

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Sentara Health System) ASBCA No. 51540
)
Under Contract No. N00140-95-C-N009)

APPEARANCES FOR THE APPELLANT: Joseph J. Petrillo, Esq.
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William A. Koenig, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE JAMES
ON APPELLANT'S MOTION FOR RECONSIDERATION

On 1 November 2000, appellant timely moved for reconsideration of the Board's 28 September 2000 decision on the captioned appeal. Appellant seeks to revise our finding 2 to incorporate "the range of incentive awards possible under the contract" for contract line items 0020AC, 0020AD, 0026AA, 0026AB, 0026AC, and 0026AD, made by Modification No. P00057, "which was not part of the Rule 4 file," but whose first four pages appellant attached to its motion. The first attached page is a Standard Form 30 signed by appellant on 30 April 1998 and by the contracting officer on 4 May 1998.

Respondent's 21 November 2000 reply to the motion raises several objections: (1) Appellant did not identify any extraordinary circumstance explaining why it did not introduce Modification No. P00057 before the Board closed the record at the conclusion of the hearing on 15 December 1999 (tr. 551), which thus deprived respondent of the opportunity to introduce rebuttal evidence in the record. (2) The document attached to the motion is inadmissible because it is incomplete and not authenticated, and appellant has not suggested how it is relevant to entitlement, which was the subject of the 28 September 2000 decision. (3) Modification No. P00057 would have no material impact upon the Board's entitlement decision.

Although styled a motion for reconsideration, the parties tacitly recognize that appellant seeks to reopen the record to receive newly discovered evidence, as permitted under the Federal Rules of Civil Procedure, Rule 60(b)(2). Appellant has not explained how Modification No. P00057, which shows on its face that it was executed in April/May 1998, could not have been discovered and introduced into the record of this appeal before 15 December 1999. When evidence is in a party's possession prior to entry of judgment, it is not "newly discovered evidence." See *Taylor v. Texgas Corp.*, 831 F.2d 255, 259 (11th Cir. 1987). Therefore, Modification No. P00057 is not "newly discovered evidence" of the sort contemplated by Fed. R. Civ. Proc. 60(b)(2).

Moreover, even if such modification were "newly discovered," such evidence does not relate to any factual or legal issue decided in our 28 September 2000 decision, relating to whether Sentara could reasonably conclude that it had the implied obligation to provide the ADS change for which its VECP offered an alternate methodology. Our decision has no bearing on the parties' consideration of Modification No. P00057, in its entirety, in resolving quantum on this appeal.

We deny appellant's motion for reconsideration.

Dated: 29 November 2000

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 51540, Appeal of Sentara Health System, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals