

INVACARE CORPORATION

**CONTRACT NOS. V797P-3149k
V797P-3480j
V797P-3775j**

VABCA-6574, 6599, 6600

**VA NATIONAL ACQUISITION CENTER
HINES, ILLINOIS**

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**OPINION BY ADMINISTRATIVE JUDGE SHERIDAN
ON CROSS-MOTIONS FOR SUMMARY JUDGMENT**

Invacare Corporation (Invacare or Contractor), filed timely appeals from a contracting officer's final decision that sought \$472,693 in price reduction offsets on three Federal Supply Schedule program contracts entered into between Invacare and the Department of Veterans Affairs (VA or Government). The dispute centers around the impact of a particular bilateral contract modification on the amount due VA, and claimed pursuant to the PRICE REDUCTION clause contained in each of the contracts. Following the pleading process, VA filed a MOTION FOR SUMMARY JUDGMENT (Gov't Mot.) with Attachments (Att.) A and B. The Appellant opposed Government's MOTION with its OPPOSITION AND CROSS-MOTION FOR SUMMARY JUDGMENT (App. Opp.) with Att. A and B (Thomas J. Ritchie Affidavit (Ritchie Aff.)). Finally, the Government answered with a REPLY BRIEF IN SUPPORT OF THE MOTION FOR SUMMARY JUDGMENT (Gov't Reply) with Att. C (John Ames Affidavit (Ames Aff.)). In addition to the foregoing, the record for purposes of deciding these Motions consists of the Pleadings, including

Contractor's Complaint (Compl.) with Attachments (Att.) A-1 through A-11, B and C; Government's Answer (Ansr.); and Appeal File (R4), tabs 1 through 134 as supplemented (R4 Supp.), tabs 1 through 13.

In Pleadings and in its response to the Government's MOTION, it is apparent that Invacare acknowledges certain offsets are due VA on all three contracts. Invacare avers that "[n]either the VA nor Invacare dispute the amounts due and owing under Contracts V797P-3480k and 3775j." Invacare also acknowledges VA is entitled to a credit on Wheelchair Contract (V797P-3149k) totaling \$64,498. App. Opp. at 7.

FINDINGS OF FACT

The following findings of fact are made for the purposes of this decision only.

VA has been delegated authority by the General Services Administration to award and administer multiple award schedule (MAS) contracts for healthcare supplies and services through the Federal Supply Schedule (FSS) program. 48 CFR 38.101(d). Indefinite delivery contracts (including requirements contracts) are awarded by the VA to several commercial suppliers to provide supplies and services at stated prices for given periods of time. The schedule contracting office is responsible for administering the contract and issuing publications, called "Federal Supply Schedules," containing the information necessary for placing delivery orders with schedule contractors. VA ordering offices then place orders for supplies and services off the schedules by issuing delivery orders directly to the schedule contractor at the prices, terms and conditions that were negotiated for the schedule by the schedule contracting office. 48 CFR 38.101. The appeals in issue involve three such FSS contracts for certain medical equipment and supplies. Each of the contracts with Invacare was the result of a

negotiated procurement, and was awarded and administered by the contracting office located at the VA National Acquisition Center (NAC), Hines, Illinois.

On January 2, 1992, the NAC awarded Contract No. V707P-3480j (Walker Contract) to Invacare for patient aids, specifically, walkers (SIN B-35(a)), shower aids (SIN B-35(d)) and commode chairs (SIN B-35(e)) for the period from January 1, 1992 through December 31, 1996. SINS in MAS contracting refer to Special Item Numbers (SIN) and represent groups of generically similar products that are intended to serve the same general purpose. Solicitation No. M3-Q3-92 showed that VA estimated the annual sales for the patient aids listed (walkers, canes, crutches, shower aids, commode chairs, pressure pads, and grab bars) as \$31,536,610. (R4, tab 131)

On December 31, 1993, VA awarded FSS Contract No. V707P-3775j (Oxygen Contract) to Invacare to procure oxygen concentrators, accessories and replacement parts (SIN D-15), physiotherapy apparatus accessories and replacement parts (SIN D-35) and lifts and patient equipment for hospital and home use, accessories and replacement parts (SIN D-41). The term for the Oxygen Contract was April 1, 1993 through September 30, 1994. (R4, tab 134)

Contract No. V797P-3149k (Wheelchair Contract) was awarded on October 7, 1994, to run from October 7, 1994 through June 30, 1994. It allowed VA ordering entities to obtain certain models of wheelchairs, specifically, manual wheelchairs (SIN F-1), powered wheelchairs (SIN F-2), and three-wheeled scooters (SIN F-3). Solicitation No. M3-Q4-94, for the wheelchairs, indicated that based on purchases as reported by the previous contractor, VA estimated its two year requirements as \$15,156,108 for manual wheelchairs, \$9,025,048 for powered wheelchairs, and \$4,546,070 for three-wheeled scooters. (R4, tab 75)

As is common in FSS schedule contracts, prior to commencing contract negotiations, Invacare and other contractors wishing to provide wheelchairs

pursuant to Solicitation No. M3-Q4-94 were required to submit Discount Schedule and Marketing Data (DSMD) disclosing the best discounts offered to its Most Favored Customer (MFC) for the same products it offered to the Government. DSMD sheets were required by the Government to assist them in negotiating fair and reasonable prices. Via the DSMD disclosure, Invacare provided VA its pricelists, information on the best discounts it gave its commercial customers (often referred to as the MFC), the total discount it offered to provide the Government, and other information on the terms of the sales it made to commercial customers. (R4, tab 76; Compl., Att. A-2) Invacare's offer identified the "Manufacturer's catalog/pricelist [and] retail price list used by our dealers" as the pricelist on which it based its offer. (R4, tab 75, Section M) Invacare's Sales Support Manager, Judith L. Kovacs provided appropriate certifications for the information provided.

VA Contracting Officer Carol J. Calhoun awarded the Wheelchair Contract. Pursuant to its terms, VA ordering offices were able to purchase their needs for the listed models of manual and powered wheelchairs off the schedule that Invacare had negotiated with VA. Depending on the model purchased, ordering offices were entitled to a 46 to 75.5% price discount on the manual models on the schedule and a 51% price discount on the powered models.

Regarding price discounts, the Contract provided:

Awarded discounts are based on 8 ea. Invacare pricelist(s) dated January 1, 1994, 6 ea. Action Price Sheets pricelist dated December 1, 1993, 12 ea. Action Price Sheets price list dated January 1, 1994 and 4 ea. Action Price Sheets price list dated May 1, 1994.

(R4, tab 75)

To protect its negotiated discounts and ensure that VA maintained its generally superior MFC pricing throughout the life of Contract, the Contract contained a price reduction clause, originally I-FSS-390 - PRICE REDUCTION (APR

1984). The PRICE REDUCTION clause required Invacare to provide VA with price reductions or increased discounts when it granted price reductions or increased discounts to certain commercial customers or categories of customers (CoC) designated in the Contract. Invacare was required to maintain the price relationship between VA's price and the price granted to the identified CoC during Contract performance. The CoC for application of the price reduction provisions of the Contract was identified by the parties prior to award as "National Accounts/Buying Groups" and "Distributors/Wholesalers." Subsequent to award, and after the schedule was in place, VA ordering offices began ordering wheelchairs off the schedule at the prices and discounts agreed upon in the Contract. (R4, tab 75)

On December 19, 1994, the parties entered into Modification #2 that deleted the Contract's original PRICE REDUCTION clause and incorporated a new one. The new PRICE REDUCTION clause, 552.238-76 PRICE REDUCTION (OCT 1994) provided, *inter alia*:

(a) Before award of a contract, the Contracting Officer and the offeror will agree upon (1) the customer (or category of customers) which will be the basis of award, and (2) the Government's price or discount relationship to the identified customer (or category of customers). *This relationship shall be maintained throughout the contract period. Any change in the Contractor's commercial pricing or discount arrangement applicable to the identified customer (or category of customers) which disturbs this relationship shall constitute a price reduction.*

(b) During the contract period, the Contractor shall report to the Contracting Officer all price reductions to the customer (or category of customers) that was the basis of award. The Contractor's report shall include an explanation of the conditions under which the reductions were made.

(c) (1) A price reduction shall apply to purchases under this contract, if after the date negotiations conclude, the Contractor --

(i) Revises the commercial catalog, pricelist, schedule or other document upon which contract award was predicated to reduce prices;

(ii) Grants more favorable discounts or terms and conditions than those contained in the commercial catalog, pricelist, schedule or other documents upon which contract award was predicated; or

(iii) Grants special discounts to the customer (or category of customers) that was the basis of award, and the change disturbs the price/ discount relationship of the Government to the customer (or category of customers)

(2) The Contractor shall offer the price reduction to the Government with the same effective date, and for the same time period, as extended to the commercial customer (or category of customers).

(d) There shall be no price reduction for sales --

(1) To commercial customers under firm, fixed-price definite quantity contracts with specified delivery in excess of the maximum order limitation specified in this contract;

* * * * *

(f) The Contractor shall notify the Contracting Officer of any price reduction subject to this clause as soon as possible, but not later than 15 calendar days after its effective date.

(g) The contract will be modified to reflect any price reduction which becomes applicable in accordance with this clause.

(R4, tab 2) (Emphasis added)

The Wheelchair Contract was subsequently modified by the parties on several occasions to reflect needed changes. Often, the Contractor initiated the request for a modification based its own self-audit and an acknowledgement that a greater discount or better price was due VA. For the most part, the modifications added and deleted models of wheelchairs and made numerous price adjustments based on temporary special promotions and sales. Typically, the MODIFICATIONS and the PRICE REDUCTION clauses were cited as the authority for these bilateral modifications. (R4 tabs 1-73) Pursuant to Modification #8, executed on October 16, 1995, the parties agreed to incorporate Clause I-FSS-164-F, Option to Extend the Term of the Contract (Aug 1995), giving the Government the right to extend the Contact and require Invacare to perform within the limits and at the prices specified for a term not to exceed five years. (R4, tab #8) A number of bilateral modifications, Modification ##12, 25, 63, 66 and 70, were also executed extending the Wheelchair Contract performance period through November 30, 2000. (R4, tabs 25, 63, 66, 70) Modification #12, and its effect, became of particular relevance to the Wheelchair Contract.

On October 12, 1995, Invacare's Ms. Kovacs wrote James Kalinski, a Contract Specialist at the NAC's Medical Care Products Division, disclosing that Invacare had recently entered into a purchase agreement with a company it characterized as "new business entity," Apria Healthcare, Inc., (Apria). Apria was formed as a result of the merger of two of Invacare's previous commercial customers, Homedco Corporation and Abbey Home Health. Prior to that time both companies were included in the Contract's applicable CoC and being used for discount tracking purposes. Ms. Kovac's letter informed VA that because

Apria had committed to purchase 90% of its requirements from Invacare, and Invacare estimated \$50 million in purchases from Apria, Invacare would be granting discounts and net prices to Apria that it would not give the Government. She also forwarded a copy of the September 9, 1995, purchase agreement with Apria and an Invacare memorandum dated September 8, 1995, indicating that Invacare believed that Apria would be purchasing an estimated \$10 million worth of wheelchairs out of a total anticipated \$50 million in purchases. (R4, tab 78) Mr. Kalinski wrote back on December 7, 1995, directing Invacare to provide DSMD data, “fully complete the page in section M of the Contract that spells out the best discounting arrangements provided to your various categories of commercial customers, inclusive of the discounts now available to Apria Healthcare, Inc.” He asked that the information requested, along with any necessary certifications, be submitted to him no later than December 22, 1995. (R4, tab 79)

On February 2, 1996, Ms. Marsha Jeffries, Patient Mobility Devices Schedule Manager at the NAC’s Medical Care Products Division, wrote Ms. Kovacs “[p]lease be advised that, pursuant to clause I-FSS-164-F, OPTION TO EXTEND THE TERM OF THE CONTRACT (AUG 1995), the Government intends to exercise this option and extend current contracts for a two year period, July 1, 1996 through June 30, 1998.” (R4, tab 81) (Emphasis in original) She indicated that “before the bilateral modification to exercise the option can be signed . . . all current contractors wishing to extend their contract must submit a certified statement that the category of customer upon which the award was predicated still exists, and that the disclosed discounts/net pricing relationships to all customers remains unchanged from the time of award.” Invacare was warned “[I]f this type of statement does not apply, you must submit new DSMD sheets for each SIN affected.”

Ms. Kovacs responded on March 4, 1996, "Invacare Corporation certifies that the category of customer upon which the award was predicated still exists and the disclosed discount/net pricing relationship to all customers remains unchanged from the time of award. The only exception is Apria Healthcare Group, Inc., which has been previously disclosed." She indicated in the letter that "[a] complete disclosure and submission of DSMD sheets are being processed by Invacare to be reviewed by James Kalinski. These disclosures . . . [will be] delivered to [Mr. Kalinski] by March 7, 1996." (R4, tab 12) Ms. Kovacs also forwarded an "Option Period/IFF [Industrial Funding Fee] Information" sheet in which she indicated "I agree*" to the following required certification:

I certify that the category(ies) of customer(s) for which the award of contract V797P- __ was predicated still exists, and the discounts disclosed on page 113 have not increased to the commercial industry.

However, she also added a asterisk qualifier under that certification, providing, "* with noted exception previously disclosed on Apria Healthcare Group, Inc." (R4, tab 12, 82)

On March 31, 1996, Ms. Kovacs sent Mr. Kalinski the promised DSMD sheets and supporting documentation. Her cover letter represented "the disclosed pricing discounts reflects Invacare's current pricing relationship with Apria Healthcare Group and other classes of customers with which Invacare conducts business." She asked Mr. Kalinski to "please incorporate this disclosure into each contract." (R4 Supp., tab 3)

Ms. Jeffries, the Contracting Officer responsible for Modification #12, forwarded proposed Modification #12 to Ms. Kovacs for her signature on May 20, 1996. She wrote "[the modification] exercises the Government's option to extend the contract, document[s] changes due to the Industrial Funding, and incorporate[s] Invacare's new aggregate and quantity discounts for the option

period. Because of the type of changes to the contract, your signature is required on the enclosed modification.” (R4, tabs 12 and 85) Ms. Kovacs executed Modification #12 on May 31, 1996. The following week she also signed Amendments ##1 and 2. Amendment #1 reopened the original solicitation, Solicitation No. M3-Q4-94, for consideration of new offers, including motorized three-wheeled scooters (SIN F-3), and to update the Contract’s terms and conditions. Invacare provided pricing information on the scooters in the form of a Commercial Sales Practice (CSP) questionnaire and chart, indicating it was now offering motorized three-wheeled scooters (SIN F-3), and that the discounts it offered to the Government were equal or better than its “best discount to any customer acquiring the same items offered for this SIN regardless of quantity or terms and conditions.” Invacare declared “National Accounts (American Home Patient)” as its customer who received its best discount on three-wheeled motorized scooters. (Gov’t Mot., Att. A, 57-60) Amendment #2 changed the delivery schedule and made several revisions, deletions and additions to Solicitation No. M3-Q4-94. (Gov’t Mot., Att. B)

Ms. Jeffries made the required Determination for Price Reasonableness prior to executing Modification #12. She noted in the “Abstract of Modification for Contract Extension of May 17, 1996,” *“the original terms and conditions remain the same” and the name and date of the “negotiated price list” as “Invacare [pricelist dated] 12/1/94; Action [pricelist dated] 5/1/94.”* The Abstract also clarifies:

Per telecon[ference with] Judy Kovacs, 5/17/96
Invacare’s MFC is National Accounts/Buying Groups.
(She is working [with] Jim Kalinski on a mod[ification]
to remove Distributors/Wholesalers as one of the
MFCs.)

(R4, tabs 12, 85)

Ms. Jeffries executed Modification #12 on June 5, 1996, making changes to the Contract's scope, additions and deletions to the Contract clauses, as well as changes to the Industrial Funding Fee [IFF], end-of-contract and quantity discounts, and providing, in pertinent part:

1. Pursuant to I-FSS-164-F, FSS-164-F, OPTION TO EXTEND THE TERM OF THE CONTRACT (AUG 1995), the Government hereby exercises its option to extend the term of the contract. The extended performance period is July 1, 1996, through June 30, 1998. The following changes are effective for this option period:

* * * * *

C. Amendments 1 and 2 to Solicitation M3-Q4-94 are attached hereto as part of this modification and the clauses contained therein are incorporated as part of this contract for the option period.

* * * * *

3. The contractor is required to amend its FSS price list to reflect the new performance period and the changes to the contract per this modification by means of a sequentially numbered FSS supplemental or cumulative edition price list. The new FSS price list shall contain the same information as the initial FSS price list coversheet

ALL OTHER ITEMS AND CONDITIONS OF THE CONTRACT REMAIN UNCHANGED.

(R4, tab 12) (Emphasis in original)

While Modification #12 was being worked on by Ms. Kovacs and Ms. Jeffries, Ms. Kovacs continued to work with Mr. Kalinski on the Apria pricing issue. On May 29, 1996, two days before she signed Modification #12,

Ms. Kovacs wrote to Mr. Kalinski requesting that VA issue a modification to change the predicated CoC from “National Accounts/Buying Groups” and “Distributors/Wholesalers” to only “National Accounts.” She wrote:

Per our conversation of May 21, 1996, Invacare Corporation is requesting a modification to the above referenced contract, to change the predicated class of customer from the original National Accounts, Buying Groups and Distributors to *National Accounts only*, specifically American Home Patient, (excluding all other class of customers). National account pricing is based on an average sales volume of approximately \$14 million and with the exception of Apria Healthcare Group, is our most favored class of customer. Please refer to all documentation sent on March 31, 1996 disclosing current pricing practices and Invacare’s pricing based on class of customer. Invacare would like the Government to consider Apria Healthcare Group as a new Super Account class of customer, which is based on a requirements contract and average sales volume of over \$50 million. This new Super Account class would be considered an *excluded* class of customer as well.

(R4, tab 84) (Emphasis in original)

Around April 1996, Debra Giannetta from Invacare’s Contract and Pricing Division also began to assume certain contract administration responsibilities on the Wheelchair Contract. (R4, tab 19) Ms. Giannetta attempted to contact Mr. Kalinski numerous times by telephone in June and July 1996 to discuss the issuance of a modification for Apria. (R4 Supp., tab 5) For assistance in addressing Invacare’s request regarding Apria, Mr. Kalinski contacted Burnell Brusveen, his Team Leader in the NAC Contract Administration Section. In considering Invacare’s request, VA took the position that since the NAC had three FSS contracts with Invacare, purchases against all three should be combined in deciding whether to track Apria or consider it as a non-comparable

CoC. Mr. Kalinski 's initial impression was that VA was "about equivalent to Apria on our procurements of items on [the] FSS schedule." (R4, tab 86)

On August 1, 1996, Mr. Kalinski informed Invacare that, based on the current buying agreements and DSMD sheets it had submitted, VA had determined Apria "should *not* be disallowed" as a predicated CoC for tracking purposes under the PRICE REDUCTION clause. He wrote:

Apria was formed as a result of a merger of the former Homedco Corporation and Abbey Home Health. Both these companies were doing business with Invacare *prior* to the agreement with Apria, and were considered for commercial customer discounting practices when your initial offer was evaluated and negotiated. The discounting to these companies was fully considered when the government negotiated its current discounts on your existing FSS contracts, specifically referencing [the Wheelchair Contract], for which you have some pending modification request currently in-house.

Apria is truly not a "brand new customer with significantly higher volume agreement", it is a combination of two companies that already were part of Invacare's commercial customer base when the offer for products on the aforementioned contracts were evaluated and awarded. The two companies merely added their volume arrangements that were already in place with Invacare together, to arrive at the higher projected dollar volume amount disclosed.

(R4, tab 87) (Emphasis in original)

Negotiations on the schedule for three wheel-motorized scooters (SIN F-3) were conducted on August 1, 1996. Ms. Kovacs wrote Ms. Jeffries on August 14, 1996, making Invacare's Best and Final Offer and representing that "[w]ith the exception of Apria," Invacare's best and final offer was based on National Accounts as the CoC. (R4 Supp., tab 6) Modification #16 was executed on September 5, 1996, adding motorized three wheel scooters to the Contract and

establishing National Accounts as the predicated CoC for application of the PRICE REDUCTION clause. (R4, tab 16)

Ms. Kovacs wrote Mr. Kalinski's team leader, Mr. Brusveen, directly on August 23, 1996, asking that VA re-evaluate its decision not to exclude Apria from the CoC. She argued that the requirements and volumes associated with Apria's purchase agreement were significantly different from any previous customer, in that the Government did not purchase "close to" the volume of Apria nor did it provide a percentage purchase requirement on any of Invacare's FSS contracts. (R4, tab 88)

Based on a request from Mr. Kalinski, Marci Vineyard, an auditor in VA's Office of Inspector General Contract Review and Evaluation Division (CRD or OIG), reviewed Invacare's request to exclude Apria from the CoC. The primary purpose of CRD is to provide audit and advisory services to VA on FSS proposals and contracts. (Ames Aff. at ¶ 3) Ms. Vineyard completed a review on Invacare's request to exclude Apria from the CoC, and recommended that the request be denied. She noted in her recommendation, *inter alia*, that the agreement between Apria and Invacare did not fit the exclusions in the PRICE REDUCTION clause, did not contain commitment to specific quantities, and did not contain a penalty provision or provision for monetary adjustment for nonperformance. (R4, tab 90) Mr. Kalinski adopted these recommendations on October 23, 1996, when he wrote Invacare again denying the request and informing them that the PRICE REDUCTION clause had been triggered on September 15, 1995, when Invacare entered into the purchase agreement with Apria. He advised Invacare to conduct a self-audit on all three of its FSS contracts, and informed Ms. Kovacs that if a self-audit was not conducted, VA "would be forced to consider other measures to remedy this situation." (R4, tab 92)

On September 11, 1996, Invacare provided another set of Discount Schedule and Marketing Data on the manual wheelchairs that revised the DSMDs it had previously sent on March 31, 1996. Again Ms. Kovacs noted "[t]his was in response to the Government's request for supporting documentation on the pricing relationship with Apria. . . . Please incorporate this disclosure into the above referenced contract." (R4, tab 89) Sometime around October 1996, Ms. Kovacs became Invacare's Director of Corporate Pricing and Contracting. (R4, tab 93) She requested a meeting regarding VA's refusal to remove Apria as the tracking CoC. The meeting was held on November 20, 1996, with Ms. Kovacs being accompanied by Invacare's attorney. (R4, tab 98) Following that meeting, Ms. Kovacs provided some additional requested information for VA's consideration on December 13, 1996. She wrote,

As a follow up to our November 20, 1996 meeting, attached is the detail requested on Government purchase, per SIN number with the comparable Apria Healthcare purchases.

* * * * *

By reviewing previous disclosed DSMD sheets, the Government can see that Invacare sells most of the products at an equal or less-than price of Apria. Please review the requested information and advise Invacare as to the final decision of the government regarding our request to remove Apria as the tracking customer for the price reduction clause.

(R4, tab 99)

After conferring with individuals at the NAC and in the CRD, Mr. Kalinski wrote Invacare on June 20, 1997, to tell it that the data had been reviewed "and there has been no change in the Government's position, which is not to exclude Apria Healthcare Group from the Contract's PRICE REDUCTION clause." He

concluded, "the Government discounts must be at least equal to those granted by your firm to the Apria Healthcare Group [a] modification to permanently reduce the Government's net pricing on these affected items to be at least equal to the pricing of the Apria Healthcare Group will be required." He again asked Invacare to conduct a self-audit and rebate to the Government any overcharges that might have occurred. He indicated that any items that could not be appropriately reduced in price could be considered for possible cancellation under the Contract's CANCELLATION clause. (R4, tab 100) Several months elapsed before the parties could find a mutually agreeable time to meet. On October 15, 1997, writing to confirm a meeting date, Mr. Kalinski wrote Ms. Kovacs about the necessity of an Invacare self-audit:

We need to see as a result of your "self-audit" how the Government may have been negatively impacted on those specific items in question whereby the Government has not been receiving net pricing at least equivalent to and not less than that given to the Apria Healthcare Corporation.

Also, so that this situation does not continue to perpetuate, a decision must be made by the authorized officials at the Invacare Corporation as to cancel (with 30 calendar days notice) any items in question whereby Invacare "is not" willing to grant pricing "at least equal to or better than" the net pricing currently being granted to the Apria Healthcare Corporation. So either we must have pricing "equal to or better than" Apria Healthcare Corporation to keep these particular items on your current FSS contract, or, they must be cancelled from the FSS contract in 30 days for the date of your decision not to do so.

(R4, tab 104)

Invacare performed the self-audit and provided it to VA on October 20, 1997. The audit showed that on the three contracts it had potential exposure of

\$173,109.30 for the period from October 1, 1995 through October 31, 1996. Specifically, Invacare acknowledged exposure of \$155,918.82 on the Wheelchair Contract, \$14,970.11 on the Walker Contract, and \$2,220.37 on the Oxygen Contract. For the period from November 1, 1996 through June 30, 1997, Invacare calculated it had a total potential exposure of \$79,271.05. This was broken down as \$72,609.15 on the Wheelchair Contract, \$6,650.28 on the Walker Contract and \$11.62 on the Oxygen Contract. Taking into account a \$55,413.24 (2%) rebate paid on the Contract for October 1, 1995 through June 30, 1996, Invacare estimated its potential exposure for that period to be \$196,967.11. Invacare also estimated its potential exposure from July 1, 1997 through September 30, 1997 to be \$29,726.64. Estimated exposure for overpayments totaled \$226,693.75 through September 30, 1997. (R4, tab 106)

Ms. Kovacs continued to pursue the Apria issue, and on October 22, 1997, she, Messrs. Kalinski and Brusveen and other VA employees, including representatives from VA's CRD and General Counsel offices having involvement with the price reduction issue, participated in a telephone conference. John

Ames, the Director of CRD, recounts that conference as follows:

Ms. Kovacs stated they had conducted an internal review and Invacare was prepared to refund \$196,967 in price reductions for the period of October 1, 1995, through June 30, 1997. This figure included all three contracts affected by the Apria contract and included a full year of price reductions after the date the modification was effective. Of that amount, \$173,114 related to the Contract, V797P-3149k. Ms. Kovacs also stated that Invacare would not reduce the FSS prices to Apria's prices for the remainder of the contract after June 30, 1997. Mr. Kalinski was adamant that a modification must be issued immediately to lower prices to match that of Apria's because that it was the Government's position that Apria triggered the provisions of the price reduction clause.

(Ames Aff. at ¶ 8)

According to Mr. Ames, members of CRD analyzed Invacare's self-audit results and responded on November 4, 1997, that instead of the \$196,967 Invacare had acknowledged, VA believed Invacare was responsible for a contract price adjustment payment of \$696,776 to cover price reductions from October 1, 1995 through June 30, 1997. He charged that Invacare's self-audit had miscalculated the price reductions on the Contract, inappropriately reducing its sales and resultant price reduction exposure. (R4, tab 109; Ames Aff. at ¶¶ 8-9) In November 1997, Mr. Kalinski asked the CRD to work directly with Invacare officials to resolve the differences in calculation methodology. (Ames Aff. at ¶ 10)

Responding on November 19, 1997, Ms. Kovacs wrote Mr. Kalinski transmitting an offer to resolve the price reduction issue. She argued that the documents Invacare had submitted "represent a general overview of the Apria contract pricing and are not and do not represent a complete and accurate self-audit. A complete, accurate self-audit representing October 1, 1995 through

present would have to be generated.” Noting that Invacare maintained that Apria represents a category of customer with a purchase volume and commitment not in existence at the time the contracts were entered into, she proposed maintaining all products on the Wheelchair Contract and enforcing the price reduction clause with all other national contracts, guaranteeing a 3.43% rebate for all contact purchases for 1997 and 5% rebate for 1998. She posited the proposed settlement would bring the Government’s pricing relationship “close to Apria’s, and in many cases . . . lower . . . than Apria’s.” (R4, tab 110)

On April 13, 1998, Mr. Kalinski wrote Ms. Kovacs that the CRD’s review of Invacare’s documentation resulted in a report that showed a “dramatic discrepancy” with Invacare’s findings on the amount of the appropriate price reduction. He also indicated that the CRD would be looking further into the matter. He warned Ms. Kovacs that VA was firm on its position that Apria did not qualify for an exemption to the PRICE REDUCTION clause. (R4, tab 111) Further review of the appropriate price reduction was subsequently conducted by the CRD and, on August 26, 1999, Mr. Ames informed Invacare that VA had revised its calculations and concluded that for the period from October 1, 1995 through June 30, 1997, VA should receive a price reduction of \$514,805 on the Contract. He concluded:

We believe the Government is entitled to [a] price reduction from the effective date of the Apria agreement, October 1, 1995 to the present time. The agreed to customer of comparability for price reduction purposes is National Accounts. The merger of Abbey Foster and Homedco that created Apria does not, in any way, revise or change the FSS contract agreement. Apria is a National Account and therefore did trigger the price reduction clause. Based on our review, the price reduction for the 21-month period, October 1, 1995 through June 30, 1997, is \$514,805. To project [the] total price reduction, we have reviewed FSS sales since 1995

and concluded that it is reasonable to assume the amount would be at least \$514,805 for the 25-month period ending July 31, 1999. This results in a total amount due of [\$1,029,610].

We also request that you submit a current listing of Apria pricing. This information will be used to modify the existing contracts.

(R4, tab 113; Ames Aff. at ¶ 12)

Ms. Kovacs wrote Mr. Ames on September 27, 1999, stating that Invacare was considering a settlement proposal and had retained the services of Ritchie Sawyer Corporation (Ritchie Sawyer), a consulting company providing technical support services in areas relating to government contracting, auditing, information systems, data analysis and litigation support, to assist them with analyzing the price reduction matters. (R4, tab 114; Ritchie Aff. at 1; Compl., Att. B)

On February 1 and 2, 1999, Ms. Kovacs, Ms. Giannetta and Mike Stanko, Invacare's Director of Corporate Pricing, met again with members of the CRD to discuss Invacare's internal review and methodology for calculating the price reductions. (Ames Aff. at ¶ 11) Invacare provided the CRD with data on the price reduction issue, as well as its analysis of that data, on February 16, 2000. (R4, tabs 116-118) The CRD analyzed the data and noted it had questions concerning both the data and the methodology used to compute the amount due the Government. VA asked for a meeting with Invacare and notified them that if a meeting could not be set they intended to issue a Bill of Collection in the amount of \$1,026,610. (R4, tab 121) Mr. Ames and OIG staff met with Ms. Kovacs, and Invacare's counsel and consultants on April 28, 2000, to discuss their problems with Ritchie Sawyer's calculations and possible settlement of the price reduction matter. (R4, tabs 116-22; Ames Aff. at ¶ 20) Mr. Ames avers that it was

at this meeting, that when asked to explain “time gaps” and changes in price reduction calculations:

Tom Ritchie offered that it was his belief that Modification #12 terminated the “initial contract period” and effectively started a new contract. This, by default, reset the price reduction ratios according to Mr. Ritchie. This was the first time that Invacare officials or representatives ever raised an issue with Modification #12 . . . [w]e inquired as to the legal basis for such an interpretation of Modification #12. Invacare’s counsel, Ernie Mansour, requested a private meeting with his client, Invacare, and with Mr. Ritchie and Mr. Sawyer. After their meeting, Mr. Mansour stated they would provide us with written legal support for their interpretation of Modification #12 within 2 weeks. When we did not receive any support for this interpretation of Modification #12, we requested that Invacare immediately revise their calculations. Invacare agreed to revise the calculations to use only the actual invoiced price and to maintain the price reduction ratio at a one to one ratio. The revised calculation for contract V797P-3149k was \$645,891. We believed this number to be reliable and the most accurate calculation of price reductions.

(Ames Aff. at ¶ 20)

About the April 28th meeting, Mr. Ritchie notes:

The VA [OIG] did not take any exceptions to our audit methodology but did take exception to our interpretation of the effect that Modification #12 had on the initial contract with respect to price reductions. The VA claimed that we did not calculate any price reductions after June 30, 1996 based on our interpretation of Modification #12. We explained that this was not true and we showed the VA our documented price reduction calculations after the date in question. We pointed out that Modification #12 established new price/discount relationships based on the new DSMD data requested by the government in

conjunction with the bilateral modification. We also explained that any price reductions which occurred from the date of the initial contract award through Contract Modification #11 expired at the end of the initial contract period on June 30, 1996. However, any price reductions that occurred after June 30, 1996 were included in our calculations.

(Ritchie Aff. at 5)

At the April 28th meeting, VA requested that Invacare recalculate the price reduction assuming that Modification #12 had no effect on the price/discount relationships. Mr. Ritchie strongly advised Invacare against making such a recalculation, but Invacare required Ritchie Sawyer to make the recalculation. Ritchie Sawyer reloaded the data files, “removed Modification #12 pricing information, and recalculated the price reduction amounts in accordance with the VA’s request.” Price reduction reports, excluding the effect of Modification #12, were generated on May 31, 2001. (Ritchie Aff. at 5-6)

Subsequently, on June 14, 2000, Ms. Kovacs again wrote to VA about the possible settlement of the issues surrounding the appropriate price reductions. She noted that the self-audit, “based upon Invacare’s interpretation of Contract Modification #12, effective July 1996,” resulted in a proposed settlement of \$237,695, through June 30, 1999. She indicated that per VA’s request, Invacare had re-run the report using the Government’s interpretation of Modification #12 and that the re-run had identified a “raw number” of \$645,891 on the Wheelchair Contract. She represented the figure was “raw,” because “Invacare did not conduct an analysis of the invoices, pricing promotions, billing errors, etc., which would greatly reduce the amount due.” Noting Invacare’s desire to resolve the matter quickly and avoid further legal arguments and that “we are both aware that legal counsel on both sides want to argue the application of Modification

#12," and Ms. Kovacs calculated her offer on the Wheelchair Contract thusly:

Government price reduction differential	\$645,891.00
Invacare self-audit results	<u>237,695.00</u>
[Subtotal]	883,586.00
Compromise figure ($\$883,586 \div 2$)	\$441,793.00
Estimated price differential through 6/30/00	
\$5,184 per worksheet enclosed	5,184.45
annualized through 6/30/00	<u>1,728.15</u>
[Subtotal]	\$448,705.60

(R4, tab 123) To reach the \$448,705.60 figure, she averaged the amount Invacare claimed was due with the amount VA claimed, and added a differential to bring the amount through June 30, 2000. To the \$448,705.60 figure, she then added in her calculations of undisputed settlement proposals amounts for the Walker Contract (\$46,559.09) and the Oxygen Contract (\$2,252.44) to reach a proposed settlement of \$497,516.82. From that figure she subtracted overpayments Invacare had made associated with the Industrial Funding Fee (\$14,690.52) and Aggregate Sales rebates (\$214,596.82). After all the calculations were made, Invacare offered a total adjusted settlement sum of \$268,596.82 to resolve the price reduction issues associated with Apria on all three contracts. Ms. Kovacs also proffered "Invacare would then make price adjustments on all Government contract products based on the Government's interpretation of the PRICE REDUCTION clause and the previously established category of customer through the end of [the Wheelchair Contract], thus eliminating any future claims." (R4, tabs 108 and 123)

Settlement discussions continued between the parties. Mr. Ames wrote back on August 2, 2000, disagreeing with Invacare's characterization of the \$645,891 figure on the Wheelchair Contract as a "raw" figure, and asserting "the entire \$645,891 is reliable and a reduction of 50 percent as proposed by Invacare

on any part of the calculation is not supported.” He stated VA was willing to accept price reductions totaling \$701,611 on the three contracts for the period June 1999 through June 2000. His figures were derived using the figures contained in Ms. Kovac’s June 14th letter. On the Wheelchair Contract, he asserted VA was due a price reduction of \$652,803 which represented Ritchie Sawyer’s calculation using the VA interpretation of Modification #12 plus Ms. Kovac’s figures to take the price reductions through June 30, 2000. Mr. Ames agreed with Invacare’s proposed adjustments for the Industrial Funding Fund overpayments and the Aggregate Sales rebates and represented that based on these calculations, the Government was due \$472,693. (R4, tab 124) Noting that VA “accept[s] Invacare’s adjustments to the settlement,” Mr. Ames calculated the VA’s counteroffer of a \$472,693 price reduction thusly,

<u>FSS Contract V797P-3149k</u>		
10/95-06/99	\$645,891	
07/99-03/00	5,184	
<u>04/00-06/00</u>	<u>1,728</u>	
TOTAL		\$ 652,803
<u>FSS Contract V797P-3480j</u>		
10/95-10/96	\$ 14,970	
11/96-06/97	6,650	
<u>07/97-12/99</u>	<u>24,938</u>	
TOTAL		\$ 46,558
<u>FSS Contract V797P-3775j</u>		
10/95-10/96	\$ 2,220	
11/96-06/96	11	
<u>07/97-12/98</u>	<u>19</u>	
TOTAL		\$ 2,250
Total Price Reduction Violation		<u>\$ 701,611</u>

We also accept Invacare's Adjustments
to the settlement

Total Price Reduction Violation	<u>\$ 701,611</u>
Less Invacare Adjustments	
IFF Overpayment Adjustment	\$ (14,690)
Rebate Overpayment Adjustment	<u>(214,228)</u>
TOTAL Adjustment	\$(228,918)
Total Amount Due the Government	\$ 472,693

(Ames Aff. ¶ 21; R4, tab 124)

Upon receiving the Government's counteroffer, Invacare, through its attorney, notified Mr. Ames on September 15, 2000, that Invacare's original offer of \$268,596.82 was withdrawn. (R4, tab 125)

Mr. Ames wrote Mr. Kalinski on September 25, 2000, recommending that VA issue a final decision and bill of collection for a price reduction in the amount of \$472,693 for the three contracts. He represented that "[a]ll issues concerning the data and methodology have been resolved. The only outstanding issue is Invacare's interpretation and treatment of Modification #12 on . . . the Wheelchair Contract." (R4, tab 126) The Contracting Officer's Final Decision, with attached Bill of Collection #01-M-001, was issued by Mr. Kalinski on October 17, 2000. Referencing the contracts' PRICE REDUCTION clauses and sales to Apria from October 1, 1995 through June 30, 2000, Mr. Kalinski sought total credits of \$472,693 on all three contracts, stating in his Final Decision:

[The CRD] has completed its own review of Invacare's self-audit and refund offer, and has concluded that the total amount due the Government is \$701,611. All issues concerning the data and methodology regarding this matter have been resolved. In reference to Modification #12 to Contract V797P-3149k, the action is

simply an extension of the current contract's expiration dated through June 30, 1998, and inclusion of the INDUSTRIAL FUNDING FEE clause 552.238-77 to the contract.

There is no indication that Modification #12 establishes new ratios for the contract's tracking categories of customers or excludes Apria Healthcare as a legitimate tracking customer. Due to an overpayment of an aggregate rebate and an Industrial Funding Fee rebate, Invacare is due a credit in the amount of \$228,918. Therefore, the balance due to the Government is \$472,693.

(R4, tab 127)

Invacare appealed the Final Decision and the matters giving rise to this dispute were duly docketed by our Board. Invacare's appeal in the Wheelchair Contract (V797P-3149k), for which VA sought a price reduction of \$652,803, was docketed as VABCA No. 6574; the \$46,559 price reduction sought in the Walker Contract (V797P-3480k) was docketed as VABCA No. 6599; and the \$2,250 price reduction sought in the Oxygen Contract (V797P-3775j) was docketed as VABCA No. 6600. (R4, tab 128) Attached to its Complaint Invacare included a position paper prepared by Ritchie Sawyer dated December 2000 that was prepared to "help define" Invacare Corporation's obligation to reduce prices under the Contract. The paper concluded that:

The VA Contracting Officer accepted the new DSMD and should have conducted a price analysis in accordance with the government's Multiple Award Schedule Procurement Policy. The VA Contracting Officer subsequently agreed to change the terms and conditions of the initial contract by signing Modification No. 12 on June 5, 1996.

* * * * *

The terms and conditions of the new MAS contract were based on Invacare Corporation's offer and the Contracting Officer's acceptance of the new DSMD information, which included the October 1, 1995 pricing agreement with Apria.

(Compl., Att. B)

DISCUSSION

Invacare concedes that, in each of the contracts, VA is entitled to certain price reductions under the applicable PRICE REDUCTION clauses, and notes that it has appealed only a portion of the amount sought by VA. The parties agree on the amount of price reductions for the Walker and Oxygen contracts, \$46,559 and \$2,250, respectively. They agree that Invacare should also receive rebates for Aggregate Sales and IFF overpayments, \$214,228 and \$14,690, respectively. Since these amounts are not in dispute we need not visit these matters. We will limit our inquiry below to the impact of Modification #12 on price reductions for the Wheelchair Contract.

Each party maintains a very different perspective on the effect of Modification #12 on the pricing and price/discount relationships for wheelchair purchases, and each party has moved for summary judgment on its interpretation. The Government maintains that Modification #12 was issued to extend the Contract, change certain clauses, *inter alia*, the CANCELLATION, END OF CONTRACT YEAR DISCOUNT, QUANTITY DISCOUNT and INDUSTRIAL FUNDING FEE clauses. It asserts the Modification did not change the pricing and price/discount relationship as set forth in the Wheelchair Contract. VA avers that the terms of the Contract, including Modification #12, are clear, that there are no material facts in dispute, and, under established principles of contract

interpretation and applicable law, it is entitled to summary judgment for \$652,803 in price reductions.

Invacare asserts that Modification #12 changed the pricing and price discount relationship between the parties and that the amount sought by VA “is calculated on an erroneous interpretation that pre-June 30, 1996, Apria pricing triggered the Price Reduction Clause after June 30, 1996.” Contractor claims that new “DSMDs were incorporated into the Contract by reference and by their very nature are submitted only to provide a basis for the VA to negotiate its most reasonable price and to establish price/discount relationships for the new contract term.” (App. Opp. at 10 and 19) The Contractor explains its position more specifically:

[I]n proffering \$244,607 as the correct amount for the price reductions, Contractor argues that the parties’ execution of Modification No. 12 affected the price reductions to which VA is entitled. It avers that after it became effective on June 30, 1996, Modification No. 12 changed the pricing and price/discount relationships between the parties thereby altering the applicable price reductions that had been negotiated in Wheelchair Contract pre-modification. The Contractor asserts that genuine issues of material fact remain as to what pricing and price/discount relationships were in effect in the Wheelchair Contract following the execution and effective date of Modification No. 12. It argues that “Modification No. 12 caused a recalculation of the price/discount relationships which stopped the effect of an Apria price reduction granted in 1995 from flowing through to the new contract period,” and constituted a bilateral modification that established a new price/discount relationship between VA and Invacare. The new price/discount relationships, it asserts, were based on the new DSMD data that “Invacare was instructed to provide in association with proposed Modification No. 12.”

(App. Opp. at 2, 10 and 11)

Distilled to their essence, the dispute, MOTIONS and the parties' respective arguments arise out of a question of contract interpretation. Both parties have moved for summary judgment based on their respective interpretations. The only question before us is whether the parties' execution of Modification #12 established new pricing and price/discount relationships for price reductions under the Contract's PRICE REDUCTION clause. Depending on the interpretation of the Modification, VA is due either \$244,607 in price reductions as Invacare has offered, or a greater amount, \$652,803, which the Government claims. The distinction between the two figures is that the \$244,607 figure was derived using Contractor's interpretation that Modification #12 effected a change in the pricing and price/discount relationships between the parties, while the \$652,803 figure was derived using the presumption requested by VA that Modification #12 did not effect a change in the pricing and price/discount relationships between the parties. Both amounts were calculated by Invacare's consultants applying Invacare generated, VA condoned methodology.

Contract interpretation is a question of law that may be resolved by summary judgment. *P.J. Maffei Building Wrecking Corp. v. United States*, 732 F.2d 913, 916 (Fed. Cir. 1984). However, if there is a genuine dispute of material fact, summary judgment is inappropriate. *Beta Systems v. United States*, 838 F.2d 1179, 1183 (Fed. Cir. 1988). For summary judgment to be granted there can be no genuine issue of material fact and the moving party must be entitled to judgment as a matter of law. In evaluating a motion for summary judgment, our role is not to resolve factual questions, or weigh the evidence and determine the truth of the matter. Rather, our role is to ascertain whether material facts are disputed and whether there exists any genuine issue for trial. The burden is on the moving party to establish it is entitled to summary judgment by proving first

that there is no genuine issue of material fact. Further, the evidence offered by the non-moving party is to be believed for purposes of the motion, and we must resolve any doubts over factual issues in favor of the party opposing summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1574 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 818 (1985); *Saturn Construction Company*, VABCA No. 3229, 91-3 BCA ¶ 24,151, *aff'd. sub nom, Saturn Construction Company v. VA Medical Center, Allen Park, Mich.*, 991 F.2d 810 (Fed. Cir. 1993) (Table); *Sabbia Corporation*, VABCA No. 5858, 99-2 BCA ¶ 30,463.

We have reviewed the record before us and find no material facts in dispute. While we are presented here with a case of contract interpretation, Invacare has confused this matter by offering unsupported legal conclusions as disputed material facts. The existence of disputed material facts or a genuine issue for trial cannot be established by the non-moving party simply challenging a fact or by making unsupported conclusions or allegations. As the non-moving party, Invacare must show, by pointing to some part of the record or additional evidence, that pertinent material facts exist that differ significantly from those presented by the moving party. Invacare must also show that based on those differing facts a reasonable fact-finder, drawing inferences in favor of the non-movant, could decide in favor of the non-movant. *Fire Security Systems, Inc.*, VABCA No. 3086, 90-3 BCA ¶ 23,235; *Hengel Associates*, VABCA No. 3921, 94-3 BCA ¶ 27,080; *C. Sanchez and Son, Inc. v. United States*, 6 F.3d 1539 (Fed. Cir. 1993).

Appellant maintains that its assertion that the new DSMD disclosures were incorporated “by reference” into the Contract via Modification #12 thereby creating a “new contract” with changed pricing and price/discount relationships

are disputed material facts. However, what it characterizes as facts are really conclusions drawn by the Contractor unsupported by the facts in the record. The Contractor's position is at times convoluted, but ultimately is founded on the conclusions that "the VA Contracting Officer accepted new DSMD sheets," "should have" conducted a price analysis, and "subsequently agreed to change the terms and conditions of the initial contract by signing Modification #12."

Invacare wrongly concludes that its submission of new DSMD sheets to the VA somehow made them part of Modification #12. It characterizes the submission as "acceptance" by "the Contracting Officer" even though the DSMDs were provided to Mr. Kalinski, a contract specialist who was working on Invacare's request to have Apria not considered in the CoC for discount tracking purposes. There is no evidence in the record that Mr. Kalinski was involved in negotiating Modification #12. The Modification was being negotiated by Ms. Jeffries, who was the responsible Contracting Officer. Invacare appears to conclude, because Ms. Kovacs informed Ms. Jeffries she was planning to provide DSMDs to Mr. Kalinski, the new DSMDs found their way into the Modification negotiations with Ms. Jeffries. While Ms. Kovacs asked Mr. Kalinski to "incorporate the DSMDs into the Contract," there is no evidence that he acted on her request. The Modification does not address the new DSMD sheets or changing the price/discount relationship.

Invacare points to no facts in the record supporting its conclusion that the new DSMD submissions were incorporated into the Contract. In fact, Invacare concedes that "[o]ther than through the DSMD disclosures, Apria was not a topic of Modification [#]12 negotiations." (App. Opp. at 8) The Contractor simply has not shown that the parties ever treated the DSMDs as within the scope of the Modification or discussed resolving the Apria request through the Modification. The clear language of the Modification does not incorporate the new DSMD

sheets. Invacare's conclusions are not facts that are in dispute. The summary conclusions Invacare provides through its consultant, pleadings, and brief are little more than assumptions and legal arguments that are not borne out by the facts in the record. Comments on what "should" have occurred to change the Contract's pricing and price/discount relationships via Modification #12 are not pertinent here. We have previously noted that more is needed in the way of facts than mere assertions by counsel. *Snack Time Foods, Inc.*, VABCA No. 3729, 93-2 BCA ¶ 25,825; *Elmstar Electrical Corporation*, VABCA No. 3385, 91-3 BCA ¶ 24,222.

We apply similar reasoning to the conclusions of Invacare's consultant which were also unsupported by material facts in the record. We did not find the consultant's position paper submitted with Invacare's complaint to be compelling or to raise any material facts in dispute. The unsigned paper gave general background and drew conclusions that ignored the Modification's language and attempted to support Invacare's position. The paper did not point to facts supporting the legal conclusions that "[t]he terms and conditions of the new MAS contract were based on Invacare Corporation's offer and the Contracting Officer's acceptance of the new DSMD information, which included the October 1, 1995 pricing agreement with Apria." The paper, containing a selective version of what occurred, focused on the fact that new DSMDs were provided to Mr. Kalinski and concluded that, therefore, Ms. Jeffries should have had the DSMDs and included them in the Modification. The statements made in the paper do not raise material facts in dispute. So too, the consultant's affidavit largely ignored the Modification's language as well as many of the facts leading up to and following its execution. The affidavit did not meet the criteria that "facts stated be set forth in detail . . . by a knowledgeable affiant" and that they be more than "mere denials or conclusory statements." *Barmag Barmer*

Maschinenfabrik AG v. Murata Machinery, Ltd., 731 F.2d 831, 835-36 (Fed. Cir. 1984). We see no facts that would lead us to conclude Ms. Jeffries received, much less “accepted,” the DSMD sheets. Even if she had received them there is no indication in the record she incorporated them into the Modification.

Having found no genuine material facts in dispute we move on the contract interpretation issue presented by Modification #12. Contract interpretation is a matter of law. The only question before us here is whether Modification #12 changed the Contract’s pricing and price discount relationship. We interpret a contract, or one of its provisions, by examining the plain language and reading all parts of the contract as a whole. An interpretation which gives a reasonable meaning to all parts will be preferred to one which leaves a portion of it meaningless. *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991); *Brant Construction Management, Inc.*, VABCA No. 539, 98-2 BCA ¶ 30,073. We make our interpretation such that no part of the contract is made inconsistent, superfluous, or redundant. *United International Investigative Service v. United States*, 109 F.3d (Fed Cir. 1997); *Gould, Inc., v. United States*, 935 F.2d 1271 (Fed. Cir. 1991); *Edward R. Marden Corp. v. United States*, 803 F.2d 701 (Fed. Cir. 1986); *Moreland Corporation*, VABCA Nos. 5409, 5410, 00-1 BCA ¶ 30,640; *Agency Construction Corp.*, VABCA Nos. 4559-60, 96-2 BCA ¶ 28,611; *L & L Insulation, Inc.*, VABCA No. 3734, 95-2 BCA ¶ 27,759.

First, and foremost in resolving this matter we begin by examining the plain language of the Contract, including Modification #12, and reading all parts as a whole. We have reviewed the terms of Modification #12 and find them clear on their face. As asserted by the Government, this Modification extended the Contract term through June 30, 1998, incorporated Amendments ##1 and 2, changed clauses and contained additional language not pertinent to this discussion. Other than the listed changes, Modification #12 specifically provided

that “ALL OTHER ITEMS AND CONDITIONS OF THE CONTRACT REMAIN UNCHANGED.”

The terms of the Modification do not change the Contract’s pricing and price/discount relationship. The Amendments, which the Modification incorporated by reference into the Contract, did not address incorporating the new DSMDs or changing the pricing in the Contract. Based on the clear and unambiguous language contained in Modification #12, we conclude that it did not change the pricing or price/discount relationships established in the Contract.

Since Modification #12 is clear on its face, we need not go further and consider extrinsic evidence such as the parties’ contemporaneous discussions and actions. However, we are compelled to note that even if Modification #12 and its terms were less clear than they are, the actions of the parties concurrent with the Modification’s execution show that neither party intended Modification #12 to change the pricing and price/discount relationship established in the Contract. We understand that Ms. Kovacs submitted some new DSMD sheets, but these were submitted to Mr. Kalinski who was working on Invacare’s request to have Apria taken out of the National Accounts CoC for tracking purposes. This was a different issue than the Modification whose primary purpose was to extend the Contract and make some adjustments to noted clauses. A different Contracting Officer, Ms. Jeffries, was working on the Modification. She was aware that Mr. Kalinski was working on the Apria request because Ms. Kovacs had indicated that in a teleconference. In correspondence sent two days before she signed the Modification, Ms. Kovacs acknowledged that the Apria issue was still outstanding. Ms. Jeffries in the Abstract prepared for the Modification noted that “the original terms and conditions remain the same” and that the applicable

negotiated price list was Invacare's pricelists of December 1, 1994 and May 1, 1994.

The conduct and actions of Ms. Kovacs and Ms. Jeffries are not disputed and clearly show it was neither parties' intent to use Modification #12 as the instrument to resolve the Apria request or to otherwise change the existing pricing and price/discount relationships. Appellant has not posited and the record does not show that Ms. Kovacs understood that the new DSMD sheets she had sent to Mr. Kalinski would be part of Modification #12. Based on these actions of Ms. Kovacs and Ms. Jeffries, as well as other actions we have not recounted, it is apparent from the record before us that in negotiating the Modification they agreed to postpone dealing with the Apria request, and that Ms. Kovacs would continue to work with Mr. Kalinski on that. Changing the Contract's pricing, the new DSMDs and Apria were not topics addressed in the Modification's negotiations or language, and after the Modification was executed Ms. Kovacs continued to work with Mr. Kalinski on the Apria pricing request.

We also observe that the Contractor's current position was derived several years after the Modification was executed and was first disclosed by the Contractor's consultant and attorney in a meeting with VA on April 28, 2000. This was approximately 3 ½ years after Ms. Kovacs and Ms. Jeffries executed the Modification. Up until the time the Contractor's new argument was revealed, Ms. Kovacs, who was Invacare's primary representative in this Contract, continued to negotiate with Mr. Kalinski on the Apria request and appropriate price reductions. She negotiated without ever asserting that Modification #12 changed the price reduction calculations for the Contract. Even after the current position was disclosed on April 28, 2000, Ms. Kovacs continued to discuss resolving the issue by using calculations that averaged the amount based on Invacare's new position with the amount VA claimed was due. By her own

conduct, Ms. Kovacs indicated her understanding that her request regarding Apria and pricing and price/discount relationships had not been resolved by Modification #12, and remained an outstanding issue for the parties to reconcile.

Contractor focused its appeal and subsequent arguments not on the fact that its calculations were in error, but rather on the issue of whether Modification #12 impacted the pricing. Having found that Modification #12 did not impact the pricing or price/discount relationships, \$652,803 is the appropriate amount for the price reduction on the Wheelchair Contract. To that amount we add the undisputed price reductions for the Walker and Oxygen Contracts and subtract the undisputed Industrial Funding Fee overpayments and the Aggregate Sales rebates.

Based on the foregoing, VA is entitled to the following:

Price Reduction Wheelchair Contract (V797P-3149k)		\$652,803
Price Reduction Walker Contract (V797P-3480j)		46,558
Price Reduction Oxygen Contract (V797P-3775j)		<u>2,250</u>
Subtotal Price Reduction		\$701,611
Less IFF Overpayment	(\$ 14,690)	
Less Aggregate Sales Rebate	(214,228)	
Subtotal Adjustment	(\$228,918)	<u>(\$228,918)</u>
Total Amount Due the Government		\$472,693

DECISION

For the foregoing reasons, the Department of Veterans Affairs' MOTION FOR SUMMARY JUDGMENT is **GRANTED**; Invacare Corporation's CROSS-MOTION FOR SUMMARY JUDGMENT is **DENIED**. Accordingly, the Appeals of Invacare Corporation, VABCA Nos. 6574, 6599, and 6600, are **DENIED**, and the Government is properly due the amount of \$472,693 from Invacare Corporation under Contract Nos. V797P-3149k, V797P-3480j, V797P-3775j.

Date: **October 3, 2002**

Patricia J. Sheridan
Administrative Judge
Panel Chair

We Concur:

Guy H. McMichael III
Chief Administrative Judge

Richard W. Krempasky
Administrative Judge