



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

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SEPTEMBER 10, 2020**

CROSS-MOTIONS FOR SUMMARY JUDGMENT DENIED: September 2, 2020

CBCA 6001

COLLECTO, INC. dba EOS CCA,

Appellant,

v.

DEPARTMENT OF EDUCATION,

Respondent.

Joseph J. Petrillo of Petrillo & Powell, PLLC, Washington, DC, counsel for Appellant.

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

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

BEARDSLEY, Board Judge.

Appellant, Collecto, Inc. dba EOS CCA (Collecto), challenges the final decision of a Department of Education, Office of Federal Student Aid (FSA) contracting officer demanding the return of an overpayment in the amount of \$1,028,414.63, plus accrued interest. FSA asserts that it overpaid Collecto for student debt collection services. Collecto asks us to find on summary judgment that FSA's claim is barred by an accord and

satisfaction between the parties, reflected in bilateral contract modification 0056. FSA has filed a cross-motion, seeking summary judgment for the alleged overpayment. FSA argues that the modification was not an accord and satisfaction, that FSA is entitled as a matter of law to recoup payments erroneously made regardless of the bilateral modification, and that Collecto breached either an implied-in-fact contract or the implied duty of good faith and fair dealing. We deny both motions for the reasons that follow.

Statement of Undisputed Material Facts

The Contract

On April 7, 2009, under contract GS-23F-0269K, FSA issued firm-fixed-price task orders to twenty-three private collection agencies (PCAs) to provide student loan default collection and resolution services. FSA issued task order ED-FSA-09-O-0007 (order) to Collecto. Under the order, FSA paid Collecto percentage commissions for payments by borrowers, and a fee for administrative resolutions, for loan consolidation, and for rehabilitations. The order ran from July 1, 2009 to April 21, 2015.

From July 1, 2009, to September 15, 2011, FSA used a portfolio management system referred to as the “Legacy System” to record all financial activity on defaulted student loan accounts. The system recorded each time Collecto collected or otherwise serviced a defaulted student loan. Based on the information in the Legacy System, FSA generated a monthly voucher for fees and commissions owed to Collecto for Collecto to review. Collecto would review the voucher, compare the information to its records, notify FSA of any proposed changes, and submit a final invoice to FSA for payment. FSA then paid Collecto the final invoiced amount.

FSA’s Change in Invoicing Practices

On September 15, 2011, FSA retired the Legacy System and transitioned to a new portfolio management system called the “Debt Management Collection System” (DMCS). The DMCS, however, did not become active until October 1, 2011, initially with limited functionality. From September 16 to September 30, 2011, there was no portfolio management system operating, and for approximately two years, FSA was unable to generate vouchers from the DMCS for PCAs to review in the same manner as under the Legacy System. As a result, from September 2011 through August 2013 FSA instructed all PCAs, including Collecto, to create and submit their own invoices each month without first receiving a voucher from FSA. FSA did not require Collecto to submit backup for the invoices because FSA intended to reconcile the invoice payments at a later date. Not until September 1, 2013, was FSA able to generate vouchers from the DMCS.

Collecto's September 2011 Invoice

By email dated October 14, 2011, Collecto submitted an invoice dated October 13, 2011, in the amount of \$1,028,414.08 for services provided for the month ending September 30, 2011 (September 2011 invoice). This invoice also included commissions in the amount of \$123,260.96 for a 2004 contract that Collecto was still performing. Collecto received payment for this invoice in full on or about November 14, 2011.

FSA's Invoice Reconciliation Process

In late 2013, FSA began to reconcile differences between the amounts invoiced by each PCA from September 2011 through August 2013 (the "reconciliation period") with what each PCA had actually earned. FSA used the data in the DMCS for the reconciliation process, but due to errors and gaps in that data, it was necessary to establish a new set of procedures and business rules to derive the amount earned by the PCAs. To develop these procedures and business rules, FSA engaged in extensive negotiations with the PCAs and then applied these procedures to the data, recalculated what each PCA had earned during the reconciliation period, added up what each PCA had already been paid, and ascertained whether any underpayments or overpayments had occurred. 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." The reconciliation procedures were finalized on April 24, 2014.

FSA calculated that Collecto had earned a total of \$52,115,863.48 for its performance during the reconciliation period, that it had already paid Collecto \$52,032,438.08 based upon invoices that Collecto had submitted to FSA, and that FSA, therefore, owed Collecto \$82,425.40. FSA now asserts that it did not include the \$1,028,414.08 that it had previously paid Collecto for September 2011 in the \$52,032,438.08 PSA-created invoice amount. Although Collecto contends that it cannot confirm how FSA calculated the already paid PSA-created invoice amount, the evidence makes clear that FSA added together the amounts in Collecto's invoices from October 2011 to August 2013, excluding the September 2011 invoice amount.

The parties dispute whether the September 2011 amount of \$1,028,414.08 invoiced for by Collecto and paid by FSA should have been included in the reconciliation period PCA-created invoice value of \$52,032,438.08. FSA initially identified the relevant period for invoices as starting on October 2011. The DMCS posted payments received September 16–30, 2011. Michael Bryant, who oversaw the reconciliation process for FSA, referred to the reconciliation period as starting in October 2011. FSA has not identified any specific

fees or commissions billed by Collecto in its invoice for September 2011 that were included in the reconciliation process. On August 14, 2012, FSA sent an email to the PCAs, stating:

You should have received by now, your September 2011 invoice. This is the last invoice using information out of the legacy system and includes payments posted through September 15, prior to conversion. The totals from this invoice will be included in the invoice reconciliation which we will be doing at some point. We would like for you to review the information in this invoice and notify us if you find any problems. The detailed payment files should be available through TSO.

Do not submit this invoice for payment. You were previously paid for September 2011 based on the invoices which you submitted last year.

The invoice referenced in this email, however, is not in the record. In October 2013, FSA sent Collecto an email listing amounts that FSA understood Collecto was paid for each month of the reconciliation period. The table in that email listed payments by month and began with October 2011 and ended with August 2013. The email stated, "Please review your numbers and if you find that you received a different amount, please report that variance to David, Lawannah and Mike."

The Contract Modification

On April 24, 2014, FSA and Collecto executed bilateral modification 0056 (mod 56), 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." The other twenty-two PCAs executed substantially similar contract modifications at about the same time. Mod 56 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."

The first two pages of Collecto's twenty-one-page modification contained a Standard Form 30 (SF 30), which included the parties' signatures and identified the stated purpose of mod 56. Box 12 of SF 30, entitled "Accounting and Appropriation Data," stated: "See Schedule"; "Modification Amount: \$0.00"; "Modification Obligated Amount: \$0.00."

The next twelve pages, under the heading "Invoice Reconciliation Procedures," contained specific written procedures and business rules regarding how to calculate Collecto's commissions for each of the following types of activities: regular payments, rehabilitations, consolidations, administrative resolutions, reversals, and refunds.

At the end of section 1.2 under the regular payments section, the following language was included: “The table in Appendix 1 shows the applicable rates for each contract code over time.” Appendix 1, titled “Historical Commission Rates,” began with a half-page chart listing Collecto’s historical commission rates for collections that Collecto had performed under 2004 and 2009 FSA contracts. After that chart of historical commission rates, the parties added another chart to Appendix 1, one without any kind of introductory title or description. In that second Appendix 1 chart, there were twenty-four line items for “Regular Collections,” forty for “Rehabilitations,” two for “Administrative Resolutions,” eight for “Consolidations,” one for “Litigation Referrals,” and one for “Performance Incentive.” The second Appendix 1 chart indicated a “FSA Total Invoice Value” of \$52,114,863.48, a “PCA-Created Invoices” number of (\$52,032,438.08), and a “Difference” of \$82,425.40.

Collecto subsequently invoiced FSA for and was paid the difference of \$82,425.40. Mod 56 did not contain any language indicating that FSA or Collecto reserved the right to make a claim for any discrepancies or other issues arising as a result of the modification.

FSA also gave credit in Appendix 1 for an “Aug-11 Titanium Invoice” in the amount of \$888.61 and for a “Sep-11 Legacy Invoice” in the amount of \$221,927.01. Nowhere in mod 56 is there any explanation of why an invoice from August 2011, which predates the reconciliation period, is included in Appendix 1. 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”:

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.

This language appears to address how FSA, for purposes of reconciliation, would handle student debt payments with an effective date after September 15, 2011, but says nothing about payments with an effective date from September 1 to 15. Nothing in mod 56 explains why FSA gives credit for a September 2011 invoice based on the Legacy System that shutdown on September 15, 2011.¹

¹ 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.” Mod 56 contains no language reflecting that.

In the entirety of the twelve-page “Invoice Reconciliation Procedures” portion of mod 56, the only reference to Appendix 1 is the one identified above. This reference 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.

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. At the bottom of each of the nineteen pages constituting mod 56 (except for the SF 30), including every page of Appendix 1 and Appendix 2, is a footer with the words “Invoice Reconciliation Procedures.”

FSA’s Demand for Repayment

In 2015, another PCA informed the agency that its PCA-created invoice for September 2011 had been omitted from the reconciliation calculation. The agency, thereafter, believed that it had made the same reconciliation calculation error for every PCA. FSA hired an independent audit firm, which determined that the agency had overpaid Collecto by \$1,028,414.63² for the reconciliation period. On March 6, 2017, FSA informed Collecto that it was overpaid by \$1,028,414.63. The FSA contracting officer issued a final decision on December 22, 2017, asserting that Collecto owed FSA the amount of the overpayment.³ Collecto subsequently filed this timely appeal. A short time after Collecto filed its notice of appeal, Transworld Systems, Inc., another of the PCAs from which the FSA contracting officer had demanded repayment for reasons similar to the demand to Collecto, filed its own notice of appeal, which the Board docketed as CBCA 6049.⁴

Collecto asks us to find as a matter of law that FSA’s overpayment claim in the amount of \$1,028,414.63 is barred by an accord and satisfaction in mod 56. In other words, Collecto argues that the payment of \$82,425.40 was a final determination of the payments

² The audit report identified a \$.55 difference in the total commissions earned by Collecto during the reconciliation period. Thus, FSA claims repayment of \$.55 more than the total of the September 2011 invoice amount — \$1,028,414.63 vs. \$1,028,414.08.

³ In error, the contracting officer’s final decision indicates that FSA demanded payment from Collecto in the amount \$1,355,737.84.

⁴ 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.

earned and owed for the reconciliation period and, therefore, there was no overpayment. Collecto asserts that this final determination cannot be reopened or changed. FSA asks us to find summary judgment for the alleged overpayment, arguing that the modification was not an accord and satisfaction, that FSA is entitled as a matter of law to recoup payments erroneously made regardless of mod 56, and that Collecto breached either an implied-in-fact contract or the implied duty of good faith and fair dealing by refusing to acknowledge the mistake and repay the overpayment.

Discussion

Summary judgment is appropriate when “there is no genuine issue as to any material fact (a fact that may affect the outcome of the litigation) and the moving party is entitled to judgment as a matter of law.” *Marine Metal, Inc. v. Department of Transportation*, CBCA 537, 07-1 BCA ¶ 33,554 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986)). “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, and *California v. United States*, 271 F.3d 1377, 1380 (Fed. Cir. 2001)).

FSA’s Overpayment Argument

The parties dispute whether there was an overpayment. FSA asserts that, by mistake, FSA failed to include Collecto’s September 2011 invoice amount in its calculation of how much Collecto had already been paid for the reconciliation period. Collecto asserts that FSA must prove that the payments and the compensable events for which Collecto invoiced in September 2011 were included in the reconciliation process. Collecto also asserts that the reconciliation process was rife with errors, and if the process can be reopened for one error, it should be reopened for all.

FSA has established that Collecto’s invoice in the amount of \$1,028,414.08 for commissions and fees in September 2011 is not included in the FSA already paid figure of \$52,032,438.08. The amount that FSA is seeking to recover clearly mirrors the September 2011 invoice payment amount plus the \$.55 variance. Adding up Collecto-created invoices from October 2011 to August 2013 equals the PCA-created invoice amount in mod 56. This finding, however, does not mean that FSA has proven that Collecto was overpaid and the amount of the alleged overpayment.

The basis for part of FSA’s calculations is inconsistent with the actual language of mod 56. The Collecto invoice for September 2011 encompasses commissions and fees from September 1 through 30, 2011, but the invoice reconciliation procedures in mod 56 were supposed to encompass a period that did not begin until September 16, 2011. 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 Collecto to adhere to that verbal agreement, which conflicts with the plain language of mod 56, while simultaneously arguing that it is not bound by agreements about other amounts included in but not supported by mod 56's language. FSA cannot pick and choose which side agreements, outside the actual language of mod 56, it will enforce. *Transworld Systems Inc. v. Department of Education*, CBCA 6049, slip op. at 14 (Aug. 13, 2020) (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.” (citing Restatement (Second) of Contracts § 383 cmt. a (1981))).

We also question FSA's inclusion, in its accounting of Collecto's prior task order payments, of commissions identified on Collecto's September 2011 invoice as having been earned under a 2004 contract, rather than under this task order. On its face, it does not seem appropriate to include in Collecto's already paid amount commissions paid on other contracts.

Collecto has identified problems in FSA's ability during the six-month negotiation period to identify and calculate the PCAs' earned commissions. The record also remains unclear as to the reasons and effect of the inclusion of the “August-11 Titanium Invoice” and the “Sep-11 Legacy Invoice” in FSA's calculation of what Collecto earned for the reconciliation period. Because the FSA contracting officer's final decision at issue here demands repayment of what the contracting officer views as FSA's overpayment to Collecto, it will be FSA's burden, assuming that mod 56 did not constitute an accord and satisfaction, to show that Collecto received an overpayment that FSA is entitled to recoup. *Transworld*, slip op. at 15 (“The assertion of a right to recoup funds paid in error is a government claim upon which the Government bears the burden of proof.” (citing *JBG/Federal Center, L.L.C. v. General Services Administration*, CBCA 5506, et al., 18-1 BCA ¶ 37,120)). To prove an 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 failed to include the September 2011 commission invoice in its calculation of Collecto's PCA-created invoice amount when negotiating the invoice reconciliation procedures leading to mod 56. However, inconsistencies between the written invoice reconciliation procedures themselves and the manner in which FSA applied them, as well as the issue of whether FSA miscalculated Collecto's commissions, preclude FSA from proving overpayment or its amount on summary judgment.

Collecto's Accord and Satisfaction Argument

Collecto asserts that, even if FSA overpaid Collecto, mod 56 constituted an accord and satisfaction barring FSA's overpayment claim. Both parties seek summary judgment based on Collecto's accord and satisfaction argument. "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." *Transworld*, slip op. at 16 (citing *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))).⁵

A. Substituted Contract versus Executory Accord

In arguing that mod 56 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 56 and that it is entitled to recalculate the amounts owed by reference to those written procedures. Collecto argues that either the reconciliation process cannot be reopened, or if it can be reopened to fix one error, the entire reconciliation process should be reopened.

[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.

Transworld, slip op. at 17 (quoting *Edward H. Foran*, ASBCA 51596, et al., 01-1 BCA ¶ 31,323). FSA defines mod 56 as a "substituted contract," and Collecto defines mod 56 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." *Transworld*, slip op. at 18 ("Whether a contract is an accord or a substituted contract is a question of interpretation." (quoting *TMW, Joint Venture, Inc.*, ASBCA 23115,

⁵ FSA argues that there was no bona fide dispute before the parties executed mod 56, a fifth element of a valid accord and satisfaction. The bona fide dispute requirement "is designed to insure that the necessary consideration is present to create the contract" or contract modification. *Transworld*, slip op. at 16 (quoting *Lowrance v. Hacker*, 866 F.2d 950, 953 (7th Cir. 1989)). Thus, we must decide whether adequate consideration supported the modification. *Id.*

84-2 BCA ¶ 17,250, and citing Restatement (Second) of Contracts § 281 cmt. e (1981))). Even if mod 56 is a substituted contract and not an executory accord, the elements of accord and satisfaction apply. *Transworld*, slip op. at 18.

B. The Elements As Applied in This Case

1. Proper Subject Matter

Subject matter is proper in an accord and satisfaction analysis if it addresses “matters that had arisen during the course of the performance of the contract.” *Transworld*, slip op. at 18 (quoting *Trataros Construction, Inc. v. General Services Administration*, GSBCA 15344, 03-1 BCA ¶ 32,251). FSA asserts that the proper subject matter element of an accord and satisfaction is not satisfied because the parties disagree as to the subject matter of mod 56. We disagree. The dispute between Collecto and FSA is about the scope of the subject matter of mod 56 — not the actual subject matter of mod 56. *Cf. Transworld*, slip op. at 18-19. Collecto and FSA disagree as to the scope of mod 56. FSA argues that mod 56 established only written reconciliation procedures that need to be properly applied while Collecto argues that mod 56 established a defined final payment amount that cannot be altered. Each party’s proposed interpretation involves the same subject matter, however. 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.

2. Competent Parties

There is no dispute that Collecto and FSA were competent to enter into and execute a contract modification.

3. Consideration and FSA’s Bona Fide Dispute Argument

FSA argues that it received no consideration for mod 56 because Collecto was performing the same student debt collection services both before and after the modification. According to FSA, mod 56 “does not require Collecto or the Agency to perform any new or different responsibilities nor is there a promise bargained for.” We disagree.

“[T]o constitute consideration, a performance or a return promise must be bargained for.” *Transworld*, slip op. at 19 (quoting *National Housing Group, Inc. v. Department of Housing & Urban Development*, CBCA 340, et al., 09-1 BCA ¶ 34,043.) “[I]n the context of a Government contract, [consideration] must render a benefit to the Government and not merely a detriment to the contractor.” *Id.* (quoting *Turner Construction Co. v. General Services Administration*, GSBCA 15502, et al., 05-1 BCA ¶ 32,924, and citing *Metzger, Shadyac & Schwarz v. United States*, 12 Cl. Ct. 602, 605 (1987)). However, “[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.” *Id.* (quoting *Turner Construction*, 05-1 BCA ¶ 32,924).

Here, as a result of prolonged negotiation, the contract modification memorialized a significant change to the original task order. Through mod 56, Collecto agreed to relieve FSA of its obligation to prepare invoices each month detailing student loan debt payment activity and to take over that duty for a period of almost two years. Mod 56 also created a series of new rules defining how to calculate Collecto’s earned commissions. These changes constituted sufficient consideration to support mod 56. *Transworld*, slip op. at 20 (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 (citing *Edo Corp.*, ASBCA 2622, 56-2 BCA ¶ 1141)).

FSA seems to be arguing that only the portion of mod 56 dealing with the actual dollar amounts to be paid Collecto, if enforceable, lacked consideration. *Transworld*, slip op. at 20. This is because FSA relies on and seeks only to enforce as binding the written invoice reconciliation procedures that are contained in mod 56. If mod 56 lacked consideration, however, the entire modification would be ineffective. *Id.* at 20 (citing Restatement (Second) of Contracts § 279 cmt. b). We do not require separate consideration for each part of the modification unless the language of the agreement specifically calls for it or the contract is divisible. *Id.* “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.” *Id.* (quoting *Denver Steel & Iron Works*, ENG BCA 2204, 1963 WL 164 (Mar. 8, 1963), and citing *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)).

Mod 56 is not divisible. “[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.” *Transworld*, slip op. at 20 (quoting 77A C.J.S. *Sales* § 15, and citing *In re Payless Cashways*, 203 F.3d 1081 (8th Cir. 2000)). 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 unrelated. *Id.* at 21. To the extent that FSA argues that the consideration is inadequate, 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.’” *Id.* (quoting *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’s argument that there was no consideration to support mod 56 is without merit.

Addressing its bona fide dispute argument, which we view as part of FSA’s argument about inadequate consideration, we find that there was a bona fide dispute that mod 56 resolved. See *Transworld*, slip op. at 21. FSA asserts that the parties agreed to the new invoice reconciliation procedures, thus precluding the existence of a bona fide dispute. “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.’” *Id.* at 21 (quoting *Chesapeake & Potomac Telephone*, 654 F.2d 711, 716 (Ct. Cl. 1981) (quoting 6 Arthur L. Corbin, *Corbin on Contracts* § 1276 (1962))). We disagree with FSA’s position that the reconciliation process was not a change to the task order. *Id.* Both parties knew that the reason for mod 56 was 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 reconciled. FSA lacked reliable data and the PCAs made extensive compromises to resolve the data deficiencies. If not a change, it, otherwise, would have been a breach of contract by FSA.

4. Meeting of the Minds

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).

Transworld, slip op. at 22.

It is unclear why FSA included dollar calculations in mod 56. “[T]he stated purpose of the modification, as set forth on [mod 56’s] first page, is to incorporate Invoice Reconciliation Procedures, rather than specific dollar amounts.” *Transworld*, slip op. at 22. Mod 56 includes several pages of written procedures that describe how FSA will calculate the commissions owed to each PCA for the reconciliation period, and Appendix 1 contains historical commission rates over time. Appendix 1, however, also seems to include FSA’s

breakdown of the amounts owed to Collecto for the reconciliation period, the amount that FSA believed it had previously paid Collecto, and FSA's calculation of the difference between the "should have been paid" and "already paid" numbers. Mod 56 fails to explain why those amounts are contained in Appendix 1 or in the modification at all. *Id.*

At oral argument, FSA could not explain why the detailed dollar figures were included in Appendix 1. FSA asserted that the inclusion of the dollar figures 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." *Transworld*, slip op. at 23. "[W]hen interpreting a contract, however, the Board must interpret it in a manner that 'give[s] reasonable meaning to all of its parts.'" *Id.* (quoting *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.* (citing *Fortec Constructors v. United States*, 760 F.2d 1288, 1292 (Fed. Cir. 1985)). In interpreting mod 56, the inclusion of detailed dollar figures cannot be rendered meaningless or superfluous, as FSA's interpretation of mod 56 does.

Collecto's assertion that the \$83,425.40 in Appendix 1 constituted a final settlement of the dollar amount that FSA owed Collecto, however, is also unsupported by contract language. As noted above, the purpose of including dollar figures is not expressly stated anywhere in mod 56. The only reference to Appendix 1 in mod 56 indicates that it identifies historical commission rates under previous contracts. Moreover,

the dollar figure calculated in Appendix 1 is inconsistent with the invoice reconciliation procedures set forth in [mod 56], given that it fails to account for [Collecto's] receipt of the September 2011 payment. Further, if the inclusion of dollar calculations in Appendix 1 was intended to define [Collecto'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 56] to the fact that there would be a detailed dollar calculation in Appendix 1 or why it is there creates an irreconcilable ambiguity.⁶

⁶ We also note, without deciding what it means, that the first page of mod 56 includes box 12, entitled "Accounting and Appropriation Data," that states "See Schedule"; "Modification Amount: \$0"; and "Modification Obligated Amount: \$0." It is unclear how

Transworld, slip op. at 23.

“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.” *Transworld*, slip op. at 24 (citing *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 parties’ competing evidence regarding their negotiations makes it impossible to resolve the scope of the parties’ “meeting of the minds” on summary judgment. The FSA business operations specialist, who negotiated mod 56 with the PCAs, 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. *Transworld*, slip op. at 24 (citing Deposition of Michael Bryant (Jan. 17, 2019) at 31-32).

Similarly, the FSA contracting officer who executed [mod 56] on FSA’s behalf testified that “[i]t was my understanding that they were bilateral modifications that memorialized the performance of the PCAs for that period of time” and that “[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 56], [Collecto] 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 56 negotiations . . . —commissions billed in the “Titanium” and “Legacy” invoices covering August and . . . 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.

Id. at 24-25. This testimony and the record provide some support for Collecto’s interpretation that Collecto gave up the right to claim that they were owed additional monies not included in FSA’s reconciliation, and each party agreed to accept the result of the reconciliation, even if there were errors and imperfect data. Collecto asserts that “there is no evidence . . . that [the] [CO] ever communicated” to Collecto that the modification was not a final determination of commissions and fees owed during the reconciliation period.

this notation in box 12 should be interpreted, and the parties should address this matter in future proceedings.

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.

Id. at 25. Accordingly, we cannot decide the scope of the parties' agreement or their "meeting of the minds" on summary judgment.

Breach of The Duty of Good Faith and Fair Dealing, Mistake, and Misrepresentation

FSA argues that, as a matter of law, it is entitled to reclaim monies that it overpaid by mistake and that, upon notification of the overpayment, Collecto breached the duty of good faith and fair dealing by failing to reasonably investigate the cause of the overpayment, to verify the amount of fees paid during the reconciliation period, and to repay FSA in the amount of the September 2011 invoice. "It is well-settled that the Federal Government is entitled to recover funds that 'its agents have wrongfully, erroneously, or illegally paid.'" *Transworld*, slip op. at 26 (quoting *United States v. Wurts*, 303 U.S. 414, 415 (1938)). FSA, however, "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.'" *Id.* (quoting *Maykat Enterprises, N.V.*, GSBCA 7346, 84-3 BCA ¶ 17,510). "[I]f 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." *Id.* (citing *Airmotive Engineering Corp.*, ASBCA 15235, 71-2 BCA ¶ 8988, and *Applied Cos. v. United States*, 37 Fed. Cl. 749, 757 (1997), *aff'd*, 144 F.3d 1470 (Fed. Cir. 1999)). We cannot find as a matter of law that FSA is entitled to recover the overpayment amount; and therefore, we cannot find that Collecto breached the covenant of good faith and fair dealing by not verifying the amount of fees earned and then reimbursing FSA.

FSA asserts that Collecto breached the covenant of good faith and fair dealing in negotiating or made an actionable misrepresentation of fact because Collecto knew or should have known of FSA's mistake requiring Collecto to tell FSA of its failure to include the September 2011 invoice in its "already paid" calculation. The record, however, is not developed sufficiently for us to decide these issues on summary judgment. "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." *Transworld*, slip op. at 27 (quoting *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))). We do not know Collecto's level of knowledge about FSA's mistake when it executed mod 56. Without 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 whether the appropriate remedy would be to reform mod 56 to fix FSA's error or to render mod 56 voidable in its entirety without more information about Collecto's actual knowledge or "reason to know" of FSA's error. *Id.* at 29-30. We deny FSA's summary judgment request on these issues.⁷

FSA's Implied-in-Fact Contract Argument

FSA asks us to find on summary judgment that it had an implied-in-fact contract with Collecto that obligated Collecto, when negotiating mod 56, to notify FSA of any errors in FSA's calculation of the amounts that FSA had previously paid to Collecto for the September 2011 to August 2013 time period. We deny FSA's request.

"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.'" *Transworld*, slip op. at 31 (quoting *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

⁷ To the extent that FSA might have attempted to disclaim mod 56 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 mentioned mutual mistake for the first time, but, in response to a motion to strike the late-raised argument that Collecto filed, FSA stated that it was not 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).

(1922))). FSA asserts that Collecto “had actual or constructive knowledge” that FSA’s calculation of the amounts previously paid to Collecto set forth in Appendix 1 was “not an accurate calculation of the payments received for PCA-created invoices during the reconciliation period.” Because Collecto “was explicitly requested to notify the Agency of any errors in the reconciliation calculations and [Collecto] failed to do so, [Collecto] breached the parties’ implied-in-fact contract, which should bar enforcement of any possible agreement on dollar amounts” in mod 56. *See id.* at 32.

There was no implied-in-fact contract here. There was no offer or acceptance that created a contract requiring Collecto to notify FSA of errors per its request. *Transworld*, slip op. at 32 (citing *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.” *Id.*

FSA had an express written contract with Collecto covering Collecto’s student loan debt collection services. “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.” *Transworld*, slip op. at 32 (quoting *Atlas Corp. v. United States*, 895 F.2d 745, 754-55 (Fed. Cir. 1990)). No separate implied-in-fact contract could exist since the negotiations for mod 56 were related to the underlying express student collections debt contract. “In arguing for an implied-in-fact contract separate and distinct from its express contract, FSA asserts that neither its task order nor mod 56 “cover assurances regarding overpayments.” *Id.* Collecto performed debt collection services and was paid for that work only because of its FSA task order. Therefore, “FSA cannot validly assert that its effort to reclaim an alleged overpayment under its task order is somehow unrelated to the task order.” *Id.*

Decision

FSA’s motion for summary judgment is **DENIED**. Collecto’s motion for summary judgment is **DENIED**, although, in further proceedings, Collecto need not establish proper subject matter, consideration, or competent parties in support of its accord and satisfaction argument.

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

We concur:

Catherine B. Hyatt
CATHERINE B. HYATT
Board Judge

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge