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FEATURE COMMENT: Release Me? Five Things Every Government Contractor Needs To Know Before Signing A Release Of Claims

Consider the following hypothetical scenario:

> After your company agrees to perform certain additional work for a significant price increase, you receive an email from the contracting officer attaching a proposed contract modification. Page 6 includes a Release-of-Claims provision, stating: "This modification provides full compensation for the changed work, including Contract cost and Contract time. The Contractor hereby releases the Government from any and all liability under the Contract for further equitable adjustment attributable to the Modification." Notwithstanding, you execute the modification.
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> Ten months later, you submit a certified claim that, while related to the changes addressed by the prior modification, seeks an adjustment for a different set of changes that, in your opinion, materialized after the modification was executed. Unfortunately, the CO thinks otherwise, and issues a final decision summarily denying the entire claim based on that release-of-claims provision.
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> At that moment, you ask: Did I fully consider the scope of that release before executing the prior contract modification?

This same release provision was the subject of *Bell BCI Co. v. U.S.*, 570 F.3d 1337 (Fed. Cir. 2009); 51 GC ¶ 243, a U.S. Court of Appeals for the Federal Circuit decision that sent shivers down the spines of many in the Government contracts community. See, e.g., Nash, "Postscript V: The Plain Meaning Rule," 23 Nash & Cibinic Rep. NL ¶ 49 (Sept. 2009).

Regardless of whether you agree with the result, in *Bell BCI* the Federal Circuit held that a contractor's disruption/cumulative impact claim was barred because the above-referenced release provision "plainly released the government from *any and all* liability for equitable adjustments attributable to the [modification]" (emphasis added). The court reached this conclusion even though the modification did not clearly release a disruption/cumulative impact claim, and despite the lower court's finding that "[u]nless provided otherwise, the bilateral modifications [to a Government contract] will compensate the contractor for performing the changed work, but not for the impact of multiple change orders on the unchanged work."

Although the Federal Circuit's *Bell BCI* decision was a reminder of the high stakes contractors face when executing a release, the release provision in that decision is just one variation of language that can cut off a contractor's right to assert claims against the Government in the future. Indeed, a survey of Government contracts decisions issued since 2016 by the Court of Federal Claims, the Armed Services Board of Contract Appeals and the Civilian Board of Contract Appeals reveals that release-of-claims provisions arise in many different shapes and sizes. They also demonstrate that the success of a Government affirmative defense based on a release—either through release/waiver or accord and satisfaction—depends upon the specific language of the release and the particular (and sometimes peculiar) facts of each case. As a result, Government contractors should consider, on a case-by-case basis, the effect a release will have on their legal rights.

In this Feature Comment, we (1) examine five recent decisions involving different release-of-claims provisions, and (2) identify five takeaways every Government contractor should consider before signing a release of claim.

***Perry Bartsch Jr., Constr. Co. v. Dep't of the Interior*, CBCA 4865, 5071, 16-1 BCA ¶ 36576—**

The CBCA's decision in *Bartsch* addressed whether global release-of-claims language, contained in just one of many contract modifications, can extinguish all of a contractor's claims against the Government.

Bartsch Construction Co. was awarded a contract to renovate the visitor center complex at Mammoth Cave National Park in Kentucky. During performance, the parties executed 15 different bilateral modifications. Six of the modifications contained language releasing "all claims or demands whatsoever arising out of or from *this Modification*," but excepted "potential time impacts based on changes included in this modification" (emphasis added). A subsequent modification contained even broader release language:

> WHEREAS, ... after completion of all work and prior to final payment, the Contractor will furnish the United States with a release of all claims.
>
> NOW THEREFORE, ... the contractor hereby remises, releases and forever discharges the United States, its officers, agents, and employees, of and from all manner of debts, dues, liabilities, obligations, accounts, claims and demands whatsoever, in law and in equity, under or by virtue of the said contract *with no exceptions*.

(emphasis added).

Bartsch later submitted separate release forms reserving certain claims, which the Government rejected. Then, after completing performance, Bartsch filed a certified claim for changes and Government-caused delays. The CO denied Bartsch's claim on the grounds of accord and satisfaction and release. Bartsch appealed. Relying on the language in the release, the Government filed a motion for summary judgment on all of Bartsch's claims.

In resolving the Government's motion, the Board analyzed the release and found it ambiguous for three main reasons. First, according to the Board, the release was vague because it suggested finality when, in reality, the work under the contract was not accepted until after the release was signed. Second, the Board found that the release required the contractor to provide a separate release of claims, which the contractor later submitted and which the agency rejected. Third, the Board stated,

> [i]n light of the numerous documented exceptions to releases taken by [Bartsch] in earlier modifications, as well as [Bartsch's] stated intention to claim additional time in a future modification, clear and manifest intent to waive these claims is not evident in the release, particularly when it is tied to forty-four pages of unrelated technical changes and makes no mention of the earlier exceptions.

Having held that the release was ambiguous, the Board then considered whether extrinsic evidence clarified its meaning. The Board looked first to other provisions in the modification and found that: (1) the stated purpose of the modification did not suggest it was intended as a global release, and (2) the modification's structure suggested that the release applied to only one section of the contract. The Board also noted that the parties "continued to negotiate a release of claims long after [the modification] was drafted and executed." As a result, the Board denied the Government's motion because the plain language of modification and the extrinsic evidence did not show that the parties had a meeting of the minds.

***Ahtna Envtl., Inc. v. Dep't of Transp.*, CBCA 5456, 16-1 BCA ¶ 36576**—In *Ahtna Environmental*, the CBCA grappled with a rather unique situation. Namely, what happens when a final payment clause requires the Government to present a "final [payment] voucher" and "draft release-of-claims" form to the contractor—as opposed to the typical scenario prescribed by Federal Acquisition Regulation 52.232-5(h)—and states that the release will be "deemed executed" if the contractor does not sign and return the voucher and release within the prescribed time period?

A final payment clause in a Federal Highway Administration (FHWA) contract with Ahtna Environmental Inc. (AEI) included such a requirement. But when the FHWA sent the final payment voucher and draft release of claims to AEI, AEI informed the FHWA by letter that it would not execute and return the form. Instead, AEI represented that it would file a request for equitable adjustment (REA) based on a unilateral deductive change-order modification that the FHWA had issued prior to completion of the contract. FHWA denied the REA, as well as a certified claim later filed by AEI, on the basis that AEI had not adequately reserved its rights.

On appeal to the CBCA, the Government argued that AEI's failure to reserve specific claims and return the release-of-claims form constituted a deemed release of all of AEI's claims. But the Board disagreed, finding that AEI's letter to the FHWA, which informed the Government of AEI's anticipated

REA, was sufficient to preclude a waiver of rights. The Board also was skeptical of the Government's self-effectuating "deemed" release, stating,

> [G]iven that AEI expressly asked the FHWA to delay AEI's need to respond to the draft voucher or submit a final release while simultaneously identifying for the FHWA the claims that it is working to quantify, the FHWA could not reasonably insist upon the strict time limit imposed by [the final payment clause].

Finally, the Government's defense also failed because, in the CBCA's opinion, a release may not bar a claim where the Government continues to consider the claim after execution of the release.

***José Gustavo Zeno v. Dep't of State*, CBCA 4867, 2016 WL 2640622 (May 6, 2016)**—In this decision, the CBCA considered whether a broad release in a personal services contract covered the contractor's potential assertion of defenses to a termination for cause/default.

José Zeno was terminated for cause by the Department of State after pleading guilty to a violation of the Virginia Code in Virginia state court. During contract closeout, Zeno signed a release discharging the Government "from all liabilities, obligations, claims and demands whatsoever arising from the said contract, except: Specified claims ... as follows: NONE." In exchange for executing the release, the Government paid Zeno for work he performed through the date of closeout, as well for unused leave (plus two additional days).

Zeno later filed a filed an appeal with the CBCA and requested that his contract be reinstated. The Government moved to dismiss the appeal, arguing, among other things, that the release executed by Zeno precluded him from challenging the termination for cause.

The CBCA held that, while Zeno released his claims for compensation under the contract, he did not release his right to appeal the Government's termination decision. It explained that the release "by its terms, refers only to monetary claims of the contractor," and as a result, it did "not plainly encompass an agreement by Zeno to waive his right to appeal the Government's decision to terminate his contract for cause, which, as noted above, is not his claim, but rather is a Government claim." The dissenting judge had a different view, however, and noted that the release did not contain an express reservation of Zeno's right to challenge his termination: "To ignore each of the words following 'all' (liabilities, obligations, claims, and demands) is inconsistent with the release language and concepts of contract close out."

***Ingham Reg'l Med. Ctr., et al. v. U.S.*, 126 Fed. Cl. 1 (2016)**—In *Ingham*, the COFC considered two release-related questions: (1) whether a release executed by two parties may itself constitute a contract that, if breached, would entitle the nonbreaching party to pursue breach of contract claims; and (2) whether one of the plaintiffs, Ingham Regional Medical Center, was barred by a previous release from bringing breach of contract claims against the Government.

In 2011, the Government offered hospitals participating in the Department of Defense's TRICARE program the opportunity to be paid "discretionary adjustments" due to possible underpayments for outpatient radiology services provided between 2003 and 2009. To be eligible for such adjustments, a hospital was required to submit an application to the Government that complied with certain conditions.

The Government agreed to review a hospital's submission and, if all conditions were met, to provide the hospital an adjusted payment that was calculated based on a specified methodology. As a condition of accepting payment, a hospital had to sign a release of all claims relating to compensation for outpatient services. The release stated, in relevant part, that a hospital (the "Releasor"):

> shall completely release, acquit, and forever discharge the Government ... from any and all claims, demands, actions, suits, causes of action, appeals, whether asserted as a class, individually, or otherwise, [for] damages whenever incurred, and liabilities of any nature whatsoever ... that Releasor ever had, now has, or hereafter can, shall, or may have against [the Government], whether known or unknown, on account of or arising out of or resulting from or in any way relating to payments, reimbursements, adjustments, recoupments, or any other means of compensation by [the Government] made at any time for outpatient services rendered to TRICARE beneficiaries by Releasor [during the period at issue]."

By signing the release, the hospital also agreed that it "understood] the significance of ... releas[ing] ... unknown claims ... [and] expressly waive[d] any and all rights and benefits under ... any ... law, rule, provi-

sion or statute ... that operates to bar the release of unknown claims."

Notwithstanding the broad nature of this release and its applicability to both "known" and "unknown" claims, Ingham, which had previously submitted an application seeking adjusted payments, signed the release and accepted payments as calculated by the Government. However, Ingham later determined that the Government had used the wrong methodology to calculate the adjustments. Ingham eventually filed suit against the Government for breach of contract.

Though seemingly accepting Ingham's assertion that the release constituted an enforceable "contract," the court held that Ingham's breach claim was barred by the "broad release of claims" it signed upon accepting payment from the Government. Specifically, the court found that the release was "unambiguous on its face and sufficiently broad to bar all of [Ingham's] breach of contract claims," which "[arose] out of" the Government's payments for outpatient services during the period in question. The court also noted that Ingham had not met its burden "to identify and specify claims to be excepted from [the] general release," or otherwise establish "vitiating circumstances," such as economic duress, fraud or mutual mistake, that would invalidate the release.

***Speegle Constr., Inc.*, ASBCA 60089, 16-1 BCA ¶ 36371**—In *Speegle*, the ASBCA considered whether a construction contractor's claim for certain subcontract costs was barred by the terms of a release that was included in a bilateral contract modification.

Here, the Army Corps of Engineers awarded the prime contractor, Speegle Construction Inc., a contract to repair facilities that were damaged by Hurricane Katrina. In November 2012, the parties discovered that the design of a fire suppression system in one of the facilities had to be changed. They negotiated the necessary changes and agreed on all terms, except for the overhead rate Speegle proposed on behalf of one of its subcontractors. After reaching an impasse, the Corps issued a unilateral modification applying a 10-percent overhead rate for the subcontractor. The modification did not provide a time extension, and preserved each party's right to pursue claims under the contract's Disputes clause.

Several months later, on Aug. 19, 2013, Speegle sent the Corps two letters. In the first letter, Speegle requested that the Corps obtain a Defense Contract Audit Agency audit of its subcontractor's overhead rate. In the second letter, Speegle requested a 21-day extension on the project and noted that its subcontractor's overhead rate "remains in dispute." After some negotiation, on Sept. 18, 2013, the parties agreed to a bilateral modification that extended the contract completion date by 32 days. The modification included a release of all claims for Speegle's "August 19, 2013 proposal(s)" and for "further equitable adjustments attributable to such facts or circumstances giving rise to the proposal for adjustment."

Thereafter, Speegle submitted an REA seeking $132,249 based on its subcontractor's revised overhead rate. The Corps denied the REA, and Speegle submitted a certified claim, which also was denied. Speegle then filed an appeal at the ASBCA.

The Board found that, when read as a whole, the September 2013 bilateral modification was ambiguous as to whether Speegle's claim for subcontractor overhead costs was included in the scope of the release. According to the Board, "the scope of the release [could] not be determined without examination of extrinsic evidence, i.e., the 19 August 2013 proposal." And, after examining the extrinsic evidence, the ASBCA found that language in the proposal "could indicate" that the scope of the release was limited to Speegle's request for a 21-day extension—namely, the language indicated that the subcontractor's overhead rate "remains in dispute." For that reason, the Board denied the Government's motion for summary judgment.

Key Takeaway No. 1: Do Your Homework before You Start Negotiating—Understandably, contractors often approach the negotiation of contract modifications like any other business transaction. It is simple: the contractor wants to get paid, and it has to convince the Government to pay. As a result, contractors may not consider the impact of a release until the very end of negotiations, when the pressure to "get the deal done" is at its zenith. But it pays for contractors to do their homework long before they negotiate the terms on a release of claims.

Before negotiating a contract modification with the Government, contractors should take the time to identify and assess all the potential claims they have or may later have under the contract. A contractor's authorized representatives will be better prepared for negotiations with the Government if they have already identified the claims that should be expressly reserved. They also will understand the effect that a broad release may have on the company's future legal rights.

Key Takeaway No. 2: Consider the Broader Implications of Release in the Context of the Entire Contract—Because a release provision can be the silver bullet that defeats a claim, contractors should closely review every contract (including modifications) to determine whether it contains a release-of-claims provision. If there is a release provision in the contract, contractors should not treat it as an afterthought—like a boilerplate provision that seemingly has no consequences. Contractors should carefully review the release (especially within the context of the entire contract and any actions taken thereunder) to assess its scope and determine whether there may be any concerns or ambiguities that should be addressed.

More often than not, spending the time upfront to consider the broader implications of a release will pay significant dividends down the road.

Key Takeaway No. 3: When Drafting a Release Provision, Be Precise—As illustrated in decisions such as *Speegle*, the "plain meaning" of a release can sometimes turn on a tribunal's interpretation of just a few words. At the same time, as the *Ingham* opinion teaches, tribunals often impose a high burden on contractors to specify any claims that are excepted from the scope of a general release.

Given that, contractors should observe a few simple drafting tips to ensure that the wording of any release clearly and accurately captures the parties' agreement. For example, if a contractor wants to settle certain claims, but reserve others for a later date, it should expressly list the claims it is reserving under a separately headed paragraph in the release provision, or even under a separately headed section of the modification.

In reserving such claims, contractors should take care to define potentially ambiguous terms—e.g., instead of reserving claims relating to "the proposal," a contractor should reserve claims relating to "proposal No. XYZ, dated April 1, 2017," along with any other pertinent identifying information. Similarly, if a document, such as a proposal, will be discussed in a release or a reservation of claims provision, consider physically attaching the proposal document as an exhibit to the modification and referencing it clearly. That way, there will be no confusion regarding which proposal you are referencing.

Key Takeaway No. 4: Whenever Possible, Avoid Sweeping Language and Unstated Assumptions—Following *Bell BCI*, most sophisticated Government contractors understand the possible implications of signing a release that encompasses "any and all claims." But as illustrated in the decisions described above, the phrase "any and all" is only one formulation of language that can cause a contractor to release its rights inadvertently.

For example, in *Ingham*, a hospital agreed not only to release "any and all claims" relating to the adjustments it was being paid, it also released all "known and unknown" claims it "ever" or "may have" had before, during and after it signed the release. When coupled with the hospital's failure to condition the release on the Government accurately calculating the requested adjustment, this sweeping language all but assured that Ingham would be forever barred from asserting claims that were even remotely related to the adjusted payments it accepted.

Additionally, contractors should consider whether releasing "any and all claims" may release certain defenses to Government claims—especially in the wake of the Federal Circuit's decision in *M. Maropakis Carpentry, Inc. v. U.S.*, 609 F.3d 1323 (Fed. Cir. 2010); 52 GC ¶ 225, which discussed when a contractor must assert a defense to a Government claim as an affirmative contractor claim.

Key Takeaway No. 5: Maintain Contemporaneous Documentation; You Never Know When You'll Need It—As demonstrated by several of the cases described above, contemporaneous written documentation of the parties' negotiations regarding the meaning of a release provision may come in handy when arguing about its scope and application. Although contractors should always endeavor to craft release language that is "clear and unambiguous," they should also document important discussions with the Government before executing a release provision, and even confirm, in writing, the parties' interpretation of the scope of a release after the fact.

This information may be useful when developing a factual record in litigation, and it also may be helpful in convincing the CO to grant a certified claim that might otherwise be denied based on the terms of a release. Like a good insurance policy, you may never need this "extrinsic evidence," but if you do need it, you will be happy to have it.

Conclusion—The Federal Circuit's decision in *Bell BCI* demonstrates the power of a broadly worded release: the Government can count on the enforceability of broadly worded general releases, while contractors have the onus to articulate and reserve

their rights. The cases summarized in this Feature Comment illustrate some of the challenges contractors face post-*Bell BCI*, including the potential for incurring significant litigation expense as a result of poorly worded or unclear releases. Considering the practical guidance discussed above will help contractors (a) minimize the risk of inadvertently releasing potential claims against the Government and (b) avoid unnecessary (and costly) litigation regarding the interpretation of a release.

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