

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
CDM Constructors, Inc.) ASBCA Nos. 60454, 60455, 60669
)
Under Contract No. W912PL-12-C-0022)

APPEARANCES FOR THE APPELLANT:

Bret S. Wacker, Esq.
Jeffrey M. Gallant, Esq.
Emily J. Baldwin, Esq.
Clark Hill PLC
Detroit, MI

APPEARANCES FOR THE GOVERNMENT:

Michael P. Goodman, Esq.
Engineer Chief Trial Attorney
John F. Bazan, Esq.
Gilbert H. Chong, Esq.
Brian M. Choc, Esq.
Engineer Trial Attorneys
U.S. Army Engineer District, Los Angeles

OPINION BY ADMINISTRATIVE JUDGE SWEET ON THE
GOVERNMENT'S MOTION FOR RECONSIDERATION

The government moves to reconsider our October 24, 2018 decision on entitlement as to the standby generator in ASBCA Nos. 60455 and 60669.* Motions for reconsideration are only appropriate if they are based upon newly discovered evidence, mistakes in the findings of fact, or errors of law. *Green Valley Co.*, ASBCA No. 61275, 18-1 BCA ¶ 37,044 at 180,329 (citing *Alliance Roofing & Sheet Metal, Inc.*, ASBCA No. 59663, 15-1 BCA ¶ 36,063). “Reconsideration is not intended to provide a party with the opportunity to reargue its position.” *Id.* (quoting *Robinson Quality Constructors*, ASBCA No. 55784, 09-2 BCA ¶ 34,171 at 168,911). Thus, “[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 v. Shinseki*, 741 F.3d 1367, 1378 (Fed. Cir. 2014) (citations and quotations omitted).

* The government does not seek reconsideration of our decision regarding the evaporation ponds in ASBCA No. 60454.

Here, the government first improperly seeks to reargue the position it advanced in its post-hearing reply brief that appellant CDM Constructors, Inc. (CDM) abandoned its defective specification claim (gov't post-hearing reply at 1; gov't mot. at 3-4). In any event, the government's argument ignores the fact that defective specification is a category of constructive change. *Grunley-Walsh Constr. Co.*, ASBCA No. 33004, 90-1 BCA ¶ 22,362 at 112,343; *see also* John Cibinic, Jr., James F. Nagle & Ralph C. Nash, Jr., ADMINISTRATION OF GOVERNMENT CONTRACTS, 399 (5th ed. 2016). It also ignores the discretion we possess to consider issues, even abandoned ones. *Becton Dickinson & Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990).

Second, the government mischaracterizes the decision's findings of fact by asserting that we found that "there was no defect in the [Southern California Edison (SCE)] drawings design" (gov't mot. at 4 (citing findings. 47-49)). In the decision, we merely found that the SCE drawings were consistent with Contract No. W912PL-12-C-0022's (0022 Contract's) appendix A, § 9.1.3, and SCE's Electrical Service Requirements ¶ 12. *CDM Constructors, Inc.*, ASBCA No. 60454, 18-1 BCA ¶ 37,190 at 181,010. It does not follow from those findings that the SCE drawings design were error free. *Id.* On the contrary, as we found, the drawings were defective because the government and SCE rejected CDM's design based upon those drawings. *Id.* at 181,010, 181,014.

Third, the government's argument that there was no government action or omission because it was SCE—and not the government—that rejected the design fails legally and factually (gov't mot. at 4-5). Legally, the government's issuance of a misleading solicitation itself is the basis for a price adjustment under a defective specification claim. *BECO Constr. Co.*, ASBCA No. 57483, 11-2 BCA ¶ 34,817 at 171,338; *F.J. Stokes Corp.*, ASBCA No. 6532, 1963 BCA ¶ 3944 at 19,542. Factually, the government also rejected the design by adopting SCE's position in a memorandum. *CDM*, 18-1 BCA ¶ 37,190 at 181,010. Indeed, the testimony of the government's electrical engineer—upon which the government relies—confirms that the government also rejected CDM's design (gov't br. at 5) (quoting tr. 4/38). Therefore, we deny the government's motion for reconsideration.

Dated: May 7, 2019



JAMES R. SWEET
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur



RICHARD SHACKLEFORD
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur



OWEN C. WILSON
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 Nos. 60454, 60455, 60669, Appeals of CDM Constructors, Inc., rendered in conformance with the Board's Charter.

Dated:

JEFFREY D. GARDIN
Recorder, Armed Services
Board of Contract Appeals