ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Ford Lumber & Building Supply, Inc.	)	ASBCA No. 61618
	)	
Under Contract No. DACA27-1-96-9	)	

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OPINION BY ADMINISTRATIVE JUDGE D'ALESSANDRIS
ON APPELLANT'S MOTION FOR RECONSIDERATION

In an opinion dated August 1, 2019, the Board granted in part the motion to dismiss filed by respondent, the United States Army Corps of Engineers (Corps or government) and dismissed ASBCA Nos. 61617 and 61618, but denied the Corps' motion with regard to ASBCA No. 61619. *Ford Lumber & Building Supply, Inc.*, ASBCA No. 61617 *et al.*, 19-1 BCA ¶ 37,407 at 181,850 (familiarity with the facts is presumed). Appellant, Ford Lumber & Building Supply, Inc. (Ford), timely filed a motion for reconsideration with respect to ASBCA No. 61618 alleging that its claim letter asserted a claim for interpretation of the lease terms or for other relief (app. mot. at 2). For the reasons stated below, Ford's motion for reconsideration is denied.

A motion for reconsideration is not the place to present arguments previously made and rejected. "[W]here litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *Dixon v. Shinseki*, 741 F.3d 1367, 1378 (Fed. Cir. 2014) (quoting *Official Comm. of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 167 (2d Cir. 2003)). Moreover, "[m]otions for reconsideration do not afford litigants the opportunity to take a 'second bite at the apple' or to advance arguments that properly should have been presented in an earlier proceeding." *Dixon*, 741 F.3d at 1378; *see also Avant Assessment, LLC*, ASBCA No. 58867, 15-1 BCA ¶ 36,137 at 176,384. On the other hand, if we have made mistakes in the findings of fact or conclusions of law, or by failing to consider an appropriate matter, reconsideration

may be appropriate. *See Robinson Quality Constructors*, ASBCA No. 55784, 09-2 BCA ¶ 34,171 at 168,911; *L&C Europa Contracting Co.*, ASBCA No. 52617, 04-2 BCA ¶ 32,708 at 161,816. The Board recently summarized the standard for reconsideration stating "[i]n short, if we have made a genuine oversight that affects the outcome of the appeal, we will remedy it." *Relyant, LLC*, ASBCA No. 59809, 18-1 BCA ¶ 37,146 at 180,841. Here, as in *Relyant*, no such mistakes have been identified.

Relevant to the pending motion for reconsideration, the Corps transferred certain portions of the former Jefferson Proving Ground, in Jefferson County, Indiana to Ford pursuant to a lease in furtherance of conveyance (LIFOC). The lease provided that the Corps would transfer the property once environmental clean-up made the property suitable for transfer. The LIFOC additionally indicated that the transferred property might be subject to environmental restrictions. *Ford Lumber*, 19-1 BCA ¶ 37,407 at 181,844. By letter dated November 14, 2017, Ford filed a claim with the Corps seeking removal of the environmental restrictions or an unspecified reduction in the purchase price of the transferred property. *Id.* at 181,846. The next day, Ford accepted a quitclaim deed of conveyance transferring the property (R4, tab 16).

The Board dismissed ASBCA No. 61618 for failure to state a sum certain. *Ford Lumber*, 19-1 BCA ¶ 37,407 at 181,848-49. The Board additionally held that "[t]o the extent Ford seeks a Board award compelling the government to remove the residential restrictions from the deed, such a request would constitute a valid claim; however it would be a request for specific performance which we lack jurisdiction to entertain" (*id.* at 181,848).

Ford now seeks reconsideration of our dismissal of this claim, alleging that its claim letter properly stated a claim for contractual interpretation and for other relief (app. mot. at 2). Specifically, Ford does not dispute that the LIFOC provided the Corps with the ability to impose environmental restrictions on the property (*id.* ("Dean and Debbie Ford always knew that restrictions would be placed on some of the parcels or portions of some parcels of the former Jefferson Proving Ground")). Instead Ford raises a new argument, not presented in its opposition to the government's motion, contending that the restrictions imposed were not "necessary and appropriate to protect human health and the environment" (*id.*). Ford further concedes that its "[c]laim makes no demand for payment of money in a sum certain" (*id.* at 5).

As noted above, a motion for reconsideration is not the appropriate place to raise an argument that should have been raised in an earlier proceeding. *Dixon*, 741 F.3d at 1378. For that reason alone, Ford's motion for reconsideration should be denied. However, even if we were to consider its newly raised argument, it would not change the outcome. In our earlier opinion, we actually agreed with Ford's new position that a request for modification of the environmental restrictions could state a valid claim under the Contract Disputes Act; however, we also noted that such a

request would be a claim for specific performance that would be beyond the jurisdiction of the Board. *Ford Lumber*, 19-1 BCA ¶ 37,407 at 181,848.

As always, we determine our jurisdiction as of the time that a notice of appeal is filed. *See, e.g., Keene Corp. v. United States*, 508 U.S. 200, 207 (1993) (quoting *Mollan v. Torrance*, 6 L.Ed. 154 (1824)) ("the jurisdiction of the Court depends upon the state of things at the time of the action brought"). Here, the property in question had already been transferred from the Corps to Ford (R4, tab 16). Thus, an interpretation of contractual terms would not change the terms of the quitclaim deed which Ford had already accepted. Moreover, Ford concedes that the Corps was permitted to place environmental restrictions in the lease. Thus, Ford's remedy, if any, would be a claim for money damages. Ford cannot convert its monetary claim into a nonmonetary claim for contract interpretation. "If 'the only significant consequence' of the declaratory relief sought 'would be that [the plaintiff] would obtain monetary damages from the federal government,' the claim is in essence a monetary one." *Securiforce International America, LLC v. United States*, 879 F.3d 1354, 1360 (Fed. Cir. 2018) (quoting *Brazos Elec. Power Coop., Inc. v. United States*, 144 F.3d 784, 787 (Fed. Cir. 1998)). Instead Ford seeks specific performance – an order directing the Corps to modify the terms of the deed – an action that is beyond the Board's jurisdiction.

The Board may possess jurisdiction to entertain money claims based upon a diminution in the value of the property. However, for us to entertain such a claim, Ford first needs to file a proper claim with the contracting officer, asserting damages in a sum certain. Ford has not done so, and thus, the motion for reconsideration is denied.

Contrary to its statement in its motion for reconsideration that its claim did not assert a sum certain (app. mot. at 5 ("Ford's Claim makes no demand for payment of money in a sum certain")), Ford asserts in its reply brief that its claim noted that "across all three of our claims, we do not seek any compensation above the amount that is remaining to be paid on the remaining parcels at [Jefferson Proving Ground]" and, thus, that the remaining lease balance would be an ascertainable sum certain vesting jurisdiction in the Board (app. reply at 2, quoting R4, tab 4 at GR4-20). Even if Ford had not waived this argument, both by failing to raise the issue in its opposition to the government's motion to dismiss treated as a motion for summary judgment, or in its motion for reconsideration, and even if Ford should not be estopped from taking the exact opposite position in its reply brief as in its motion for reconsideration, Ford still fails to state a sum certain. The claim document refers to a possible amount for three claims, and does not provide an ascertainable sum certain for which Ford would be willing to settle this specific claim. Without an allocation of the amount to the specific claims, Ford's purported sum certain is logically similar to the "pick one" claim asserting multiple proposed claim amounts that we rejected in *Southwest*

Marine, Inc., ASBCA No. 39472, 91-3 BCA ¶ 24,126 at 120,744. Moreover, stating a ceiling to the claim amount does not state a sum certain. The Board has long held that qualifications to a numerical amount, such as the use of the word "approximately," prevent its consideration as a sum certain. *See, e.g., M.J. Hughes Constr. Inc.*, ASBCA No. 61782, 19-1 BCA ¶ 37,235 at 181,235 (citing cases holding that expressing a minimum amount for a claim does not state a sum certain and suggesting, but not holding, that an amount stating a maximum amount for a claim would also fail to state a sum certain). Ford's statement that three claims combined "do not seek any compensation above" an unstated but calculable amount is not sufficient to state a sum certain. Ford's vague statement is less definite than the statement of an "approximate" claim amount rejected by the Board in *J.P. Donovan Constr., Inc.*, ASBCA No. 55335, 10-2 BCA ¶ 34,509 at 170,171, *aff'd* 469 Fed. Appx. 903, 908 (Fed. Cir. 2012) (non-precedential). If the rule were otherwise, every contractor could assert a claim of not more than one trillion dollars, rendering the sum certain requirement meaningless.

CONCLUSION

For the reasons stated above, Ford's motion for reconsideration is denied.

Dated: December 18, 2019

DAVID D'ALESSANDRIS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

J. REID PROUTY
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. 61618, Appeal of Ford Lumber & Building Supply, Inc., rendered in conformance with the Board's Charter.

Dated:

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