UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR RECONSIDERATION DENIED: November 16, 2016

CBCA 2882-R

BRYAN CONCRETE & EXCAVATION, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Bradley W. Andersen and Timothy J. Calderbank of Landerholm, P.S., Vancouver, WA, counsel for Appellant.

Brian R. Reed, Kristin Langwell, Glenn Sebesta, and Brent Pope, Office of Regional Counsel, Department of Veterans Affairs, Chicago, IL, counsel for Respondent.

Before Board Judges **SOMERS**, **DRUMMOND**, and **ZISCHKAU**.

SOMERS, Board Judge.

Bryan Concrete & Excavation, Inc. (BCE) seeks reconsideration under Board Rule 26 (48 CFR 6101.26 (2015)) of the Board's August 26, 2016, decision granting summary relief to respondent, the Department of Veterans Affairs (VA). The facts underlying this dispute are laid out in detail in the Board's earlier opinion. *See Bryan Concrete & Excavation, Inc. v. Department of Veterans Affairs*, CBCA 2882, 16-1 BCA ¶ 36,475. After filing this motion, BCE filed an appeal from our decision to the United States Court of Appeals for the Federal Circuit (CAFC). For the reasons explained below, we first find that we possess jurisdiction to consider BCE's motion, despite the fact that BCE has appealed to

the CAFC. Next, upon consideration of appellant's brief and the VA's opposition, we deny the motion.

The Board Possesses Jurisdiction Over BCE's Motion for Reconsideration

On November 8, 2016, BCE filed an appeal from our decision with the United States Court of Appeals for the Federal Circuit, which was docketed on November 8, 2016. "[A]s a general proposition, once final judgment is entered and a timely notice of appeal has been filed, the trial tribunal loses jurisdiction over the case except to act in aid of the appeal or to correct clerical errors." *Travel Centre v. General Services Administration*, GSBCA 14057-R, 00-2 BCA ¶ 31,129, at 153,769 (quoting *A.C. Nielsen Co. v. Defense Commissary Agency*, GSBCA 13466-P-R, et al., 97-1 BCA ¶ 28,774, at 143,594); *see also Zinger Construction Co.,* GSBCA 6568-R, 87-1 BCA ¶ 19,444 (1986), (citing *Chore-Time Equipment, Inc. v. Cumberland Corp.*, 713 F.2d 774, 781 (Fed. Cir. 1983)); *Yachts America, Inc. v. United States*, 8 Cl. Ct. 278, 281, *aff'd,* 779 F.2d 656 (Fed. Cir. 1989). Generally, the only things left for the lower tribunal to rule upon are those matters vested in the lower tribunal by statute or mandatory rule which are appropriate for post-trial or post-hearing disposition. *Id*. (citing *Chemical Engineering Corp. v. Essef Industries, Inc.*, 795 F.2d 1565, 1574-75 (Fed. Cir. 1986); *see also Signal Contracting, Inc.*, ASBCA 44963, 93-3 BCA ¶ 26,058 (citing *Hattersley v. Bollt*, 512 F.2d 209, 215 (3rd Cir. 1975).

However, at least one of our predecessor boards determined that it is appropriate to hear and deny a motion for relief even after an appellant has filed a notice of appeal, without leave of the appellant court. *A.C. Nielsen Co.*, 97-1 BCA at 143,594. As the General Services Board of Contract Appeals (GSBCA) explained:

> In *Yachts America*, the Federal Circuit recognized that it was appropriate for the Claims Court[1] to assume jurisdiction over a motion for relief from decision while an appeal was pending. There, the Federal Circuit affirmed the Claims Court's denial of a Rule 60(b) motion filed after the Claim's Court decisions had been appealed. In assuming jurisdiction, the Claims Court recognized:
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>> [c]onceptually, it is awkward for a court to rule in a case when jurisdiction lies elsewhere. But practically, it is helpful to the appellate court to know whether the record it has is complete,

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[1] The United States Claims Court was renamed the United States Court of Federal Claims by the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4516.

> whether the proposed new evidence makes a difference and whether judicial and litigation time and resources are likely to be misspent by unnecessary transferral of the case between courts. To the extent the trial court can provide this information about a case with which it is so far more familiar than is the court of appeals, it acts "in furtherance of the appeal."

Id.; *Accord Placeway Construction Corp. v. United States*, 19 Cl. Ct. 484, 488 (1990). The grant or denial of a motion for relief from decision is discretionary. *Yachts America*, 779 F.2d at 662.

Factors which prompted the GSBCA to assume jurisdiction over the motion for relief in *A.C. Nielsen* persuade us that is appropriate for us to consider BCE's motion for reconsideration, even though an appeal is pending.

<u>BCE's Motion for Reconsideration is Denied</u>

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.

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.

Here, BCE moves for reconsideration "to prevent manifest injustice" and then argues three legal arguments to support its motion for reconsideration. First, BCE asserts that the VA is equitably estopped from now claiming that the contract is void ab initio. Second, BCE contends that the VA waived its right to claim the contract is void ab initio. Finally, BCE states that "laches prohibits the VA from claiming the contract is void ab initio."

BCE presented the first argument in its opposition to the VA's motion for summary relief, and we expressly rejected it. *Bryan Concrete & Excavation,* 16-1 BCA at 177,732-33. The other arguments could have been made on the basis of the documents in the record but were not. Neither variety of argument is appropriately put before us now. *Ocwen Loan Servicing, LLC v. Department of Veterans Affairs*, CBCA 1073, 09-1 BCA ¶ 34,121, at 168,716 (citing *Watson v. United States*, 281 F.App'x 970, 971 (Fed. Cir. 2008) ("a new legal argument cannot be raised in a motion for reconsideration under RCFC [Rules of the Court of Federal Claims] 59(a)(1) when the plaintiff knew of the facts giving rise to the argument during the pendency of the case")); *National Westminister Bank, PLC v. United States*, 512 F.3d 1347, 1352 (Fed. Cir. 2008) (argument made on reconsideration but not presented during briefing stage held to have been waived). "Reconsideration is not available to retry a case or introduce arguments that could have been made previously." *URS Energy & Construction, Inc. v. Department of Energy*, CBCA 2260-R, 12-2 BCA 35,147, at 172,524 (citing *W.G. Yates & Sons Construction Co. v. General Services Administration*, CBCA 1495-R, 12-1 BCA ¶ 35,038, at 172,153 (2011)).

Decision

After careful review of the points raised by BCE, we see no basis for granting its motion for reconsideration. BCE's motion for reconsideration is **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

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JEROME M. DRUMMOND	JONATHAN D. ZISCHKAU
Board Judge	Board Judge