UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS FOR CLARIFICATION AND RECONSIDERATION DENIED:
November 29, 2016

CBCA 4545

GRUNLEY CONSTRUCTION CO., INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Lawrence M. Prosen and Daniel P. Broderick of Kilpatrick Townsend & Stockton LLP, Washington, DC, counsel for Appellant.

Jay N. Bernstein, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **DRUMMOND**, and **RUSSELL**.

DANIELS, Board Judge.

On October 27, 2016, the Board issued a decision granting in part and denying in part cross-motions filed by the parties, Grunley Construction Co., Inc. (Grunley) and the General Services Administration (GSA), for partial summary relief in two appeals, CBCA 4539 and CBCA 4545. *Grunley Construction Co. v. General Services Administration*, CBCA 4539, et al., 16-1 BCA ¶ 36,536. Both parties have asked us to reconsider portions of the decision, and Grunley has also asked us to clarify one part of the decision.

We note first the aspects of the decision to which the clarification and reconsideration motions are not directed. Neither party takes exception to our ruling in CBCA 4539, regarding the wage determination claim, or to our ruling in CBCA 4545 as to markups on the additional asbestos claim. We consequently do not address those parts of the decision here.

The clarification and reconsideration motions concern the principal issues in CBCA 4545 – what was indicated on the contract drawings and whether Grunley gave GSA sufficient notice of what the contractor considers differing site conditions, so as to avoid prejudicing the agency in responding to the claim.

As to the first of these issues, the parties had different positions regarding the portions of the contract the contractor should have considered as showing the asbestos to be abated. Grunley maintained that it properly relied only on the hazardous materials, or hazmat, drawings, as showing that asbestos, while GSA contended that the contract's mechanical, electrical, and plumbing, or MEP, drawings – and an appendix to section 02085 of the specifications – were relevant as well. We agreed with GSA's position. 16-1 BCA at 177,990. Grunley moves for reconsideration of this ruling. In doing so, however, it merely reargues the points it made earlier. "Arguments already made and reinterpretations of old evidence are not sufficient grounds for granting reconsideration." Rule 26(a) (48 CFR 6101.26(a) (2015)). This motion is denied.

Grunley's motion for clarification asks whether we meant to say that if horizontal piping was shown on the hazmat drawings without asbestos containing material (ACM) and also depicted on the MEP drawings as requiring demolition, the contractor should have anticipated ACM on that piping. The motion for clarification also asks whether, if neither the hazmat drawings nor the MEP drawings depicted a horizontal pipe, we meant to say that the contractor should have anticipated that the piping it found was wrapped with ACM.

These questions go to matters beyond what the parties presented for a ruling in their cross-motions for summary relief. The questions may be hypothetical, as well; Grunley asserts that "[n]one of the pipe for which Grunley is claiming entitlement for additional asbestos abatement work was shown on the MEP Drawings or the Hazmat Drawings," and GSA responds that it "vigorously disputes this contention." An analysis of the matters raised in the motion for clarification will best be provided after development of the record. The motion is denied. We do note in this regard, though, that GSA has effectively conceded that it erred by saying, in its Statement of Undisputed Fact number 14, that "[t]he G400 series of hazmat drawings . . . do not depict any of the horizontal piping." We incorporated this statement into our decision. The agency now tells us, in response to the contractor's motion,

that hazmat drawing G402B, which shows the building's ground floor, depicts some horizontal piping.[1]

As to the second principal issue in CBCA 4545, whether Grunley gave sufficient notice, we reported that the contractor sent the agency two separate requests for information (RFIs) regarding asbestos it found but had not expected – RFI 175, on April 30, 2006, and RFI 408, in early January 2007. We said in our decision that after considering the material presented in the cross-motions for summary relief, we were "not in a position to determine the scope of asbestos referenced in RFI 175, which of the parties' statements in opposition to their current positions is more valid than the others, or what additional information might be persuasive on the issue." 16-1 BCA at 177,992.

GSA moves us to reconsider this ruling. The agency argues that the GSA statements which we labeled "in opposition to [its] current position[]" should not have been so characterized, so we should accept the agency's position that RFI 408 was the contractor's first notice of additional asbestos in the building. GSA correctly points out an error of fact in the decision: We noted that the agency "responded to RFI 408 by saying that '[i]t appears that the contract drawings show fewer than 50% of the pipe riser locations within the exterior walls' and that performance of work additional to that shown in the contract was a matter to be discussed through a change order." 16-1 BCA at 177,992. Actually, as the agency says, the first of these statements was made by Grunley and restated in the GSA response; only the second of the statements was made by the agency. GSA also notes that its project manager qualified his statement (which was reported by us, *id.*) that "there is some area of entitlement in their claim." In his deposition testimony, the project manager "guess[ed]" that "there's probably no merit there," but said that he thought change orders had "taken care of" other asbestos-related issues.

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[1] In opposing GSA's motion for summary relief, Grunley did not file a Statement of Genuine Issues, as required by Rule 8(g)(3) (48 CFR 6101.8(g)(3) (2015)). GSA's opposition to Grunley's motions for clarification and reconsideration noted this lack of filing. After receiving that opposition, Grunley sent us a letter apologizing for not submitting earlier the Statement of Genuine Issues, which the contractor says (with supporting documentation) that it had inadvertently omitted from filing with its opposition to the agency's motion for summary relief. We have reviewed Grunley's Statement of Genuine Issues and have determined that its contents have no impact on our earlier decision's exposition of background information or analysis. Curiously, Grunley in its Statement of Genuine Issues did not take issue with the statement we made based on GSA's Statement of Uncontested Facts number 14 – which the agency now tells us was incorrect.

Our mistake in attributing a Grunley statement to GSA, and the GSA project manager's statement being differently equivocal from the way in which we reported, do not change the conclusion we reached in our earlier decision. Although these instances might make us a bit more skeptical about the merit of Grunley's position, they do not alleviate our concern that we do not fully understand the scope of asbestos referenced in RFI 175 and need to hear additional information which might be persuasive on the issue. The instances noted by GSA do not make the agency's position so definitively correct that we may rule in its favor on summary relief. We therefore deny the motion for reconsideration as to this matter. We also note that Grunley, in its opposition to GSA's motion for reconsideration, calls to our attention documentation on GSA forms bearing dates in 2009 which says that due to "lessons learned," more money would be paid to Grunley "to accomplish those changes performed in Phase I which will be reoccur [sic] in Phase II," including some for abatement. These documents are unsigned. We do not know whether they were ever agreed to or whether they relate in any way to the additional asbestos claim before us in CBCA 4545. This information creates in our minds additional questions which will have to be resolved through development of the record.

Decision

Grunley's motion for clarification is **DENIED**. Both parties' motions for reconsideration are **DENIED**.

STEPHEN M. DANIELS
Board Judge

We concur:

JEROME M. DRUMMOND
Board Judge

BEVERLY M. RUSSELL
Board Judge