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ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of -)
)
Shoreline Foundation, Inc.) ASBCA Nos. 62876, 63616
)
Under Contract No. W912EP-16-C-0027)

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OPINION BY ADMINISTRATIVE JUDGE O’CONNELL
ON APPELLANT’S MOTION FOR RECONSIDERATION

Appellant, Shoreline Foundation, Inc. (SFI), seeks reconsideration of the Board’s decision in *Shoreline Foundation, Inc.*, ASBCA Nos. 62876, 63616, 24-1 BCA ¶ 38,607 (*SFI II*).^{*} In that decision, the Board granted summary judgment to the United States Army Corps of Engineers (USACE) on SFI’s defective specifications and misrepresentation theories but denied it with respect to SFI’s superior knowledge theory. Familiarity with that decision is presumed. SFI requests that the Board reconsider the decision with respect to SFI’s misrepresentation claim. The Board denies the motion.

DECISION

“To prevail on a motion for reconsideration, a party ‘must demonstrate a compelling reason for the Board to modify its decision.’” *Restoration Specialists*,

^{*} In an earlier decision, the Board struck SFI’s allegations related to delays caused by a bid protest because SFI did not submit a claim to the contracting officer. *Shoreline Foundation, Inc.*, ASBCA Nos. 62872, 63616, 23-1 BCA ¶ 38,468 (*SFI I*).

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LLC, ASBCA No. 63284, 24-1 BCA ¶ 38,503 at 187,138 (quoting *Golden Build Co.*, ASBCA No. 62294, 20-1 BCA ¶ 37,742 at 183,161). Motions for reconsideration are not the place to present arguments previously considered and rejected, but if we made erroneous conclusions of law, or failed to consider an appropriate matter, reconsideration may be appropriate. *Id.*

SFI requests that the Board reconsider its grant of summary judgment to USACE with respect to an alleged USACE misrepresentation of its “subjective state of mind” (app. mot. at 1). SFI relies upon the decision of the Court of Appeals for the Federal Circuit in *T. Brown Constructors, Inc. v. Pena*, 132 F.3d 724 (Fed. Cir. 1997). That appeal involved a contract for highway construction where the agency provided test results of a quarry to bidders. The test results showed low amounts of clay. However, the agency failed to advise bidders that the tests were not conducted in accordance with agency standards and failed to warn that the tested samples were not taken from the clay seams in the quarry. After the contractor began work, it found that the actual amount of clay was much higher than shown in the test results. The Federal Circuit held that the agency was liable for a misrepresentation. *Id.* at 728-29.

In its decision, the Federal Circuit explained that “for a contractor to prevail on a claim of misrepresentation, the contractor must show that the Government made an erroneous representation of a material fact that the contractor honestly and reasonably relied on to the contractor’s detriment.” *Id.* at 729. In these appeals, USACE is entitled to summary judgment because the contract contains no material misrepresentation.

As described in *SFI II*, SFI builds almost its entire case on a sentence in the contract that states “[i]t is anticipated that the placement season may occur between April 1st and October 1st.” *SFI II* at SOF ¶ 17. This sentence was in the August 9, 2016, solicitation and referred to the 2017 and 2018 placement seasons. *Id.* at SOF ¶¶ 1, 17, 32.

T. Brown Constructors involved completed test results on a discrete topic, the amount of clay in a quarry, which an agency is quite capable of conveying in an accurate manner. *T. Brown Constructors*, 132 F.3d at 728. By contrast, these appeals involve weather that, based on SFI’s original plan to start placement on May 9, 2017, was a minimum of nine months in the future and a maximum of more than two years. *SFI II*, SOF ¶¶ 1, 32. Considering how far into the future this was, along with the inherent unpredictability of the weather, the Board concluded that, when USACE stated that placement “may occur” between April 1st and October 1st, this was only an estimate or general guideline of the duration of the placement season. It was not a warranty or representation that weather and sea conditions would be suitable for placing concrete mats. *SFI II* at 187,676-77.

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The Board also based this conclusion on several other parts of the contract. These included contract clauses that clearly allocated the risk of assessing the weather and ascertaining the cost and difficulty of the work on SFI. *SFI II* at 187,675-76. Further, the contract included a clause that warned bidders that the site was subject to inclement weather that “typically occurs between November 1st and May 1st.” *SFI II* at SOF ¶ 18. By using the word “typically” USACE signaled that its grasp of future weather was not precise and that the inclement weather season might not end by May 1st. In other words, the ability to place mats in April and even May was subject to the uncertainty of the inclement weather season. *SFI II* at 187,677.

Finally, as the Board observed, at its most basic level, SFI’s complaint is that the wind, waves, and water clarity at the site were worse than it expected. *SFI II* at 187,675. But, as we stated in the opinion, the contract contained no representations as to how clear the water would be. *Id.* at 187,677. Perhaps most importantly, the contract warned bidders that the site was subject to stormy, windy, and rainy conditions during the entire year. *SFI II* at SOF ¶ 19. USACE made no false or inaccurate representations with respect to the maximum wind speeds or wave heights that SFI would encounter. *SFI II* at 187,677-78. Accordingly, there was no misrepresentation.

SFI contends that the contract provision stating “[i]t is anticipated that the placement season may occur between April 1st and October 1st” is a representation as to what USACE “subjectively anticipated” (app. mot. at 4-6). It is difficult for the Board to understand this argument because SFI has been quite vague as to what *it* anticipated, let alone what USACE anticipated. The Board finds it impossible to believe that any reasonable bidder would read a solicitation stating that the site “typically” suffered from inclement weather until May 1st, and was subject to stormy, windy, and rainy conditions year-round, but nevertheless concluded that the agency was representing that the weather would be almost entirely favorable. But that is what SFI alleges. In its second supplemental brief, SFI represented to the Board that it believed that it could conduct “placement operations throughout April with only a handful of adverse weather delay days during that month” (app. second supp. br. at 7). The placement season clause says no such thing, and such an interpretation would require us to ignore all the other provisions of the contract that we have discussed.

Finally, SFI also relies upon the Board’s decision in *Martin Edwards & Assocs., Inc.*, ASBCA No. 57718, 12-2 BCA ¶ 35,058. That decision is inapposite because it involved disputed facts concerning the representations that an agency made to a contractor to induce it to sign a release. *Id.* at 172,209. In these appeals, there is no dispute as to what the contract states. For the reasons that we have stated, the contract does not warrant or represent that weather would in no way hinder the contractor’s ability to work unencumbered on any given day.

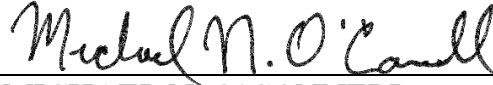
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CONCLUSION

SFI's motion is denied.

Dated: September 16, 2024



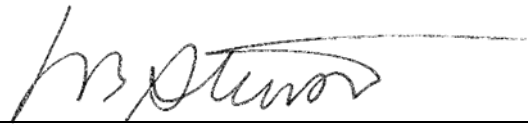
MICHAEL N. O'CONNELL
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I concur



OWEN C. WILSON
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



DAVID B. STINSON
Administrative Judge
Armed Services Board
of Contract Appeals

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I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA Nos. 62876, 63616, Appeals of Shoreline Foundation, Inc., rendered in conformance with the Board's Charter.

Dated:

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals