



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR RECONSIDERATION DENIED:
December 14, 2016

CBCA 2294-R

AMERICOM GOVERNMENT SERVICES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Thomas L. McGovern, III and Brendan M. Lill of Hogan Lovells US LLP, Washington, DC, counsel for Appellant.

Jennifer L. Howard, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **GOODMAN** and **SHERIDAN**.¹

GOODMAN, Board Judge.

Respondent, General Services Administration, pursuant to CBCA Rule 26 (48 CFR 6101.26 (2015)), has filed a motion for reconsideration of this Board's decision on the

¹ Judge Howard A. Pollack, the panel chair when the decision on the merits was issued, has retired. A panel member is not substituted to resolve a motion for reconsideration.

merits in this appeal, in *Americom Government Services, Inc. v. General Services Administration*, CBCA 2294, 16-1 BCA ¶ 36,320.²

Respondent's motion details three matters as to which reconsideration is requested: 1) the Board's decision with regard to institutional ratification; 2) the Board's treatment of the issue of the Limitations of Funds clause; and 3) alleged numerous errors of fact. Respondent requests that "[i]n light of a number of clear errors of law and fact contained in the Board's . . . decision . . . , the Board must vacate its decision and deny the appeal." Respondent's Motion for Reconsideration at 1.

As respondent has not stated grounds for reconsideration of the Board's decision on the merits, we deny the motion.

Discussion

Rules 26 and 27 of the Board's rules set forth the standards by which a motion for reconsideration will be evaluated:

[R]econsideration may be granted for any of the following reasons: newly discovered evidence which could not have been earlier discovered, even through due diligence; justifiable or excusable mistake, inadvertence, surprise, or neglect; fraud, misrepresentation, or other misconduct of an adverse party; the decision has been satisfied, released, or discharged, or a prior decision upon which it is based has been reversed or otherwise vacated, and it is no longer equitable that the decision should have prospective application; the decision is void, whether for lack of jurisdiction or otherwise; or any other ground justifying reconsideration, including a reason established by the rules of common law or equity applicable as between private parties in the courts of the United States.

² The Board had issued three previous decisions in this appeal—*Americom Government Services, Inc. v. General Services Administration*, CBCA 2294, 12-1 BCA ¶ 34,895 (2011) (denying respondent's motion to dismiss) (*Americom 1*), 14-1 BCA ¶ 35,687 (granting respondent's motion for summary relief in part and denying appellant's motion for summary relief) (*Americom 2*), and 15-1 BCA ¶ 35,902 (denying respondent's motion to dismiss for lack of jurisdiction) (*Americom 3*).

Oregon Woods, Inc. v. Department of the Interior, CBCA 1072-R, 09-1 BCA ¶ 34,063, at 168,431-32, *aff'd sub nom. Oregon Woods, Inc. v. Salazar*, 355 F. App'x 403 (Fed. Cir. 2009).

“Reconsideration is not a vehicle for retrying a case or introducing arguments that could have been made previously.” See *Ryll International, LLC v. Department of Transportation*, CBCA 1143-R, 12-1 BCA ¶ 35,029, at 172,144. “Arguments already made and reinterpretations of old evidence are not sufficient grounds for granting reconsideration.” Rule 26.

Institutional Ratification

With regard to the issue of institutional ratification, respondent alleges:

Reconsideration is necessary in this matter for a number of reasons, but primarily because of the Board's failure to follow binding precedent from the U.S. Court of Appeals for the Federal Circuit (Federal Circuit). The failure of a Board to follow binding precedent constitutes clear legal error. *Avila-Ramirez v. Holder*, 764 F.3d 717, 722 (7th Cir. 2014). Specifically, as is explained in more detail below, the Federal Circuit has plainly described the circumstances under which a Board may find that a government agency has ratified a contractual commitment. Necessary to such a finding is, as a first step, the finding of an actual or implied contract between the government agency at issue and the party seeking payment. Without such an actual or implied contract there can be no ratification, because, to put it simply, there cannot be a ratification of a contract that does not exist. It is undisputed, and the Board previously found, that no actual express contract ever existed between Americom and GSA for the provision of the Host Nation Agreements (HNAs) at issue. *Americom 3*. Therefore, in order to hold that GSA ratified a contract with Americom for the provision of the HNAs, as the Board did so hold, the Board would first have to determine that an implied contract existed. However, the Board made no such determination. In fact, the Board wholly failed to even address whether the necessary elements for an implied contract were present in this matter. The required elements for finding an implied contract come from binding Federal Circuit precedent and so the Board's failure to follow those elements represents clear legal error.

Respondent's Motion for Reconsideration at 1-2.

Respondent further asserts that the Board's decision is plainly contradicted by *City of El Centro v. United States*, 922 F.2d 816 (Fed. Cir. 1990), which requires a finding of four components of an implied-in-fact contract, and that the Board, instead of properly applying the *El Centro* decision, relied upon *Silverman v. United States*, 679 F.2d 865 (Ct. Cl. 1982), which respondent asserts requires a specific promise to the contractor which is allegedly lacking in the instant appeal. Additionally, respondent argues that *Janowsky v. United States*, 133 F.3d 888 (Fed.Cir. 1998), cited by the Board, does not support the Board's finding of institutional ratification. Respondent's Motion for Reconsideration at 5-6.

Respondent has not established a ground for reconsideration on the issue of institutional ratification. Rather, respondent re-argues its positions on this issue that were extensively briefed by the parties and considered by the Board before the Board issued its decisions in *Americom 2*, *Americom 3*, and the Board's decision on the merits. The cases cited in respondent's motion were cited during prior briefing and considered by the Board in its deliberations. The Board's decisions in *Americom 2* and *Americom 3* addressed GSA's arguments by ruling that, in limited and exceptional circumstances, institutional ratification provides a potential basis for recovery on a contract claim where the standard legal requirements for an implied-in-fact contract are not otherwise met. The Board's decision on the merits found that, based upon the facts and circumstances of the instant case, institutional ratification had occurred. The Board stated:

In the instant case, the facts largely fit within the parameters of *Janowsky*, in that GSA clearly allowed USFK [United States Forces Korea] to continue using the HNA licenses, thereby taking the benefit at no cost. Clearly, GSA knew by early 2006, and certainly by May 2006, that USFK was using licenses that had not been properly procured. *Janowsky* makes it clear that the Government cannot continue to receive the benefits and expect not to pay for them.

16-1 BCA at 177,079.

Our decision on the merits is not contrary to the *Janowsky* decision or the other decisions relied upon therein. Respondent has reargued issues that have been raised and argued previously during the proceedings in this appeal. Accordingly, respondent has failed to state a ground for reconsideration with regard to the issue of institutional ratification.

Limitation of Funds Clause

Respondent maintains in its motion for reconsideration that the Board failed to follow binding Federal Circuit precedent by not considering appellant's claim barred by the

Limitation of Funds clause. Respondent's Motion for Reconsideration at 7. In the decision on the merits, the Board made specific findings that "GSA paid the invoice in full on September 15, 2005, for \$579,793.52. According to AGS [Americom Government Services, Inc.], at that point, GSA still had \$1,105,464.72 in available funds of the \$5,115,611 total funding level." 16-1 BCA at 177,076. Respondent had not proved that the Limitation of Funds clause was violated, and the Board found accordingly. Respondent has failed to state a ground for reconsideration with regard to this issue this issue.

Fact Issues

Respondent's motion enumerates what respondent considers to be "erroneous factual conclusions," and that these "factual errors . . . added together resulted in an erroneous decision." In challenging the Board's conclusions, respondent does not offer newly discovered evidence or support its position with arguments that could not have been made previously; rather, respondent reargues its previous positions, interpreting evidence in the record that has been considered by the Board, to disagree with the Board's reasoning and factual findings. This is not a ground for reconsideration.

Decision

Respondent's motion for reconsideration is **DENIED**.

ALLAN H. GOODMAN
Board Judge

I concur:

PATRICIA J. SHERIDAN
Board Judge