UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR RECONSIDERATION DENIED: August 8, 2019

CBCA 6147-R

CH2M–WG IDAHO, LLC,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Mark J. Meagher, Phillip R. Seckman, and K. Tyler Thomas of Dentons US LLP, Denver, CO, counsel for Appellant.

Margaret B. Hinman, William C. Harvey, and Eva M. Auman, Office of Chief Counsel, Department of Energy, Idaho Falls, ID, counsel for Respondent.

Before Board Judges **SOMERS** (Chair), **SHERIDAN**, and **ZISCHKAU**.

SHERIDAN, Board Judge.

Respondent, Department of Energy (DOE), has filed a motion asking us to reconsider our decision in *CH2M-WG IDAHO, LLC v. Department of Energy*, CBCA 6147, 19-1 BCA ¶ 37,339. In that decision we found that "DOE's claims [in CBCA 6147 were] premised on precisely the same issues litigated and decided by the Board in CBCA 3876." *Id*. at181,595; *CH2M-WG IDAHO, LLC v. Department of Energy*, CBCA 3876, 17-1 BCA ¶ 36,849. The Board concluded that the principles of res judicata barred proceeding on CBCA 6147 and dismissed the appeal. We deny DOE's current motion because the motion for reconsideration makes precisely the same arguments that were made in CBCA 6147 which we considered and denied.

Background

At issue in this motion, as well as in CBCA 3876 and CBCA 6147, [1] are certain sums that DOE seeks to withhold from CH2M-WG IDAHO (CWI). These sums relate to incentive fee payments and payments for safe units provided under an employee incentive plan. The Board found the withholdings improper and ordered DOE to pay CWI $27,359,380 in incentive fees and $5,985,811 for safe units. *See CH2M-WG IDAHO, LLC,* 17-1 BCA at 179,572.

We note that after we rendered our decision in in CBCA 3876, DOE neither requested Board reconsideration nor appealed the decision to the United States Court of Appeals for the Federal Circuit (Federal Circuit). Consequently, the Board's decision became final. 41 U.S.C. § 7107(b) (2012); Rule 31(c) (48 CFR 6101.31(c) (2018).

Sometime after the Board's decision in CBCA 3876 became final, a DOE contracting officer issued another final decision pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109. This final decision informed CWI that DOE would only be paying a portion of the amounts the Board had awarded in CBCA 3876. The contracting officer determined that DOE was entitled to withhold payment of $4,790,066 of the $27,359,380 awarded to avoid what she referred to as a "double fee payment."[2] The contracting officer also claimed DOE's right to withhold all of the $5,985,811 the Board awarded to CWI for safe units, positing that prior to paying the awarded safe unit funds, DOE was entitled to receive a plan for disbursement to former employees who held safe unit shares as of September 30, 2012. CWI appealed the final decision, seeking payment of the full award in CBCA 3876, and the matter was docketed as CBCA 6147. After concluding that DOE's claims were premised on the same issues as those litigated and decided by the Board in CBCA 3876, the Board granted summary judgment in favor of CWI in CBCA 6147, again ordering DOE to pay CWI $27,359,380 for incentive fees and $5,985,811 for safe units, along with applicable CDA interest. 19-1 BCA at 181,595. More specifically, we concluded that the double fee payment argument advanced by DOE in CBCA 6147 mirrored the unpersuasive argument DOE made in the CBCA 3876 litigation. *Id*. We also found that DOE had made the same argument in

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[1] Familiarity with the decisions in CBCA 3876 and CBCA 6147 is assumed and necessary for a full understanding of our decision here.

[2] Throughout the contract and subsequent litigation, the parties have referred to this issue in various ways, including "the G&A allocation issue," "the double fee payment issue," "the double payment issue," "the B.5 G&A allocation issue," and "the G&A issue." In CBCA 3876 we generally referred to the issue as "the B.5 allocation issue." In CBCA 6147 we refered to the issue as "the double fee payment" issue, because that is how the DOE contracting officer referred to it in her final decision.

CBCA 3876, that CWI had not properly disbursed safe unit payments and that "DOE was given a full and fair opportunity to present any evidence it had relating to the payment of safe units [in CBCA 3876]. For the safe units dispute, DOE litigated all the contentions in CBCA 3876 that it now seeks to relitigate in CBCA 6147." *Id*. We concluded that "DOE has shown no sound bases that would permit it to get another chance in CBCA 6147 to relitigate the positions taken in CBCA 3876 which the Board implicitly rejected." *Id*.

DOE still resists full payment of the award in CBCA 3876, now moving the Board to reconsider its decision in CBCA 6147. DOE posits that the Board made mistakes of fact that were material to the decision in CBCA 6147. It argues that the Board failed to consider that CWI's claim submitted in CBCA 3876 expressly excluded the $4,790,066, and that the decision in CBCA 3876 was a "new fact/circumstance impacting the payment of the [$4,790,066] fee invoice." Positing that the Board's CBCA 6147 decision failed to consider these "facts," DOE concludes that:

> (a) res judicata cannot apply because the Board did not have jurisdiction to consider any issues pertaining to a Government CDA monetary or non-monetary claim which did not exist and had not been subject to a [contracting officer's] final decision; and
>
> (b) res judicata cannot apply because [the decision in CBCA 3876] created new transaction facts which were contingent on, but distinct from, those considered in [CBCA 3876].

DOE also continues to assert that res judicata cannot preclude it from performing an audit and requiring contract compliance before disbursement of the $5,985,811 for safe units.

CWI requests that DOE's motion be denied, asserting that the motion does nothing more than attempt to upend the decision in CBCA 3876, a decision that was not appealed and is final and binding on DOE, by rearguing the very same facts and law that it presented in opposition to CWI's motion for summary judgment in CBCA 6147. CWI posits that DOE has not established any viable grounds for reconsideration and its motion should be denied.

Discussion

The burden to prove that the Board's decision contains substantive errors warranting reconsideration rests with DOE. The question of whether to grant or deny a motion for reconsideration is left to the considerable and sound discretion of the Board. *See URS Energy & Construction, Inc. v. Department of Energy*, CBCA 2260-R, 12-2 BCA ¶ 35,147, at 172,522; *see also* Rule 26.

Reconsideration is not a vehicle for retrying a case, advancing arguments that were already made, or introducing arguments that could have been made previously. *See ThinkGlobal, Inc. v. Department of Commerce*, CBCA 4410, 17-1 BCA ¶ 36,642, at 178,457; *Americom Government Services, Inc. v. General Services Administration*, CBCA 2294-R, 17-1 BCA ¶ 36,590, at 178,212 (2016); *Tidewater Contractors, Inc. v. Department of Transportation*, CBCA 50-R, 07-2 BCA ¶ 33,618, at 166,501. Advancing reinterpretations of old evidence likewise is not sufficient grounds for reconsideration. *See Americom Government Services,* 17-1 BCA at 178,212; *see also URS Energy & Construction Inc.,* 12-2 BCA at 172,522-23.

In exercising our discretion, and in evaluating a request for reconsideration, we must "strike a delicate balance between two countervailing impulses: the desire to preserve the finality of judgments and the incessant command of the [tribunal's] conscience that justice be done in light of all the facts." *Flathead Contractors, LLC v. Department of Agriculture*, CBCA 118-R, 07-2 BCA ¶ 33,688, at 166,770 (quoting *Advanced Injection Molding, Inc. v. General Services Administration*, GSBCA 16504-R, et al., 05-2 BCA ¶ 33,097).

The Board has no doubt that DOE deeply regrets its failures in CBCA 3876. Its actions in CBCA 6147 and its motion for reconsideration show a desperate attempt to provide evidence that should have been provided in CBCA 3876 to justify its withholdings. There is no reason the evidence could not have been provided in CBCA 3876. During the extensive litigation and a hearing lasting approximately two weeks, DOE had ample opportunity to develop compelling evidence to bolster its double payment and improper disbursement arguments. It failed to support its arguments with sufficient evidence and the Board's decision reflected that failure by ordering DOE to release the amounts improperly withheld. DOE does not now get another chance to relitigate the same arguments it made in CBCA 3876.

The Board denies DOE's motion for reconsideration because it does nothing more than advance the same facts and arguments that were already addressed in CBCA 3876. The facts and law that DOE advances in its motion were extensively litigated by the parties in CBCA 3876 and were considered and rejected by the Board. DOE's contention that the Board failed to properly consider certain facts and arguments in CBCA 6147 is meritless. In the motion for reconsideration, DOE does nothing more than, once again, reargue the same alleged facts and arguments that run throughout the dispute about incentive fee payments and payment of safe units.

Decision

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

Patricia J. Sheridan
PATRICIA J. SHERIDAN
Board Judge

We concur:

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge