UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

APPELLANT'S MOTION FOR SUMMARY RELIEF GRANTED IN PART;
RESPONDENT'S MOTION TO DISMISS FOR LACK OF JURISDICTION DENIED;
RESPONDENT'S MOTION FOR SUMMARY RELIEF DENIED: April 2, 2008

CBCA 71

GOVERNMENT MARKETING GROUP,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Timothy Sullivan and Katherine S. Nucci of Thompson Coburn LLP, Washington, DC, counsel for Appellant.

Todd R. Bailey, Office of General Counsel, Federal Bureau of Prisons, Department of Justice, Washington, DC, counsel for Respondent.

Before Board Judges **STERN**, **FENNESSY**, and **SOMERS**.

FENNESSY, Board Judge.

This appeal is from a decision of a contracting officer of the Department of Justice (DOJ), Federal Prison Industries (FPI), doing business as UNICOR, denying the certified claim of Government Marketing Group (GMG or appellant) in the amount of $577,401.10. The appeal was originally taken to the Department of Transportation Board of Contract Appeals (DOTBCA). Effective January 6, 2007, Section 847 of Public Law 109-163 established the Civilian Board of Contract Appeals (CBCA) and terminated the DOTBCA and other civilian agency boards of contract appeals. The cases of the terminated boards,

including the instant case, were transferred to the CBCA. We have before us respondent's motion to dismiss for lack of jurisdiction and the parties' cross-motions for summary relief. For the reasons discussed below, we deny the motion to dismiss for lack of jurisdiction, grant in part appellant's motion for summary relief, and deny respondent's motion for summary relief.

Jurisdictional Facts

Federal Prison Industries, Inc., operating under the trade name UNICOR, is a wholly-owned Government corporation as defined by 31 U.S.C. § 9101 (2000) within the Department of Justice. Congress created UNICOR to provide employment, education, and training opportunities to inmates within federal prisons. UNICOR does not operate with appropriated funds but derives its funds from product sales. Therefore, UNICOR is a non-appropriated fund instrumentality (NAFI). *Logan Machinists, Inc. v. Federal Prison Industries,* DOTBCA 4184, 05-1 BCA ¶ 32,894.

On September 14, 1999, UNICOR awarded a contract to GMG to provide to federal agencies marketing, sales, design, delivery, and installation services of traditional furniture and industrial metal products. Appeal File, Exhibit 4. The contract provided that the period of performance was one five-year base period and five one-year option periods. *Id*.

The contract incorporated the standard Federal Acquisition Regulation (FAR) Disputes clause. 48 CFR 52.233.1 (1998). Appeal File, Exhibit 4. That clause stated that the contract was subject to the Contract Disputes Act of 1978 (CDA) and set forth the requirements for submission of a claim to a contracting officer for a decision. *Id*. The clause provides in pertinent part:

> (f) The contracting officer's decision shall be final unless the contractor appeals or files a suit as provided in the Act.

Id. At the time the contract was awarded until January 5, 2007, the applicable regulation provided that, pursuant to the CDA, final decisions of DOJ contracting officers were appealable to the DOTBCA. 48 CFR 2833.211(a).

In 2004, during the first option year, the parties mutually agreed to terminate the contract for the convenience of the Government. On January 13, 2005, they negotiated and executed a termination settlement agreement, set forth in contract modification 0013, making the termination effective January 31. Appeal File, Exhibit 17; Complaint ¶ 13; Answer ¶ 13; Declaration of Wendell Chandler (November 19, 2007).

In August 2005, a dispute arose between the parties concerning UNICOR's right to withhold payments due GMG pursuant to the settlement agreement. On December 23, 2005, the contracting officer issued a final decision "[p]ursuant to Federal Acquisition Regulation (FAR) 33.211" asserting that GMG owed UNICOR $564,797.66. Appeal File, Exhibit 48. The contracting officer advised GMG that, if it were dissatisfied with the decision, GMG could "file a claim" with UNICOR's chief of procurement. GMG submitted a certified claim to the chief of procurement, who affirmed the contracting officer's final decision. The decision of the chief of procurement did not contain any notice of appeal rights; nevertheless, GMG promptly commenced its appeal to the DOTBCA.

The appeal was stayed to permit the parties to settle their dispute. Once it became evident that the parties would not reach a settlement, the parties submitted the pending cross-motions.

Discussion

Jurisdiction

Section 847 of Public Law 109-163 established the Civilian Board of Contract Appeals (CBCA) and terminated the civilian agency boards of contract appeals established pursuant to section 8 of the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 607. This legislation imbued the CBCA with jurisdiction as provided by section 607(d) of Title 41. It also provided:

> The Civilian Board may, with the concurrence of the Federal agency or agencies affected--
>
> (A) assume jurisdiction over any category of laws or disputes over which an agency board of contract appeals established pursuant to section 607 of this title exercised jurisdiction before the effective date of this section; and
>
> (B) assume any other function performed by such a board before such effective date on behalf of such agencies.

41 U.S.C.A. § 438(c)(2) (West Supp. 2007). Further, in a "savings provision" Congress provided that this legislation would not affect any proceedings pending before any terminated agency board of contract appeals and required that any such proceedings be continued by the CBCA. Pub. L. No. 109-163, § 847(c)(2), 119 Stat. 3136 (2006).

The Government argues that this Board lacks jurisdiction to hear this appeal for three reasons: 1) because UNICOR, a NAFI, is not subject to the CDA; 2) because the DOJ has not agreed that this Board would hear UNICOR cases in accordance with the additional jurisdiction provision of 41 U.S.C. § 438(c)(2); and 3) because this appeal, when commenced, was not properly before the DOTBCA and, therefore, is not properly before this Board pursuant to the savings provision. Appellant agrees that UNICOR contracts are not subject to the CDA, but contends that this appeal is properly before the Board. For the reasons discussed below, we find that the Board possesses jurisdiction of this appeal pursuant to the savings provision of Pub. L. No. 109-163, § 847(c)(2), 119 Stat. 3136.

In *Logan Machinists,* the DOTBCA held that it did not possess jurisdiction over the appeal from a decision of a UNICOR contracting officer by virtue of the CDA because UNICOR is a NAFI, not within the scope of the CDA. However, the board found that it did possess jurisdiction over the appeal because the DOTBCA's charter imbued it with authority to hear appeals from decisions of contracting officers of another agency when that agency had designated the DOTBCA to decide the appeal, 48 CFR 6301.3(a)(2); the DOJ had designated the DOTBCA to decide its appeals, 48 CFR 2833.211(a); the contract included the standard FAR Disputes clause, 48 CFR 52.233-1, which, though erroneously stating that the contract was subject to the CDA, provided a mechanism for resolving disputes; the notice of termination did not provide any notice of appeal rights but directed the contractor to the Termination for Default clause, which referenced the Disputes clause; and the contractor appealed to the DOTBCA from a decision by a UNICOR contracting officer. *Id*. These factors led to the conclusion that the parties had agreed to have the DOTBCA hear appeals from UNICOR contracting officer decisions.

This appeal has essentially the same jurisdictional underpinnings as those in *Logan Machinists.* At all times relevant to this dispute, the DOTBCA had authority to hear appeals from decisions of other agencies, 48 CFR 6301.3(a) (2006); DOJ had designated the DOTBCA as the tribunal to decide appeals from contracting officers' decisions, 48 CFR 2833.211(2006); the contract contained the same standard Disputes clause, 48 CFR 52.233-1 (1998), as was included in the *Logan Machinists* contract; and GMG appealed the adverse decision of a UNICOR contracting officer to the DOTBCA.

UNICOR attempts to distinguish this appeal from *Logan Machinists* by arguing that there is evidence that the parties did not intend for the DOTBCA to exercise jurisdiction over this appeal. Specifically, UNICOR states that, following the decision of the Court of Appeals for the Federal Circuit in *Core Concepts of Florida, Inc. v. United States*, 327 F.3d 1331 (Fed. Cir. 2003), which held that neither the Tucker Act, 28 U.S.C. 1491, nor the CDA confers jurisdiction upon the Court of Federal Claims of claims arising under UNICOR contracts, UNICOR stopped including the standard FAR Disputes clause ins its contracts. Instead, UNICOR created a new Disputes clause that eliminated the appeal process

referenced in the standard FAR Disputes clause. The new clause provided that a contractor who is dissatisfied with a contracting officer's decision may appeal the decision to the chief of UNICOR's procurement branch and that the chief's decision will be final. This new procedure is set forth in a revised Disputes clause reflected on UNICOR's web site. There is no evidence as to when this new policy was posted to the web site. UNICOR argues that its decision to stop including the standard FAR Disputes clause in its contracts reflects its intent not to agree to have its disputes heard by the DOTBCA.

UNICOR's argument is flawed. While it may have started using its new disputes provision in contracts awarded after the *Core Concepts* decision, it did not modify appellant's contract to substitute the new clause for the standard FAR Disputes clause. Consequently, according to the terms of the contract and applicable regulation, DOJ, of which UNICOR is a part, and appellant agreed to have their disputes decided by the DOTBCA. Contrary to UNICOR's contention, the direction in the contracting officer's decision to file a claim with the chief of procurement if GMG disagreed with the decision merely provided for another level of review. It did not alter the terms of the contract.

Because this case properly was pending before the DOTBCA on the date on which that board was terminated, the case was properly continued by the CBCA pursuant to the savings provision of Pub. L. No. 109-163, § 847(c)(2), 119 Stat 3136 (2006).

Undisputed Material Facts

GMG provided to federal agencies marketing, sales, design, delivery, and installation services. The contract stated that payment of fees for marketing and sales was a percentage of sales calculated according to a formula set forth in the contract. GMG was responsible for the errors of its staff, and fees were not paid for items not accepted by the customer. Adjustments for unaccepted products or services were "deducted as a line item from the next monthly net sales figures." Appeal File, Exhibit 4. The parties refer to these deductions as "charge-backs."

Payment of fees for design and installation services was separate, based upon actual orders issued by federal agencies for those services. Appeal File, Exhibit 4. Modification 0002 provided that the installation price was a percentage of sales generally not greater than fourteen percent, plus a one percent "holdback" for UNICOR. *Id*., Exhibit 6. This one percent UNICOR "holdback" was for administrative expenses for invoicing UNICOR's customers. *Id*., Exhibit 52. Thus, GMG would quote an installation price to UNICOR's customers at fifteen percent of the product sales price and UNICOR would bill that amount to its customers. UNICOR paid fourteen percent of the sales price to GMG as its installation fee and "held back" the one percent UNICOR administration fee.

There were no other contract provisions that provided for, or addressed, deductions from payments due GMG.

The termination of the contract for the Government's convenience was due to GMG's serious financial difficulties. Shortly after the decision to terminate, the parties discussed the amount of charge-backs GMG then owed UNICOR. Although UNICOR did not agree with GMG's estimate of outstanding charge-backs, on January 3, 2005, UNICOR offered to accept $77,361.02 from GMG for charge-backs accrued through the end of fiscal year 2003, with the understanding that the parties would reconcile additional charge-backs quarterly beginning with the first quarter of fiscal year 2004. Appeal File, Exhibit 20.

A few days later, on January 13, the parties met and negotiated the terms of a termination settlement agreement. GMG was represented by its president and outside counsel. UNICOR was represented by its general manager. As the parties negotiated, UNICOR's general manager simultaneously typed the settlement agreement. It was set forth in contract modification 0013 and executed by both parties that same day. Appeal File, Exhibit 17; Complaint ¶ 13; Answer ¶ 13; Chandler Declaration.

Page two of the modification stated that the contract would be terminated for the convenience of the Government effective January 31, 2005. It stated that the termination would be in accordance with the "attached documents." The modification provided in pertinent part:

> The contractor hereby unconditionally waives any claims against the Government whatsoever arising under or by reason of the total cancellation effected in the paragraphs above, and the Government hereby releases the contractor from any obligation to perform work or make deliveries except those stated in attached termination letter.

The attached documents provided that final sales commissions would be calculated based upon the January 31, 2005, version of two UNICOR computerized reports; one report showed product produced and shipped as of January 31 and the other showed product ordered but not produced by January 31. It further stated in pertinent part:

> This modification will terminate this contract by Mutual Agreement of the parties and constitute a Settlement Agreement. The effective date of this termination is January 31, 2005. This modification will define all liabilities and fees associated with this termination. These liabilities and

> fees are limited to those specifically expressed in this settlement agreement.
>
> . . . .
>
> UNICOR will hold $100,000 of money otherwise due to GMG as part of this settlement agreement until such time as all product currently in possession of GMG/LNI[1] installers or subsequently received by GMG/LNI installers has been installed and UNICOR receives either a Punch List or Acceptance Form. Not later than June 15, 2005, UNICOR and GMG will jointly reconcile product shipped to GMG/LNI installers against the receipt of proof of install. After this reconciliation is accomplished, the money will be released subject to any forfeiture as a result of failure to install product. This forfeiture shall be limited to the cost of the product in question and related freight cost.
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> UNICOR and GMG agree that GMG . . . will continue to provide installation services in a timely manner and obtain either a Punch List or an Acceptance Form showing proof of install. GMG further agrees to provide UNICOR a signed customer Acceptance Form or Punch List not later than May 31, 2005.
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> . . . .
>
> All invoices for installation, storage, or other related charges shall be submitted to UNICOR no later than May 31, 2005 . . . .
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> . . . .
>
> The parties agree that this modification shall settle all outstanding issues related to this contract. In consideration of

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[1] It appears from the record that LNI was a subcontractor to GMG named Logistics Network Incorporated. Appeal File, Exhibit 22.

> the modification set forth herein, the parties mutually release each other from any and all known or unknown liability relating to this contract.

Appeal File, Exhibit 17.

On February 15, 2005, UNICOR provided to GMG final calculations for the sales commissions based upon the two UNICOR reports. The calculations showed that UNICOR owed GMG $738,310 for sales and marketing. Appellant's Statement of Uncontested Facts, Exhibit 1.

On March 2, 2005, GMG submitted an invoice for the $738,310, recognizing that $100,000 would be held back pursuant to modification 0013. Appeal File, Exhibit 30. UNICOR did not pay GMG's invoice. Instead, five months later, at an August 3 meeting, UNICOR announced that GMG owed UNICOR $639,665[2] for unaccounted-for products, charge-backs, and the one percent UNICOR holdback. *Id.,* Exhibit 40.

In a December 23, 2005, final decision the contracting officer reduced UNICOR's claim to $564,797.66[3] for unaccounted-for products, charge-backs, and the one percent UNICOR holdback fee. Appeal File, Exhibit 48. UNICOR informed GMG that sum would be set off against the amount otherwise due appellant pursuant to modification 0013, and that UNICOR would pay the remaining commission amount of $198,512.34 to GMG's subcontractor pursuant to an assignment of claims. *Id*.

On March 20, 2006, GMG submitted a certified claim to UNICOR's chief of procurement demanding payment of the balance due GMG pursuant to modification 0013. Appeal File, Exhibit 51. By letter dated July 18, 2006, the chief of procurement affirmed the contracting officer's decision. GMG's appeal of that affirmance is docketed as CBCA 71.

Discussion

Summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of

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[2] This amount was composed of $233,106.31 for unaccounted-for products; $174,528.41 for charge-backs previously submitted; $149,749.70 for charge-backs from October 2004 forward; $7413.24 for UNICOR's one percent holdback; and $74,867.38 for invoices lacking proper documentation.

[3] It appears that the contracting officer eliminated the claim of $74,867.38 for invoices lacking proper documentation.

demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A fact is considered to be material if it will affect the Board's decision, and an issue is genuine if enough evidence exists that the fact could reasonably be decided in favor of the nonmovant after a hearing. *Fred M. Lyda v. General Services Administration*, CBCA 493, 07-2 BCA ¶ 33,631; *John A. Glasure v. General Services Administration*, GSBCA 16046, 03-2 BCA ¶ 32,284.

When both parties move for summary relief, 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. *Anderson,* 477 U.S. at 248; *First Commerce Corp. v. United States*, 335 F.3d 1373, 1379 (Fed. Cir. 2003); *DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1322 (Fed. Cir. 2001). The fact that the 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. *California v. United States*, 271 F.3d 1377, 1380 (Fed. Cir. 2001).

Here, the cross-motions are based upon one central issue -- whether the settlement agreement precludes UNICOR from withholding from sales commissions amounts in excess of $100,000 for charge-backs, payment for unaccounted-for product, and Unicor's one percent fee.

GMG argues that the plain language of the settlement agreement makes clear that it settled all outstanding issues relating to the contract and that the parties mutually released each other from any and all known or unknown liability relating to the contract. Therefore, according to GMG, all that UNICOR could retain from the sales commissions due GMG was the $100,000 retainage agreed upon in the settlement agreement in the event GMG failed to install product.

UNICOR contends that parts of the settlement agreement are ambiguous and that extrinsic evidence establishes that modification 0013 did not terminate the contractual rights and obligations of the parties for services performed prior to the effective date of the settlement agreement and, further, the settlement agreement required performance of outstanding installations. Therefore, UNICOR argues that it was entitled to continue to withhold charge-backs, payments for unaccounted product, and UNICOR's one percent installation fee pursuant to the terms of the contract as they existed before the settlement agreement.

A settlement agreement is a contract and disputes arising from settlement agreements are governed by contract principles. *See Musick v. Department of Energy*, 339 F.3d 1365, 1369 (Fed. Cir. 2003); *Kasarsky v. Merit Systems Protection Board*, 296 F.3d 1331, 1336 (Fed. Cir. 2002); *see also Fentress Bradburn Architects, Ltd. v. General Services Administration*, GSBCA 15898, 02-2 BCA ¶ 32,011, at 158,164 (settlement agreement is a

modification of a procurement contract). When interpreting the language of a contract, we must give reasonable meaning to all parts of the agreement and not render any portion meaningless, or interpret any provision so as to create a conflict with other provisions of the contract. *Fortec Constructors v. United States*, 760 F.2d 1288, 1292 (Fed. Cir. 1985); *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1555 (Fed. Cir. 1983). In other words, "an interpretation that gives a reasonable meaning to all parts will be preferred to one which leaves a portion of it useless, inexplicable, inoperative, void, insignificant, meaningless, superfluous, or achieves a weird and whimsical result." *Arizona v. United States*, 575 F.2d 855, 863 (Ct. Cl. 1978); *see also, e.g.*, *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991); *Johnson Controls*, 713 F.2d at 1555. The contract language should be given the plain meaning that would be derived by a reasonably intelligent person acquainted with the contemporaneous circumstances. *Firestone Tire & Rubber Co. v. United States*, 444 F.2d 547, 551 (Ct. Cl. 1971); *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 975 (Ct. Cl. 1965). The contract must be construed to effectuate its spirit and purpose, giving reasonable meaning to all of its parts. *Gould, Inc.*, 935 F.2d at 1274. Extrinsic evidence will not be received to change the terms of a contract that is clear on its face. *SCM Corp. v. United States*, 675 F.2d 280, 284 (Ct. Cl. 1982).

Generally, the plain language of a contract controls, and only language which is reasonably susceptible to more than one meaning may be considered ambiguous. *John C. Grimberg Co. v. United States*, 7 Cl. Ct. 452, 457, *aff'd*, 785 F.2d 325 (Fed. Cir. 1985) (table). To prove an ambiguity, it is not enough to show that the parties interpreted the provision differently. Both interpretations must fall within a "zone of reasonableness." *Metric Constructors, Inc. v. National Aeronautical Space Administration*, 169 F.3d 747, 751 (Fed. Cir. 1999).

Applying these principles to this appeal, we find that, with limited exception, GMG's interpretation is the only reasonable interpretation of the settlement agreement. The plain language of the agreement provides that its purpose was to terminate the contract and define "all liabilities and fees associated with this termination." From this language, it is clear that the parties intended to bring the contract to an end and to enumerate the outstanding obligations of the parties. Thus, the parties set forth the bases for calculating final sales commissions. Further, because the termination was effective as of January 31, 2005, the parties recognized that there would be no subsequent sales commissions against which UNICOR could assess rejected product, charge-backs, or unaccounted-for property. Therefore, the parties agreed that UNICOR would withhold $100,000 from the final sales commissions due GMG pending reconciliation of product shipped against punch lists and acceptance forms. If the reconciliation reflected failure to install product, GMG would forfeit an amount up to the value of the uninstalled product, not to exceed a total of $100,000. The language "failure to install product" is sufficiently broad to include unaccepted or rejected product or lost or missing product.

While the term "charge-backs" may apply to something less than a total failure to install product, the spirit and purpose of the agreement and the contemporaneous circumstances warrant the conclusion that charge-backs were included within the $100,000 retainage. Because the final reconciliation was to be based upon punch lists, as well as acceptance forms, it is reasonable to interpret the retainage provision to include charge-backs constituting something less than total failure to install product. This conclusion is underscored by the fact that both parties were aware, when they executed the settlement agreement in January 2005, that there were outstanding charge-backs accrued as of October 2004 which UNICOR had attempted to settle for $77,000 just ten days before executing the settlement agreement.[4] Complaint ¶ 12; Answer ¶ 12. Rather than reserving its right to pursue these charge-backs, UNICOR agreed that the settlement agreement "settled all outstanding issues relating to this contract." In consideration of the settlement agreement, the parties "mutually release[d] each other from any and all known and unknown liability relating to the contract." Appeal File, Exhibit 17. Charge-backs were a known liability when the parties executed the settlement agreement.

UNICOR argues that the settlement agreement is ambiguous because it did not address continued installation services by GMG or payment terms for the installation work. Therefore, UNICOR contends, it is necessary to resort to extrinsic evidence because the agreement "did not specify under what authority GMG would continue to provide installation services." Respondent's Response to Appellant's Motion for Summary Relief and Cross-Motion for Summary Relief at 15. UNICOR argues that GMG's continued submission of installation invoices, and UNICOR's payment of them, after the effective date of the termination reflects the parties' agreement that the installation services would continue to proceed in accordance with the terms of the contract, including the right to withhold charge-backs, payment for unaccounted-for property, and the one percent UNICOR administrative holdback. *Id.*

Except as to the one percent holdback, UNICOR's argument lacks merit for multiple reasons. First, it is based upon the unfounded contention that the settlement agreement did not address GMG's promise to continue to install product after the termination and did not provide for payment to GMG for the installation work. Contrary to UNICOR's argument, it is unnecessary to resort to extrinsic evidence because the settlement agreement expressly provides that GMG will continue to provide installation services and to obtain and submit to UNICOR by May 31, 2001, acceptance forms or punch lists as proof of installations. Similarly, the settlement mandated GMG to submit "invoices for installation, storage and other related charges" to UNICOR by May 31, 2005. Thus, the payments UNICOR made

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[4] The record reflects that the outstanding charge-backs through October 2004 were approximately $175,000, and that they continued to accrue.

to GMG after the termination, for installation services performed both before and after the termination, were consistent with the express terms of the settlement agreement.

Second, UNICOR's interpretation ignores the settlement agreement's express limitation to $100,000 on UNICOR's right to withhold payment for failure to install product. It renders meaningless the language of the settlement agreement that the parties' liabilities and fees associated with the termination are "limited to those specifically expressed in this settlement agreement." Appeal File, Exhibit 17. If the parties intended the charge-backs to continue accruing as they had before the termination, the provision for the $100,000 retainage would have been unnecessary.

UNICOR also argues that to construe the $100,000 retainage for failure to install product as a limitation upon UNICOR's right to withhold payments for charge-backs renders the settlement agreement not supported by consideration because GMG was already required by the contract to install product. UNICOR's position ignores the fact that GMG had no obligation to install product after the effective date of the termination other than as provided in the settlement agreement. Further, although the settlement agreement did not specifically address how invoicing and payment for installation services would proceed under the settlement agreement, we can conclude that it was the parties' intention that payments for those services would proceed as they had prior to the termination, except that, if charge-backs and unaccounted-for property had been routinely offset against installation payments, they would be limited by the $100,000 retainage provision of the settlement agreement.

This brings us to the one percent UNICOR holdback. According to the record, UNICOR billed its customers for installations based upon GMG's quote of fifteen percent of product sales price as provided in modification 0002. The one percent UNICOR holdback was included in GMG's fifteen percent quote. UNICOR paid GMG a fourteen percent installation price and withheld the one percent administration fee. There is nothing in the settlement agreement that required UNICOR to increase GMG's installation price to fifteen percent of product sales prices, which would be the effect of precluding UNICOR from retaining the one percent fee.

Given UNICOR's statement in its brief that it paid millions of dollars to GMG for installation services following the execution of the settlement agreement, logic dictates that UNICOR would have "held back" its one percent fee from those installation payments. If that assumption is correct, the funds for the one percent holdback would not have been paid to GMG and there would be no basis for offsetting payments for the holdback against the sales commissions due GMG pursuant to the settlement agreement. The record is not sufficiently developed on this issue. UNICOR's position seems to be that it paid GMG the one percent holdback. Given the absence of sufficient factual information, we cannot grant summary relief to either party on this issue.

Decision

Appellant's motion for summary relief is **GRANTED IN PART**. UNICOR is not entitled to withhold sums for charge-backs and unaccounted-for products in excess of $100,000 from the sales commissions due pursuant to modification 0013 and UNICOR shall release the excess amounts withheld for those items. Appellant's motion is otherwise **DENIED.** Respondent's motion to dismiss for lack of jurisdiction and its cross-motion for summary relief are **DENIED**..

EILEEN P. FENNESSY
Board Judge

We concur:

JAMES L. STERN
Board Judge

JERI KAYLENE SOMERS
Board Judge