ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Office Automation & Training Consultants	)	ASBCA No. 56838
	)	
Under Contract No. W912P4-05-P-0019	)	

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OPINION BY ADMINISTRATIVE JUDGE DICKINSON
ON APPELLANT'S MOTION FOR RECONSIDERATION
AND REQUEST FOR SUMMARY JUDGMENT AS TO ENTITLEMENT,
WITH QUANTUM TO BE DETERMINED IN A LATER PROCEEDING

Office Automation & Training Consultants ("OATC" or appellant) timely moves for reconsideration of our decision granting the government's motion for summary judgment in this appeal involving the Service Contract Act (SCA). *Office Automation & Training Consultants*, ASBCA Nos. 56779, 56838, 11-1 BCA ¶ 34,666 ("*OATC I*").[1] OATC further requests that the Board vacate its decision and grant summary judgment to OATC on entitlement to post-award equitable relief,[2] with determination of quantum to be made in a later proceeding. The government opposes the motion.

Fundamentally, appellant, represented by new counsel, asks that we sustain the appeal on the basis of a claim which is different from the one submitted to the contracting officer. Appellant argues that the contracting officer (CO) failed as a matter of law to attach the applicable wage determination (WD) to either the solicitation or contract. It now continues on reconsideration that when the Department of Labor (DoL)

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[1] Our decision also dismissed OATC's protective appeal ASBCA No. 56779 for lack of jurisdiction. OATC's Motion for Reconsideration included ASBCA No. 56779 in the caption but the motion did not raise any issues for reconsideration associated with our decision as it relates to that appeal.

[2] OATC did not previously move for summary judgment as to any issue.

subsequently assessed back pay against appellant, it was entitled to a post-award equitable adjustment pursuant to the Changes clause, FAR 22.1015 and 29 C.F.R. § 4.5(c). As we discuss below, appellant's claim and complaint before us in this appeal asserted entitlement based on the different claim that appellant was entitled to relief on the basis of a pre-award unilateral mistake in its bid/quote. Because our jurisdiction is limited by the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 7101-7109, we are not at liberty to decide the appeal based upon appellant's new theory which has not been submitted as a claim to the CO.

Appellant also challenges certain of the Board's Statements of Fact (SOFs) and the Board's invocation of the patent ambiguity doctrine in part of the decision. For the reasons set forth below, we are not persuaded that we erred as to the challenged SOFs. We are persuaded, however, that our discussion of the patent ambiguity doctrine was *dictum* in the context of this appeal and unnecessary to the outcome of the appeal. Accordingly, we strike that portion of the decision.

I. Jurisdiction

A. Appellant's Claim Which is the Subject of the Appeal

The Corps of Engineers ("COE") awarded Contract No. W912P4-05-P-0019 to OATC, an 8(a) contractor, on 14 January 2005. The contract provided for an initial period of performance (base period) from 1 January 2005 through 31 December 2006. It incorporated by reference FAR 52.222-41, SERVICE CONTRACT ACT OF 1965, AS AMENDED (MAY 1989), which requires that employees be paid not less than the minimum monetary wages and associated fringe benefits specified in any WD attached to the contract. The contract did not physically attach the applicable WD. Rather, the last page of the contract, and the underlying solicitation, included the heading "WAGE RATES" with an internet address at which, presumably, the applicable WD could be found. (R4, tab 4 at 105, tab 16 at 164, 176, 220-222)

On 12 March 2006, appellant's prior counsel, the Camardo Law Firm, P.C. (Camardo), notified the CO that it was representing OATC on a wage determination issue with the DoL and that it would be filing a Request for Equitable Adjustment (REA) (R4, tab 18). In December 2006, the DoL requested that the CO withhold payments to appellant because of an alleged violation of the SCA. On or about 15 February 2008, following expiration of the contract, OATC reached agreement with DoL allowing it to make restitution of back wages and fringe benefits for work performed on the contract in the amount of $98,709.02 (R4, tab 19).

On 14 January 2008, Camardo submitted OATC's REA to the CO. The REA stated that DoL had determined that its employees were underpaid in the total amount of

$98,709. The REA alleged that the government was liable for a total of $146,347.31[3] because of OATC's unilateral mistake in its bid/quote. Specifically, the REA stated:

> OATC alleges that it made a unilateral mistake in its price proposal for which it is entitled to compensation through a reformation of the contract. In order to show a unilateral mistake for which compensation is granted, the contractor must show:
>
> a. The mistake occurred before the contract award;
> b. The mistake is a clear-cut clerical or mathematical error or a misreading of the specifications, and was not an eror in judgment;
> c. Prior to the award, the government should have known that a mistake was made;
> d. The government's request for verification was inaccurate;
> e. If reformation is sought, clear and convincing evidence be presented of the intended bid without the mistake.
>
> This present case clearly meets the criteria, as evidenced by the following:
>
> a. The mistake obviously occurred prior to the award since it deals with an error in the price submitted as part of the proposal;
> b. The mistake was based upon a misreading of the terms of the contract. This was OATC's first government contract and was [sic] unaware of any requirement that statutory wages were to be paid....
> c. As is detailed above, the Government knew or should have known that an error was made....
> d. The Government, having knowledge of a possible error, had an obligation to issue an adequate verification request....
>
> Therefore, given the foregoing facts, OATC alleges that a unilateral mistake was made in regard to the wages that were included in its bid and that as a result, the DOL assessed back

[3] This amount consisted of $91,941.57 (the amount of the DoL wage determination less a credit, plus burden, G&A, profit, and proposal preparation by Camardo and accountants) (R4, tab 3 at 26).

> wages in the amount of $145,347.31 [sic]. Further OATC alleges that the Government, as a result of its failure to supply OATC with a complete solicitation and its failure to notify OATC of its error and issue a bid verification letter, it is entitled to be compensated for all damages resulting therefore. Therefore, OATC requests that the Government issue a reformation to the contract in the amount of $146,347.31.

(R4, tab 3 at 20-22[4])

On 15 April 2009, Camardo notified the CO that OATC was converting its REA to an identical claim and enclosed a certification by appellant's president. On 6 May 2009, the CO denied the claim, and this timely appeal followed.

Appellant's complaint, filed by Camardo, was similar to the claim submitted to the CO. The entirety of the request for relief in the complaint was:

> **Whereas,** the Appellant alleges that because:
>
> a. The Government failed to include the Service Contract Act Wages in the Solicitation;
>
> b. OATC failed to include the proper Service Contract Act Wages in its proposal;
>
> c. The Government failed to request a required verification of proposal prices when it was obvious that the proposed prices could not cover the Service Contract Act Wages and that a mistake had been made by OATC;
>
> The subject contract was awarded, based upon a significant unilateral mistake, which resulted in additional labor costs being assessed by the DOL in excess of what was included in the contract, and for which OATC has the right to be compensated for by the issuance of a reformation of the contract.

[4] Our original decision cited to tab 2 rather than tab 3 for the text of the REA; the correct citation is tab 3.

> **WHEREFORE,** OATC requests that the Board sustain this Appeal in its entirety, by granting the reformation of the subject contract to correct the unilateral mistake, in the amount of $146,347.31, plus interest as allowed by the Contract Disputes Act.

(Compl. at 8)

On 14 August 2009, the government moved for summary judgment in the appeal. On 6 October 2009, Camardo withdrew from representation of appellant "upon the grounds that the Appellant has irreconcilable differences with the undersigned [attorney] in the defense of this action." Appellant elected to continue *pro se.* In our decision which is under reconsideration, we held that, drawing all reasonable inferences in favor of appellant as the nonmovant, the government was entitled to judgment as a matter of law because appellant had not met at least three of the requirements for relief on the basis of a pre-award unilateral mistake in its bid/quote. Specifically: (1) there was no evidence it had actually made a mistake (as opposed to an error in business judgment); (2) there was no evidence to support OATC's bare assertion that the government knew or should have known a mistake was made; and, (3) there was no evidence that OATC's intended bid/quote was different from its actual bid/quote. *OATC I* at 170,768-70. Present counsel filed a notice of appearance following issuance of the Board's decision.

B. Appellant's Claim on Motion for Reconsideration

On motion for reconsideration, as we discuss further below in connection with the SOFs which it challenges, appellant argues that the government failed as a matter of law to attach the applicable WD to the solicitation and resultant contract. It considers that referencing an internet address was insufficient for this purpose. It continues:

> Appellant is entitled to a price adjustment. The adjustment must be a full equitable adjustment in the base period of performance. OA&TC has sought an equitable adjustment. OA&TC has asked that the contract to be reformed [sic] for the Government mistake in leaving out the WD. Appellant is entitled to relief for this error under the plain provisions of the contract.

(Mot. at 17)

In its response to the government's opposition to the motion for reconsideration, appellant distinguishes between the claim appellant submitted to the CO (and which was the subject of the Board's original decision) and the claim as to which it now argues appellant is entitled to relief:

> The discussion of the law of mistake in the Board's decision also misses the point as to the real nature of the mistake here. Yes, Appellant submitted a claim based on mistake and asked for contract reformation. And yes, that theory is right and the remedy is correct. But the means to that end as analyzed by the Board is less than ideal. As described in Appellant's motion for reconsideration, the mistake was a unilateral mistake **of the Government,** and not really a unilateral mistake in bid by OATC, at least in the conventional sense. **The Government made a mistake—it failed to include the proper wage determination in the contract.** Appellant's claim seeks reformation for a mistake. While the Board quite naturally fit its analysis within the traditional law of mistake, the reformation here is really a remedy set forth in the regulations and contract itself and not subject to the same analysis as the Board went into. This isn't a conventional "mistake in bid" case, and it isn't subject to a conventional mistake in bid analysis. **It is more appropriately a Changes clause case seeking an equitable adjustment for a constructive change on a contract which must be reformed to include a mistakenly omitted wage determination in the base year of contract performance.** But here, rather than modify the contract and add the necessary wage determination, the Government just grabbed the contractor's money, paid the workers directly, and refused to exercise contract options. The Government left out the wage determination from the contract and never even added by way of any modification. This Government's unilateral mistake is subject to correction. Both DOL's regulations and the FAR provide for the retroactive insertion of the wage determination after award and provide that the contractor shall get an adjustment in price. FAR 22.1015 and 29 C.F.R. 4.5(c). Thus, the reformation sought by OATC for the Government's unilateral mistake is based on the operative contract terms and pertinent regulatory provisions, and is subject to normal Changes clause analysis rather than the analysis of the law of mistake set forth in the Board's prior decision.

(App. Response at 9 n.6) (emphasis in original) A comparison of this new claim raised on reconsideration with the preceding quoted language from OATC's claim and complaint makes it obvious that the focus of the new claim on a post-award equitable

adjustment arising under the Changes clause is quite different from OATC's claim submitted to the contracting officer and complaint in which it only sought relief on the basis of its own pre-award unilateral mistake in its bid/quote.

C. Conclusion on Jurisdiction

The proper scope of an appeal processed under the Contract Disputes Act ("CDA") is "circumscribed by the parameters of the claim, the contracting officer's decision thereon, and the contractor's appeal therefrom." *Centurion Electronics Service*, ASBCA No. 51956, 03-2 BCA ¶ 32,262 at 159,589 (quoting *Stencel Aero Engineering Corp.*, ASBCA No. 28654, 84-1 BCA ¶ 16,951 at 84,315).

We think it quite clear from the quoted material that the claim which appellant is arguing in the motion for reconsideration is different from the claim submitted to the CO and which is the subject of this appeal. The claim submitted to the CO was based on a unilateral mistake in bid by OATC and concerned itself with events which took place prior to award of the contract. The claim presented in the motion for reconsideration is based on a unilateral mistake of the government in allegedly failing to include the applicable WD in the contract and concerns itself with events which took place (or failed to take place) subsequent to award of the contract, when, according to appellant, the government should have issued a modification to the contract adding the applicable WD in the base period and granting appellant an equitable adjustment pursuant to the Changes clause and relevant regulations. We conclude, therefore, that the claim now asserted through the motion for reconsideration seeks relief on the basis of different operative facts and is beyond the scope of the appeal. It is axiomatic that the scope of a motion for reconsideration may not exceed the scope of the decision from which it is taken. Accordingly, we do not address the merits of appellant's arguments in support of its new claim for relief.

II. Challenged SOFs

Appellant disputes in whole or in part SOFs 3, 6, 7 (including footnotes), 10 and 11 in our original decision. We start with SOFs 6 and 7 and then proceed to SOFs 3, 10 and 11.

A. SOF ¶¶ 6, 7 — Existence of an Applicable WD

On reconsideration, for the first time, OATC disputes whether there was a WD applicable to the solicitation. The entirety of our SOF ¶ 6 stated:

> It is undisputed for purposes of the motion that the DoL wage determination (WD) applicable to the contract at the time of

> the solicitation and award was WD No. 94-2371, Rev. No. 24, dated 21 July 2004 (R4, tabs 8, 9; app. opp'n at 4).

OATC I at 170,766. The government presented this information as an undisputed fact in its motion for summary judgment and OATC did not dispute this information with any evidence or even a bare assertion in its opposition to the government's motion. Rather, OATC's opposition to the summary judgment motion which we considered in our *OATC I* decision included several references to WD No. 94-2371 as the applicable WD and even included as an attachment a copy of a later version of the WD. The entirety of OATC's stated basis for disputing SOF ¶ 6 now, long after the record was closed for purposes of our original decision, is that "[s]ince no WD has been added to the contract it is impossible as a matter of law to determine what WD is applicable to the contract" (app. mot. at 4).

OATC also now partially disputes SOF ¶ 7, which included a comparative table based on the wage rates for the base year of the contract. OATC states:

> It is in dispute whether the Government knew or should have known the wage rates and dollar breakdown of [OATC's] cost components. Since the WD was never made applicable to the Contract, it is impossible to determine the wage rates and fringe benefits, so footnotes 1-5 are also in dispute.

(App. mot. at 4)

The record before us in *OATC I* established as undisputed that there was a WD applicable to this contract at the time of the solicitation (*OATC I* at 170,766, SOF ¶ 6), and that the CO had the applicable WD in order to compare it to OATC's bid/quote submitted in response to the solicitation. *OATC I* at 170,767, SOF ¶ 8. OATC argued before our original decision that, because there was an applicable WD in existence which the government used to compare OATC's bid/quoted rates, from that comparison the government should have discovered OATC's alleged mistake in its bid/quoted wage rates. In *OATC I* we found it undisputed that the CO and contract administrator had compared OATC's bid/quoted wage rates to "the total of DoL-required minimum wage rates and any associated fringe benefits for each job classification" and OATC has not raised this as an error in its motion for reconsideration. *OATC I* at 170,767, SOF ¶ 8. The document listing "DoL-required minimum wage rates and any associated fringe benefits for each job classification" is a WD. *See* 29 C.F.R. § 4.3(c). OATC did not allege in its claim to the contracting officer, nor in its complaint before the Board, nor in its opposition to the government's motion for summary judgment that there was no then-current DoL wage determination. In fact, as pointed out above and cited in our original decision, OATC's opposition to the summary judgment referred to the same WD as alleged by the government to be the then-applicable WD. The record before us

showed that DoL assessed back wages and benefits and, in the absence of any evidence to the contrary, DoL did so on the basis of an applicable WD. The record contains no evidence nor even a bare assertion of a DoL determination of the lack of an applicable WD. Now, on reconsideration, OATC for the first time alleges that it is disputed as to whether there was an applicable WD and offers only bare assertion and argument, but offers no evidence, to support its argument (app. mot. at 4). We find no basis in OATC's arguments on reconsideration for changing our finding of undisputed fact in *OATC I* that there was an undisputed, applicable WD in existence at the time of the solicitation.

B. SOF ¶ 3

The full SOF ¶ 3 stated:

> 3. It is undisputed that a hard copy of the DoL wage rates was not attached to the solicitation. **However, on the last page of the document, under the heading "*WAGE RATES*," there was an Internet Web address that provided a direct link to the applicable wage determination. (R4, tab 4 at 102, tab 16 at 222)** The two headings that followed "*WAGE RATES*" and the Web address ("*SF 86 FORM*" and "*PARC LETTER*") both specifically stated "Hard copy is attached to the contract," but there was no such statement with regard to "*WAGE RATES.*" The government has asserted (gov't mot. at 4; R4, tab 2, ¶ 11), and OATC has not disputed, that the then-current DoL wage rates were available at the referenced website.

OATC I at 170,766 (emphasis added). OATC specifically takes issue with the second sentence of SOF ¶ 3, stating:

> Sentence 2 is in dispute and is factually erroneous. There is no "direct link to the applicable wage determination." [T]he link was available only to Government personnel. [OATC] had no access to the wage determination. In addition, since [OATC] had no way of knowing which DOL "then current DOL wage rates" applied, [OATC] thus disputes the statement that the then-current DOL wage rates were available at the reference [sic] website.

(App. mot. at 4) OATC also argues in its motion, though not in the context of a specific SOF, that a hard copy of the applicable WD was required to be physically attached to the solicitation and contract and that provision of a web address was insufficient (app. mot. at 1-2, 6 ("additional undisputed fact" 26), 10-12). Since SOF ¶ 3 was the place in our

original decision where we addressed the undisputed fact that there was no hard copy WD attached to the contract and that the contract provided the WD information by use of the web link given in the contract, we address OATC's argument in that regard here.

1. Attachment of a WD to the Solicitation

On reconsideration, OATC argues that the first sentence of SOF ¶ 3, stating as undisputed that the WD was contained in the solicitation in the form of an Internet Web address, is in error because the government was required by DoL regulations to physically attach a copy of the applicable WD to the solicitation (app. mot. at 6, ¶ 26). OATC argues as undisputed that WDs "are not self-implementing and are required by regulation to be physically incorporated into the contract by the Government" citing *Universities Research Ass'n v. Coutu*, 450 U.S. 754, 784 n.38 (1981) (app. mot. at 6, ¶ 26). However, the cited case held only that the Davis-Bacon Act is not self-implementing; the case did not address whether WDs were required to be physically incorporated into the contract. And nowhere in the cited case is the word "physically" used to describe the incorporation of a WD in a solicitation or contract.

Further, in our inspection of the DoL regulations cited by appellant we did not find the word "physically" used anywhere nor did we find any other language which would necessarily limit attachments to physical pieces of paper. The SCA requires that "every contract [for services] and any bid specification therefore in excess of $2,500 contain a wage determination" but does not specify in what form a wage determination is to be contained therein. 29 C.F.R. § 4.4(a)(1). FAR 22.1002-1, GENERAL, provides:

> Service contracts over $2,500 shall contain mandatory provisions regarding minimum wages and fringe benefits, safe and sanitary working conditions, notification to employees of the minimum allowable compensation, and equivalent Federal employee classifications and wage rates.

The clause does not specify in what form the mandatory provisions are to be contained in a contract but it is well-established that they may be incorporated by reference. *See, e.g.,* FAR 52.252-1, FAR 52.252-2. The mandatory provisions incorporated by reference in the solicitation at issue here included FAR 52.222-41, SERVICE CONTRACT ACT OF 1965, AS AMENDED (MAY 1989) and FAR 52.222-44, FAIR LABOR STANDARDS ACT AND SERVICE CONTRACT ACT-PRICE ADJUSTMENT (FEB 2002), both of which required that OATC pay its employees in compliance with the SCA and the then-applicable WD. *OATC I* at 170,765-66. When referring to the applicable WD, these mandatory provisions did not specify in what form the WD was to be attached, contained in or incorporated in the solicitation or the later contract. FAR 22.1012-1, GENERAL, provides:

> The Wage and Hour Administrator, generally, will issue a wage determination or revision to it.... The contracting officer shall incorporate the determination or revision in the particular solicitation and contract for which the wage determination was sought.

The clause does not specify in what form a WD is to be incorporated in a solicitation. OATC has not directed us to any prohibition against attachment, containment or incorporation of a WD by reference in the same way that mandatory FAR clauses are incorporated by reference. In fact, incorporation by reference of solicitation provisions other than FAR clauses,[5] is contemplated in the FAR. For example:

> SOLICITATION PROVISIONS INCORPORATED BY REFERENCE (FEB 1998)
>
> This solicitation incorporates one or more solicitation provisions by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available.... Also, the full text of a solicitation provision may be accessed electronically at this/these address(es):
>
> _____
>
> _____
>
> [*Insert one or more Internet addresses*]

FAR 52.252-1. Further, the SCA only requires that the applicable WD be "contained, as an attachment." 29 C.F.R. § 4.5(a). To be sure, a hard copy of a WD, physically appended to the solicitation would be an attachment. But in today's world, attachments are also routinely accomplished and generally understood to include electronically embedded and linked documents, photos, websites and other files. The NEW OXFORD AMERICAN DICTIONARY (3d ed. 2010), recognizes the realities of electronic attachments in the present commercial world when it includes in its definition of "attach" to "fasten (a related document) to another, or to an e-mail" and it includes in its definition of "attachment" a "computer file appended to an e-mail." It is obvious to us that attachments to e-mails or any other electronic documents or files must also be in electronic form and that they are not, indeed cannot be, physically connected to the electronic document or file to which they are attached. It seems to us that if an attachment can be electronic in form, there is no logical reason that an electronic attachment cannot be attached, contained or incorporated into a hard copy document such as a solicitation or contract by providing the appropriate Internet Web address providing

[5] The incorporation of FAR clauses by reference is provided for in FAR 52.252-2.

access to the full text of the attachment. In the absence of language in the FAR or DoL regulations requiring an attachment to be physically attached, contained in or incorporated into a solicitation in the form of a physical piece of paper, and in recognition of the fact that the FAR specifically contemplates that solicitation provisions can be incorporated by reference and by reference to Internet addresses, we see no reason to impose the limitation of physical attachment here. We therefore find that providing an Internet Web address where the full text of the WD can be obtained by prospective bidders meets the requirements of the DoL regulations by providing notice of the applicable WD wage rates and benefits.

2. Web access to the WD

As quoted above, OATC argues that the second sentence of SOF ¶ 3, in which we found it undisputed that the web link in the solicitation provided a direct link to the applicable WD, is now in dispute and is factually erroneous. OATC did not present any of these arguments in its opposition to the government's motion for summary judgment which we considered in reaching our original decision. OATC's new counsel, for the first time and on reconsideration, now contends that the government's assertion that the applicable WD could be accessed using the website provided on the last page of the solicitation was "simply misleading, if not untrue" (app. mot. at 2). In particular, counsel argues that his attempts to access the WD using the website in the solicitation were unsuccessful in February 2011 and further alleges that the website in the solicitation could only be accessed by a government computer. In support of his allegations counsel has provided argument and printouts dated 15 February 2011 of the COE website www.mvs.usace.army.mil/oc/labstan.htm (which is *not* the Internet Web address provided in the solicitation) and a web page alleged to have appeared when he tried to access the link to wage determinations listed in the just-previous website. (App. mot. at 2, exs. 1, 2) These exhibits were not part of the record before us in our original decision and are, therefore, new evidence.

> The receipt of new evidence upon motion for reconsideration is discretionary with the Board.... [The] Board basically will examine the circumstances of the appeal in which the motion for reconsideration is filed to ascertain whether an "injustice" has occurred and whether the additional evidence offered would permit the Board to remedy that "injustice." In making this determination, the Board will consider, among other things, the "kind" of evidence being offered, the evidence's prior availability, and whether the opposing party has been prejudiced by the delay in presenting such evidence. [Citations omitted]

BAE Systems Information & Electronic Systems Integration, Inc., ASBCA No. 44832, 03-1 BCA ¶ 32,193 at 159,115; *see also AM General LLC*, ASBCA No. 53610, 06-2 BCA ¶ 33,387 at 165,524-25. Here, as was the case in *BAE Systems*:

> It is abundantly clear that appellant disagrees with legal conclusions set forth in our opinion...granting the Government's motion for summary judgment. Appellant's simple disagreement with any or all of our holdings, however, does not constitute an "injustice" requiring reopening of the record here.

BAE Systems, 03-1 BCA ¶ 32,193 at 159,115. Further:

> We said in *Rainbow Valley Corp.*, ASBCA No. 11691, 69-1 BCA ¶ 7655 at 35,519-20:
>
> > An opportunity to the losing party to offer additional evidence that it could easily have adduced earlier and have another "bite at the apple" after it has received an adverse decision is not to be granted lightly. As a matter of fairness the losing party should not be permitted to wait until after it receives an adverse decision before offering evidence that it could easily have presented before the adverse decision was rendered, except for the most compelling reasons. [Citations omitted]
> >
> > ....
>
> *Gelco Builders & Burjay Construction Corp. v. United States*, 369 F.2d 992, 1000 at n.7 (Ct. Cl. 1966) ("Litigants should not, on a motion for reconsideration, be permitted to attempt an extensive re-trial based on evidence which was manifestly available at time of the hearing."); *Pacific Contact Laboratories, Inc. v. Solex Laboratories Inc.*, 209 F.2d 529, 533 (9th Cir. 1953) (sustaining district court's exercise of discretion denying receipt of new evidence "not offered until after new counsel had been substituted by appellants at a time when...appellants had already had their day in court.").

AM General, 06-2 ¶ 33,387 at 165,525.

OATC's counsel offers the bare assertion that OATC "never obtained the WD from the website that is allegedly cryptically referenced in the last page of the Solicitation. Nor is there any evidence [OATC] could have done so" (app. mot. at 2). Despite counsel's bare assertion, OATC had to have known before the record closed for purposes of our original decision whether or not it actually tried the website provided in the solicitation and then whether it could or could not access a WD by using the website. Yet, OATC never made any allegations (supported or unsupported) in its opposition to the government's motion for summary judgment disputing the government's assertion that the link provided direct access to the then-current WD. Further, OATC's counsel provides no evidence to show that OATC, through the exercise of due diligence, could not have discovered and produced evidence before the closing of the record for purposes of the motion for summary judgment of whether it actually tried the website prior to submitting its bid/quote and what it observed when it did so. To the extent counsel implies that OATC was incapable of exercising due diligence in this regard merely because it opposed the motion *pro se* (app. mot. at 1, 3, 17), we reject that argument. As we stated in *Shiffer Industrial Equipment, Inc.*, ASBCA Nos. 34027, 34028, 88-2 BCA ¶ 20,584 at 104,049:

> [A]ppellant has now hired an attorney who would represent it if the record was reopened. Appellant could have done this before, and is entitled to no special consideration because he has appeared *pro se*.

See also Corbett Technology Co., ASBCA No. 49478, 00-1 BCA ¶ 30,801 at 152,067. In its opposition to the government's motion for summary judgment, OATC stated only that it had "misread" the "direction to search on a digital medium (computer connect to the Internet) for the Wages Determination" (app. opp'n at 3). OATC did not dispute that the Internet Web address contained in the solicitation provided access to the applicable WD.

The proffered new evidence provides only what appeared on certain web pages on 15 February 2011, six years after OATC alleges it made a mistake in its bid/quote because it "misread" the solicitation. OATC's argument on reconsideration as to accessibility and content of DoL and COE websites in 2011 (mot. at 12; app. reply at 3), none of which are the Internet Web address provided in the solicitation, does nothing to demonstrate what would or would not have been available to OATC if it had tried the website in the solicitation during the bid preparation period in November and December 2004. As was the case in *Engineering Technology Consultants, S.A.*, ASBCA No. 43376, 93-1 BCA ¶ 25,371, we are not persuaded that the information provided for the first time now on reconsideration was not reasonably available to OATC prior to the closing of the record and we reject counsel's assertion that "[i]f the situation was different in 2005, then the Government must come forward with that information" (app. mot. at 2) as an

impermissible attempt to shift to the government OATC's burden as to alleged new evidence offered in its motion for reconsideration.

We find counsel's proffered new evidence to be unpersuasive as to what was or was not accessible by use of the website contained in the solicitation in late 2004 when OATC prepared and submitted its bid/quote (the timeframe relevant to OATC's allegation of a pre-award unilateral mistake). We also find counsel's failure to present evidence of due diligence on the part of OATC in late 2004 by checking the website provided in the solicitation to fall short of persuading us that our original decision was in error.

C. SOF ¶¶ 10, 11

OATC now partially disputes SOF ¶ 10 and disputes SOF ¶ 11 in its entirety. These two SOFs contained information from the record as to WDs dated after contract award and provided to OATC by the CO and as to which OATC did not request a price adjustment under FAR 52.222-44(e). With regard to these SOFs, OATC states:

> [OATC] disputes that the WD was ever added to the contract in the initial solicitation or after award.

(App. mot. at 4-5) With respect to whether or not there was a WD contained or incorporated in or attached to the solicitation, our analysis as to SOF ¶¶ 3, 6 and 7 above is equally applicable to SOF ¶¶ 10 and 11. OATC also argues that, since it takes the position on reconsideration that there was no WD in the contract, and one was not issued by modification, the time period provided in FAR 52.222-44(e) would not be applicable as a matter of law. We clarify that the SOFs were only intended to state the undisputed fact that OATC did not request an increase in its unit prices within 30 days of the CO's letters.

D. Conclusion on Challenged SOFs

We have considered appellant's arguments addressed to alleged errors in our SOF ¶¶ 3, 6, 7, 10 and 11 and have found no persuasive basis for changing them.

III. Patent Ambiguity

In our original decision we found it undisputed that the applicable WD was contained in the solicitation and resulting contract in the form of a Web address. Our original decision also included *dictum* discussing the creation of a patent ambiguity if the WD had not been contained in the solicitation. As the *dictum* is not necessary to our decision, we are persuaded to strike it.

CONCLUSION

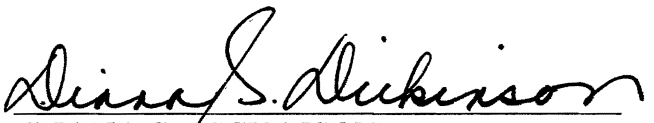
On reconsideration, much of OATC's argument and assertions of alleged undisputed facts are addressed to the subject of its Request for Summary Judgment on Entitlement as to a post-award equitable adjustment under the Changes clause which is not before us in this appeal and therefore not properly before us now on reconsideration. The only subject before us in this appeal, and which was the subject of our original decision in *OATC I*, is whether OATC was entitled to reformation of its contract due to its own alleged pre-award unilateral mistake in its bid/quote. We held in *OATC I* that OATC had failed to produce evidence sufficient to show facts in dispute which were material to the elements of reformation necessary for it to meet its burden of proof. On that basis we granted the government's motion for summary judgment on the subject of reformation due to unilateral mistake by OATC.

The record in this appeal is not reopened for the admission of the new 2011 evidence proffered by appellant's counsel. We reaffirm our decision granting summary judgment in favor of the government on the basis that OATC failed to raise a triable issue of fact as to one or more of the elements necessary for OATC to prevail on a theory of reformation due to unilateral mistake in bid and on which it failed to come forward with proof in our decision in *OATC I.*

We strike from the *OATC I* decision the portion of the last paragraph at 11-1 BCA ¶ 34,666, page 170,769 from "Even if, for purposes of the motion" through the end of the first paragraph on page 170,770, and clarify SOF ¶¶ 10 and 11 as stated above.

OATC's motion for reconsideration is granted in part and denied in part in accordance with this opinion. OATC's motion to vacate the prior decision is denied. We do not reach its request for summary judgment in OATC's favor.

Dated: 21 November 2011



DIANA S. DICKINSON
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

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. 56838, Appeal of Office Automation & Training Consultants, rendered in conformance with the Board's Charter.

Dated:

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