

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
COSTAR III, LLC) ASBCA Nos. 55297, 55298, 55299
)
Under Contract No. N62477-00-D-0085)

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OPINION BY ADMINISTRATIVE JUDGE PAUL ON
APPELLANT’S MOTION FOR RECONSIDERATION

Appellant COSTAR III, LLC (COSTAR) has filed a motion for reconsideration with respect to three of the four appeals which we denied in a published decision dated 31 December 2009. *COSTAR III, LLC*, ASBCA Nos. 55296, 55297, 55298, 55299, 10-1 BCA ¶ 34,341.¹ The Navy filed an opposition brief. When deciding a motion for reconsideration, the Board determines whether the motion is based upon newly discovered evidence, errors either of fact or of law, or legal theories not considered by the Board in reaching its decision. *Robinson Quality Constructors*, ASBCA No. 55784, 09-2 BCA ¶ 34,171 at 168,911; *ITT Avionics Division*, ASBCA No. 50403 *et al.*, 03-2 BCA ¶ 32,378 at 160,214. Moreover, it is not the purpose of a motion for reconsideration to afford the movant the opportunity to reargue allegations that were fully analyzed and denied by the Board. *McDonnell Douglas Electronics Systems Co.*, ASBCA No. 45455, 99-1 BCA ¶ 30,132 at 149,056-57; *Gloe Construction, Inc.*, ASBCA Nos. 26434, 26814, 84-3 BCA ¶ 17,516 at 87,231. COSTAR’s motion fails to meet these standards and, therefore, must be denied.

¹ COSTAR “does not challenge the decision in related ASBCA No. 55296” (app. br. at 1). Familiarity with our decision is presumed.

ASBCA No. 55297

Through this appeal, COSTAR alleged that the terrorist attacks of 11 September 2001 led to a dramatically increased population at the Patuxent Naval Air Station which itself caused COSTAR's supply and labor costs on its base operating services contract to increase. Reasoning from this factual premise, COSTAR contended that the Navy had superior knowledge of this alleged population increase and that the contract should be reformed as a result of mutual mistake by the parties regarding the base's population. *COSTAR*, 10-1 BCA ¶ 34,341 at 169,607. The Board held that no record evidence supported these allegations. Neither contemporaneous employment projections nor base loading reports for the period reflected any population increases. Moreover, the base's commanding officer at the time testified that, if anything, the base had a slight dip in population after "911." Hence, we denied COSTAR's appeal.

In its motion for reconsideration, COSTAR does not present any new evidence to bolster its rejected allegations; instead, it merely restates the arguments which the Board found to be without merit. For example, COSTAR attacks our reliance on the base loading reports which contradicted its contentions regarding population increase. But, just as it did at the hearing, COSTAR offers no evidence to contradict these reports with respect to population increases at specific buildings (mot. at 2-3). COSTAR also argues that the base commanding officer's testimony upon which the Board relied was "irrelevant" (mot. at 3). To the contrary, CAPT Hovatter's testimony was both credible and persuasive. Through its remaining arguments, COSTAR attacks the credibility of other witnesses whose testimony we did not weigh heavily in reaching our decision on this appeal (mot. at 3-6). The Board rejects these contentions and affirms its decision in ASBCA No. 55297.

ASBCA No. 55298

In this appeal, COSTAR stated that 24 buildings were included in the contract as requiring only once a day cleaning and restocking. It contended that, as a result of tenants' complaints, it "began performing twice-a-day services in these twenty-four buildings." COSTAR concluded that it should be reimbursed for these allegedly enhanced services. 10-1 BCA ¶ 34,341 at 169,607-08. The Board ruled that COSTAR's evidence lacked specificity by referring "to unidentified, complaining tenants" as a cause for its unilaterally increasing the service at the specified buildings. Moreover, we held that "[n]owhere in its claim does COSTAR refer to any direction from the CO as a basis for increasing service at the designated restrooms." On this basis, we denied the appeal. (*Id.* at 169,608)

In its motion for reconsideration, COSTAR, once again, introduces no new evidence. Rather, it restates its argument that it increased the level of service and that the

contracting officer (CO) ratified its actions (mot. at 6-8). Unfortunately for COSTAR, the underlying record does not support these allegations. Accordingly, the Board affirms its decision in ASBCA No. 55298.

ASBCA No. 55299

Through this appeal, COSTAR contended that, pursuant to contractual Modification No. P00014, the Navy added custodial services at service level B3 for five buildings. It went on to state: “However, unlike the other buildings (all office buildings) serviced...under the contract, these 5 buildings were living quarters that demanded a higher level of service to maintain.” COSTAR also asserted: “On June 3, 2002, in partial recognition that the living quarters require a higher level of service, the government upgraded the service classification for these buildings.” Finally, COSTAR contended that even this level of service was inadequate and that it was required to provide an even higher level of service than was required under the twice modified contract...” (*Id.* at 169,608) The Board noted that the two modifications which upgraded the service for these buildings were bilaterally executed and did not result from unilateral actions on the CO’s part. We also held that any unilateral actions which COSTAR undertook to provide an even higher level of service than set forth in the contractual modifications were those of a volunteer and thus not compensable. (*Id.*)

In its motion for reconsideration with respect to this appeal, COSTAR presents no new evidence. Rather, despite the clarity of the written modifications, it attempts to rehash parole evidence which is part of the existing record in order to explain “the context in which the modifications arose” (mot. at 8). The Board, once again, declines COSTAR’s invitation to alter written modifications which are clear on their face. Therefore, the Board affirms its decision in ASBCA No. 55299.

CONCLUSION

The Board has reconsidered its decisions in ASBCA Nos. 55297, 55298, and 55299 and affirms them.

Dated: 13 September 2010

MICHAEL T. PAUL
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

I concur

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

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 Nos. 55297, 55298, 55299, Appeals of COSTAR III, LLC, rendered in conformance with the Board's Charter.

Dated:

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