ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
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CI^2, Inc.	)	ASBCA No. 56257
	)	
Under Contract No. DABN01-03-C-0007	)	

APPEARANCE FOR THE APPELLANT: H.J.A. Alexander, Esq.
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Atlanta, GA

APPEARANCES FOR THE GOVERNMENT: Raymond M. Saunders, Esq.
Army Chief Trial Attorney
Kyle E. Chadwick, Esq.
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DELMAN ON GOVERNMENT'S MOTION FOR RECONSIDERATION

The government has filed a timely motion seeking reconsideration of our decision under ASBCA No. 56257 in which we granted, in part, appellant's appeal. *CI^2, Inc.*, ASBCA Nos. 56257, 56337, 14-1 BCA ¶ 35,698. Appellant has filed in opposition to this motion.[1] Familiarity with our decision is assumed.

In *ADT Construction Group, Inc.*, ASBCA No. 55358, 14-1 BCA ¶ 35,508 at 174,041, we recently stated the well settled law pertaining to the review of a motion for reconsideration:

> [The moving party] must demonstrate a compelling reason for the Board to modify its decision. *J.F. Taylor, Inc.*, ASBCA Nos. 56105, 56322, 12-2 BCA ¶ 35,125. In determining whether a party has done so, we look to whether there is newly discovered evidence or whether there were mistakes in the decision's findings of facts, or errors of law. *Id.* Motions for reconsideration are not intended to provide a party with an occasion to reargue issues that were previously raised and denied. *WestWind Technologies, Inc.*, ASBCA No. 57436 11-2 BCA 34,859.

[1] Appellant also seeks unidentified sanctions against the government for unsupported arguments in its motion papers. We believe the record fails to support sanctions, and we deny appellant's request.

Applying these well established principles, we address the government's motion below.

Breach of Contract

The government contends that the Board erred because it relied upon a contract breach theory that appellant never raised in its claim (gov't mot. at 5). The government is incorrect. Appellant claimed, among other things, that the government was contractually obligated to assign and pay for the permanent registrar and temporary registrar (TR) units identified in the contract as modified,[2] and its failure to do so was a breach. The Board granted appellant's claim, in part, on this basis. This was not a new or novel "breach theory."

Course of Dealing in Derogation of the Contract as Modified

Notwithstanding Modification (Mod.) No. P00001, which stated, *inter alia*, that effective 10 February 2003, the government shall order services under Indefinite Delivery/Indefinite Quantity (ID/IQ) contract line item numbers (CLINs), *i.e.*, TRs, through the issuance of contract modifications, the government contends that the Board erred in failing to find that the parties had a "course of dealing" in derogation of this contract requirement (gov't mot. at 5). According to the government, the contracting officer's representative (COR) requested the TRs during weekly consultations with appellant's German subcontractor and that is how the Army placed orders under the ID/IQ CLINs in practice (*id.* at 6).

Evidence of a "course of dealing" is extrinsic evidence that may be used to establish the meaning of ambiguous contract language, or to establish that an explicit contract requirement is not binding due to waiver and estoppel. JOHN CIBINIC, JR., RALPH C. NASH, JR. & JAMES F. NAGLE, ADMINISTRATION OF GOVERNMENT CONTRACTS 210-11 (4th ed. 2006). The government failed to show either circumstance. The government failed to show that Mod. No. P00001 was ambiguous; to the contrary, the new contract requirement to order ID/IQ CLINS through contract modifications was clear. The government also failed to show that the COR had the authority to waive the requirements of Mod. No. P00001. Indeed, she admitted she did not have the authority to change the terms of the contract (tr. 1/8). The cases cited by

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[2] See appellant's certified claim (R4, tab 23), which is based upon and incorporates the following amounts: Mod. No. P00002, SUBCLIN 0003AA, Permanent Registrars, $1,470,840.00 (R4, tab 14 at 2 of 3), which is carried over to appellant's claim for FY 03 under Invoice No. 240 (back-up sheet). Mod. No. P00003, CLIN 1004, Temporary Registrars, $757,944.00 (R4, tab 15 at 3 of 15), which is carried over to appellant's claim for FY 04 under Invoice No. 241 (back-up sheet).

the government in support of its position involved claims of course of dealing based upon prior contracts, and have no application here.

The Board did not err in failing to find a "course of dealing" in derogation of the requirements of this contract as modified.

The Contract Modifications

The government contends that the Board erred in construing Mod. No. P00002 to obligate permanent registrars in the amount of 360.5 months for the base year, contending that this figure was only an estimate. By finding that this was a contract obligation, we rejected this interpretation, and the government has not persuaded us that our interpretation was in error. The government's interpretation is unsupported by the language of Mod. No. P00002, *i.e.*, it is unsupported by any estimate-type language provided in the contract modification for the permanent registrars, and it is also inconsistent with that portion of the contract modification that expressly modifies "[t]he total cost" of the contract (R4, tab 14 at 2), and which also includes release-type language that appellant was obligated to sign (*id.* at 1). Contract interpretation is a question of law, *Applied Companies v. Harvey*, 456 F.3d 1380, 1382 (Fed. Cir. 2006), and we are not bound by the unreasonable contract interpretation of any party or witness.

The government also contends that the Board cannot logically hold that the Army breached the contract by failing to "order" quantities of permanent registrars that were not subject to order under the Ordering clause (gov't reply br. at 5). However, we did not state that permanent registrars should have been ordered under the Ordering clause. Rather, we concluded that the 360.5 figure for permanent registrars under the bilateral contract modification was a binding contract obligation. The Board's use of the term "failure to order" in this context referred to the government's failure to "assign" these units to the various work sites consistent with its contract obligations and as determined by the Board's entitlement decision.

Similarly, the government contends that the Board cannot logically hold that the Army breached the contract by failing to "order" quantities of TRs that were in fact ordered under Mod. Nos. P00002 and P00003 (gov't reply br. at 5). Our response is also similar. With respect to the TRs, the Board's reference to the government's failure to "order" was a reference to the government's failure to "assign" these TR units to the various work sites consistent with its contract obligations, as modified by the contract modifications.

Although we believe these verbal distinctions were readily apparent in the context in which they were written, we hereby clarify the language in our decision in accordance with the above to reflect the change in terminology from "order" to

"assign," at the following sections of the decision: "**Base Year 'Ramp-Up Period' and Beyond**," last paragraph, sentence 3, and also at "**Temporary Registrars in Option Year**," last paragraph, first sentence, *see CI², Inc.*, 14-1 BCA ¶ 35,698 at 174,782-84. Appellant's objection to the Board's terminology provides no basis to reverse our holding.

The government also contends that the Board erred in construing Mod. No. P00003 as obligating the government to order TRs in the amount of 216 units for the option year, contending that this figure was only an estimate. While it is true that the Indefinite Quantity clause in the contract, as awarded, provided that such quantities in the schedule were estimates and were to be ordered in accordance with the Ordering clause, it is undisputed that Mod. No. P00001 changed the Ordering clause to provide that ID/IQ CLINs shall be ordered by issuance of contract modifications. Such was the case here. The government otherwise basically reiterates arguments previously raised and rejected by the Board. This is not a basis for reconsideration. *ADT Construction Group, Inc.*, 14-1 BCA ¶ 35,508 at 174,041.

Our decision remanded quantum to the parties. The parties on remand should address any proven damages of appellant arising out of any contract breaches referenced in our decision. As the parties are aware, we did not state in our decision that appellant was entitled to the full contract price incident to any breaches of contract.

CONCLUSION

We have reconsidered our decision in view of the government's motion, and we find no basis to reverse our decision. Our decision, as clarified herein, is affirmed.

Dated: 21 November 2014

JACK DELMAN
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur

DAVID W. JAMES, Jr.
Administrative Judge
Acting 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. 56257, Appeal of CI^2, Inc., rendered in conformance with the Board's Charter.

Dated:

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