UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

APPELLANT'S MOTION FOR SUMMARY RELIEF GRANTED;
RESPONDENT'S MOTION FOR SUMMARY RELIEF DENIED: April 24, 2017

CBCA 4994

SBBI, INC.,

Appellant,

v.

INTERNATIONAL BOUNDARY AND WATER COMMISSION,

Respondent.

John T. Flynn and Joseph J. Minock of Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, Atlanta, GA, counsel for Appellant.

Joseph A. Pixley, Civil Division, Commercial Litigation Branch, Department of Justice, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **SULLIVAN**, and **RUSSELL**.

RUSSELL, Board Judge.

Both parties have moved for summary relief in this appeal brought pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012). Appellant, SBBI, Inc. (SBBI or contractor), moves for summary relief on respondent's counterclaim for liquidated damages, arguing that the counterclaim was dismissed with prejudice in a prior suit (CBCA 3735) involving the two parties, and thus, cannot be raised again in this appeal. Similarly, the International Boundary and Water Commission (IBWC or agency) moves for summary relief, asserting that SBBI's modified total cost claim in this appeal was previously dismissed with

prejudice after the parties settled the claim in prior suits, CBCA 3213 and CBCA 3559, and cannot be raised again. For the reasons stated below, the Board grants SBBI's motion and denies the IBWC's motion.

Background

This appeal relates to contract no. IBM10C007 that the IBWC awarded to SBBI in December 2009 for rehabilitation of a levee located along the Rio Grande in Hidalgo County, Texas. *See* Appellant's Statement of Uncontested Facts ¶ 1; Respondent's Statement of Uncontested Facts ¶ 1. SBBI achieved substantial completion of the rehabilitation work on October 31, 2012, and demobilized from the worksite in January 2013. Appellant's Statement of Uncontested Facts ¶ 4. Thereafter, SBBI filed a series of claims with the IBWC, the most recent of which is the subject of this appeal. Pertinent facts of the current and predecessor appeals relevant to the Board's decision are summarized below.

I. The Parties' Prior Disputes

A. CBCA 3559[1]

In October 2013, SBBI filed an appeal from a "deemed denial" following the agency's failure to render a timely decision on SBBI's written claim challenging the IBWC's denial of its request for an equitable adjustment (REA).[2] SBBI asserted that it was entitled to an adjustment based on its provision of materials in excess of what was required under the contract. Appellant's Motion for Summary Relief, Exhibit 3, at 3. The parties refer to the dispute, which was docketed as CBCA 3559, as one concerning "overplanned quantities." *Id*., Exhibit 10.

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[1] As discussed below, CBCA 3559 was resolved with CBCA 3213, an appeal filed by SBBI against the IBWC in March 2013.

[2] Under the CDA, for claims over $100,000, a contracting officer must, within sixty days of receipt of a certified claim, issue a decision on that claim or notify the contractor of the time within which the decision will be issued. 41 U.S.C. § 7103(f)(3). If the contracting officer does not timely take one of these actions, the claim is deemed denied and the contractor may file an appeal. *Id*. § 7103(f)(5).

In its second amended complaint filed with the Board in CBCA 3559, SBBI described its appeal as follows:

> This appeal relates to four (4) CLINs [contract line item numbers] contained in the Contract, including CLINs 007, 011, 012, and 013. These CLINs contain specific quantities of material associated with Appellant's work and Appellant submitted its bid based on the quantities in the IFB [invitation for bids], which quantities became a part of the Contract upon its execution. Throughout the course of performance, and, even after performance was complete, these quantities were changed by the IBWC.

Respondent's Response to Appellant's Motion for Summary Relief, Exhibit D, ¶ 4. CLIN 007 provided for the removal and stockpile of topsoil, CLIN 011 provided for bench excavation, CLIN 012 provided for the emplacement of levee embankment material, and CLIN 013 provided for the installation of previously stockpiled topsoil. *Id*. ¶¶ 5-8.

B. CBCA 3735

On February 6, 2014, the IBWC's contracting officer issued a written decision denying SBBI's claim for an REA based on overplanned quantities (the same claim as that at issue in CBCA 3559), and in the decision asserted a claim for liquidated damages based on the IBWC's assessment of the number of days of contractor delay. Appellant's Motion for Summary Relief, Exhibit 3. SBBI's appeal of that decision was docketed as CBCA 3735.

In its amended complaint filed in CBCA 3735, SBBI presented claims similar to those presented in CBCA 3559. Specifically, SBBI alleged that it was entitled to an REA based on its provision of overplanned quantities under four CLINs. Amended Complaint (CBCA 3735) ¶¶ 4, 5.[3] SBBI also challenged the IBWC's claim for liquidated damages. *Id*. ¶ 16.

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[3] Although not included as an exhibit to either party's briefing, the Board takes judicial notice of the contents of the amended complaint filed in CBCA 3735. *See* Fed. R. Evid. 201(a court may take judicial notice of a fact "not subject to reasonable dispute in that it is either (1) generally known within the jurisdiction of the trial court or (2) capable of accurate and ready determination by resorting to sources whose accuracy cannot reasonably be questioned."); *see also Twelfth & L Streets Ltd. Partnership*, GSBCA 7599, 88-1 BCA ¶ 20,519, at 103,727 n.2 (taking judicial notice of a document filed in another appeal involving the same parties).

C. The IBWC's Responses in CBCA 3559 and CBCA 3735

The IBWC moved to consolidate CBCA 3559 and CBCA 3735. Appellant's Motion for Summary Relief, Exhibit 6. The Board issued a conference memorandum and order deferring ruling on the IBWC's motion. *Id*. at 2.

The IBWC subsequently filed separate, but similar pleadings in CBCA 3559 and CBCA 3735. In its answers to the second amended complaint in CBCA 3559 and amended complaint in CBCA 3735, both filed in October 2014, the IBWC asserted a counterclaim for liquidated damages based on its assessment of the number of days of contractor delay. Appellant's Motion for Summary Relief, Exhibits 7 at 10-12, 8 at 10-12. However, in its subsequent "Amended Answer and Affirmative Defenses to the Second Amended Complaint and Dismissal of the Counterclaim for Liquidated Damages" in CBCA 3559, filed on December 12, 2014, the IBWC stated:

> After reviewing the documents produced by Appellant in response to IBWC's discovery requests, IBWC hereby dismisses and abandons the counterclaim for liquidated damages. Respondent has no present intention to assess or attempt to collect liquidated damages with respect to Appellant's performance under the Contract at issue in this appeal.
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> . . . .
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> Appellant filed a redundant case with this Honorable Court to appeal the Contracting Officer's final decision. That case is CBCA 3735. As noted above, in this document Respondent dismisses and abandons the assessment of liquidated damages and the attempt to recover liquidated damages with regard to Appellant's performance under the Contract at issue in this appeal. Now that liquidated damages are not an issue in this case, the parties intend to file a joint motion to dismiss CBCA 3735.

Id., Exhibit 9 at 1, ¶ 14.

The IBWC did not file an amended pleading in CBCA 3735 abandoning its claim for liquidated damages.

D. Disposition of CBCA 3559 and CBCA 3735

On December 12, 2014, the parties jointly moved to dismiss, with prejudice, CBCA 3735, but agreed that SBBI's claim for overplanned quantities survived in CBCA 3559.

Appellant's Motion for Summary Relief, Exhibit 10. In the December 16, 2014, order dismissing CBCA 3735, the Board stated:

> The parties have filed a joint request for dismissal of this appeal with prejudice, with their agreement that "appellant's claim for overplanned quantities which was part of this appeal and CBCA 3559 survives in CBCA 3559 and is not dismissed by this agreement."

Id., Exhibit 11.

In February 2015, the parties effectuated a settlement agreement in CBCA 3559, which included the following language:

> WHEREAS, in July 2010 and again in October 2010 flooding events occurred which required IBWC to release water from dams on the Rio Grande River to protect the dams and mitigate the potential flood water damages to downstream personnel and property. Potential damages included loss of life and damages to or destruction of farms, businesses and homes. The releases of water adversely impacted SBBI's work sites and ability to perform its obligations under the Contract. In a request for equitable adjustment ("REA") claim and in the subsequent Civilian Board of Contract Appeals ("CBCA") Case Number 3213[4], SBBI sought compensation for flood standby charges, home office overhead, field office overhead, profit, bond costs, interest, and attorney's fees.
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> WHEREAS, during the performance of the Contract SBBI was required to perform bench excavation of levee material (CLIN 011), emplace levee embankment material (CLIN 012), and install topsoil material (CLIN 013) in quantities that greatly exceeded the amounts of materials estimated or planned in the Contract. In a REA claim and in the subsequent CBCA Case Number

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[4] The settlement and subsequent dismissal orders in CBCA 3559 also applied to CBCA 3213. CBCA 3213 was based on SBBI's claim for "additional equipment standby costs, field office overhead, home office overhead, profit and bond [costs]" from October 16, 2010, to January 10, 2011. Appellant's Response to Respondent's Motion for Summary Relief, Exhibit A, ¶¶ 5, 12, 21. In the settlement agreement, the IBWC agreed to pay SBBI $1.5 million to resolve the claims filed in CBCA 3213 and CBCA 3559. Respondent's Motion for Summary Relief, Exhibit A, ¶ 2.

> 3559, SBBI sought compensation for the costs of the variations in estimated quantities, interest, and attorney's fees.

Respondent's Motion for Summary Relief, Exhibit A at 1. The settlement agreement also contained the following release:

> SBBI releases and discharges IBWC, its officers, agents, and employees, of and from all liabilities, obligations, claims, appeals, and demands which it now has or hereafter may have, whether known or unknown, administrative or judicial, legal or equitable, arising under or in any manner relating to the issues in CBCA Cases Numbered 3213 and 3559, arising from Contract No. IBM10C007, including all attorney's fees, paralegal fees, expert fees, interest, and any and all other expenses.

Id. ¶ 9. On March 11, 2015, the Board dismissed, with prejudice, CBCA 3213 and CBCA 3559. Respondent's Motion for Summary Judgment, Exhibit B.

II. This Appeal (CBCA 4994)

After dismissal of CBCA 3735, and settlement and dismissal of CBCA 3213 and CBCA 3559, but before the filing of this appeal, the parties attempted to resolve their remaining dispute, specifically that related to the total cost claim at issue in this appeal. This effort is reflected in multiple email messages between the parties. Appellant's Response to Respondent's Motion for Summary Relief, Exhibits E, F, G, H, I, J, K. For example, in one, dated March 25, 2015, from Matthew Myers, the IBWC's counsel, to John T. Flynn, SBBI's counsel, the following is stated:

> We are grateful for your kind offer to try to settle the remaining issue(s) amicably without going to the CBCA or federal court . . . .
>
> I was surprised by the size of the REA. When we spoke in November, I understood that Debra [Echeverria-Fain, SBBI's president] had calculated the total cost of the project to be around $24 million. After the payments SBBI received (during the contract execution and settlement), I expected a cost figure of around $6 million - $8 million for the final REA. If the attorneys fees and settled claims are excluded from the REA, why is it so much greater than the numbers we discussed in November 2014?

Id., Exhibit E.

These settlement efforts were further explained by Deborah Echeverria-Fain, SBBI's owner and president, in an affidavit in support of SBBI's response to the IBWC's motion for summary relief. In her affidavit, Ms. Echeverria-Fain states:

> In November, 2014, Matt Myers, the Chief Legal Counsel for the IBWC, came to SBBI's office in Sonoita, Arizona, to review SBBI's documents associated with its then pending appeals in CBCA 3213 and CBCA 3559. During that visit, my counsel, John Flynn and I discussed with Mr. Myers the fact that SBBI was preparing a modified total cost claim that was going to be submitted at some point in the future. We also discussed the discrete claims that SBBI had prepared that were the bases of CBCA 3213 and CBCA 3559. These claims were specifically limited in scope because I was unable to further price the impacts to the project at that time. These specific claim elements were the only elements where costs could be isolated and quantified. The anticipated modified total cost claim included a myriad of overlapping items where individual costs could not be isolated or quantified.
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> . . . .
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> SBBI and the IBWC . . . met in Tucson, Arizona in February, 2015 to mediate SBBI's claims in CBCA 3213 and CBCA 3559. [CBCA] Judge Candida Steel conducted the mediation, which successfully resolved both CBCA 3213 and CBCA 3559 . . . After the agreement was reached to settle those two claims, the parties and Judge Steel discussed SBBI's remaining claim, the modified total cost claim, and the fact that the parties wanted Judge Steel to mediate that claim as well. All the people present [including from the IBWC] . . . knew that the settlement effected in CBCA 3213 and CBCA 3559 was limited to specific claims in those two appeals and that SBBI was subsequently going to submit another claim, the modified total cost claim . . . In fact, the IBWC insisted that paragraph 4 of the settlement agreement be included so that any attorney's fees or costs associated with SBBI's modified total cost claim would only start after the date of the settlement agreement for CBCA 3213 and CBCA 3559.

Appellant's Response to Respondent's Motion for Summary Relief, Exhibit D (Affidavit of Deborah Echeverria-Fain (May 2, 2016) ¶¶ 6, 8).

The settlement efforts were unsuccessful, and by letter dated May 21, 2015, SBBI submitted a certified claim for $10,292,330.47 to the contracting officer, claiming costs based on a modified total cost theory, including costs for the IBWC's alleged "flawed plans and

specifications, stop work orders, delays, untimely responses to RFIs and other reasons."[5] Appellant's Response to Respondent's Motion for Summary Relief, Exhibit C at 1. The contracting officer issued a final decision dated September 22, 2015, denying SBBI's total cost claim and assessing liquidated damages against the contractor based on the IBWC's assessment of the number of days of contractor delay. Appellant's Motion for Summary Relief, Exhibit 13. On September 23, 2015, SBBI appealed the contracting officer's decision, *id*., Exhibit 14, and the Board docketed the appeal as CBCA 4994.

SBBI filed its complaint in this appeal on November 18, 2015. On February 4, 2016, the IBWC filed its answer and counterclaim, demanding liquidated damages based on the same number of days of contractor delay as in CBCA 3735.

Discussion

I. Standard for Summary Relief

The summary relief stage requires that the Board determine whether the moving party has demonstrated "the absence of a genuine issue of material fact," and thus, is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The non-moving party may successfully defeat a motion for summary relief by showing that a disputed material fact exists; however, the non-moving party cannot simply rely on the parties' pleadings but must support its argument with evidence such as affidavits, depositions, answers to interrogatories, admissions, and other admissible documents under Board Rule 8 (48 CFR 6101.8 (2016)). *See id*.; *see also Crown Operations International, Ltd. v. Solutia, Inc*., 289 F.3d 1367, 1375 (Fed. Cir. 2002) (opposing party cannot rest on mere allegations to establish a genuine issue of material fact but must present actual evidence); Rule 8(g)(3). When both parties have moved for summary relief, as here, each party's motion will be evaluated on its own merits and all justifiable inferences will be resolved against the party whose motion is under consideration. *Turner Construction Co. v. Smithsonian Institution*, CBCA 2862, et al., 15-1 BCA ¶ 36,139, at 176,392.

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[5] The parties continued their efforts to settle SBBI's total cost claim even after the contractor submitted its written claim to the IBWC's contracting officer. *See* Appellant's Response to Respondent's Motion for Summary Relief, Exhibit I (email message dated August 4, 2015, from Mr. Myers, the IBWC's counsel, to Mr. Flynn, SBBI's counsel, in which Mr. Myers discussed the parties' on-going effort to resolve the pending total cost claim).

II. SBBI's Motion

SBBI moves for summary relief on the IBWC's counterclaim for liquidated damages, arguing that, because the IBWC's claim for liquidated damages was dismissed with prejudice in CBCA 3735, it cannot be raised again in this appeal. The IBWC counters that it withdrew its counterclaim in its amended answer in CBCA 3559 filed on December 12, 2014, and thus the counterclaim was not before the Board when CBCA 3735 was dismissed with prejudice on December 16, 2014. The IBWC seems to be arguing that the two appeals, based essentially on the same claim, were consolidated, albeit constructively, such that the dismissal of its counterclaim in CBCA 3559, which the IBWC construes as one without prejudice, applies as well to CBCA 3735.

A. The IBWC's Counterclaim Was Never Properly Before the Board in CBCA 3559

The first problem with the IBWC's argument is that the agency is urging that, in CBCA 3559, it dismissed, without prejudice, a counterclaim over which the Board never had jurisdiction in the first instance. CBCA 3559 was an appeal based on a deemed denial of a claim, i.e., there was no contracting officer's final decision in which the IBWC asserted its counterclaim claim for liquidated damages, and from which SBBI appealed.

The Board derives its jurisdiction from the CDA. 41 U.S.C. § 7104(a). Prior to an appeal, "[e]ach claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer." *Id*. § 7103(a)(3); *see also Raytheon Co. v. United States*, 747 F.3d 1341, 1354 (Fed. Cir. 2014) (It is a well-established principle that "contract claims, whether asserted by the contractor or the Government, must be the subject of a contracting officer's final decision.").

In CBCA 3559, as an appeal from a deemed denial of a contractor claim, the IBWC's contracting officer never issued a final decision on the agency's claim for liquidated damages. The agency argues that it issued a final decision for liquidated damages in CBCA 3559 by referencing CBCA 3559 in its contracting officer decision dated February 6, 2014, assessing liquidated damages against SBBI, and by referencing the contracting officer's decision in its CBCA 3559 pleadings. The Board finds the agency's arguments unsupported. "The statutory language of the CDA is explicit in requiring a contractor [or the Government] to make a valid claim to the contracting officer *prior to litigating that claim*." *M. Maropakis Carpentry, Inc. v. United States*, 609 F.3d 1323, 1331 (Fed. Cir. 2010) (emphasis added). The agency's claim for liquidated damages, presented in its February 6, 2014 decision, does not get incorporated in CBCA 3559, filed by SBBI in October 2013, by way of reference or relating back. The

CDA and subsequent case law clearly provide that "obtaining a final decision is a jurisdictional prerequisite to any subsequent action before a Board of Contract Appeals or the trial court." *Raytheon*, 747 F.3d at 1354. The agency did not satisfy this requirement based on CBCA 3559. The IBWC's assessment of liquidated damages was not properly before the Board until SBBI appealed the contracting officer's final decision of February 6, 2014, in which the IBWC counterclaimed for liquidated damages, in CBCA 3735.

B. Claim Preclusion Bars the IBWC's Counterclaim in CBCA 3735

The preclusive effect of prior litigation is examined under the doctrines of issue preclusion and claim preclusion, "which are collectively referred to as 'res judicata.'" *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). "Issue preclusion bars a party from litigation of those matters that were actually litigated in a prior proceeding," whereas "claim preclusion bars litigation of those matters that a party [raised or] could have raised or litigated in an earlier proceeding but failed to do so." *Optimum Services, Inc. v. Department of the Interior*, CBCA 4968, 16-1 BCA ¶ 36,357, at 177,243 (citing *Carson v. Department of Energy*, 398 F.3d 1369, 1375 n.8 (Fed. Cir. 2005)); *see also Pactiv Corp. v. Dow Chemical Co.*, 449 F.3d 1227, 1230 (Fed. Cir. 2006). The prior appeals applicable to the parties' motions, CBCA 3559 and CBCA 3735, were not resolved by judicial determination following litigation; thus, the doctrine of issue preclusion does not apply. *See Chromalloy American Corp. v. Kenneth Gordon (New Orleans), Ltd.*, 736 F.2d 694, 697 (Fed. Cir. 1984). Accordingly, if *res judicata* is to apply, it must rest on the doctrine of claim preclusion.

"Claim preclusion applies when '(1) the parties are identical or in privity; (2) the first suit proceeded to a final judgment on the merits; and (3) the second claim is based on the same set of transactional facts as the first.'" *Phillips/May Corp. v. United* States, 524 F.3d 1264, 1268 (Fed. Cir. 2008) (quoting *Ammex, Inc. v. United States*, 334 F.3d 1052, 1055 (Fed. Cir. 2003)). As for the second element, the doctrine of claim preclusion applies "to [a] final judgment of an administrative agency, such as a board of contract appeals, that 'is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate.'" *Phillips/May*, 524 F.3d at 1268 (quoting *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966)). As for the third element, courts have defined "same transaction" in terms of a "core of operative facts," the "same operative facts," the "same nucleus of operative facts," or "based on the same, or nearly the same, factual allegations." *Ammex, Inc.*, 334 F.3d at 1056 (citations omitted); *see also Corners & Edges, Inc. v. Department of Health & Human Services*, CBCA 1002, 09-2 BCA ¶ 34,140, at 168,781. The Supreme Court has recently stated that the purpose of claim preclusion is to bar "'successive litigation *of the very same claim*' by the same parties.'" *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2305 (2016) (quoting *New Hampshire*

v. Maine, 532 U.S. 742, 748 (2001)) (emphasis added). The theme seems to be that, at the very least, there must be a substantial degree of factual identicalness underpinning the initial and subsequently brought claims for claim preclusion to be implicated.

SBBI asserts that, because the agency's counterclaim for liquidated damages was dismissed with prejudice in CBCA 3735, it cannot be raised again in this appeal. We find that the elements to establish claim preclusion are met. Both CBCA 3735 and this appeal involve the same parties, SBBI and the IBWC. CBCA 3735 was dismissed with prejudice, which equates to a judgment on the merits. *See Pactiv Corp.*, 449 F.3d at 1230 ("A dismissal with prejudice is a judgment on the merits for purposes of claim preclusion."); *Telcom Systems Services, Inc. v. Department of Health & Human Services*, GSBCA 12488-P, 94-1 BCA ¶ 26,272, at 130,703 (1993) ("The doctrine of claim preclusion operates by virtue of a final judgment, whether the judgment results by default, consent, dismissal with prejudice, or otherwise."). Finally, this appeal includes the same allegation, a counterclaim for liquidated damages based on an assessment of days of contractor delay, that was presented by the IBWC in CBCA 3735. Thus, the doctrine of claim preclusion bars the IBWC's counterclaim in this appeal.

The IBWC contends that its amended answer in CBCA 3559, filed on December 12, 2014, equates to a voluntary dismissal without prejudice of its counterclaim in both appeals (CBCA 3559 and CBCA 3735) under Rule 41 of the Federal Rules of Civil Procedure (Fed. R. Civ. P.).[6] Therefore, according to the IBWC, the agency is not precluded from raising its counterclaim in this appeal. The Board, however, has established that the IBWC's counterclaim was never properly before the Board in CBCA 3559. Therefore, the IBWC could not have voluntary dismissed the counterclaim over which the Board did not have jurisdiction in the first instance.

Nevertheless, even if the IBWC's counterclaim was arguably properly before the Board in CBCA 3559, the agency's argument based on Fed. R. Civ. P. 41 would still be unpersuasive. The problem is that the language asserting abandonment of the counterclaim was included in

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[6] The Board's rules allow us to look to the Federal Rules of Civil Procedure for those matters not specifically covered by our Rules. *Mission Support Alliance, LLC v. Department of Energy*, CBCA 4985, 16-1 BCA ¶ 36,210, at 176,683. Fed. R. Civ. P. 41(c) states that a voluntary dismissal of a counterclaim before a responsive pleading is served or, if there is no responsive pleading, before evidence is introduced at a hearing or trial, is without prejudice unless the claimant's notice or stipulation of dismissal states otherwise. Fed. R. Civ. P. 41(c).

IBWC's amended answer in CBCA 3559, not in any IBWC pleading in CBCA 3735. The incontrovertible fact is that the two appeals, CBCA 3559 and CBCA 3735, were not consolidated. Although SBBI's claims and the IBWC's responses and defenses thereto were virtually identical in both appeals, separate complaints, answers, and dismissal orders were filed in the two appeals. The IBWC asserted a counterclaim for liquidated damages in its contracting officer's decision, which SBBI appealed and the Board subsequently docketed as CBCA 3735, and also in its answer in CBCA 3735. The agency neither withdrew its counterclaim in a manner that can be interpreted as consistent with a dismissal without prejudice under Fed. R. Civ. P. 41, nor preserved the claim before entry of dismissal with prejudice in CBCA 3735. Thus, even assuming that the IBWC's argument based on Fed. R. Civ. P. 41 had merit (and the Board is making no determination on this point), the Board cannot construe a consolidation of appeals for the purpose of preservation of a claim that, from the record, does not exist. Accordingly, the agency is precluded from raising the counterclaim in this appeal.

III. The IBWC's Motion

A. Claim Preclusion Does Not Bar SBBI's Claim

Turning to the IBWC's motion, the agency argues that SBBI's total cost claim in this appeal is barred by *res judicata* because the claim was previously dismissed with prejudice after the parties executed the February 2015 settlement agreement in CBCA 3213 and CBCA 3559. As with SBBI's motion, the IBWC must satisfy the three elements to establish claim preclusion. *Phillips/May*, 524 F.3d at 1268. It is clear that the first two elements are readily met. This appeal involves the same parties as CBCA 3213 and CBCA 3559, and those appeals were dismissed with prejudice by the Board pursuant to the parties' stipulation of dismissal and settlement. On this point, "[i]t is widely agreed that an earlier dismissal based on a settlement agreement constitutes a final judgment on the merits in a *res judicata* analysis." *Ford-Clifton v. Department of Veterans Affairs*, 661 F.3d 655, 660 (Fed. Cir. 2011). Accordingly, the only remaining issue is whether this appeal is based on the same transactional facts as CBCA 3213 and CBCA 3559.

Courts decide whether two claims involve the same transactional facts by "pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." *Phillips/May*, 524 F.3d at 1271 (quoting *Restatement (Second) of Judgments* § 24(2) (1982)). In contract disputes, there is a presumption that claims arising from the same contract are based on the same transactional facts, and thus, must be brought together. *Id.*; 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4408, at 203

(3d ed. 2016) ("Contract cases often can be resolved by a simple rule that the first suit must claim every breach that has then occurred."). The presumption, however, may be overcome by showing that the claims are unrelated. *See Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990) ("[I]f the claims . . . will necessitate a focus on a different or unrelated set of operative facts as to each claim, then separate claims exist."). Therefore, to determine if claim preclusion applies, we look at the claims that SBBI brought and settled, in CBCA 3213 and CBCA 3559, and the claim that SBBI brought in this appeal.

In CBCA 3213, SBBI brought a claim for "additional equipment standby costs, field office overhead, home office overhead, profit and bond [costs]" incurred from October 16, 2010, to January 10, 2011. SBBI's claim in CBCA 3559 was limited to the IBWC's change in quantities of material relating to CLINs 007, 011, 012, and 013. SBBI, in its complaint in this appeal (CBCA 4994), states the following:

> During the course of performance, SBBI's work and ability to move forward with its work was repeatedly delayed and adversely impacted by multiple acts and omissions of the IBWC and/or its agent, Tetra Tech.
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> . . . .
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> SBBI has attempted, unsuccessfully, to segregate its costs associated with each impacting event. Thus, it has prepared its claim for these multiple delays and impacts on a modified total cost basis.

Complaint (CBCA 4994) ¶¶ 5, 6. From our review of SBBI's certified claim documents and pleading, SBBI seeks delay and impact costs incurred due to design and specification errors, official and unofficial stop work orders, project disruptions, and the agency's failure to timely respond to appellant's submittals. *Id*.; Appellant's Response to Respondent's Motion for Summary Judgment, Exhibit C, at 1.

SBBI's claims in CBCA 3213 and CBCA 3559 were narrowly tailored, focused on certain discrete items (i.e., additional equipment standby costs, field office overhead, home office overhead, profit, and bond costs) related to a narrow time period in the former, and changes in quantities of material relating to four CLINs in the latter. Specifically, the claims in CBCA 3213 covered just under three months out of approximately thirty-six months of contract performance, and the claims in CBCA 3559 related to four from the contract's total of seventy-five CLINs. *Id*., Exhibits A, ¶ 12, and B, ¶¶ 11, 12. This appeal (CBCA 4994) is based on SBBI's claim of delays and adverse impacts allegedly caused by the IBWC and appears to concentrate on a separate set of operative facts from those found in both previous appeals, including SBBI's allegations related to changes to forty-eight of the seventy-five

CLINs in the contract and delays it encountered in twenty-seven of the thirty-six months of contract performance. Complaint (CBCA 4994) ¶¶ 20, 25. Upon review of the claims presented in the three appeals, the Board is unable to find that the claim in this appeal and those in the predecessor appeals are related such that this appeal, CBCA 4994, is barred by *res judicata*.[7]

Respondent argues that the settlement agreement in CBCA 3213 and CBCA 3559 contains broad release language precluding the claim brought in this appeal. We disagree. "In determining the *res judicata* effect of an order of dismissal based upon a settlement agreement, [this tribunal attempts] to effectuate the parties' intent." *Pactiv Corp.*, 449 F.3d at 1231 n.2 (citing *Norfolk S. Corp. v. Chevron, U.S.A.*, 371 F.3d 1285, 1289 (11th Cir. 2004)). Naturally, "[t]he best evidence of that intent is . . . the settlement agreement itself . . . as interpreted according to traditional principles of contract law." *Id*. The problem for the IBWC is that the language releasing and discharging the IBWC from further liabilities and other actions that SBBI might bring expressly relates only to those issues in CBCA 3213 and CBCA 3559 arising under the contract. Respondent's Motion for Summary Relief, Exhibit A, ¶ 9. Accordingly, the release language in the settlement agreement in CBCA 3213 and CBCA 3559 could reasonably be construed as not to reach any and all claims that were or could have been brought under the contract, but only to the narrow set of allegations presented in the certified

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[7] In its written claim to the contracting officer related to this appeal, SBBI expressly recognized that it had previously settled its claim for standby costs and overhead costs in CBCA 3213 and its claim for overplanned quantities in CBCA 3559. Appellant's Response to Respondent's Motion for Summary Judgment, Exhibit C, at 5. Further, in her affidavit, SBBI's president states that the total cost claim could not have been brought in CBCA 3213 and CBCA 3559, as she was unable to price the impacts to the project at the time those two appeals were at issue, *id*., Exhibit D, Echeverria-Fain Affidavit, ¶¶ 6, 8. *See Phillips/May Corp*., 524 F.3d at 1268 (the doctrine of claim preclusion "is properly applied" to disputed issues of fact over which the parties had "an adequate opportunity to litigate.") (quoting *United States v. Utah Construction & Mining Co.*, 384 U.S. at 422); *see also Sharp Kabushki Kaisha v. ThinkSharp, Inc*., 448 F.3d 1368, 1372 (Fed. Cir. 2006) ("Precedent cautions that *res judicata* is not readily extended to claims that were not before the court, and precedent weighs heavily against denying litigants a day in court unless there is a clear and persuasive basis for that denial.") (quoting *Kearns v. General Motors Corp.*, 94 F.3d 1553, 1557 (Fed. Cir. 1996)). The piecemeal litigation on the one contract, this appeal being the fourth, is unfortunate as two purposes of the doctrine of claim preclusion are to protect against "the expense and vexation attending multiple lawsuits" and "conserv[e] judicial resources." *Montana v. United States*, 440 U.S. 147, 153 (1979). Nevertheless, based on the record, we cannot say that SBBI's reason for proceeding on its total cost claim as it did was motivated by a vexatious or illegitimate purpose.

claims and complaints in the two appeals. That the settlement agreement states the amount paid ($1.5 million) was to resolve SBBI's claims filed in CBCA 3213 and CBCA 3559, and not all claims that could have been brought under the contract, supports this point. *Id.* ¶ 2. The parties could have, of course, readily agreed that their settlement agreement precluded any and all future claims that could have been brought under the contract, but they did not do so. *See Aspex Eyewear, Inc. v. Marchon Eyewear, Inc.*, 672 F.3d 1335, 1345 (Fed. Cir. 2012) ("In a settlement agreement, the parties to an action can determine for themselves what preclusive effect the settlement of the first action will have as to any potential subsequent actions between the parties.").

The Board is also unpersuaded by respondent's argument that the preamble language in the settlement agreement has the force of a release. In this instance, it appears that the language does no more than simply set forth background information on what occurred during contract performance and describes the claims presented in the complaints filed in CBCA 3213 and CBCA 3559. *See* Respondent's Motion for Summary Relief, Exhibit A. The preamble language, at least in this agreement, does not reflect any obligation or commitment of the parties.

B. The Parties' Conduct Indicates the Total Cost Claim Was Not Released

Even if one assumes that SBBI failed to preserve its total cost claim, the parties' post-release negotiations and attempted mediation of the claim would vitiate any argument that the release effectively barred the claim. In support of its opposition to respondent's motion for summary relief, SBBI, through an affidavit from its owner and president, as well as with multiple email messages from the IBWC's own counsel, shows that the IBWC was trying to resolve SBBI's total cost claim after settlement and dismissal of CBCA 3213 and CBCA 3559.

"A tribunal may decline to find that a claim is barred by release 'where the parties continue[d] to consider the claim after execution of a release.'" *Ahtna Environmental, Inc. v. Department of Transportation*, CBCA 5456, 17-1 BCA ¶ 36,600, at 178,306 (2016) (quoting *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575, 1581 (Fed. Cir. 1993)). The IBWC's consideration of a post-release resolution of SBBI's total cost claim "manifests an intent that the parties never construed the release [in the settlement agreement] as an abandonment of [SBBI's total cost recovery claim]." *A & K Plumbing & Mechanical, Inc. v. United* States, 1 Cl. Ct. 716, 723 (1983); *see Walsh/Davis Joint Venture v. General Services Administration*, CBCA 1460, 11-2 BCA ¶ 34,799, at 171,262 ("[A] claim may be prosecuted despite the execution of a general release" where parties' conduct shows that the parties "never construed the release as constituting an abandonment of the claim.") (quoting *J.G. Watts Construction Co. v. United States*, 161 Ct. Cl. 801, 806-07 (1963)); *Electrospace Corp.*,

ASBCA 14520, 72-1 BCA ¶ 9455, at 43,926 ("[A] release from all claims signed by the parties has been abrogated by the subsequent actions of the Government showing the release to be conditional as, for example, entertaining further negotiations on the claim."). Therefore, "[w]here the Government continues to review, consider, and negotiate the contractor's claim for a significant period of time after the supposed release, the release will generally be found not to bar the claim." *Ahtna Environmental*, 17-1 BCA at 178,306; *see also Perry Bartsch Jr. Construction Co. v. Department of the Interior*, CBCA 4865, et al., 16-1 BCA ¶ 36,576, at 178,131-32 (finding that the parties' final release of claims in a modification was vitiated by their continued negotiations of the release long after executing the modification).

Here, the record demonstrates that both SBBI and the IBWC understood that SBBI's total cost claim was distinct from the claims presented in CBCA 3213 and CBCA 3559, and not resolved with and foreclosed by the settlement of those appeals. The parties' continued attempt to negotiate or mediate SBBI's claim several months after their execution of the February 2015 settlement agreement forecloses any argument relying on release based on that settlement agreement. Accordingly, the Board finds that SBBI's total cost claim is viable and may move forward in this appeal.[8]

Decision

SBBI's motion for summary relief is **GRANTED**, and the IBWC's motion for summary relief is **DENIED**.

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BEVERLY M. RUSSELL
Board Judge

We concur:

_____
JERI K.SOMERS
Board Judge

_____
MARIAN E. SULLIVAN
Board Judge

[8] This decision does not mean, however, that the IBWC is foreclosed from raising, in a post-discovery motion for summary relief or a hearing on the merits, that reimbursements for specific, discrete costs sought by the IBWC in this appeal are barred by the settlements of previous appeals. The Board, however, is unable to make that determination based on the IBWC's pending motion.