UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR RECONSIDERATION DENIED: June 1, 2017

CBCA 5395-R

CB&I AREVA MOX SERVICES, LLC,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Noah M. Hicks II and James A. Ouellette Jr. of CB&I AREVA MOX Services, LLC, Aiken, SC, counsel for Appellant.

Matthew Butsick, Office of the General Counsel, National Nuclear Security Administration, Department of Energy, Washington, DC; and Mary-Ellen Noone, Office of the General Counsel, National Nuclear Security Administration, Department of Energy, Aiken, SC, counsel for Respondent.

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

DANIELS, Board Judge.

CB&I AREVA MOX Services, LLC (MOX Services) believes that it is entitled to a fee of .25% more than the Department of Energy's (DOE's) National Nuclear Security Administration paid, during a specified period of time, for work performed under a contract between the two parties. MOX Services has expressed this belief through two separate claims – one that the language of the contract, as amended, mandates this result, and the other that the contractor is entitled to the additional fee because the agency did not negotiate the matter in good faith.

We have issued two decisions in this case. In the first, we held that because the second claim had not been presented to the contracting officer, the Board had no jurisdiction to hear it. *CB&I AREVA MOX Services, LLC v. Department of Energy*, CBCA 5395, 17-1 BCA ¶ 36,591 (2016). MOX Services did not seek reconsideration of that decision. Instead, it has presented the claim to the contracting officer and awaits his decision on it.

In our second decision, we held, on cross-motions for summary relief, that the language of the contract, as amended, mandates the result sought by the agency and not the result sought by the contractor. *CB&I AREVA MOX Services, LLC v. Department of Energy*, CBCA 5395, 17-1 BCA ¶ 36,697. MOX Services seeks reconsideration of that decision.

MOX Services advances two arguments in support of its motion. First, it contends that "[t]he Board should reconsider its denial of MOX Services' appeal and issue a stay in the present proceeding to prevent a manifest injustice." The contractor urges that because

> [t]he facts of [the second] [c]laim are intertwined with the facts before the Board in the instant appeal . . . , it would directly and obviously (i.e., manifestly) result in an injustice to MOX Services to allow those factual findings made by the Board in reaching its decision to stand, without the Board considering the context of those additional and material facts asserted by MOX Services in its [second] [c]laim.

MOX Services' second argument is that "[t]he Board should reconsider its decision because it is clear error for the Board to have made factual determinations in the absence of discovery between the Parties and also in light of MOX Services[']s opposition to the Government's statement of uncontested facts."

As DOE maintains, neither of these justifications for reconsideration is valid. As to the first: The Board has already held, and the contractor has accepted, that the facts relevant to the second claim (lack of good faith) are different from the facts relevant to the first claim (contract interpretation). 17-1 BCA ¶ 36,591, at 178,217-18. In other words, the facts relevant to the two claims are not "intertwined," as the contractor suggests. If the contracting officer grants the second claim, or if he denies that claim and the contractor appeals his decision to the Board, the facts relevant to that claim may lead to a result different from the one we reached on the first claim. What MOX Services deems a "manifest injustice" will then have been avoided. But that result will be based on different facts, and reconsidering the analysis of the first claim will be unnecessary. The contractor has not shown us any facts relevant to the first claim that would mandate a different result as to that claim.

As to MOX Services' second justification for reconsideration: The contractor's assertion that discovery is necessary is at odds with its contention, in advancing its motion for summary relief, that the facts in this case are clear and unambiguous, so the Board may not resort to extrinsic evidence to interpret them. Further, the Board made no findings of fact in resolving the case; it relied on facts which were uncontested. Although MOX Services fancies that some of the facts were contested, the disputes concerned either legal argument or, as exemplified in footnote 1 of our decision, addressed facts which were not really in dispute. *See* 17-1 BCA ¶ 36,697, at 178,712 n.1. The contractor does not identify any issues which are both contested and relevant to the resolution of the claim which was before us.

Decision

MOX Services has not cited any valid ground for reconsideration. *See* Board Rules 26, 27(a) (48 CFR 6101.26, .27(a) (2016)). The motion for reconsideration is consequently **DENIED**.

STEPHEN M. DANIELS
Board Judge

We concur:

H. CHUCK KULLBERG
Board Judge

MARIAN E. SULLIVAN
Board Judge