UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 3, 2017

CBCA 5524

SERVITODO LLC,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

William J. Acuff, Management Officer of ServiTodo LLC, Atlanta, GA, appearing for Appellant.

Scott C. Briles, Office of the General Counsel, Department of Health and Human Services, Atlanta, GA, counsel for Respondent.

Before Board Judges **GOODMAN**, **SHERIDAN**, and **CHADWICK**.

GOODMAN, Board Judge.

Appellant, ServiTodo LLC (appellant or ServiTodo), filed this appeal on October 24, 2016, from a final decision dated October 12, 2016, issued by a contracting officer of respondent, Department of Health and Human Services (HHS or respondent), denying appellant's claim for breach of four contracts (the four contracts) between appellant and respondent. Respondent has filed a motion to dismiss this appeal pursuant to CBCA Rule 8 (48 CFR 6101.8 (2015)), asserting that all claims and appeals related to the four contracts have been previously settled and released pursuant to a settlement agreement between the parties that resolved five prior appeals by appellant at this Board and released the claim which is the subject of the instant appeal. We treat the motion as one for summary relief, grant the motion, and deny the appeal.

Background

Appellant completed performance of each of the four contracts before it submitted the claim that underlies this appeal to the contracting officer.

Contract no. 200-2011-F-38848 had a performance period of April 8, 2011, through April 7, 2012, and a total value of $249,428.96.

Contract no. 200-2012-M-51078 had a performance period from September 1, 2012, through August 31, 2013, and a total value $93,328.31.

Contract no. 200-2011-41281 had a base period of September 1, 2011, through August 31, 2012, with four option periods. The value of the base period was $562,841.60. Option period 4 was not exercised, and contract performance ended August 31, 2015.

Contract no. 200-2011-39879 (sometimes referred to herein as contract 39879) had a base period from July 15, 2011, through July 14, 2012, with four option periods. The total value of the base plus option periods was $1,523,238.32. Option periods 3 and 4 were removed by a bilateral modification. Contract performance ended July 14, 2014.

Before filing the instant appeal, appellant had filed seven appeals–CBCA 4777, 4820, 4910, 4911, 4933, 4979, and 5065–in June through November 2015. Appellant was represented in all proceedings before the Board by its management officer, William Acuff, who signed all filings and personally appeared before the Board in a hearing and alternative dispute resolution (ADR) proceedings.[1]

CBCA 4777 was an appeal from the denial of a claim in the amount of $57,264, arising from contract no. 200-2012-M-51078, which was granted in part in the amount of $15,290. *ServiTodo LLC v. Department of Health and Human Services*, CBCA 4777, 15-1 BCA ¶ 36,161. CBCA 4910 was an appeal from the denial of a claim arising from

[1] Mr. Acuff filed an eighty-eight page declaration (Declaration of William Acuff (December 20, 2016) in support of his opposition to respondent's motion to dismiss, in which he recites in detail his preparation of the claims and participation in the proceedings in the seven prior appeals. The Declaration of William Acuff also discusses the preparation and submission of a claim dated October 7, 2016 (the claim or instant claim) which is the subject of the instant appeal. A substantial portion of that claim is duplicated in that declaration, and appellant has also designated the claim as its complaint in this appeal.

contract no. 200-2011-39879. Respondent paid the claim in substantial part, and the appeal was withdrawn by appellant and then dismissed with prejudice by the Board on December 22, 2015.

The parties agreed to attempt to resolve the remaining five appeals (the five appeals) by ADR. CBCA 4820 and 4979 were related to claims arising from contract no. 200-2011-41281. CBCA 4011, 4933, and 5065 were related to claims arising from contract no. 200-2011-39879.[2]

Pursuant to the Board's ADR procedures, a board judge was appointed as ADR neutral to aid the parties in reaching a settlement. An ADR proceeding was initiated and concluded on November 17, 2015, without the appeals being resolved. Thereafter, a second ADR proceeding was initiated with another Board judge serving as ADR neutral, and was held on March 1-2, 2016. At the conclusion of the second ADR proceeding, the parties executed a settlement agreement dated March 3, 2016,[3] which read as follows:

UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS
MEDIATION

SERVITODO LLC	CBCA NO. 4820 & 4979
APPELLANT	CONTRACT NO. 200-2011-41281
v.	CBCA 4911, 4939[4] & 5056[5] CONTRACT NO. 200-2011-39879

[2] Before the instant claim was filed, appellant had not filed an appeal from the denial of a claim arising from contract 200-2011-F-38848. Acuff Declaration ¶ 48.13.

[3] The settlement agreement became a public record when it was subsequently filed with the Board as an attachment to the motion to dismiss the five appeals.

[4] This was a typographical error as the parties intended CBCA 4933 rather than 4939, as indicated in the Board's subsequent order dated April 8, 2016, described herein.

[5] This was a typographical error as the parties intended CBCA 5065 rather than 5056, as indicated in the Board's subsequent order dated April 8, 2016, described herein.

DEPARTMENT OF HEALTH & HUMAN SERVICES, CENTER FOR DISEASE CONTROL AND PREVENTION, RESPONDENT AGENCY.	CONTRACT NO. 200-2012-M-51078 CONTRACT NO. 200-2011-F-38848

MEMORANDUM OF SETTLEMENT AGREEMENT

PARTIES

1. The Parties to this Settlement Agreement are the Department of Health and Human Services (HHS), Centers for Disease Control and Prevention (CDC), Respondent Agency (collectively the "Agency") and ServiTodo LLC, Appellant.

2. The Parties have entered into this Settlement Agreement to reach a complete and final settlement of all present and pending requests for equitable adjustment, claims, and CBCA Appeals, including CBCA 4820, 4979, 4911, 4933 and 5065, and all future requests for equitable adjustments, claims, CBCA appeals, actions in the Court of Federal Claims, and in any other forum, related in any way to Contract Nos. 200-2011-41281, 200-2011-39879, 200-2012-M51078 and 200-2011-F-38848.

THE OBLIGATIONS OF SERVITODO LLC

3. ServiTodo LLC agrees that this Settlement Agreement is a complete and final settlement of all present and pending requests for equitable adjustment, claims, and CBCA Appeals, including CBCA 4820, 4979, 4911, 4939[6] and 5065, and all future requests for equitable adjustments, claims, CBCA appeals, actions in the Court of Federal Claims, and any other forum, related in any way to Contract Nos. 200-2011-41281, 200-2011-39879, 200-2012-M-51078 and 200-2011-F-38848.

4. ServoTodo LLC agrees that this Settlement Agreement operates as a complete Contractor Release of any and all claims against HHS, CDC, and its

[6] This was a typographical error as the parties intended CBCA 4933 rather than 4939, as indicated in the Board's subsequent order dated April 8, 2016, described herein.

> Agents, Officers, and Employees, pertaining in any way to Contract Nos. 200-2011-41281, 200-2011-39879, 200-2012-M-51078 and 200-2011-F-38848.
>
> AGENCY'S OBLIGATIONS
>
> 5. The Agency agrees to pay to ServiTodo LLC, upon execution of this Settlement Agreement, the sum of $1,150,000.00 within 10 to 14 days (barring unexpected, brief systems failure) of the receipt of a proper invoice submitted directly to Nancy Norton, Deputy Director OAS [Office of Acquisition Services], OFR [Office of Financial Resources].
>
> 6. The Agency agrees to change the "marginal" CPARS [Contractor Performance Assessment Reports System] ratings on Contract No. 200-2011-39879 to "satisfactory."
>
> 7. The Agency agrees to provide a rating in CPARS of "satisfactory"" on Contract Nos. 200-2011-41281, 200-2012-M-51078 and 200-2011-F-38848.
>
> MISCELANEOUS [sic]
>
> 8. The signatories below are authorized to enter into this Settlement Agreement of behalf of ServiTodo LLC, Appellant, and HHS, CDC, Respondent Agency, respectively.
>
> 9. The Parties have read and understand the terms of the Settlement Agreement and have entered into same freely and voluntarily.

The settlement agreement was executed on behalf of appellant by Mr. Acuff and on behalf of respondent by Nancy M. Norton, who attended the ADR proceedings.

On March 4, 2016, appellant sent respondent the invoice referenced in paragraph 5 of the settlement agreement. The invoice, like the settlement agreement, referenced the four contracts and the five appeals and read in relevant part: "Settlement of 200-2011-F-38848, 200-2011-39879, 200-2011-41281, 200-2012-M-51078 and CBCA 4820, 4979, 4911, 4933, 5065 per Memorandum of Settlement Agreement dated March 3, 2016."

As of the date of the settlement agreement, the performance periods for the four referenced contracts were concluded, with the last of the contracts, 200-2011-4128, having expired on August 31, 2015, after option period 4 was not exercised. There is no evidence

in the record that appellant, before executing the settlement agreement or before respondent fulfilled its obligations stated therein, objected to the terms of the settlement agreement or alleged that it was ambiguous.

Respondent fulfilled its obligations listed in the settlement agreement by issuing the "satisfactory" CPARS ratings and paying appellant the sum of $1,150,000, which appellant accepted without objection. Appellant acknowledged receipt of the settlement amount via email on March 24, 2016. There is no evidence that appellant found the CPARS ratings not to be in compliance with the settlement agreement or objected to the payment or receipt of the settlement funds. That same day, respondent filed a motion to dismiss the five appeals with prejudice, with a copy of the settlement agreement attached. Appellant did not object to the motion to dismiss. The Board dismissed the five appeals with prejudice on April 1, 2016. The Board issued an order dated April 8, 2016, to correct clerical errors in the dismissal order with respect to the docket numbers of two of the appeals.[7]

Claimant thereafter submitted the instant claim–a certified claim dated October 7, 2016–seeking damages for breach of the four contracts in the total amount of $10,691,408.94. The claim, totaling seventy-four pages with attachments, contained a fifty-nine page narrative, detailing the proceedings in the seven previous appeals, which stated in part:

> The Settlement Agreement developed during mediation on March 3rd [,2016] required the CDC to pay $1.15 million against ServiTodo's claims. The settlement agreement *contained a general release* . . . .
>
> [Respondent] . . . took advantage of Contractor's insolvency in promulgating an unconscionable Settlement Agreement, itself a breach of the duty of good faith and fair dealing.
>
> Finally, the CDC's behavior in its administration of these contracts caused Contractor's duress, such duress rendering Contractor unable to make an

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[7] The Board stated in that order:

> On April 5, 2016, respondent, DHHS, moved the Board to correct these errors by replacing "4939" with "4933" and "5056" with "5065." Appellant, Servitodo LLC, does not object to the motion.

informed decision regarding *the general release language* contained within the Settlement Agreement of March 3, 2016.

Due to the duress caused by the cumulative effects of nearly 5 years of CDC underpayments, late payments and uncompensated adductive [sic] change orders, Contractor was unable to afford professional accounting or legal help, and represented itself *pro se*[8] both in preparation of its various Ras [Requested Adjustments], claims and appeals before the CBCA. This preparation included attempting to calculate its internal indirect cost rates in order to determine its actual costs in performing the Contracts [footnote 57 - Contractor has had no previous exposure or training in CAS [Cost Accounting Standards] cost principles. As such, its calculated rates were provisional at best and would not survive audit.]

After receiving funds as directed by the Settlement Agreement in April 2016, Contractor began paying its costs in arrearage, including its employees' payroll arrearage and payroll tax arrearage.

Contractor further engaged an accounting firm with experience in CAS accounting to help it determine its actual indirect cost rates and thus, its actual costs in performing the Contracts. The instant claim is based on these rates which are provisional and pending a complete audit.

Since ServiTodo entered into the Settlement Agreement, it has been able to more accurately calculate its unabsorbed costs [footnote 58—The amounts presented in the instant claim while more accurate, are still provisional and subject to audit which is in process], this corrected cost calculation renders the settlement amount unconscionable; and as these rates were not part of the discussion or negotiated as part of the mediation, *the general release provisions are null and void and ServiTodo should be allowed to proceed de novo with its REAs, claims, and appeals.*

There is an order of magnitude difference between Contractor's actual unabsorbed costs and the Contractor's original *pro se* cost calculations.

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[8] Referring to the fact that appellant was represented by Mr. Acuff, its managing officer.

> The settlement offer put forth by the government, in the amount of $1,150,000 against Contractor's total unsecured costs of $11,841,408 [footnote 59—Provisional amount pending audit] is shocking in its unconscionability.
>
> Given the Government's demonstrated bad faith and overreaching in the conduct of its contractual relationship with plaintiff, and in light of the fact that Contractor's actual costs for performing the contracts were in excess of $11.7 million versus the Government's settlement offer of $1.15 million, the release language should additionally be vacated based on violation of the application of the doctrine of unconscionability.
>
> The settlement agreement is no bar to recovery of damages for the Government's breaches, as mediation, and therefore the discussion leading up to the Settlement Agreement, was limited to the named CBCA dockets [footnote 60—CBCA 4820, CBCA 4910[9], CBCA 4911, CBCA 4933, and CBCA 4979] which were themselves tied to specific claims. Further, Contractor's indirect cost and profit rates were not the subject of discussion, *thus not covered by the release language.*
>
> *The general release language contained in the Settlement Agreement should be struck and vacated so Contractor can proceed de novo with . . . its contemplated REAs, claims and appeals* (using its now more accurate cost figures).

Respondent's Motion to Dismiss, Exhibit 5, ¶¶ 25, 29.8-33 (emphasis added).

Appellant arrives at the quantum of $10,691,408.94 for the claim by deducting the settlement amount of $1,150,000 from the total cost calculations. The claim states that the "contractor can demonstrate termination costs of $2,309,001.77 for the removal of Option Years 3 and 4 which are also unpaid, for a total of $3,233,228.97 in unabsorbed costs still owed contractor for Contract No. 39879." Claim at 8; Complaint at 8.

Exhibit 5 of the claim is a spreadsheet which indicates the following: The total owed the contractor on contract 39879 is $3,233,228.97. The sum of the amounts allegedly owed

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[9] CBCA 4910 was not the subject of the mediation. As stated previously, respondent paid the claim in substantial part and the appeal was withdrawn by appellant and dismissed with prejudice by the Board on December 22, 2015. Appellant did not include CBCA 5065 in this list of appeals referenced in the settlement agreement.

the contractor for all four contracts is $11,841,408.93, but this sum does not appear in the spreadsheet. It can be derived by adding the amounts in the "total owed Contractor" column for each of the four contracts. The spreadsheet indicates a total claim amount of $10,691,408.94, which is $11,841,408.93 reduced by the settlement amount previously received of $1,150,000.

On page 59 of the claim, the amount in dispute for contract 39879 is not indicated as $3,233,228.97 (as it was on the spreadsheet in Exhibit 5), but is reduced by the settlement amount of $1,150,000 and stated as $2,083,228.97, with an explanatory statement that "Contractor, based on information and belief, understands the entire 3/3/2016 settlement amount was charged to this contract."

The contracting officer issued a final decision dated October 12, 2016, denying the claim, stating in relevant part:

> ServiTodo claims costs for a Government breach of the subject contracts. ServiTodo previously filed several claims and appeals to the Civilian Board of Contract Appeals (CBCA). These appeals were the subject of Alternative Dispute Resolution under the auspices of [a] CBCA Judge . . . in which a complete and final settlement was reached on March 3, 2016 for all present and pending requests for equitable adjustment, claims, and CBCA Appeals, including CBCA 4820, 4979, 4911, 4933 and 5063,[10] and all future requests for equitable adjustments, claims, CBCA appeals, actions in the Court of Federal Claims, and in any other forum, related in any way to Contract Nos. 200-2011-41281, 200-2011-39879, 200-2012-M-51074 and 200-2011-F-38848. Further, the Settlement Agreement operates as a complete Contract Release of any and all claims against HHS, CDC, and its Agents, Officer [sic], and Employees pertaining in any way to Contract Nos. 200-2011-41281, 200-2011-39879, 200-2012-M51078, and 200-2011-F-38848. In the Settlement Agreement, the parties assert that they have read and understand the terms of the Settlement Agreement and have entered into the same freely and voluntarily. On April 1, 2016 the referenced CBCA appeals were dismissed with prejudice. . . .
>
> The CBCA Appeals have been dismissed with prejudice, and the parties agreed to a final Settlement Agreement for all present and pending requests for

[10] An apparent erroneous reference to CBCA 5065, as noted in appellant's subsequent notice of appeal.

> equitable adjustment, claims, and CBCA Appeals, including CBCA 4820, 4979, 4911, 4933 and 5063,[11] and all future requests for equitable adjustments, claims, CBCA appeals, actions in the Court of Federal Claims, and in any other forum, related in any way to the subject contracts. The Agency fulfilled its obligations under the Settlement Agreement and there is no allegation that it failed to do so. Accordingly, this claim is denied in full.

Appellant filed a notice of appeal in the instant appeal on October 24, 2016. Appellant listed the following with regard to the contracts and the amounts in dispute, totaling $10,691,408.94:

Contract No.	Contract Date(s)	Amount in Dispute
200-2011-F-38848	4/8/2011-4/7/2012	$323,332.38
200-2011-39879	7/15/2011-7/14/2016[12]	$2,083,228.97[13]
200-2011-41281	9/1/2011-8/31/2016[14]	$8,206,539.65
200-2012-M-51078	9/1/2012-8/31/2013	$78,307.93

Appellant's notice of appeal stated further:

> The instant claim was not subject to any alternative dispute resolution or addressed by the settlement agreement entered into by Appellant and Respondent, said agreement being the product of a mediation session conducted by [a] CBCA neutral . . . on March 3, 2016, under the terms of an Alternative Dispute Resolution Agreement dated October 13, 2015 that

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[11] An apparent erroneous reference to CBCA 5065, as noted in appellant's subsequent notice of appeal.

[12] Appellant has included all option periods in the contract period. Because option periods 3 and 4 were removed by a bilateral modification, the contract performance period ended July 14, 2014.

[13] As mentioned previously, appellant's claim arrives at this amount by deducting the settlement amount of $1,150,000 from the amount it believes is due under this contract.

[14] Appellant has included all option periods in the contract period. Because option period 4 was not exercised, the contract performance period ended August 31, 2015.

> enumerated CBCA dockets 4820, 4910,[15] 4911, 4933, and 4979 (dockets incorrectly identified in the attached Contracting Officer's Final Decision.[16])
>
> Appellant asserts that this settlement agreement is no bar to recovery as the negotiations did not include resolution of Appellant's current claims, that the terms of the settlement agreement were unconscionable and that it was entered into under duress by Appellant.

On November 21, 2016, respondent filed a motion to dismiss the appeal, on the basis that appellant's claim which is the subject of the appeal was encompassed by the settlement agreement which served as a release of future claims under the four contracts, and therefore the instant claim was released.

In response to the motion to dismiss, appellant states with regard to the alleged duress and Mr. Acuff's ability to assess the language of the settlement agreement as follows:

> Although we conducted our performance of these contracts in good faith at all times, our costs for performing these contracts far exceeded the payments from the CDC. This shortfall was caused by changes made by the CDC to the contracts without adjustment, and was paid in part by my personal savings and the liquidation of my personal effects.
>
> We are currently in arrears for payroll expenses incurred in the performance of these contracts, primarily employee compensation and payroll taxes owed to Federal and State authorities, fees for professional service providers, and subcontractor costs.
>
> This arrearage was caused by the CDC's interference with and failure to cooperate in our performance of these contracts, specifically by their systemic and deliberate pattern of behavior of starving us from the fruits of the contracts by withholding payments and making changes to the contracts that increased our costs, then excluding us from the remedies normally available to other contractors to secure the costs.

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[15] Appellant erroneously lists CBCA 4910 as enumerated in the settlement memorandum. As noted previously, the appeal docketed as CBCA 4910 was withdrawn by appellant and dismissed with prejudice by the Board on December 22, 2015.

[16] An apparent reference to the listing of CBCA 5063 instead of CBCA 5065 in the contracting officer's decision.

> *The resulting duress impaired our ability to calculate our actual costs incurred prior to, as well as our ability to make an informed decision during the ADR session of March 3, 2016.*
>
> We performed these contracts continuously, without a break in service, during the period of performance, with the exception of the "Government shutdown of 2013," when we were subject to a stop-work order that remains unsecured by adjustment.
>
> *I [Mr. Acuff] became aware, after being notified by the CDC, that we were required to pay McNamara-O'Hara Service Contract Act (SCA) wages and benefits from August 2011, and did so for its entire period of performance of the contracts, which materially increased our costs beyond our offer and was the primary cause of the duress* [17] *that forced us to accept the Settlement Agreement of March 3rd , 2016*. The SCA requirement was not included in any of the bid or award documents.

Acuff Declaration ¶¶ 5-8 (emphasis added).

Mr. Acuff states further with regard to the release language in the settlement agreement and his actions after the settlement agreement was executed:

> The CDC's delays and defaults on these contracts consisted of withholding payment, adding additional work without compensation deducting work that secured our indirect costs, and otherwise breaching the terms of our contracts, *these defaults caused us such duress that I was unable to make an informed decision regarding the general release language contained within the Settlement Agreement of March 3, 2016. . . .*
>
> After receiving funds as directed by the Settlement Agreement in April 2016, I proceeded to begin paying our costs in arrears including my employees' payroll arrears and payroll tax arrears.

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[17] Appellant refers to circumstances which it characterizes as financial duress resulting from contract performance, including the inability to obtain legal counsel (Acuff Declaration ¶ 24), being forced to file Contract Disputes Act (CDA) claims in October 2015 (*id.* ¶ 26), and the impact of the non-exercise of option year four in contract 200-2011-41281 (*id.* ¶ 50.33.1).

> I soon discovered that we had not collected nearly enough to satisfy our arrears.
>
> I was also able to engage an accounting firm with experience in CAS accounting to help us determine our actual indirect cost rates and thus, our actual costs in performing the Contracts.
>
> I filed a claim for the remaining costs based on this compilation, which is still provisional and pending a final audit, on October 7, 2016.

Acuff Declaration ¶¶ 41, 43-46 (emphasis added).

In support of its motion to dismiss, respondent filed a declaration by Ms. Nancy M. Norton, who participated as the principal for respondent in both ADR proceedings and executed the settlement agreement. She states:

> On March 3, 2016, the parties reached and executed [a] global settlement of all pending and future claims and appeals on all four of the contracts CDC entered into with the ServiTodo LLC.
>
> Specifically, the purpose of the mediation and settlement agreement was to reach "complete and final settlement of all present and pending requests for equitable adjustments, claims, and CBCA Appeals 4820, 4979, 4911, 4933 and 5065, and all future requests for equitable adjustments, claims, CBCA appeals, and actions in the Court of Federal Claims, and in any other forum, related in any way to Contract Nos. 200-2011-41281, 200-2011-39879, 200-2012-M-51078 and 200-2011-F-38848." The Settlement Agreement further provided that it operated "as a complete Contractor Release of any and all claims against HHS, CDC, and its Agents, Officers, and Employees, pertaining in any way to Contract Nos. 200-2011-41281, 200-2011-39879, 200-2012-M-5- l078 and 200-2011-F-38848.". . .
>
> In consideration of ServiTodo LLC executing the Settlement Agreement, the Agency agreed to pay ServiTodo LLC the sum of $1,150,000.00 and issue "satisfactory" ratings in CPARS for its four contracts with the CDC. The Agency fulfilled its obligations under the Settlement Agreement in good faith by March l7, 2016 . . . .
>
> Entering into a settlement agreement with ServiTodo LLC that did not fully resolve any and all present and potential disputes related in any way to its four

> contracts with the CDC would serve no purpose. As CDC Settlement Authority, I would not sign an agreement that was not a complete and final settlement of any and all present and potential claims and appeals related to ServiTodo LLC's four contracts with the CDC.

Respondent's Motion to Dismiss, Exhibit 25.

Discussion

Respondent has filed a motion to dismiss this appeal, maintaining that the instant claim was released by the settlement agreement between appellant and respondent entered into after the second ADR proceeding at this Board. We read respondent's motion as one to dismiss for failure to state a claim upon which relief can be granted. In general, a case can only be dismissed for this reason based solely upon the pleadings. To the extent that materials outside the pleadings are considered, the matter should be treated as a motion for summary relief. *Walker Equipment v. International Boundary and Water Commission*, GSBCA, 11527-IBWC, 93-3 BCA ¶ 25,954 at 129,074. As the parties refer extensively to materials outside the pleadings in their respective filings, we treat this motion as a motion for summary relief. *Payne Enterprises v. Department of Agriculture*, CBCA 2899, 13 BCA ¶ 35,261; *A to Z Wholesale v. Department of Homeland Security*, CBCA 2110, 11-1 BCA ¶ 34,674; *Tomas Olivas Ibarra v. Department of Homeland Security*, CBCA 1986, 10-2 BCA ¶ 34,573; *Metlakatla Indian Community v. Department of Health & Human Services*, CBCA 282-ISDA, 09-2 BCA ¶ 34,279.

Summary relief is appropriate only where 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 relief as a matter of law. Any doubt on whether summary relief is appropriate is to be resolved against the moving party. The moving party shoulders the burden of proving that no genuine issue of material fact exists. *Patrick C. Sullivan v. General Services Administration*, CBCA 936, 08-1 BCA ¶ 33,820. Contract interpretation is a question of law generally amenable to summary judgment. *Varilease Technology Group v. United States*, 289 F. 3d 795, 798 (Fed. Cir. 2002).

Appellant offers various arguments as to why it should be allowed to proceed with this appeal. Appellant maintains that the settlement agreement is ambiguous as to whether the claim was encompassed by the release language contained therein. Appellant also asserts that it entered into the settlement agreement under duress and was therefore unable to make an informed decision regarding the general release language contained within the settlement agreement. Appellant posits that the amount of the claim, $10,691,408.94, in comparison to the settlement amount, $1,150,000, renders the settlement agreement unconscionable.

Finally, appellant alleges that the release language should be found "null and void," and that appellant should be allowed to proceed with this appeal and retain the benefits of the settlement agreement. As discussed herein, we find that no issues of material fact remain in dispute, and respondent is entitled to judgment as a matter of law.

The Settlement Agreement Is Not Ambiguous And Releases the Claim

Appellant acknowledges in its claim that the settlement agreement contained a "general release." The settlement agreement lists the four contracts in the caption and the text (even though the appeals arose from claims under two of the four contracts), and states twice, in paragraphs 2 and 3, that it is a:

> *complete and final settlement of all present and pending requests for equitable adjustments claims, and CBCA appeals including* [the five appeals], and *all future* requests for equitable adjustments, claims, CBCA appeals, actions in the Court of Federal Claims, and in any other forum, related in any way to *Contract Nos. 200-2011-41281, 200-2011-39879, 200-2012-M51078 and 200-2011-F-38848.*

(Emphasis added.) This is reiterated in paragraph 4, which states:

> ServoTodo LLC agrees that this Settlement Agreement operates as a *complete Contractor Release of any and all claims* against HHS, CDC, and its Agents, Officers, and Employees, *pertaining in any way to Contract Nos. 200-2011-41281, 200-2011-39879, 200-2012-M-51078 and 200-2011-F-38848.*

(Emphasis added.)

Appellant did not assert that the settlement agreement was ambiguous before Mr. Acuff executed it or before it submitted the invoice to respondent on March 4, 2016, which clearly references settlement of the four contracts in addition to the five appeals. Appellant did not assert that the settlement agreement was ambiguous before it accepted the satisfactory CPARS ratings and accepted and spent the $1,150,000 settlement amount. Appellant also did not assert ambiguity or object when, three weeks after the parties executed the settlement agreement, respondent filed its motion to dismiss the five appeals with prejudice–which included the settlement agreement as an attachment. The Board granted the motion and dismissed the five appeals with prejudice.

Appellant's claim which is the subject of this appeal was filed with the contracting officer on October 7, 2016, seven months after the settlement agreement was executed. In that claim appellant did not assert that the settlement agreement was ambiguous. Rather, in various provisions of that claim appellant acknowledges the general release language in the settlement agreement but alleges that the release language is "null and void." Appellant therefore requests that the contracting officer vacate the general release, so the claim can be considered de novo.

Appellant first asserted that the settlement agreement was ambiguous when it responded to the motion to dismiss, ten months after Mr. Acuff had an opportunity to clarify any alleged ambiguity before the settlement agreement was executed. Appellant's lengthy argument as to the alleged ambiguity is prefaced by the allegation that "[t]he release language in the Settlement Agreement is unclear and ambiguous on its face." Appellant's Opposition to Respondent's Motion to Dismiss at 3. If this were true, an obvious, patent ambiguity would have raised an obligation of the party alleging an ambiguity to clarify the ambiguity before executing the settlement agreement and accepting its benefits. *See, eg.*, *P.J. Dick, Inc. v. Department of Veterans Affairs*, CBCA 3927 et al., 16-1 BCA ¶ 36,239.

The settlement agreement is not ambiguous, and the release language contained therein clearly acts as a release of the claim that is the subject of the instant appeal, as the claim arises from the four contracts that are listed in the caption of the settlement agreement and within the text, even though the claims that were the subject of the docketed appeals in the ADR proceedings arose pursuant to two of the four contracts. The invoice submitted by appellant to respondent the day after the settlement was executed reiterates the scope of the settlement as covering the four contracts as well as the five appeals.

Appellant asserts that a question of material fact exists as to the intentions of the parties, as appellant contends that "mediation was limited to lump-sum settlement figures for Contractor's claims for its existing appeals of claims against the 4 contracts," Complaint ¶ 23, and that "[c]ontractor's indirect cost rates were not mediated and were not included in the settlement agreement developed." *Id*. ¶ 24. Regardless of what was discussed at the ADR proceeding,[18] the language of the settlement agreement does not include a reservation of any claims, but contains a general release encompassing all claims arising from the contracts

[18] There is no record of the ADR session. Board Rule 54 states in relevant part: "Written material prepared specifically for use in an ADR proceeding, oral presentations made at an ADR proceeding, and all discussions in connection with such proceedings are considered 'dispute resolution communications' as defined in 5 U.S.C. 571(5) and are subject to the confidentiality requirements of 5 U.S.C. 574."

listed in the settlement agreement. Similar language has been found to release all claims arising under a specified contract, not limited to the claims pending before a board of contract appeals. *See Toole Construction Co.*, HUD BCA 79-439-C49, 81-2 BCA ¶ 15,318, *motion for reconsideration denied*, 81-2 BCA ¶ 15,403.

In a similar situation in which we upheld the clear language of a settlement agreement, we stated that "[i]n a settlement 'each party gives up something in order to terminate the dispute without further litigation.'" *Primetech v. Department of Homeland Security*, CBCA 2453, et al., 12-2 BCA ¶ 35,130 at 172,477-78 (quoting *Asberry v. United States Postal Service*, 692 F.2d 1378, 1381-82 (Fed. Cir. 1982)). In the instant case, both appellant and respondent gave up something to terminate the dispute. According to the clear and unambiguous language of the settlement agreement, respondent paid $1,150,000 to appellant and issued "satisfactory" CPAR ratings, and appellant gave up its right to proceed in the appeals pending at the CBCA and further claims on the four contracts. Appellant's contention that it believed the settlement was limited to matters discussed during the ADR proceedings, or was not applicable to claims that were not calculated at the time, is contrary to the clear and unambiguous language of the settlement agreement. We have held that a party's belief as to the scope of discussions during an ADR session cannot alter the plain meaning of the terms of a settlement agreement. *Primetech,* 12-2 BCA at 172,477.

We find that the clear and unambiguous release language in the settlement agreement encompasses the claim that is the subject of this appeal, and therefore releases the claim.

Appellant Did Not Plead Facts Supporting a Claim for Duress

A settlement agreement is binding on the parties and "bars further recovery on the issues raised or referred to in it directly or by reference, absent mutual mistake or duress." *Primetech*, 12-2 BCA at 172,477 (quoting *Toole Construction Co.*, 81-2 BCA at 75,866 (citing *Beard v. United States*, 67 F. Supp. 963, 965 (Ct. Cl. 1946))).

As this Board held in *Lynchval Systems Worldwide, Inc. v. Pension Benefit Guaranty Corp.*, CBCA 3466, 14-1 BCA ¶ 35,792, in order to prove economic duress, a party must establish that it involuntarily accepted the terms of an agreement, that circumstances permitted no alternative, and that such circumstances were the result of the other party's coercive acts. The Board stated:

> "Economic duress may not be implied merely from the making of a hard bargain." *Johnson, Drake & Piper* [*v. United States*], 531 F.2d [1037] at 1042 [Ct. Cl. 1976] (quoting *Aircraft Associates & Manufacturing Co. v. United States*, 357 F.2d 373, 378 (Ct. Cl. 1966)). "In order to substantiate the

> allegation of economic duress or business compulsion, the plaintiff must go beyond the mere showing of a reluctance to accept and of financial embarrassment. . . " *Fruehauf Southwest Garment Co . v. United States*, 11 F. Supp. 945, 951 (Ct. Cl. 1953).

14-1 BCA at 175,067.

There is no evidence to support economic duress. Appellant voluntarily accepted the terms of the settlement agreement and willingly received its benefits, including a substantial monetary settlement amount. Appellant had the alternative to reject respondent's offer and continue to proceed at the Board and receive a decision on the merits. There is no evidence that appellant was coerced into accepting the settlement agreement.

Appellant states in its complaint that the "need to pay wages which materially increased our costs beyond our offer . . . was the primary cause of the duress." Appellant asserts duress resulting from contract performance—the difficulties of administering the contracts, additions and deduction of contract work, unexpected cost increases, lost revenue from when contract options are not exercised, and litigation of claims without the assistance of counsel. These circumstances describe financial hardship, not economic duress. Indeed, "[i]f [financial hardship] alone were sufficient to establish economic duress, no settlement involving it would ever be free from attack." *Asberry*, 692 F.2d at 1381.

Mr. Acuff states in the claim that the impact of the circumstances appellant encountered "impaired our ability to calculate our actual costs incurred prior to, as well as our ability to make an informed decision during the ADR session of March 3, 2016," and that he was "unable to make an informed decision regarding the general release language [in the settlement agreement]." These allegations also do not describe economic duress. Furthermore, as they were first asserted months after the settlement agreement was executed and the benefits were received, they cannot relieve appellant from the clear and unambiguous terms of the settlement agreement. "The intention of a party entering into a contract is determined by an objective reading of the language of the contract, not by that party's statements in subsequent litigation." *Varilease*, 289 F.3d at 799.

The Settlement Agreement Is Not Unconscionable

After appellant executed the settlement agreement and received the settlement amount, it hired an accounting firm that performed what appellant calls a "corrected cost calculation" which resulted in the claim which is the subject of the instant appeal. Appellant states that the claim amount in comparison to the settlement amount "renders the settlement amount unconscionable," as "[t]here is an order of magnitude difference between Contractor's actual

unabsorbed costs and the Contractor's original *pro se* cost calculations. The settlement offer put forth by the government, in the amount of $1,150,000 against Contractor's total unsecured costs of $11,841,408[19] . . . is shocking in its unconscionability."

An unconscionable contract provision is one "which no man in his senses, not under a delusion, would make, on the one hand, and which no fair and honest man would accept on the other." *Glopak Corp. v. United States*, 851 F.2d 334, 337 (Fed. Cir. 1988); *TPL, Inc. v. United States*, 118 Fed. Cl. 434, 444 (2014); *Peters v. United States*, 694 F.2d 687, 694 (Fed. Cir. 1982). The doctrine of unconscionability "has been applied in situations where one party signed an unreasonable contract with little or no knowledge of its terms, from which it could be inferred there was no consent." *House of Denim, Ltd. v. Department of Homeland Security*, GSBCA 16182-DHS, 04-1 BCA ¶ 32,477, at 160,631 (2003) (quoting *Louisiana-Pacific Corp. v. United States*, 656 F.2d 650, 655 (Ct. Cl. 1981)). Applying these principles, the settlement agreement was not unconscionable. The settlement agreement conferred the benefit on appellant of satisfactory CPAR ratings for all four contracts and a settlement amount that was not insignificant compared to the values of the four contract. There is no evidence that appellant signed the settlement agreement without knowledge of its terms, or without consent.

Additionally, unconscionability is determined at the time the parties enter into the agreement at issue. An unconscionability argument based on hindsight is therefore meritless on its face. *Glopak*, 851 F.2d at 338; *TPL, Inc.*, 118 Fed. Cl. at 445. Appellant bases its allegation of unconscionability on a hindsight comparison of the settlement amount to a "corrected cost calculation" performed after the settlement agreement was executed and after the settlement amount was received and spent. Appellant cannot support its assertion of unconscionability with information neither appellant nor respondent possessed when the terms of the settlement agreement were agreed upon. While appellant is correct that the claim amount is large, compared to the settlement amount, this fact is not material, and it does not suggest that the settlement agreement was unconscionable.

We find that the settlement agreement was not unconscionable.

The Release Language in the Settlement Agreement is Valid

We find no factual or legal basis for appellant's allegation that the release language in the settlement agreement is "null and void." The doctrine of concurrent interpretation, or

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[19] $11,841,408 equals $10,691,408.94 +$1,150,000—the sum of the instant claim plus the settlement amount in the settlement agreement.

contemporaneous construction, holds that great, if not controlling, weight should be given to the parties' actions before a dispute arises in order to interpret a contract. *Saul Subsidiary II Ltd. Partnership v. General Services Administration*, GSBCA 13544, et al., 98-2 BCA ¶ 29,871 at 147,861. The settlement agreement conditioned appellant's acceptance of the benefits of that agreement upon the release stated therein. Appellant executed the settlement agreement without objection to the release language and accepted the benefits, including the settlement amount of $1,150,000. Appellant did not allege that the release language was null and void until months after it voluntarily accepted the benefits of the settlement agreement and spent the settlement amount.[20] A party cannot accept and retain such substantial monetary and other benefits of an agreement and at the same time maintain that the agreement has no force and effect. Having accepted the benefits of the settlement agreement, appellant is equitably estopped from challenging it. *Asberry*, 692 F.2d at 1382. We find that the release language in the settlement agreement is valid.

Conclusion

The clear and unambiguous release language in the settlement agreement encompasses the claim that is the subject of this appeal, and therefore releases the claim. The circumstances alleged by appellant do not prove economic duress or that the settlement agreement was unconscionable, and the release language in the settlement agreement is valid. As appellant accepted the benefits of the settlement agreement, including the settlement amount of $1,150,000, appellant is therefore equitably estopped from challenging it. We find that no issues of material fact remain in dispute, and respondent is entitled to judgment as a matter of law. The contracting officer properly denied the claim.

[20] By deducting the settlement amount from the total amount allegedly recalculated as owing under the instant claim, appellant treats the settlement amount as a partial payment of the instant claim and ignores the consequences that result from the release language of the settlement agreement when the benefits of the settlement agreement are received.

Decision

The motion to dismiss, which we have treated as a motion for summary relief is granted, and this appeal is **DENIED**.

ALLAN H. GOODMAN
Board Judge

We concur:

PATRICIA J. SHERIDAN
Board Judge

KYLE E. CHADWICK
Board Judge