ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Zulco International, Inc.	)	ASBCA No. 55441
	)	
Under Contract No. SPO100-05-D-4046	)	

APPEARANCE FOR THE APPELLANT: Mr. Mohammad Ishaq
President

APPEARANCE FOR THE GOVERNMENT: Michael L. McGlinchey, Esq.
Chief Trial Attorney
Defense Supply Center (DLA)
Philadelphia, PA

OPINION BY ADMINISTRATIVE JUDGE PARK-CONROY
ON APPELLANT'S MOTION FOR RECONSIDERATION

Appellant has moved for reconsideration of our Rule 11 decision denying its appeal from the termination for default of its contract to supply swords and scabbards to the United States Marine Corps. *Zulco International, Inc.*, ASBCA No. 55441, 07-2 BCA ¶ 33,701.

Reconsideration is not intended to provide a party with the opportunity to reargue its position. *See McDonnell Douglas Electronics Systems Co.*, ASBCA No. 45455, 99-1 BCA ¶ 30,132 at 149,056. Absent compelling reason, the Board will not modify its decision on reconsideration. *See Sunshine Cordage Corp.*, ASBCA No. 38904, 90-1 BCA ¶ 22,572 at 113,277. The general standards we apply in deciding if the motion for reconsideration advances a compelling reason are whether the motion is based upon newly discovered evidence, mistakes in our findings of fact or errors of law. *See L&C Europa Contracting Co.*, ASBCA No. 52617, 04-2 BCA ¶ 32,708.

Appellant has provided us with a number of new documents that were not included in the Rule 11 record to support its present motion. Among these documents are an e-mail dated 19 January 2005 to Mr. Amir Farooq, appellant's marketing manager, from Mr. Jeff Lakin, who was a Defense Supply Center Philadelphia (DSCP) contract specialist, an e-mail from Mr. Farooq dated 5 April 2005 to Mr. Lakin, some internal government e-mails relating to testing, and several new versions of the contracting officer's rejections of the first article samples. We have carefully reviewed each of these documents and are not persuaded that any of them qualify as newly discovered evidence. Appellant has not shown that it was excusably ignorant of this evidence and that it could

not, by the exercise of due diligence, have discovered these documents in time to include them as part of the Rule 11 record. Appellant also has not shown that any of these documents are of such a material nature as to change the outcome of the appeal. *See D. E .W., Inc. and D. E. Wurzbach, a Joint Venture*, ASBCA No. 38392, 98-2 BCA ¶ 29,768 at 147,509.

The record is clear that Mr. Farooq was very much involved in the matters underlying this appeal. He signed appellant's offer on 3 September 2004, certified that it was valid until 14 January 2005, was in communication with Mr. Lakin, and signed the 6 September 2005 letter to the DSCP contracting officer providing information regarding appellant's failure to perform. Appellant, therefore, could not have been ignorant of the importance of Mr. Farooq, and what appellant asserts were his personal records, to this appeal. Nor do we excuse appellant from failing to exercise due diligence in locating Mr. Farooq's e-mails. The reasons offered with respect to documents alleged to have been in Mr. Farooq's possession are not supported by any evidence. Moreover, the reasons offered are seemingly contradicted by the fact that appellant had access to other of Mr. Farooq's personal records that relate to this contract, including the e-mail he sent to Mr. Lakin on 13 April 2005 which appellant included as an attachment to its Rule 11 brief.

Appellant advances five separate arguments in support of its motion for reconsideration. It first argues that it protested the late contract award and infers that the government agreed to cancel the contract if appellant had difficulty submitting first article samples. We understand appellant to assert, as it did in its Rule 11 brief, that it had a subcontract with a factory in Pakistan that had entered into an "agreement with a team of professional people" to perform the contract work and that this agreement was going to end at some unspecified date. There is no record evidence to support this assertion, much less when the agreement would expire. *See IMS Engineers – Architects, P.C.,* ASBCA No. 53471, 06-1 BCA ¶ 33,231 at 164,673 (unsubstantiated assertions do not constitute proof or evidence). Moreover, Mr. Farooq certified that appellant's offer was good until 14 January 2005 (R4, tab 1 at 58). Because the award was only four days later, we have difficulty understanding how appellant's ability to meet the 90-day requirement for submission of first article samples was impacted, even if there was a "team" with a defined time arrangement.

The new evidence upon which appellant relies, the 19 January 2005 e-mail, is from Mr. Lakin, not Mr. Farooq, and it is only by supposition that one could infer what Mr. Farooq might have communicated to Mr. Lakin, much less that he actually protested the award. In this regard, Mr. Lakin was not the contracting officer and there is nothing in the record that even remotely suggests that he had authority to bind the government in any way with respect to the first article samples. Appellant's contentions to the contrary on this issue are without merit. The other new evidence, Mr. Farooq's 5 April 2005

e-mail relating to the first submission of samples, states that the samples were prepared by the "team" hired for this contract, thereby contradicting appellant's contentions about the unavailability of the "team."

Appellant also challenges the incorporation of the standard FAR 52.209-4, FIRST ARTICLE APPROVAL – GOVERNMENT TESTING (SEP 1989) clause. This argument was not previously raised. It is, nevertheless, without merit. Modification No. P00001 was issued on 18 May 2005. This was after the first set of samples had been submitted to DSCP, examined for visual and dimensional requirements, and rejected. The preamble to FAR 52.209-4 states that the clause is to be inserted in contracts as prescribed by FAR 9.308-2, TESTING PERFORMED BY THE GOVERNMENT. FAR 9.308-2 directs that:

> (a)(1) The contracting officer shall insert the clause at 52.209-4, First Article Approval—Government Testing, in solicitations and contracts when a fixed-price contract is contemplated and it is intended that the contract require first article approval and that the Government will be responsible for conducting the first article test.

Contract Line Item (CLIN) 9906 provided that two first article samples were to be inspected at the plant and accepted at destination (DSCP), with directions for delivery to Mr. Lakin at DSCP (R4, tab 1 at 2, 17). In short, FAR 52.209-4 was mandated for this contract. Thus, it was, as the government contends, an administrative change to the contract under (b)(1) of FAR 43.103, TYPES OF CONTRACT MODIFICATIONS, which authorizes unilateral modifications to make administrative changes. Block 13.B. of Modification No. P00001 is checked, reflecting issuance pursuant to FAR 43.103(b). That the block indicating that the modification was to be signed by appellant and returned was also checked was obviously an error and is wholly insufficient for us to disregard the terms of a mandatory contract clause.

Appellant next complains about alleged incomplete and illegible drawings and asserts that the government did not respond to its inquiries, referring us to tab 5 of its motion for reconsideration. Except for an e-mail dated 13 April 2005, the documents assembled behind the reduced-size drawings in tab 5 relate to contract administration matters, including the omission of FAR 52.209-4, which we discussed above. As we found in our Rule 11 decision, while the 13 April 2005 e-mail indicates that appellant may have attempted to reach Mr. Lakin, there is no evidence establishing why it was trying to do so.

Appellant's fourth argument relates to alleged efforts by the government to deceive the Board. Relying upon documents that are not in the Rule 11 record, it asserts that the contracting officer's rejection of the first samples was by a letter bearing the

handwritten date: "03.30.05" (not the 20 April 2005 date found in Rule 4, tab 10). According to appellant, the contracting officer simply added the date "August 10, 2005" to the earlier letter to show that the delay in award and inspection did not affect appellant's ability to produce acceptable first article samples. It again asserts that the first set of samples was produced by its "team," but not to the specifications in the contract. Another new version addressing the second submission of samples is date-stamped 17 August 2005.

The government points out that it makes no difference if the contracting officer's rejection of the first set of samples was dated 30 March 2005 or 20 April 2005, except that appellant may have been notified earlier that the samples failed. Government counsel further responds that he has never seen the version of the contracting officer's letter that is date-stamped 17 August 2005, but that this letter makes no difference to the outcome of the appeal since it confirms that appellant failed to make conforming samples on two occasions. Thus, even if these documents qualified as newly discovered evidence, we would agree with the government.

As part of its fourth argument, appellant claims that it never received the 29 August 2005 show cause letter (R4, tab 13). The letter written by Mr. Farooq dated 6 September 2005, however, appears in both context and substance to be a response to the 29 August 2005 letter (R4, tab 14). There is no record support for appellant's present assertion that Mr. Farooq's letter was written in response to a telephone conversation. *See IMS Engineers – Architects, P.C., supra.*

Appellant's final argument is that there was excusable delay due to confusion over where to inspect the samples. This is essentially the same argument appellant raised in its Rule 11 brief. Appellant refers us to a number of new government internal e-mails addressing the question of inspection that are not included in the Rule 11 record. While these documents do provide some additional background relating to the inspection issue, they are not so material as to change the outcome of the appeal.

Appellant also refers us for the first time to DSCP clause 52.209-9P01, SPECIAL INSTRUCTIONS FOR FIRST ARTICLES AND ATTENDANT DOCUMENTATION (MAY 2004), which was incorporated into the contract by Modification No. P00001. The DSCP clause requires in (a) that the contractor notify the cognizant Quality Assurance Representative (QAR) in sufficient time prior to the manufacture of the first article to accommodate an in-process verification of the first article manufacture and in (b) that it give 10-days written notification to the contracting officer and the QAR before the first article will be presented to DSCP.

The DSCP clause was not incorporated into the contract until 18 May 2005, after the first set of samples was rejected (R4, tab 7). Notwithstanding appellant's present

contentions, its 24 August 2005 and 6 September 2005 letters indicate that these samples were indeed intended as its first article (R4, tabs 12, 14). In any event, the government considered the samples to be a first article submission and rejected them after examination for visual and dimensional requirements, not for any lack of in-process inspection. Thus, to the extent there was any confusion over in-process verification of the first article, it does not appear to have had any impact upon rejection of the first set of samples.

Modification No. 00011A, issued on 20 June 2005, changed the inspection point from "Origin" to "Destination," *i.e.*, DSCP. Appellant's second set of samples was not submitted until 1 August 2005. Appellant asserts, as it did in its Rule 11 brief, that the delay associated with the inspection location caused the second set of samples it submitted to fail first article inspection because its "team" was no longer at the factory. We considered the argument in our earlier decision and found it wanting. We find no compelling reason to change our view.

For all of these reasons, appellant's motion for reconsideration is denied.

Dated: 25 January 2008

CAROL N. PARK-CONROY
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

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. 55441, Appeal of Zulco International, Inc., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals