



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR RECONSIDERATION DENIED: November 17, 2017

CBCA 4078-R

AFFILIATED WESTERN, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Paul H. Sanderford of Sanderford & Carroll, P.C., Temple, TX, counsel for Appellant.

Mary A. Mitchell, Office of General Counsel, Department of Veterans Affairs, Houston, TX, counsel for Respondent.

Before Board Judges **SOMERS** (Chair), **HYATT**, and **GOODMAN**.

SOMERS, Board Judge.

In *Affiliated Western, Inc. v. Department of Veterans Affairs*, CBCA 4078, 17-1 BCA ¶ 36,808, we found that the Department of Veterans Affairs (VA) properly terminated Affiliated Western, Inc. (AWI) for default. We held that the VA's contracting officer had a reasonable belief that there was no likelihood of timely completion under the contract. *Id.* at 179,400. Our decision was based on evidence that showed AWI did not adequately assure the contracting officer of its diligent performance. We therefore denied AWI's request to overturn the VA's termination for default and convert it to a termination for convenience. AWI now seeks reconsideration.

We deny AWI's request. "Motions for reconsideration are committed to the considerable discretion of the Board." *URS Energy & Construction, Inc. v. Department of Energy*, CBCA 2260-R, 12-2 BCA ¶ 35,147, at 172,522 (citing *Beyley Construction Group Corp. v. Department of Veterans Affairs*, CBCA 5-R, et al., 08-1 BCA ¶ 33,784, at 167,203). We reconsider our decisions under the limited circumstances set out in Board Rule 26 (48 CFR 6101.26 (2016)). As we have stated:

[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.

Bryan Concrete & Excavation, Inc. v. Department of Veterans Affairs, CBCA 2882-R, 16-1 BCA ¶ 36,549, at 178,031 (citing *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); see *Universal Home Health & Industrial Supplies, Inc. v. Department of Veterans Affairs*, CBCA 4012-R, et al., 16-1 BCA ¶ 36,530, at 177,947 ("Reconsideration is not a vehicle for retrying a case or introducing arguments that have been made previously" (citing *Ryll International, LLC v. Department of Transportation*, CBCA 1143-R, 12-1 BCA ¶ 35,029, at 172,144)). Significantly, Rule 26(a) also cautions that "[a]rguments already made and reinterpretations of old evidence are not sufficient grounds for granting reconsideration, for altering or amending a decision, or for granting a new hearing."

Here, AWI argues that our prior decision contained flawed legal analysis and failed to consider important, undisputed facts. AWI further alleges that we misapplied the burden of proof for delay damages, and it contests its obligation to prove excusable delay. AWI emphasized its entitlement to an extension of the contract completion date following a unilateral modification that extended phases 1 and 2. According to AWI, the Board denied its appeal in part because we failed to appreciate the factual significance of the contract phases corresponding with definite weekly durations, which AWI believed contractually entitled them to an extension of the overall contract commensurate with those durations.

On the contrary, we found that the contracting officer possessed sufficient evidence to support his decision to terminate for default on the basis that AWI's timely performance of the contract was imperiled. When the contracting officer issued the notice terminating AWI for default, AWI was approximately three weeks behind schedule on phase 2, with approximately 50% of the work completed on that phase. AWI fell behind on two extended milestones (phases), had completed a negligible percentage of work on those delayed phases at the time of termination, had created uncertainties regarding its subcontractor, and displayed continual shortcomings with its scheduling and project management. AWI's numerous failures to assure the contracting officer following delays and other shortcomings with its performance controlled this case.

In sum, AWI simply takes issue with the factual and legal findings of the Board's prior decision. Ultimately, however, AWI has not presented grounds to justify reconsideration of our decision to uphold the VA's decision to terminate for default.

Decision

For the reasons set forth above, AWI's motion for reconsideration is **DENIED**.

JERI K. SOMERS
Board Judge

We concur:

CATHERINE B. HYATT
Board Judge

ALLAN H. GOODMAN
Board Judge