ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
The Boeing Company	)	ASBCA No. 60373
	)	
Under Contract No. W58RGZ-09-C-0161	)	

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

The Department of the Army (Army or government) seeks reconsideration of our opinion in *Boeing Company*, ASBCA No. 60373, 18-1 BCA ¶ 37,112.[1] Appellant, The Boeing Company (Boeing), opposes the motion. For the reasons stated below, the Army's motion is denied.

In our opinion, we granted summary judgment in favor of Boeing, holding that software developed with costs charged to a Technology Investment Agreement (TIA) pursuant to 10 U.S.C. § 2358 constituted software "developed exclusively at private expense" as defined in the Department of Defense Federal Acquisition Regulation Supplement (DFARS) 252.227-7014(a)(8). *Boeing*, 18-1 BCA ¶ 37,112 at 180,621. The Army alleges three bases for legal error in our opinion. First, the Army alleges that we failed to give deference to the Army's proposed construction of the regulation, an argument that the Army should have, but did not raise in opposition to Boeing's motion for summary judgment (gov't mot. at 3-4). Second, the Army alleges that we failed to construe the phrase "costs not allocated to a government contract" in a manner consistent with the plain meaning of the DFARS (*id.* at 5-7). Third, the Army alleges that we improperly rejected the Army's citation to relevant case law (*id*. at 7-9).

[1] We suspended our review of this motion while the appeal was stayed for settlement negotiations.

A motion for reconsideration is not the place to present arguments previously made and rejected. "[W]here litigants have once battled for the court's decision, they should neither be required, nor without good reason permitted, to battle for it again." *Dixon v. Shinseki*, 741 F.3d 1367, 1378 (Fed. Cir. 2014) (quoting *Official Comm. of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 167 (2d Cir. 2003)). Moreover, "[m]otions for reconsideration do not afford litigants the opportunity to take a 'second bite at the apple' or to advance arguments that properly should have been presented in an earlier proceeding." *Dixon*, 741 F.3d at 1378 (citations omitted); *see also Avant Assessment, LLC*, ASBCA No. 58867, 15-1 BCA ¶ 36,137 at 176,384. On the other hand, if we have made mistakes in the findings of fact or conclusions of law, or by failing to consider an appropriate matter, reconsideration may be appropriate. *See Robinson Quality Constructors*, ASBCA No. 55784, 09-2 BCA ¶ 34,171 at 168,911; *L&C Europa Contracting Co.*, ASBCA No. 52617, 04-2 BCA ¶ 32,708. The Board recently summarized the standard for reconsideration stating "[i]n short, if we have made a genuine oversight that affects the outcome of the appeal, we will remedy it." *Relyant, LLC*, ASBCA No. 59809, 18-1 BCA ¶ 37,146 at 180,841. Here, as in *Relyant*, no such mistakes have been identified.

With regard to the Army's argument that we failed to give deference to its proposed interpretation, we need not consider this argument because it properly should have been raised in its opposition to Boeing's motion for summary judgment. *Dixon*, 741 F.3d at 1378. The Army admits that this is a new argument, as if a new argument that properly should have been raised before is somehow better than rehashing a previously rejected argument (gov't reply at 2 (noting that its arguments "were not previously asserted in the government's opposition to Boeing's motion for partial summary judgment")). The Army cites two cases for its incorrect argument that "Board jurisprudence allows reconsideration to address legal theories that were not considered by the Board in rendering its decision" (gov't mot. at 2). First, the Army cites *DLT Solutions, Inc.*, ASBCA Nos. 54812, 55362, 09-2 BCA ¶ 34,148, a decision which emphatically does not stand for the Army's stated proposition (gov't mot. at 2). Instead, *DLT Solutions* summarily rejected a motion for reconsideration for simply repeating arguments already presented. *Id.* Second, the Army cites *SUFI Network Servs., Inc.*, ASBCA No. 55306, 09-2 BCA ¶ 34,201 (gov't reply at 2). In *SUFI*, the Board corrected some errors, particularly regarding the proper calculation of damages, but the opinion nowhere indicates that new legal arguments, that could have been properly raised earlier, are an appropriate subject for a motion for reconsideration. *Id.*

To the extent we were to consider the Army's deference argument, it would only apply were we to find the regulation to be ambiguous. *See, e.g., Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (citation omitted) (*Auer* deference only applicable when regulation is ambiguous). In our decision, we granted summary judgment in favor of Boeing based upon the plain meaning of DFARS 252.227-7014, *Boeing*, 18-1 BCA ¶ 37,112 at 180,624, thus the Army's deference argument is irrelevant.

The remainder of the Army's motion for reconsideration simply reargues its interpretation of the DFARS provision as requiring Technology Investment Agreements (TIAs) to be considered development at government expense. We rejected the Army's interpretation in our decision and nothing in the Army's motion compels a different result. In the motion for reconsideration the Army argues that our interpretation does not give effect to the term "costs not allocated to a government contract" because, in the "proper context" advocated by the Army, "costs not allocated to a government contract" must mean costs "not reimbursed in any way by the government, not just literally under a government contract" and that the term "contract" in the phrase "costs not allocated to a government contract" is not the FAR definition of "contract" (gov't mot. at 5-7). In its reply brief, the Army presents an analysis of the legislative history of the term "developed exclusively at private expense" in an attempt to demonstrate that TIA's were not intended to be considered development at private expense (gov't reply at 5-9).

While the government asserts that the Board has not read the DFARS provision as a whole, it is the Army's proposed interpretation that does not give meaning to the entire regulation – specifically by not giving meaning to the term "contract." As Boeing notes, the contract incorporates FAR 52.202-1 (R4, tab 12 at 26), which provides that when a contract clause uses a term defined in the FAR, the FAR definition applies. As noted in our opinion, the FAR definition of contract excludes TIA's. Moreover, the TIA's at issue specifically provide that they are not procurement contracts. *Boeing*, 18-1 BCA ¶ 37,112 at 180,622-23. Additionally, the Army's proposed definition of "contract" would potentially broaden the term to include non-contract funding such as grants and cooperative agreements that would create additional conflicts with the FAR definition of "contract."

The Army's legislative history argument fares no better. In opposing the Army's motion for reconsideration, Boeing argued that the Army's interpretation was contrary to a 1995 change in the DFARS that changed the definition of "developed exclusively at private expense" from a definition "in terms of who 'paid for' the development" to a definition based on "how development costs are allocated, and in particular whether they are allocated to a 'contract' as that term is defined in FAR 2.101" (app. opp'n at 5). In response, the Army cites to a proposed rule issued in September 2010 that would have changed the definition of "developed exclusively at private expense" to mean "development was accomplished entirely with costs not paid or reimbursed by the Government, or costs paid or reimbursed by the Government through indirect costs pools, or any combination thereof." Defense Federal Acquisition Regulation

Supplement; Patents, Data, and Copyrights (DFARS Case 2010-D001), 75 Fed. Reg. 59,412, 59,446 (Dept. of Defense, proposed rule, Sept. 27, 2010).[2] The Army contends that this unadopted language "clearly demonstrates that the government understood the phrase 'costs not allocated to a government contract' to mean that the government was not funding the development of an item" (gov't reply at 9). However, the language of a proposed, but unadopted regulation from 2010 cannot be used to interpret the language of a regulation adopted in 1995.

The United States Court of Appeals for the Federal Circuit has made clear that regulations, such as the DFARS, are correctly interpreted based upon the published rule and the history of the rule as published in the *Federal Register*.[3] *See*, *e.g.*, *Sikorsky Aircraft Corp. v. United States*, 773 F.3d 1315, 1323 (Fed. Cir. 2014). A proposed rule, such as the 2010 proposed rule relied upon by the Army, has no legal effect. *See*, *e.g.*, *Sweet v. Sheahan*, 235 F.3d 80, 87 (2d Cir. 2000) (citing *LeCroy Research Systems Corp. v. Commissioner*, 751 F.2d 123, 127 (2d Cir. 1984)) ("Proposed regulations are suggestions made for comment; they modify nothing."). Moreover, the proposed rule states that it has "revised" definitions (75 Fed. Reg. at 59,413) rather than stating that it clarified the definitions.[4] A "revision" implies that the proposed rule would change the definition, and thus, would not be useful in interpreting the text of the existing regulation.

[2] The Army erroneously cites to 75 Fed. Reg. 59,450; however, the proposed rule combines the current DFARS 252.227-7014 into DFARS 252.227-7013. The Army's citation to proposed DFARS 252.227-7014 contains similar language but pertaining to the Small Business Innovation Research Program currently codified at DFARS 252.227-7018.

[3] For this reason, the Army's citation to the unpublished Government-Industry Technical Data Advisory Committee Report to the Secretary of Defense is not relevant to our analysis (gov't reply at 8 n.1, ex. at 13).

[4] To the extent the proposed rule states that some definitions are "further revised as to be consistent with statutory definitions" (75 Fed. Reg. at 59,413), this would not apply to the definition of "developed exclusively at private expense" because the statute delegated the definition of that term to the Secretary of Defense. *See* 10 U.S.C. § 2320(a)(3).

CONCLUSION

For the reasons stated above, we deny the Army's motion for reconsideration.

Dated: June 23, 2020

DAVID D'ALESSANDRIS
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

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

I concur

OWEN C. WILSON
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. 60373, Appeal of The Boeing Company, rendered in conformance with the Board's Charter.

Dated: June 24, 2020

PAULLA K. GATES-LEWIS
Recorder, Armed Services
Board of Contract Appeals