UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR RECONSIDERATION DENIED: September 20, 2012

CBCA 2260-R

URS ENERGY & CONSTRUCTION, INC.,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Daniel R. Frost and Claire Y. Dossier of Snell & Wilmer L.L.P., Denver, CO, counsel for Appellant.

Brady L. Jones, III, Kaniah W. Konkoly-Thege, and Sky M. Smith, Office of Legal Services, Environmental Management Consolidated Business Center, Department of Energy, Cincinnati, OH, counsel for Respondent.

Before Board Judges **SOMERS**, **HYATT**, and **SHERIDAN**.

SOMERS, Board Judge.

The Department of Energy (Government) seeks reconsideration of the Board's June 29, 2012, decision granting summary relief to the appellant, URS Energy & Construction, Inc. (URS), on its claim for $7,799,049.19. The facts underlying this dispute are laid out in detail in the Board's earlier opinion. *See URS Energy & Construction, Inc. v. Department of Energy*, CBCA 2260, 12-2 BCA ¶ 35,094. Upon consideration of the respondent's brief and the appellant's opposition, we deny the motion.

Motions for reconsideration are committed to the considerable discretion of the Board. *Beyley Construction Group Corp. v. Department of Veterans Affairs*, CBCA 5-R, et al., 08-1 BCA ¶ 33,784, at 167,203. In exercising its discretion, the Board seeks to harmonize "two countervailing impulses: the desire to preserve the finality of judgments and the incessant command of the [Board's] conscience that justice be done in light of all the facts." *Advanced Injection Molding, Inc. v. General Services Administration*, GSBCA 16504-R, et al., 05-2 BCA ¶ 33,097, at 164,063. Accordingly, the circumstances under which the Board will reconsider its prior decisions are few and defined. *See Metlakatla Indian Community v. Department of Health and Human Services*, CBCA 282-ISDA-R, 10-2 BCA ¶ 34,475, at 170,041 ("[R]econsideration is granted in very limited circumstances, such as in the case of fraud, misrepresentation, or other misconduct of an adverse party; justifiable or excusable mistake, inadvertence, surprise, or neglect; and/or newly discovered evidence that could not have been discovered previously through due diligence."). Reconsideration will not be granted if the moving party simply reargues facts and theories upon which the Board has already ruled, or if the moving party raises arguments that it failed to raise in an earlier proceeding. *See* Board Rule 26(a) (48 CFR 6104.26(a) (2011)) ("Arguments already made and reinterpretations of old evidence are not sufficient grounds for granting reconsideration, for altering or amending a decision, or for granting a new hearing."); *Flathead Contractors, LLC v. Department of Agriculture*, CBCA 118-R, 07-2 BCA ¶ 33,688, at 166,769.

In its motion for reconsideration, the Government merely reargues many of the same issues that we already considered and rejected. As we explain below, because the Government has not articulated any error of law or fact that would warrant reconsideration of our June 29, 2012, decision, we decline to reconsider that decision.

First, the Government alleges that our decision will wreak "manifest injustice" upon the Government because, "as a matter of law," the decision imposes "substantial harm" upon the Government by effectively binding it to an implied-in-fact indemnification agreement to which it did not assent. This characterization of our decision is incorrect. We did not hold that the Government was bound by the terms of the URS-Federal Insurance Company (Federal) indemnity agreement. Nor did we find that the Government agreed to indemnify URS against liability resulting from third-party lawsuits. Instead, we determined that, given the unique circumstances presented in this case, the cost that URS incurred as a result of its indemnification agreement with Federal is an allowable cost under this cost-reimbursement type government contract.

Next, the Government repeats its argument that it is not responsible for URS's claimed costs because the bankruptcy discharged URS's obligation to pay the district court judgment. We expressly rejected that argument in our decision. Rather, we held that because

URS was "seek[ing] reimbursement only for the amount it was obligated to pay Federal, as surety, as part of its indemnity obligation," which was not discharged during the bankruptcy, the "bankruptcy does not, in any way, affect the outcome of the case." *URS Energy & Construction*, 12-2 BCA at 172,354. The Government's motion does not provide any new or compelling arguments that warrant revisiting that conclusion.

Finally, in reliance of the principles enunciated in *Hercules, Inc. v. United States*, 516 U.S. 417 (1996), the Government avers that our decision "contravenes the fundamental tenants [sic] of the sovereign immunity doctrine and the Anti-Deficiency Act." We disagree. Because *Hercules* did not concern the allowability of legal costs under a cost-reimbursement type contract – the heart of this dispute – it bears little, if any, relevance to this case.

The facts of *Hercules* are instructive in this regard. At the height of the Vietnam War, the Government awarded a series of firm fixed-price contracts to several chemical manufacturers for the production and sale of phenoxy herbicide, also known as Agent Orange. *Hercules*, 516 U.S. at 419. Years later, Vietnam veterans filed a class action lawsuit against the manufacturers, alleging that their exposure to dioxin, a toxic byproduct found in Agent Orange, had caused various health problems. *Id.* at 420. The parties ultimately agreed to a multi-million dollar settlement, prompting the manufacturers to seek recovery from the Government of the costs they incurred in defending the suit, asserting entitlement under a theory of implied-in-fact contractual indemnification. *Id.* at 420-21. The Supreme Court rejected the manufacturers' claims, noting that the circumstances did not establish the existence of an implied agreement that the Government would indemnify the manufacturers against third-party liability. *Id.* at 426.

In contrast to the facts in *Hercules*, URS pursued recovery on the theory that the cost for which it seeks reimbursement is an allowable contract cost under the terms of its cost-reimbursement contract with the Government. That is quite different from asserting a claim, as the manufacturers did in *Hercules*, that the Government owes a contractor money under the terms of an implied-in-fact indemnification agreement. Indeed, because the contracts between the chemical manufacturers and the Government in *Hercules* were firm fixed-price in nature, the contractors in *Hercules* were not in a position to argue that their claimed costs were "allowable." Simply put, this is a case about the allowability of a particular legal cost under a cost-reimbursement type contract. Accordingly, *Hercules* does not, in any way, control the outcome of this case.

For the first time, the Government implies that the Anti-Deficiency Act, 31 U.S.C. § 1341 (2006) bars the Government from paying contractors for claims arising from third-party lawsuits, citing *Hercules*. We reject this argument. The Anti-Deficiency Act prohibits federal employees from "mak[ing] or authoriz[ing] an expenditure or obligation

exceeding an amount available in an appropriation or fund for the expenditure or obligation." 31 U.S.C. § 1341(a)(1)(A). The *Hercules* Court, upon holding that the "conditions" of the case did not "give rise to an implied-in-fact indemnity agreement," 516 U.S. at 426, cited the Anti-Deficiency Act as evidence that an implied-in-fact contract did not exist. Nothing in the Anti-Deficiency Act precludes our holding that URS's claimed cost is an allowable contract cost. In any event, the Government never previously raised the argument that reimbursing URS for its claimed costs would exceed the amount of funds appropriated for this contract. It cannot do so now. Reconsideration is not available to retry a case or introduce arguments that could have been made previously. *W. G. Yates and Sons Construction Co. v. General Services Administration*, CBCA 1495-R, 12-1 BCA ¶ 35,038, at 172,153, citing *Confederated Tribes of Coos, Lower Umpqua, & Siuslaw Indians v. Department of Health and Human Services*, CBCA 237-ISDA-R, 10-2 BCA ¶ 34,476, at 170,043.

In the end, our previous decision's holding is simple; its reach, narrow. We held that the particular cost claimed by the contractor is an allowable cost under this government contract. The Government has not articulated any viable grounds for reconsideration.

Decision

The Government's **MOTION FOR RECONSIDERATION** is **DENIED**.

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JERI KAYLENE SOMERS
Board Judge

We concur:

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CATHERINE B. HYATT
Board Judge

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PATRICIA J. SHERIDAN
Board Judge