



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTIONS FOR RECONSIDERATION DENIED;
MOTION FOR CLARIFICATION GRANTED: October 15, 2012

CBCA 2057-R

POWER WIRE CONSTRUCTORS,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Ronald G. Schmidt of Schmidt, Schroyer, Moreno, Lee & Bachand, P.C., Rapid City, SD, counsel for Appellant.

Claire Douthit, Office of General Counsel, Department of Energy, Lakewood, CO, counsel for Respondent.

Before Board Judges **DANIELS (Chairman)**, **GOODMAN**, and **KULLBERG**.

GOODMAN, Board Judge.

Appellant, Power Wire Constructors, has filed a motion for reconsideration and clarification of the Board's decision dated August 30, 2012. Respondent has filed a response which includes information that we treat as a motion for reconsideration.

Appellant's Motion for Reconsideration

The Board found that appellant's stripping of a portion of proposed area 5 without respondent's contractually-required prior approval and the destruction of a potentially

historical site within that area by tenants was justification for the state authority to bar appellant from further activity in the entire area. The Board found further that it was reasonable for respondent to concur with the state authority's determination.

Appellant asserts in its motion for reconsideration that the Board overlooked facts that prove that respondent gave appellant prior approval for stripping proposed area 5. However, appellant asserted a contrary position in its response to respondent's motion for summary relief:

The primary reason the DOE [Department of Energy] shut down PW [Power Wire Constructors] on the morning of September 24 was its commencement of "stripping" *without the prior approval of DOE*. The undisputed evidence discloses that there was never any contractual requirement for PW to seek the DOE's prior approval for stripping activities. The contract clearly and unambiguously distinguishes "stripping" activities and "excavation" activities within a borrow area. (emphasis added)

Appellant's Brief in Support of Its Motion for Summary Relief and in Opposition to Respondent's Motion for Summary Relief at 18-19.

It is Power Wire's position that "stripping" and "excavating" are separate and distinct and that no authorization or approval is required by DOE for stripping as a matter of law. . . . The only work that PW had done in Borrow Area 5 was strip *for which it did not need approval*.

Appellant's Response to Respondent's Statement of Undisputed Facts 38, 41 (emphasis added).

Thus, while appellant previously asserted that it had stripped a portion of proposed area 5 without prior approval and that prior approval was not required, appellant now asserts in its motion for reconsideration that it had received approval for stripping. A motion for reconsideration is not a vehicle that allows a party to retry a case or reinterpret evidence. *Ryll International, LLC v. Department of Transportation*, CBCA 1143-R, 12-1 BCA ¶ 35,029.

Appellant also asserts in its motion for reconsideration that it should have been allowed to use that part of proposed area 5 that was undisturbed and allegedly did not contain any historical material. These arguments were previously raised by appellant and considered by the Board in reaching its decision. The Board noted that proposed area 5 contained two contiguous areas of approximately eight acres each, *Power Wire Constructors v. Department of Energy*, CBCA 2057, slip op. at 4 (Aug. 30, 2012), and that appellant maintained it could

have still been allowed to remove borrow material as the destruction of the site by the tenants of the property was minimal compared to the overall area, *id.* at 8. The operative undisputed facts were that approximately half the area was stripped prematurely by appellant and a potential historical site was destroyed by the tenants that were farming the area. In light of these actions, appellant was barred by the state authority from using the entire area, including the remainder of the area which had not been disturbed, and respondent concurred with the state authority's decision, in accordance with its obligations under the National Historic Preservation Act (NHPA).

We held:

The resolution of appellant's claim does not require us to determine whether there was historical material in proposed area 5 and in the site that was destroyed. Rather, we must determine whether respondent's determination, after proposed area 5 was stripped and the site destroyed, to preclude appellant from using proposed area 5 as a borrow area was a breach of contract. . . .

Based upon appellant's stripping of proposed area 5 without approval, contrary to the contract, and the tenants' deliberate destruction of a potential historical site, the SHPO decided to bar any further activity in proposed area 5. This decision was within the SHPO's authority to determine, and there is no evidence that the decision was arbitrary or capricious. It was reasonable for respondent to concur with the SHPO's decision. It was also reasonable for respondent to bar all construction activity within proposed area 5 pending its own investigation of the destruction of the site by the tenants and the possibility that historical material was scattered throughout the site. Such decision was neither arbitrary, capricious, nor an abuse of discretion. Accordingly, respondent's refusal to approve proposed area 5 as a source of borrow material was not a breach of contract. In so doing, respondent fulfilled its obligations pursuant to the NHPA.

Power Wire Constructors, slip op. at 5 n.5; 8.

Reconsideration is not granted when a party reargues facts and theories upon which the Board has previously ruled. *Flathead Contractors, LLC v. Department of Agriculture*, CBCA 118-R, 07-2 BCA ¶ 33,688.

Appellant has not stated grounds for reconsideration.

Appellant's Motion for Clarification

Appellant requests clarification as to the interest to be paid on its claim for transformer oil processing granted by the Board. As noted in the decision, appellant's claim on this issue was \$41,706. Respondent admitted liability with regard to \$15,000 of this claim. The amount in dispute was therefore \$26,706.¹ The Board's decision was applicable to the disputed amount only. *Power Wire Constructors*, slip op. at 2 n.1. Appellant is entitled to interest on the claimed amount of \$41,706 at the rate allowed by the Contract Disputes Act, from the date the claim was received by the contracting officer until the date paid. 41 U.S.C.A. § 7109 (Supp. IV 2011).

Appellant also requests clarification with regard to what it characterizes as an "award" in the amount of \$43,000 for a contract modification which respondent has described in its statement of uncontested facts. According to respondent, the modification amount includes the contract balance owed and the \$15,000 undisputed amount for transformer oil processing. While respondent appears to admit liability to pay the contract modification, the modification was not addressed in the appeal or the Board's decision, and the Board did not "award" the \$43,000 to appellant as appellant suggests.

Decision

The **MOTIONS FOR RECONSIDERATION** are **DENIED**. The **MOTION FOR CLARIFICATION** is **GRANTED** as stated herein.

ALLAN H. GOODMAN
Board Judge

¹ Responding to appellant's motion for clarification, respondent submits calculations not previously submitted to show that the amount in dispute was \$18,424. We treat respondent's response as a motion for reconsideration. Reconsideration is not a vehicle for introducing arguments that could have been made previously. *Ryll*.

We concur:

STEPHEN M. DANIELS
Board Judge

H. CHUCK KULLBERG
Board Judge