CJCC; and William Huntress, president of Acquest. Motion for Summary Relief, Exhibit 3.

6. On January 30, 2003, GSA took occupancy of 136,629 square feet of the total of 170,546 square feet contained in the lease. Occupancy included the rodent buildings, nos. 22, 23, and 24; the flight pen building, no. 21, at 33% beneficial use; and the indoor aviary buildings, nos. 11 and 11a. GSA further indicated that it would not accept the rodent buildings or start rent until the inside doors of the vestibules were replaced. GSA further advised that it was willing to pay a $140,414.40 settlement for the warehouse and that the Government would determine the final liquidated damages and credits or debits upon full completion, acceptance, and use of the project. Appeal File, Exhibit 19.

7. On January 31, 2003, CJCC submitted to Acquest an application for payment, no. 19. It showed the total contract value of $16,158,805, with a payment due of $270,758. The payment due was the same amount shown on the earlier January 23, 2003, final subcontract change order. Motion for Summary Relief, Exhibit 4.

8. On March 20, 2003, Acquest submitted a certified claim to the GSA contracting officer for $732,000, for design and scope changes to the contract and related delays. Acquest notified GSA at that time that its claim did not include costs that its subcontractor might have incurred and that, if claimed, they would be added to the claim. Appeal File, Exhibit 45.

9. On April 3, 2003, CJCC met with Acquest in the offices of CJCC's attorneys in Boulder, Colorado. The letter of understanding from the April 3, 2003, meeting was prepared on CJCC stationary and bore the initials "JDC "(John D. Chivers, CJCC's vice-president), but was not signed by Acquest or CJCC. The letter of understanding stated that during that meeting, Acquest and CJCC agreed to complete punch list items and that those items would be reviewed to determine whether they should be costed to CJCC, Acquest, or the Government.

It was further agreed that CJCC had settled all claims against Acquest other than the claims for the punch list items, based on the change order they had signed on January 23, 2003. It further stated "[t]hat all other recovery from the Colorado Jaynes claim are believed to be Government issues and that Colorado Jaynes will not pursue any claim against Acquest regardless of the outcome of the remaining claims found or not found against the Government." Motion for Summary Relief, Exhibit 5.

10. On April 8, 2003, Mr. Chivers wrote a letter to the president of Acquest indicating his understanding of the earlier April 3rd meeting and a subsequent telephone conversation regarding the Building C project (another CJCC/Acquest subcontract under another Acquest/GSA contract) and the OPP project. He asked Acquest's president to sign and return the letter if he agreed with his understanding. Regarding the OPP project, the letter stated as follows:

> 1. Upon completion of 1-2 above [sic], Acquest will release all retainage on OPP, being approximately $1,020,756, less $200,000 to cover the cost of the punch list and landscaping.
>
> 2. Any retainage release shall be contingent upon CJCC delivering to Acquest an executed partial or full release of lien, as the case may be, for the amount of such payment. CJCC shall also release any part of its lien attributable to the "pass through claim" described in 6 [sic] below.
>
> 3. CJCC shall submit change orders for any punch list items and other work that it in good faith believes should be paid by Acquest or the Government. Acquest shall determine in the ordinary course whether to accept or deny the change orders. For any change orders which are denied, CJCC, may seek payment for any or all of such work as a claim against the Government.
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> 4. CJCC intends to submit a claim to Acquest and the Government for numerous costs incurred by CJCC due to fault of the Government in the design and construction of the OPP. It is understood that this claim will in effect be a "pass through claim" by CJCC to the Government through the conduit of Acquest, and will not be a claim against Acquest. Acquest will reasonably cooperate in presenting and pursuing such claim against the Government.

Motion for Summary Relief, Exhibit 6. Although the record does not indicate whether Acquest's president signed and returned the letter to CJCC, appellant does not dispute that the letter represented the understanding of Acquest and CJCC at that time. Appellant's Statement of Genuine Issues ¶ 11.

11. On April 15, 2003, Acquest paid CJCC $250,000 on the OPP contract. Motion for Summary Relief, Exhibit 7.

12. On June 25, 2003, CJCC executed a partial release of lien which stated that it was releasing in part the previously-filed mechanic's lien against the OPP project in the amount of $2,950,970 for materials, supplies, labor, and services. The partial release stated further that it was conditioned upon the payment by Acquest of $400,000 (retainage monies), and after adjusting for additional unpaid site work performed prior to the date of the lien, the amount of the existing lien was reduced to $2,745,539. Motion for Summary Relief, Exhibit 8 at 5.

13. On June 25, 2003, CJCC sent the partial lien release to Acquest and informed Acquest that the full amount owed to CJCC, exclusive of interest, was $2,745,539. CJCC indicated that it understood that Acquest was arranging final financing and that CJCC's intent was to release its lien in full upon payment of $370,757, the balance of the retainage, provided that there was a signed written agreement between Acquest and CJCC outlining the joint pursuit of claims against the Government or an acceptable payment in satisfaction of the claims. Motion for Summary Relief, Exhibit 8.

14. On July 25, 2003, CJCC had submitted application for payment no. 22 reflecting a total contract amount of $16,440,046, an increase of $281,241. The application indicated that previous payments totaled $16,379,017, and the current amount due was $46,967. Motion for Summary Relief, Exhibit 10.

15. On July 25, 2003, Mr. Chivers sent a letter to Mr. Huntress, president of Acquest, requesting Mr. Huntress to sign and return the draft agreement and attached draft "Agreement to Jointly Pursue Claims" if he agreed with the terms. The draft agreement contained terms pertaining to both the Building C and OPP projects. The following terms in the draft pertain to the OPP project:

> 6. At the closing (the OPP closing) of permanent financing of OPP by Acquest Government Holdings OPP, LLC (Acquest OPP), Acquest OPP will make a final payment to CJCC in connection with OPP of $1,015,436, constituting all amounts billed by CJCC to date, including all retainage, less a $50,000 landscape credit leaving a balance of ($965,436). Acquest OPP shall also deliver to CJCC at closing a release of performance and payment bond in the form of Exhibit E. At the OPP closing, CJCC shall deliver to Acquest OPP all documents listed in Exhibit F and Acquest OPP and CJCC will execute the agreement attached as Exhibit G (the OPP Claim Agreement). Failure to execute the OPP Claim Agreement and or failure by either party to act in their best joint interest in pursuing the above mentioned claim, will cause this

> agreement and the OPP claim agreement to terminate and be null and void. If this event should occur the parties reserve the right to their claims as provided in the construction agreement and as allowed under the law.
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> 7. Upon compliance with their obligations under paragraph 6, except for their rights and obligations under this letter agreement and the OPP Claim Agreement, Acquest OPP on the one hand and CJCC on the other hand shall be deemed to have released any and all claims each may now or hereafter have against the other in connection with OPP, whether such claims are known or unknown, liquidated or unliquidated, now accrued or accruing hereafter. In addition, subject to the OPP Claim Agreement, CJCC agrees that it shall not hereafter make any claim against or seek any payments from Acquest OPP on account of, or file any lien against, OPP and will, if a CJCC subcontractor hereafter files a lien against OPP, pay or bond off said lien at its sole cost and expense. Further, CJCC agrees to indemnify and hold Acquest OPP harmless from and against any and all claims of any and all subcontractors with respect to OPP.

Motion for Summary Relief, Exhibit 9 at 5810-11.

16. The draft "Agreement to Jointly Pursue Claims," also dated July 25, 2003, contained the following relevant terms:

> Whereas, CJCC has asserted that, during the course of construction, certain acts and omissions, including but not limited to the addition of design criteria, added scope of work [scope] and cost changes in the construction mandated by the Government caused undue expense and delay to the OPP Project, and
>
> Whereas CJCC has submitted change orders in the form of a claim or claims to Acquest and in turn Acquest has submitted the same to the Government, hereinafter "Claim or Claims" to compensate for the cost of such changes, and
>
> Whereas, to date such Claims have not been fully considered or acted upon by the Government, and
>
> Whereas, construction of OPP is now substantially complete and Acquest and CJCC wish to complete their payment arrangements for such design and construction services and otherwise complete their obligations under the construction contract, while providing for pursuit of the claims,

Now, therefore, for good and valuable consideration, the receipt of which is acknowledged, Acquest and CJCC agree as follows:

1. The Parties will diligently pursue the Claims in good faith and in cooperation with the other. The CJCC portion of the Claim is being tendered as a "pass thru" claim that has been made in the name of Acquest on behalf of CJCC for approximately $2.3 million. Upon successful resolution of the Claims, neither Acquest nor the property shall have any liability to CJCC or any other person or entity for any claim by CJCC included in the Claims.

2. The Claims will be pursued through mediation, if available, arbitration and litigation, as mutually agreed upon by Acquest and CJCC from time to time.

3. Any recovery from the Government on the Claims shall be paid first to CJCC for all monies up to $1.25 million. Any recovery in excess of that amount shall then be paid to Acquest up to $500,000, and then the balance, if any, shall be paid to CJCC.

4. CJCC, in its discretion, shall have control over the claims process, and, if necessary, shall engage counsel on behalf of both parties to pursue the Claims. CJCC and Acquest agree to execute a waiver of conflict of interest to allow a law firm, if needed, and as mutually selected, to pursue the Claims. CJCC and Acquest shall share all costs in jointly pursing the Claims, including, without limitation, expert witness fees, attorney's fees, mediator's fees, arbitration costs, travel expenses and related expenses.

5. Any settlement or compromise of the Claims must be agreed to by both Acquest and CJCC.

6. In reliance upon this agreement and the letter agreement of even date herewith, CJCC has agreed, among other things, to release its liens against the OPP property, and upon successful resolution and payment of CJCC's portion of the Claims to release any and all claims against Acquest relating to OPP, and to forego all future claims against Acquest or the OPP property. Failure of either party to act in good faith and in the best interests of the parties in pursueing [sic] the Claims will cause this agreement to terminate and be null and void. If such event should occur, the parties reserve their rights to their claims as provided in the construction agreement and as allowed under law.

Motion for Summary Relief, Exhibit 9 at 5812-13.

17. On July 25, 2003, CJCC also submitted to Acquest (with the draft letter agreement) a notarized release of lien, signed by Mr. Chivers, which indicated that CJCC "hereby releases the claim of lien" on the OPP property upon which it had filed a lien on February 24, 2003. This lien release was not recorded at that time. Motion for Summary Relief, Exhibit 9 at 5816.

18. On September 4, 2003, Mr. Huntress edited the draft letter agreement sent to him by CJCC's vice-president. In that draft letter agreement (*see* Statement of Fact 15), Mr. Huntress changed the last sentence in paragraph 6 to read simply: "Both parties will act in their best joint interest in pursuing the above mentioned claim." Motion for Summary Relief, Exhibit 9 at 5810.

19. On September 5, 2003, representatives from both CJCC and Acquest signed the letter agreement regarding closing out the OPP subcontract between the parties and the "Agreement to Jointly Pursue Claims."

20. The terms of the signed letter agreement pertaining to the OPP project are as follows:

> 6. At the closing (the OPP closing) of permanent financing of OPP by Acquest Government Holdings OPP, LCC (Acquest OPP), Acquest OPP will make a final payment to CJCC in connection with OPP of $720,756, constituting all unpaid amounts billed by CJCC to date of $770,756, including retainage, less a $50,000 landscape credit. CJCC has not yet billed for an additional $14,062 of retainage, which Acquest OPP agrees to pay when billed. At the OPP closing, CJCC shall deliver to Acquest OPP lien releases and Acquest OPP and CJCC will execute the attached OPP Claim Agreement.
>
> 7. Upon compliance with their obligations under paragraph 6, except for their rights and obligations under this letter agreement and the OPP Claim Agreement (pursuant to which Acquest OPP agrees to use its best reasonable efforts to collect amounts owed Acquest and CJCC), Acquest OPP on the one hand and CJCC on the other hand will have released any and all claims each may now or hereafter have against the other in connection with OPP, whether such claims are known or unknown, liquidated or unliquidated, now accrued or accruing hereafter. In addition, CJCC agrees that it shall not hereafter make any claim against or seek any payments from Acquest OPP on account of, or file any lien against, OPP and will, if a CJCC subcontractor hereafter files a lien against OPP, CJCC shall pay or bond around said lien at its sole cost and expense. Further, CJCC agrees to indemnify and hold Acquest OPP harmless from and

> against any claims and all claims of any and all CJCC subcontractors with respect to OPP.

Motion for Summary Relief, Exhibit 9 at 5801-02. The letter and attached "Agreement to Jointly Pursue Claims" were signed by J. Howard Mock, Chairman and CEO of CJCC, on September 5, 2003. Mr. Mock closed the letter by indicating that if Mr. Huntress agreed, Mr. Huntress should sign it and return a copy to him, and that if he signed it, the letter and the attached claim agreement would act as their written, binding agreement in regard to the matters. Mr. Huntress signed the letter and the attached "Agreement to Jointly Pursue Claims" on September 5, 2003.

21. The terms of the signed "Agreement to Jointly Pursue Claims" provide, in pertinent part, as follows:

> Whereas CJCC has asserted that, during the course of construction, certain acts and omissions, including but not limited to the addition of design criteria, added scope of work [scope] and cost changes in the construction mandated by the Government caused undue expense and delay to the OPP Project, and
>
> Whereas CJCC has submitted change orders in the form of a claim or claims to Acquest and in turn Acquest has submitted same to the Government, hereinafter "Claim or Claims," to compensate for the cost of such changes, and
>
> Whereas, to date such Claims have not yet been fully considered or acted upon by the Government, and
>
> Whereas, construction of OPP is now substantially complete and Acquest and CJCC wish to complete their payment arrangements for such design and construction services and otherwise complete their obligations under the construction contract, while providing for pursuit of the Claims,
>
> Now, therefore, for good and valuable consideration, the receipt of which is acknowledged, Acquest and CJCC agree as follows:
>
> 1. The parties will diligently and in good faith, using their best reasonable efforts, pursue the Claims and in cooperation with the other **(Bill Huntress agrees to bust his butt to get the claims paid).** The CJCC portion of the claim is being tendered as a "pass thru" claim that has been made in the name of Acquest on behalf of CJCC for approximately $2.3 million. Neither Acquest nor the property shall have liability to CJCC or any other person or entity for any claim by CJCC included in the Claims.

2. The Claims will be pursued through mediation, if available, arbitration and litigation, as mutually agreed upon by Acquest and CJCC from time to time.

3. Any recovery from the Government on the Claims shall be paid first to CJCC for all monies up to $1.25 million. Any recovery in excess of that amount shall then be paid to Acquest up to $500,000, and then the balance, if any, shall be paid to CJCC.

4. Each of CJCC and Acquest shall pay their own expenses in pursuing their respective portion of the Claims, including, without limitation, expert witness fees, attorney's fees, mediator's fees, arbitration costs, travel expenses and related expenses.

5. Any settlement or compromise of the Claims must be agreed to by both Acquest and CJCC.

6. In reliance upon this agreement and the letter agreement of even date herewith, CJCC has agreed, among other things, to release its lien against the OPP property, to release any and all claims against Acquest relating to OPP, and to forego all future claims against Acquest or the OPP property.

Motion for Summary Relief, Exhibit 9 at 5803-04.

22. A comparison between the draft "Agreement to Jointly Pursue Claims" and the final version shows that in paragraph 6, line 3, the words "and upon successful resolution and payment of CJCC's portion of the Claims" were deleted. Also, in paragraph 6, the last two sentences in the draft were deleted from the final version. The deleted sentences were: "Failure of either party to act in good faith and in the best interests of the parties in pursueing [sic] the Claims will cause this agreement to terminate and be null and void. If such event should occur, the parties reserve their rights to their claims as provided in the construction agreement and as allowed under law."

23. Another release of liens against the OPP property was signed by Acquest on September 4, 2003. This release was filed with the county recorder on September 16, 2003. There is no evidence that CJCC's previous July 23, 2003, release of liens had been filed with the county recorder. Response to Motion for Summary Relief, Affidavit of William Huntress (May 29, 2007), Exhibit A-1.

24. On March 15, 2004, the contracting officer denied liability for appellant's twenty-seven proposed change orders totaling $2,633,809.58, submitted to GSA by Acquest

on behalf of CJCC. This was not, however, designated as a final decision by the contracting officer. Appeal File, Exhibit 32, Tab 1.

25. On May 18, 2004, Acquest responded to the Government's denial of its request for an equitable adjustment. Appeal File, Exhibit 32, Tab 6A.

26. On July 14, 2004, GSA assessed $504,000 in liquidated damages against Acquest for late completion of construction by 210 days at $2,400 per day. Appeal File, Exhibit 31, Tab 7.

27. In October 2004, GSA and CJCC's attorneys began discussions regarding the claims. The contracting officer advised appellant that as long as the parties were working on a resolution of the issues, the assessment of liquidated damages would be delayed until January 2005. Appeal File, Exhibit 45.

28. On November 19, 2004, Acquest submitted a "Request for Equitable Adjustment" to the contracting officer. The request included the following categories of costs:

Unresolved Changes	$1,184,935.10
Inefficiency Labor Costs Due to Changes, PCO #44	$ 328,402.03
Extended Duration Expense	$1,359,258.67
February/March 2003 Punchlist Deduction	$ 36,000.00
Consultant Fees	$ 16,500.00
Attorney's Fees	$ 80,761.00
Total Request for Compensation	$3,005,857.00[1]

Appeal File, Exhibit 31, Tab 1 at 31. This "Request for Equitable Adjustment" included claims by Acquest on its own behalf and on behalf of CJCC.

29. On March 24, 2005, appellant submitted supplemental information and documentation to support its claims. Appellant reduced its request from 209 calendar days to 194 days, thus reducing the request for costs of delay ("Extended Duration Expense") to $l,261,704.22. Appeal File, Exhibit 33, Tab 1 at 34.

30. On May 16, 2005, the contracting officer notified appellant that the $504,000 in liquidated damages would begin to be assessed in June 2005 and that $21,000 would be deducted from each month's rent for the next two years. Appeal File, Exhibit 45.

[1] Actual total is $3,005,856.80

31. On May 16, 2005, Acquest certified the November 19, 2004, claim (supplemented on March 24, 2005) and requested a contracting officer's final decision. Appeal File, Exhibit 33, Tab 18.

32. On May 26, 2005, the GSA contracting officer issued a final decision assessing liquidated damages against Acquest in the amount of $504,000. Appeal File, Exhibit 46.

33. On June 3, 2005, Acquest appealed the final decision on GSA's claim of liquidated damages to the General Services Board of Contract Appeals (GSBCA). The appeal was docketed as GSBCA 16665. It was redocketed as CBCA 407 when it was transferred to the Civilian Board of Contract Appeals (CBCA).

34. On July 21, 2005, the contracting officer issued a final decision denying Acquest's certified claim of May 16, 2005. GSBCA docketed the appeal from that denial as GSBCA 16713. Following its transfer to this Board, it was redocketed as CBCA 413.[2]

Discussion

Summary relief is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). "Only disputes over facts that might affect the outcome of the case under governing law will properly preclude the entry of summary judgment." *Id.* at 248. The moving party has the initial burden of informing the tribunal of the basis for its motion and identifying those portions of the pleadings, depositions, affidavits, admissions, and answers to interrogatories, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The non-moving party is required to point to "specific facts showing that there is a genuine issue for trial." *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). In considering a motion for summary relief, the court will not make credibility determinations or weigh conflicting evidence. *Anderson*, 477 U.S. at 249. "All reasonable inferences and presumptions are resolved in favor of the non-moving party." *Id*. at 255.

The material facts controlling the merits of respondent's motion for summary relief are undisputed. We, therefore, must resolve whether the Government has satisfied its burden of establishing that CJCC unconditionally released Acquest from any further obligations relating to the claims that are being sponsored by Acquest on CJCC's behalf. *See Metric Constructors, Inc. v. United States*, 314 F. 3d 578, 582 (Fed. Cir. 2002); *Severin v. United States*, 99 Ct. Cl. 435 (1943).

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[2] CBCA 407 and CBCA 413 were consolidated for purpose of discovery and the hearing. However, respondent's motion for summary relief only pertains to CBCA 413.

To support its contention that the *Severin* doctrine bars appellant from sponsoring CJCC's claims, respondent relies primarily upon language in the subcontract's final change order, dated January 23, 2003, which provided, in essence, that the release did not include the claims remaining to be submitted to the GSA/Government for which Acquest would have no liability. Respondent further relies upon the language in the September 5, 2003, letter agreement and the "Agreement to Jointly Pursue Claims" between Acquest and CJCC which, in pertinent part, provide that (1) the release excepts claims submitted to the Government by Acquest on behalf of CJCC; (2) Acquest, upon signing the "Agreement to Jointly Pursue Claims" will have no further liability for the claims; (3) the parties will jointly cooperate in the pursuit of claims against the Government; and (4) Acquest will pay to CJCC any monies recovered according to the manner of distribution set forth in the agreement.

Appellant disputes respondent's argument that the *Severin* doctrine bars the claims and contends that the documents establish that the parties excepted from the releases the "pass-through" claims presented by Acquest to the Government on behalf of CJCC, even though they also agreed that Acquest would have no further liability for the claims upon agreeing to present the claims to the Government, cooperate in the presentation of the claims, and pay any recovery on the claims according to their agreement.

The *Severin* doctrine arose from a case, *Severin v. United States*, 99 Ct. Cl. 435 (1943), decided by the United States Court of Claims. In *Severin*, the Court held that, in a suit filed by a contractor against the Government on behalf of a subcontractor, the contractor "had the burden of proving, not that someone suffered actual damages from the defendant's [Government's] breach of contract, but that they, plaintiffs, suffered actual damages. If plaintiffs had proved that they, in the performance of their contract with the Government became liable to their subcontractor for the damages which the latter suffered, that liability, though not yet satisfied by payment, might well constitute actual damages to plaintiffs, and sustain their suit." *Id*. at 443. The subcontract in that case, however, provided that "[t]he Contractor or Subcontractor shall not in any event be held responsible for any loss, damate [sic], detention or delay caused by the Owner [Government] or any other Subcontractor upon the building; or delays in transportation, fire, strikes, lockouts, civil or military authority, or by insurrection or riot, or by any other cause beyond the control of Contractor or Subcontractor, or in any event for consequential damages." *Id*. The Court found that this provision effectively absolved the prime contractor from any liability to the subcontractor for delays caused by the Government and, thus, there were no damages suffered by the prime contractor for which the Government would be liable. The Court further stated that:

> Plaintiffs must, then, so far as their claim includes items of losses suffered by their subcontractor, be merely accommodating another person who was damaged, by letting that other person use, for the purposes of litigation, the name of plaintiffs, who had a contract and could properly have sued if they had

> been damaged. Orderly administration of justice, as well as the statute against assignment of claims, seem to us to forbid that.

Id. at 444.

In subsequent cases, the courts and boards of contract appeals recognized the harshness of the rule, and allowed the prime contractor to bring claims on behalf of subcontractors, even if the subcontracts contained a "hold-harmless" clause similar to the one in the *Severin* case, when the subcontractors' claims were eligible for inclusion in an equitable adjustment provision under the prime contract and were not breach of contract claims. *See Seger v. United States*, 469 F.2d 292 (Ct. Cl. 1972); *Blount Brothers Construction Co. v. United States*, 346 F.2d 962, 965 (Ct. Cl. 1965); *Aydin Corp*., EBCA 355-5-86, 89-3 BCA ¶ 22,044, at 110,904; *Castagna & Son, Inc*., GSBCA 6906, 84-3 BCA ¶ 17,612, at 87,741.

The post-*Severin* direction has been for the doctrine to be construed narrowly. *See United States v. Johnson Controls*, *Inc*., 713 F.2d 1541, 1552 n.8 (Fed. Cir. 1983). In its present state, the doctrine applies only where there is an iron-clad release or contract provision immunizing the prime contractor completely from any liability to the subcontractor. *J.L. Simmons Co. v. United States*, 304 F.2d 886 (Ct. Cl. 1962); *Cross Construction Co. v. United States*, 225 Ct. Cl. 616 (1980); *George Hyman Construction Co. v. United States*, 30 Fed. Cl. 170 (1993), *aff'd*, 39 F.3d 1197 (Fed. Cir. 1994) (table). Also, the burden is on the Government to establish the existence of an iron-clad release, sufficient to trigger application of the *Severin* doctrine. *Metric Constructors, Inc. v. United States*, 314 F.3d 578 (Fed. Cir. 2002).

In *J.L. Simmons*, the United States Court of Claims held that the "[w]aiver of lien and release" in the subcontracts did not preclude an action against the Government by the prime contractor for damages suffered by the subcontractors where the subcontractors did not expressly negate the prime contractor's liability to the subcontractors, even though waivers provided that the liability was limited to any monies it could recover and collect from the Government. 304 F.2d at 887-90. This type of release has been commonly referred to as the "as and when" clause, since the contractor has agreed to reimburse its subcontractor for damages suffered at the hands of the Government only "as and when" the former receives payment for them from the Government. The "as and when" provision has been held to constitute sufficient liability on the part of the prime contractor to bar the application of the *Severin* doctrine. *See Kentucky Bridge & Dam, Inc. v. United States*, 42 Fed. Cl. 501, 527 (1998) (citing *J. L. Simmons*, 304 F.2d at 890); *Pan Arctic Corp. v. United States*, 8 Cl. Ct. 546 (1985); *Folk Construction Co. v. United States*, 2 Cl. Ct. 681 (1983).

Here, the subcontract claims are for costs allegedly stemming from Government changes to the scope of work under the prime contract that were passed down to the

subcontractor, who was the party actually performing the project's construction work. As discussed above, when the prime contract contains a remedy-granting clause, the prime contractor is allowed to sponsor a claim on behalf of its subcontractor against the Government if the subcontractor has suffered damages because of the Government's action under that clause, as long as the subcontract does not immunize the prime contractor completely from such liability or the subcontractor has not provided the prime contractor an iron-clad release from liability. *See J.L. Simmons*, 304 F.2d at 888-89. In all cases of sponsorship, the liability of the prime contractor to the subcontractor for the claimed costs must be established under the terms of the subcontract, although the damages may flow down to the subcontractor from actions taken by the Government under the terms of the prime contract. This link in liability in these "pass-through" claims must be established since the Government is not in privity of contract with the subcontractor.

In its motion, the Government does not allege that a particular subcontract provision immunizes the prime contractor completely from liability to the subcontractor for actions taken by the Government. Instead, it alleges that under the terms of the January 23, 2003, final subcontract change order, and the September 5, 2003, letter agreement and "Agreement to Jointly Pursue Claims" between the prime and the subcontractor, CJCC released Acquest of all liability under the subcontract relating to the claims. Acquest argues that the release excepted the claims presented to the Government on behalf of CJCC, and that although CJCC agreed to release Acquest from further liability if it agreed to pursue the claims against the Government, it remained obligated to pursue the claims and, if they were successful, to pay CJCC according to the agreement. It argues that this evidences that Acquest had conditional liability to CJCC, which precludes the application of *Severin*, citing *Pan Arctic Corp.* and *Kentucky Bridge & Dam, Inc.*

Respondent did not address in its motion for summary relief whether the interpretation of the subcontract and the close-out agreements entered into by the prime and subcontractor at the time of final payment were governed by state law or federal law. Appellant, in its response to the motion noted that the subcontract provided that it would be governed by "the law of the place where the Project is located." Motion for Summary Relief, Exhibit 2 at 35, art. 13, § 13.1. Thus, Colorado state law governs the interpretation of the subcontract and the release.[3] Appellant also contends that, for purposes of the motion, the governing law is not critical, since the law governing contract interpretation is the same under federal law and Colorado state law. Appellant's Response to Motion for Summary Relief at 8-9.

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[3] The rights and obligation of the parties under the prime contract are governed by federal contract law. To the extent that provisions of the prime contract were incorporated into the subcontract, these subcontract provisions are also governed by federal law. *See 6800 Corp.*, GSBCA 5880, 81-2 BCA ¶ 15,388, at 76,241-42 (citing *Keydata Corp. v. United States*, 504 F.2d 1115, 1123 (Ct. Cl. 1974)).

Under Colorado law, as under federal law, the interpretation of a contract is a question of law. *Town of Silverton v. Phoenix Heat Source System, Inc*., 948 P.2d 9 (Colo. App. 1997). When a contract is clear on its face, there is nothing to interpret and the contract is enforced as written in accordance with its plain and ordinary meaning. *People v. Johnson*, 618 P.2d 262 (Colo. 1980). When a contract is ambiguous, its meaning is found by examining the entire contract and construing it as a whole with an attempt to harmonize and give meaning to all of its provisions. *KN Energy*, *Inc*. v. *Great Western Sugar Co*., 698 P.2d 769 (Colo. 1985). Furthermore, any unclear language must be construed in accordance with the intent of the parties and relevant extrinsic evidence may be considered to resolve factual questions of the parties' intent. *Dorman v. Petrol Aspen*, *Inc*., 914 P.2d. 909 (Colo. 1996).

We need not spend much time addressing the intent of the parties under the terms of the final change order, since that order states that it "excludes all claims as shown on the P.C.O. Log that are claims against the original documents . . . . The P.C.O. Log represents items to be claimed against the NWRC, GSA and the Government." It also states that "[b]oth parties agree that the execution of this change order does not negate the claims against the GSA/NWRC/Government or limit in any way the other provisions or rights of Colorado Jaynes contract other than the [sic] stated above." Clearly the intent was to settle costs arising from changes caused strictly by actions on the part of Acquest, and not those that the parties believed were Government-caused. Additionally, this change order was not the final payment under the subcontract and all financial matters between the parties had not been settled at that time. Respondent has failed to establish that this final change order released Acquest from any further obligations relating to the pass-through claims the parties intended to present to the Government.

As to the subcontract's final close-out agreements, the September 5, 2003, letter agreement and the "Agreement to Jointly Pursue Claims" are not the most artfully drafted documents. The letter agreement excepts the obligations and rights under the terms of the letter agreement and the "Agreement to Jointly Pursue Claims" from any release, and the "Agreement to Jointly Pursue Claims" excepts the subcontract claims filed with the Government from release, but at the same time, the parties agree that Acquest would not be liable for the claims once it agreed to pursue the claims against the Government. However, when read together, it is clear that the parties were not settling the claims before the Government; the parties intended those claims to go forward, with Acquest agreeing to pursue its claims and sponsor CJCC's claims and pay the recovery, if any, to CJCC according to the formula agreed upon. Even though the parties did not use the "as and when" language that has been held by the courts and boards to be acceptable for placing conditional liability on the prime contractor, the "Agreement to Jointly Pursue Claims" did place obligations on the prime contractor to pursue the claims, cooperate in the presentation of the claims, and turn over any monies recovered according to their agreement. The agreement did not negate all liability to CJCC on the claims.

Even if we found the terms to be ambiguous, and looked to the drafts of the letter agreement and the "Agreement to Jointly Pursue Claims" for clarity, the language in the drafts that was changed by Acquest related primarily to language proposed by CJCC that would have required Acquest to remain liable on the claims if they were not "successfully" resolved, not merely resolved. We do not see Acquest's deletion of language that would have kept Acquest liable if the claims were not successfully resolved as problematic, since it is reasonable that Acquest would not want to remain liable to CJCC if the "pass-through" claims were not successful. In the affidavits submitted by appellant, the president of Acquest and the chairman emeritus of CJCC testified that the intent of the September 5, 2003, letter agreement and "Agreement to Jointly Pursue Claims" was that Acquest would pursue claims against GSA on behalf of CJCC and itself and pay over any amount recovered according to the agreement, and that based upon that agreement, Acquest would have no further liability on the claims. The affiants assert that under the release, Acquest was not relieved of the obligation to jointly pursue the claims, cooperate in the joint pursuit of the claims, and turn over any recovery according to the agreed-upon formula. CJCC's chairman emeritus further testified that he agreed with the changes to the draft proposed by Acquest because he believed the changes did not affect the intent that the claims would be jointly pursued and that Acquest would turn over to CJCC any monies recovered according to their agreement. Appellant's Response to Motion for Summary Relief, Affidavit of J. Howard Mock (May 29, 2007), and Huntress Affidavit.

To interpret the "Agreement to Jointly Pursue Claims" as an agreement that did not place any further obligation on Acquest relating to the claims, as respondent contends, would mean that Acquest intended to trick CJCC, in that Acquest would not have to pay CJCC on those claims and also would not have to pursue the claims before the Government on its behalf and pay over any monies recovered. This would lead to a nonsensical result. It is clear that the prime contractor was only trying to protect itself against liability for damages beyond those it could successfully prove were Government-caused. *See TAS Group v. Department of Justice*, DOT BCA 4535, 06-2 BCA ¶ 33,441; *Castagna & Son, Inc*., 84-3 BCA at 87,742.

The "Agreement to Jointly Pursue Claims" places the obligation on Acquest to pursue the claims submitted by Acquest on behalf of CJCC prior to that time and to pay any recovery as set forth in the agreement. Thus, Acquest was not totally absolved of liability, and the *Severin* doctrine does not bar Acquest from sponsoring CJCC's claims submitted prior to the September 5, 2003, agreement. The Government has not met its burden of establishing an iron-clad release of those claims, and we, thus, deny the motion for summary relief for the subcontract claims submitted prior to September 5, 2003.[4]

[4] The letter agreement and "Agreement to Jointly Pursue Claims" excepted from the release only those claims that had been presented on behalf of CJCC prior to September 5, 2003, and released all other claims then known and unknown, and all future claims arising under the subcontract.

Respondent's Motion for Sanctions

Respondent moved the Board for sanctions against appellant for failing to provide, during discovery, or in a timely fashion thereafter, a document that appellant now wishes the Board to consider for purposes of deciding respondent's motion for summary relief. Respondent asks the Board to impose sanctions upon appellant by denying admission of the document into the record for purposes of ruling on respondent's motion for summary relief. During discovery, respondent requested of Acquest any documents evidencing any agreements between Acquest and its subcontractors. This agreement was such a document. The document, however, was not submitted by appellant during discovery, but submitted in response to respondent's motion for summary relief as an attachment to the affidavit of William L. Huntress, president of Acquest, as Exhibit A-2. The document was allegedly drafted in August 2004 (although it is not dated), approximately a year after the September 5, 2003, "Agreement to Jointly Pursue Claims" for the purpose of clarifying and updating the terms of the earlier agreement regarding Acquest's and CJCC's agreement to jointly pursue their claims against the Government.

We need not decide the merits of respondent's motion for sanctions, since the document in question, in any event, has no evidentiary value. It is the agreement that was entered into at the time of the release that is relevant to the issue of release of claims, not an agreement purportedly entered into approximately a year after the subcontract close-out. *See J.L. Simmons Co.,* 304 F.2d 886, 890 (Ct. Cl. 1962); *George Hyman Constr. Co. v. United States*, 30 Fed. Cl. 170 (1993), *aff'd*, 39 F.3d. 1197 (Fed. Cir 1994). Additionally, the later agreement appears to be an attempt to reform the substance of the earlier agreement, and we have no jurisdiction to grant reformation of the terms of a subcontract. *See George Hyman*, supra, at 174-75, citing *United States Department of Energy v. Ohio*, 503 U.S. 607 (1992). For reasons stated above, we did not consider the document for purposes of ruling on respondent's motion for summary relief. We deny respondent's motion for sanctions.

Decision

Respondent's **MOTIONS FOR SUMMARY RELIEF AND FOR SANCTIONS ARE DENIED**.

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BERYL S. GILMORE
Board Judge

We concur:

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ROBERT W. PARKER
Board Judge

ALLAN H. GOODMAN
Board Judge