ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
2Connect W.L.L.	)	ASBCA No. 59233
	)	
Under Contract No. 2CON W 000276	)	

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

The Defense Information Systems Agency (government) has timely filed a motion for reconsideration of the Board's decision in *2Connect W.L.L.*, ASBCA No. 59233, 17-1 BCA ¶ 36,775 (familiarity with that decision is presumed) to allow the government to offset damages awarded by the Board against the proceeds of a sale of appellant's assets after the close of the record. The government requests the Board allow post-judgment discovery to determine the value appellant allegedly received for the sale of its company relating to the specific asset that was the subject of the aforementioned decision. Because the government relies on evidence created after the record had closed and requests that the Board allow post-judgment discovery, we treat the motion as a request for post-judgment relief.

The Board held a hearing in this appeal January 27-28, 2015, and the Administrative Judge closed the record at the conclusion of the hearing (tr. 2/144). The decision centered on costs associated with an Irrevocable Right of Use (IRU), also called an Indefeasible Right of Use. An IRU is an exclusive, long-term lease, granted by an entity holding legal title to a telecommunications cable or network, of a specified portion of a telecommunications cable, such as specified fiber optic strands within an optical fiber cable, or the telecommunications capacity of a cable or network, such as specific channels of a given bandwidth. *2Connect*, 17-1 BCA ¶ 36,775 at 179,207 n.1 (citing *Ansari v. Qwest Communications Corp.*, 414 F.3d 1214, 1215 (10th Cir. 2005)). In our

decision, dated June 2, 2017, we found that 2Connect W.L.L. (2Connect or appellant) proved that it incurred $2,274,015 in nonrecoverable equipment costs resulting from the cancellation of the contract. We concluded that "the equipment costs were reasonably incurred, as the [GCCIX IRU's] purpose was to provide facilities and equipment to meet the contract requirements" and the GCCIX IRU had no foreseeable reuse. We also concluded that appellant had proven that there is limited or no commercial use for the GCCIX IRU. *2Connect*, 17-1 BCA ¶ 36,775 at 179,206-07.

Attached to the government's initial motion, appellant's opposition to the motion and the government's subsequent reply brief, were several business documents submitted in support of the parties' respective positions. We summarize below the relevant portions of the attachments solely for purposes of the instant motion.

FACTUAL SUMMARY

The record in this appeal closed on January 28, 2015. The General Director of the Telecommunications Regulatory Authority of the Kingdom of Bahrain revoked appellant's telecommunications license in a letter dated March 31, 2016 (gov't mot., ex. G-1 at 9 of 44). Appellant's undated board meeting minutes describe a tripartite committee's approval to sell "the assets of the company per the conditions deed and business transfer agreement" to Infonas W.L.L. (Infonas) for 1.2 million Bahraini dinars on June 6, 2016 (*id.*, ex. G-3 at 19 of 44). In a business transfer agreement dated June 6, 2016, appellant sold substantially all of its assets to Infonas for 1.2 million Bahraini dinars, approximately $3,198,294 (*id.* at 3 of 44, ex. G-2 at 13-14 of 44). Appellant's consolidated statement of financial position dated June 22, 2016, recounts that appellant held a general meeting on March 23, 2016, formed a sales committee, and reached an agreement to sell the company and its assets to Infonas on or about June 8, 2016 (the business transfer agreement states the agreement and sale occurred June 6, 2016, while the consolidated statement of financial position states June 8, 2016) (*id.*, ex. G-5 at 30 of 44).

Appellant sent an email, dated June 26, 2016, to two government representatives, including a master sergeant and a procurement attorney of the Defense Information Systems Agency (DISA) (the Board is unable to determine the relationship of the two government recipients of the email to appellant's contract). The email states, in part: "please find attached to this email the novation agreement signed and sealed by both 2Connect and Infonas." (Gov't reply, ex. G-1 at 1) Attached to the email is a "NOVATION AGREEMENT" signed and dated as of June 26, 2016, by the chief executive officer and secretary of 2Connect. The novation agreement is also signed and dated as of June 26, 2016, by a "Board Member and Managing Director" of Infonas. The novation agreement identifies 2Connect and Infonas, and, states, in relevant part:

(a) THE PARTIES AGREE TO THE FOLLOWING FACTS:

(1) The Government, represented by various Contracting Officers of the Defense Information Systems Agency, has entered into certain contracts with 2Connect as shown in the attached list marked "Exhibit A"[*] and incorporated in this Agreement by reference. The term "the contracts," as used in this Agreement, means the above contracts and purchase orders and all other contracts...made between the Government and 2Connect before the effective date of this Agreement....

(2) As of June 29, 2016, 2Connect has transferred to Infonas all the assets of 2Connect by virtue of a purchase and transfer agreement between 2Connect and Infonas.

(3) Infonas has acquired all the assets of 2Connect by virtue of the above transfer.

(4) Infonas has assumed all obligations and liabilities of 2Connect under the contracts by virtue of the above transfer.

....

(6) It is consistent with the Government's interest to recognize Infonas as the successor party to the contracts.

....

(b) IN CONSIDERATION OF THESE FACTS, THE PARTIES AGREE THAT BY THIS AGREEMENT—

(1) 2Connect confirms the transfer to Infonas, and waives any claims and rights against the Government that it now has or may have in the future in connection with the contracts.

....

[*] This exhibit was not included in the government's reply brief.

(4) The Government recognizes Infonas as 2Connect's successor in interest in and to the contracts. Infonas, by this Agreement, becomes entitled to all rights, titles, and interests of 2Connect in and to the contracts as if Infonas were the original party to the contracts.

(Gov't reply, ex. G-1 at 1-2 of 4) The novation agreement presented to us is not signed and executed by a government representative. With regard to the instant motion, as neither party submitted a properly signed and executed novation agreement (*see* FAR 42.1202, 42.1203, of subpart 42.12, Novation and Change-of-Name Agreements) with their briefs, the Board presumes one does not exist for the purposes of this decision.

CONTENTIONS OF THE PARTIES

In its motion, the government contends that the documents summarized above show that appellant sold the GCCIX IRU for value that was not subtracted from the government's liability. Further, the government contends that because of the sale, it may no longer have access to the GCCIX IRU at no charge (gov't mot. at 3-5 of 44). The government requests post-judgment discovery and reconsideration of the Board's decision as to quantum (*id.* at 1, 5 of 44). Specifically, the government "seeks to preserve its rights to offset the damages assessed against DISA by any amount 2Connect received in payment for the IRU, as satisfaction of 2Connect's damages" and "to secure the use of the IRU...to further reduce the liability of the Agency" (gov't reply at 4-5). Appellant counters that evidence created after a hearing has ended cannot serve as the basis for reconsideration (app. opp'n at 4-6). Appellant further avers that it did not sell the GCCIX IRU because the business transfer agreement references two different IRUs, which are unrelated to the IRU that was at issue in our decision on the merits (*id.* at 2, 6-7).

DECISION

In deciding a motion for reconsideration, the general standards the Board applies are whether the motion is based upon newly discovered evidence, mistakes in our findings of fact, or errors of law. *Robinson Quality Constructors*, ASBCA No. 55784, 09-2 BCA ¶ 34,171 at 168,911.

The crux of the government's argument is that since the Board found in its decision that the GCCIX IRU has no foreseeable reuse, if appellant has sold the GCCIX IRU, any proceeds attributable to the IRU should be used to reduce the damages otherwise payable by the government to appellant (gov't mot. at 3-4 of 44). The government's proffered evidence, including the revocation of appellant's telecommunication license (dated March 31, 2016), business transfer agreement (dated June 6, 2016), and consolidated statement of financial position (dated June 22, 2016), were created after the record was closed on January 28, 2015. Thus, the

government's evidence consists of business-related documents created nearly 18 months after the closing of the record. As these records were not in existence at the time of trial, the proffered evidence cannot be the basis for a motion for reconsideration. *Carolina Maintenance Co.*, ASBCA No. 25891, 88-1 BCA ¶ 20,388 at 107,077; *General Time Corp.*, ASBCA Nos. 22306, 21211, 85-1 BCA ¶ 17,842 at 89,286.

Even if it could, the final element for reconsideration, as guided by FED. R. CIV. P. 60(b)(2), is that the moving party must show that the evidence must be of such a nature that it is likely to produce a different result if the judgment is reopened and a new trial is ordered. *AECOM Government Services, Inc.*, ASBCA No. 56861, 11-1 BCA ¶ 34,664 at 170,762-63; *Oscar Narvaez Venegas*, ASBCA No. 49291, 98-2 BCA ¶ 29,887 at 147,950; *Toole v. Baxter Healthcare Corp.*, 235 F.3d 1307 (11th Cir. 2000). The government's proffered business documents fall short of supporting a different result. First, the business documents do not indicate that the IRU at issue, the GCCIX IRU, was part of the asset transfer to Infonas. The GCCIX IRU telecommunications circuit was to connect Manama, Bahrain and Camp Lemonier, Djibouti, while the business documents indicate "Bayanat/Mobily IRU." For example, under the Agreement section of the purchase and sale of the business transfer agreement, it states, "Bayanat/Mobily Indefeasible Right of Use of Capacity Contracts as at the Closing Date ('Mobily IRU Contracts')." (Gov't mot., ex. G-2 at 13) Again, the Bayanat/Mobily IRU is stated as part of the purchase in the summary of select financial information (*id.*, ex. G-6 at 44 of 44). Because the business documents do not specifically reference the GCCIX IRU, the evidence is not of a nature that it is likely to produce a different result if the judgment is reopened and a new trial is ordered.

For both of these reasons, the government's proffered documents do not support a motion for reconsideration.

In its reply, the government argues that post-judgment relief is available under FED. R. CIV. P. 60(b)(5), (6), allowing for relief if the judgment has been satisfied, released or discharged, or for any other reason that justifies relief (gov't reply at 4). Next, the government argues that "[a] third party's payment may satisfy a defendant's liability and thus reduce the quantum of damages" (gov't reply at 4). The government cites *Sunderland v. City of Philadelphia*, 575 F.2d 1089, 1090 (3d Cir. 1978) (judgment reduced by insurance subrogation payment) and FED. R. CIV. P. 60(b)(5)-(6) (relief from a judgment when it has been subsequently satisfied) without providing further explanation. This argument, too, is not persuasive. The facts and issues raised in *Sunderland* are distinct and unrelated to those raised in the government's motion. Regarding FED. R. CIV. P. 60(b)(5)-(6), we have held, "in resolving Rule 60(b) motions, [the courts] have denied vacatur after failing to find 'exceptional circumstances' upon weighing the interest of the parties against the public's interest in finality and judicial precedents." *Ordnance Devices, Inc.*, ASBCA No. 42709, 99-1 BCA ¶ 30,304 at 149,836. The government has not put forth any arguments of exceptional

circumstances based on weighing the parties' interest against the public's interest in finality and judicial precedents.

The government further argues that FED. R. CIV. P. 69 authorizes post-judgment discovery in aid of execution of a judgment and cites, *Turbomach*, ASBCA No. 30799, 87-2 BCA ¶ 19,756 at 99,953-54. However, the government's reliance on *Turbomach* is misplaced. Without providing further explanation, the government asserts "that this Board has the inherent power to control the discovery process in appeals before it." (Gov't reply at 3) The issue before the Board in *Turbomach* was whether it had jurisdiction to sanction the government and assess attorneys' fees as a discovery sanctioning tool. In *Turbomach*, "[t]he Government...failed to cooperate in voluntary discovery and displayed a lackadaisical attitude toward compliance with Board orders" to which appellant requested attorneys' fees as a sanction under FED. R. CIV. P. 31, 35, and 37. *Turbomach*, 87-2 BCA ¶ 19,756 at 99,953. Accordingly, *Turbomach* does not discuss FED. R. CIV. P. 69 and the issues presented in that decision are not the same as in the present motion. Thus, the government's arguments are not persuasive.

We note in addition that, if in fact the government had a genuine interest in the GCCIX IRU, the question of the government's access to the IRU could and should have been addressed by the government as a matter of contract administration at the time appellant and Infonas proffered the novation agreement to it for execution. A motion for reconsideration does not function as a vehicle for redressing oversights in contract administration.

CONCLUSION

The government's motion for reconsideration is denied.

Dated: July 26, 2018

OWEN C. WILSON
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur

LYNDA T. O'SULLIVAN
Administrative Judge
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. 59233, Appeal of 2Connect W.L.L., rendered in conformance with the Board's Charter.

Dated:

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