UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RECONSIDERATION DENIED: October 2, 2007

CBCA 118-R

FLATHEAD CONTRACTORS, LLC,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Mark Mann, Flathead Contractors, LLC, Muskogee, OK, appearing for the Appellant.

Mary E. Sajna, Office of the General Counsel, Department of Agriculture, Portland, OR, counsel for Respondent.

Before Board Judges **VERGILIO**, **POLLACK,** and **STEEL**.

Opinion for the Board by Board Judge **POLLACK**. Board Judge **VERGILIO** dissents in part.

POLLACK, Board Judge.

Each party has filed a motion for reconsideration of the decision granting in part the appeal. *Flathead Contractors, LLC v. Department of Agriculture*, CBCA 118, 07-1 BCA ¶ 33,556. Rule 26 of the Board Rules provides in pertinent part that reconsideration "may be granted for any of the reasons stated in Rule 27(a) and the reasons established by the rules of common law or equity applicable between private parties in the courts of the United States." The rule states, "Arguments already made and reinterpretations of old evidence are

not sufficient grounds for granting reconsideration." Among matters listed in Rule 27 for which the Board may relieve a party from the operation of a final decision is newly discovered evidence which could not have been earlier discovered, even through due diligence; and/or justifiable or excusable mistake, inadvertence, surprise or neglect. Under the applicable Board rules, reconsideration is a matter within the discretion of the Board.

This appeal was subject to several days of hearing. The parties each had a full opportunity to assess what evidence they needed to put on and to react to each other. The fact that a party now has concluded that other arguments or evidence could have been presented or highlighted is not a basis for us to allow reconsideration. *Mitchell Enterprises, Ltd. v. General Services Administration*, CBCA 402-R (Aug. 1, 2007). While the Board will look at clear errors, be they of fact or law, the Board will not use reconsideration to allow a party to retry a case or introduce facts and arguments that it failed to present at the original hearing or put forward in its briefing.

For purposes of this decision, we do not provide a separate findings of fact but instead refer the reader to the underlying decision. *Flathead*.

Forest Service (FS) issues:

In the underlying decision, we found in favor of the Department of Agriculture's Forest Service (FS) contention that appellant utilized some on-site rock excavation at the rock wall in lieu of using Grading A. This was material to our consideration because we valued the compensation due for using on-site rock excavation at a lesser figure than the unit price for using Grading A. We arrived at the quantity of on-site rock excavation used in lieu of Grading A by taking numbers compiled by the contracting officer (CO) and set out in Respondent's Exhibit 2, which along with setting out the quantity also included citations to the logs (which the FS contended supported its proposed reduction). Although we relied on the CO quantity, we reduced the quantity for several reasons. One was the failure of one of the cited job logs, Appeal File at 353, to support the quantity; and second, we adjusted for a math error. Pertinent to the FS motion for reconsideration is the reduction associated with the lack of support in the cited job log. *Id.* at 353.

The FS asks us to reconsider our reduction for on-site rock on the basis that the CO made a typographical error in citing us to page 353 of the appeal file, when it should have cited us to page 352. The FS acknowledges that page 353 did not support a reduction in Grading A and further that it did not cite page 352 to the Board in Respondent's Exhibit 2, nor at the hearing or in briefing. That said, the FS asserts that because it meant to include page 352 and not page 353, we should substitute the quantity listed on page 352 for the quantity not supported on page 353.

While our rules allow us to reconsider for a number of reasons, our rules do not mandate that action. Rather, reconsideration is a matter to be left to our discretion. In exercising our discretion, and in evaluating a request for reconsideration, "a tribunal 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.'" *Advanced Injection Molding, Inc. v. General Services Administration*, GSBCA 16504-R, 05-2 BCA ¶ 33,097." *See also Tidewater Contractors, Inc. v. Department of Transportation*, CBCA 50, 07-1 BCA ¶ 33,525.

The matter of substitution of rock excavation for Grading A was a contested issue. The FS raised the claim for reduction for the first time at the hearing and in Respondent's Exhibit 2. Page 352 of the appeal file, now being relied upon, was not identified in Respondent's Exhibit 2 and not cited elsewhere as a basis for reducing the amount of Grading A placed. Appellant had no notice that the log now being offered by the FS supported the claimed reduction and no reason to address that log at either the hearing or in briefing.

The FS staked out its position at the hearing. It identified a specific reduction based on specific supporting documents. If we permit reconsideration here, and allow it to substitute the proffered document for another, the FS will be given an opportunity to augment the record it made at the hearing and the arguments it presented in briefing. Here, after receiving the Board's decision, the FS would be given an opportunity to clean up its mistake. It could have avoided the current situation had it taken more care in preparing the exhibit. Taking into account the overall circumstances presented in this request by the FS, we find that reconsideration is not warranted.

The second matter for which the FS seeks reconsideration is a request that we increase the quantity of the loads that we had attributed to vehicles carrying the Grading A and rock from fifteen cubic yards (cys) a load to twenty cys a load. That would increase the amount of rock excavation material for which the FS would be given a credit in lieu of Grading A used behind the wall.

The FS acknowledges that it used fifteen cys per hauling vehicle for its calculation and estimate in Respondent's Exhibit 2 for the amount of rock excavation used in lieu of Grading A; however, the FS now wants us to reject the capacity it offered for a larger number. It bases its request on the following. It first says that at paragraph 55 of the majority decision, the Board notes that appellant testified that each hauling vehicle contained twenty cubic yards rather than the fifteen cys used by the FS in its calculation of excavation material in lieu of Grading A. The FS then makes the following statement, as further support for our granting reconsideration:

> Since the majority gives great weight to Appellant's testimony over that of the Forest Service, the majority should also recalculate the quantity of fill using Appellant's cubic yardage per load.

Respondent's Motion for Reconsideration at 1 and 2.

First, the reference cited by the FS as to twenty cys was in the context of the hauling of Grading C material and not Grading A or rock excavation. Thus, the FS is not comparing like matters. Second, as to the rationale in the above quote, we find it to be poorly thought out and inappropriate. The Board decides issues on the basis of weighing evidence in specific instances. Sometimes that results in finding for one side and sometimes for the other. Finally, when a party puts forth a calculation or theory, the Board expects that the party to include numbers that the party believes are correct. If a party believes a greater or lesser number should be included, we would expect to see that in the original calculation and not expect modifications after the decision has been issued. Here, allowing the FS to reverse its earlier calculation would be reargument of old evidence. The truck quantity initially offered by the FS stands. Reconsideration is denied on this matter.

The FS also seeks reconsideration on the markups which the Board allowed for both the subcontractor, Freeman, and appellant. The FS claims the Board allowance was not based on evidence in the record. We assume, although the FS never specifies the remedy sought, that the FS wants the Board to limit overhead and profit to 6.5 percent and not the 20 percent allowed for Freeman and a 10 percent markup allowed for Flathead.

The Board reviewed and set out the testimony as to markups at paragraph 36 of the "Findings of Fact" of its decision. The Board stated that Mr. Freeman testified that he bids 15 percent to 18 percent overhead. We then pointed out that on further questioning, he stated that in estimating he hardly ever estimates below 10 percent. We also set out in the same paragraph that in bidding, he acknowledged that he had used a rate of 6.5 percent for the rock wall item. Finally, we pointed out that we understood that Freeman provided no historical documents to corroborate his overhead or profit figures.

In our analysis, we recognized weaknesses in both appellant's and FS's evidence and simply concluded that the appellant's evidence was more convincing and likely than the position of the FS. We pointed out that "the added cost was due to a change in the work and as such a contractor is not bound by the markups used in its bidding." We then stated that markups of 10 percent for overhead and 10 percent for profit were consistent with the general industry standard, and we considered that in conjunction with the rest of the evidence.

Moreover, the FS approach appears to be based on a lack of understanding of the distinction between pricing overhead and profit for a competitive bid and pricing those elements for changed work. When bidding, one often lowers overhead and profit rates in order to secure a project. However, a contractor is not then generally bound to those markups for all and any subsequent changed work. That is because a change is priced separately as an equitable adjustment and as such is to reflect the normal costs and markups for the work. Clearly, if appellant had used a 30 percent overhead in its bidding the FS would not take the position that it had to pay 30 percent overhead for every change. The principle works both ways.

The FS chose to put all its eggs in the 6.5 percent basket but did not make the distinction between overhead for changes and a bid-driven overhead. It provided no evidence other than what Freeman bid as to the rock wall item to support the claim that 6.5 percent was a regular rate used by Freeman for combined overhead and profit on work and changes. Accordingly, we deny reconsideration as to the markups.

The FS next asked us to modify the calculation we made for the hauling costs and for placing of the rock excavation material behind the wall. Although we concluded (as is discussed in more detail below, in responding to appellant's motion) that appellant should be paid for the hauling and placement costs of putting rock-excavation behind the rock wall, we also found that appellant should not be compensated for material, since the rock excavation material was being furnished from the site and further there was no evidence that appellant had processed the rock, beyond removing it through excavation and ultimately placing it at the wall. To reach a number for hauling and placement, the Board created a formula, by which we subtracted estimated crushing costs associated with the Grading A material (initially called for) from the unit price in the contract for Grading A (also Government-furnished). That left us with the remainder, which we concluded would be hauling and placing costs. Neither appellant nor the FS kept any specific cost records to establish the cost of the exact hauling and placing and thus we made an estimate.

The FS says we erred in that estimate because we discounted evidence from the FS that established that using rock excavation material reduced the hauling costs. The FS is incorrect in that characterization. The majority opinion referenced the fact that the CO claimed that the haul distance from the rock excavation site was closer and less expensive than the Grading A site. The majority simply did not find the CO evidence to be particularly helpful. The CO had not been at the site or involved at the time of the work. He established no expertise in pricing. Our decision as to the proper number for Grading A was based on estimates and other data. It was a compromise number and included hauling, loading, and placement of the rock excavation material in lieu of contractor crushed Grading A. The fact that the rock excavation was coming from a closer location than the source of the Grading

A went into our thought process in coming up with a final number. The FS could have provided its own calculation at the hearing, but it did not. Reconsideration on this matter is denied.

The final issue for which the FS seeks reconsideration is our determination that the added wall work was due to a change and not a design error. The FS argument presents nothing new to the issue. The Board explained its position in the initial decision and will not restate it here. Reconsideration is denied on this issue.

Appellant's motion

Appellant challenges the reduction of its Grading A claim on the basis that the 685 cys which the FS claimed was rock excavation material was significantly overstated and much of the material might have been used as general fill and not specifically in neat lines behind the rock wall. Appellant says that the Board should not have relied on presumptions from the CO, since his presumptions were not conclusive. Appellant then provides a detailed explanation for its position (backed by an affidavit), citing dates for start and finish of the wall and making numerous other detailed assertions. Appellant, however, is making arguments it could and should have made before the decision. Particularly relevant to that is the following statement regarding the use of rock excavation that has been set out by appellant in its briefing on the motion:

> This argument could have been explored further by the Appellant at the hearing. In fact, both the Forest Service and Appellant could have questioned Mr. Acosta who was on the project when the rock excavation was placed behind the wall; and, Appellant could have attempted to contact its Superintendent and author of the diaries, Ron Wilson by phone for testimony, but time constraints out weighed the significance placed on this issued by Appellant. This is because Appellant believed at the time that it was irrelevant based on the reading of Specification Section 105.5 Rights and Use of Materials Found or Produced on the work.

Respondent's Memorandum in Support of Appellant's Counter Motion for Reconsideration at 5.

Implicit in the above is the acknowledgment that appellant had an opportunity at the hearing and in briefing to address the Grading A claim at issue and to address the FS claims as to the substitution of the rock excavation. While we agree that the quantity put forth by the FS was based on presumptions or conclusions drawn by the CO from the logs, when we looked at the logs, the CO conclusions seemed reasonable and supportable. Appellant did

not provide convincing evidence to the contrary. By filing for reconsideration, a party does not get an opportunity to retry the case. The various affidavits and new arguments, all now offered with the benefit of the Board decision, are too late. Accordingly, we do not grant reconsideration as to the quantity.

Appellant also asks that we reconsider our reduction of the recovery on shoulder rock, Grading C. The Board adjusted the dollar figure for Grading C material by 25 percent to account for the fact that appellant did not give the FS notice and, therefore, the FS was deprived of the opportunity to secure a better price. Appellant argues that the FS had constructive notice and therefore the Board reduction was not warranted. Additionally, appellant claims we were too low on the value we placed on the Grading C material which it placed and challenges the fact that we did not include a figure for overhead and profit on this item.

In our initial decision, we discussed the notice issue in detail. Appellant here is simply rearguing its case. It was clear that the CO was not aware that appellant was seeking payment and clearly not aware of the price appellant planned or ultimately charged. Appellant poses the question at what point was notice to the FS required. A safe answer for that is that appellant should have put the CO on notice before performing the work. Telling the CO as soon as appellant was aware of the Government's alleged "improper reading of the specifications," but after the work has been performed, does not constitute adequate notice, particularly where no constructive notice to the CO was established. As to the Grading C, we allowed some recovery, notwithstanding the lack of notice, simply because there was no dispute that the material would have had to be placed, even if the FS knew there would be some cost.

The valuation used by the Board which included the 25 percent reduction for Grading C was an estimate, pieced together from the information provided to us. Appellant's argument that, had it been aware of how the Board would deal with the method of recovery, it could have solicited quotes to demonstrate reasonable market prices, misses the point that evidence supporting costs are not to be provided after the close of the record and certainly not after the Board has issued its decision. The estimate used by the Board stands.

In assessing the amount to allow for Grading C, the Board did use the word "windfall" to describe appellant's recovery on shoulder rock and referenced that wording when it stated the Board would not include a separate item for overhead and profit for the shoulder rock. The comment was made in recognition of the fact that if the rock had not been used on the shoulder, then it would have become government property and appellant would have recovered no compensation for the crushing costs. The dollar figure the Board arrived at for the compensation for Grading C was an estimate and a compromise number. In using the

base figures it did, the Board did not intend to add additional markups. Had markups been added, the Board would have used a lower base number. Reconsideration is denied on this issue.

The final argument provided by appellant is to the meaning of specification 105.5 and its applicability to the issue of the shoulder rock. The specification reads:

> 105.05 Rights in & Use of Materials Found or Produced on the Work
>
> (a) With the written approval of the CO, suitable stone, gravel, sand and other material found in the excavation can be used on the project. Payment will be made both for the excavation of such materials at the corresponding contract price and for pay items for which the excavated material is used. Replace, without additional compensation, sufficient suitable materials to complete the portion of the work that was originally contemplated to be constructed with such material.

For purposes of context, the contract had a line item for rock excavation and a separate line item for Grading A. Appellant was paid for rock excavation for the rock material used at the wall under the line item for that work.

Appellant says that under specification 105.05, it is to be paid the full contract unit price for each cy of rock excavation placed at the wall, in lieu of Grading A. Put another way, appellant claims that it should be paid as if only Grading A was placed. The FS argued otherwise, contending that the unit price for Grading A included material costs, and where rock was being substituted, such material was not being provided at the wall. According to appellant, not paying the full unit price set out for Grading A would allow "the Government to have its cake and eat it too." Appellant argued that it would have had little or no incentive to utilize suitable material from the excavation if the Government was just going to turn around and take the cost savings. We find appellant's position to be lacking. Additionally, it is particularly noteworthy that in arguing its point on this issue, appellant for the first time raises the contention that it had already crushed enough Grading A for use at the wall and by using excavated rock instead of Grading A, some of the processed Grading A material it produced was not paid for. Appellant argues that it would have used that processed Grading A and received a unit price for that material, but for the agreement to use rock excavation. It reasons that it therefore should be paid for the rock excavation material as if that material was Grading A. According to appellant, that would compensate it for the processed Grading A material which it otherwise would have been paid for. To the extent the argument as to crushed Grading A is valid, appellant raises it too late.

Moreover, in reading contract language, although we look at the plain meaning, we also read language in context of the contract and its purpose. Applying that, we cannot come to the conclusion that the FS was agreeing in this specification to pay appellant for Grading A material which was not being provided. Instead, we read the specification to make clear that to the extent the contractor incurs costs in substituting the rock excavation for Grading A, then the contractor will be entitled to be paid those costs under the Grading A pay item. The specification is a recognition that even though appellant substituted excavated rock for Grading A, appellant still had costs such as hauling and placing which needed to be recovered. The specification provided a mechanism for paying those costs.

Decision

The **MOTIONS FOR RECONSIDERATION** are **DENIED**.

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HOWARD A. POLLACK
Board Judge

I concur:

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CANDIDA S. STEEL
Board Judge

VERGILIO, Board Judge, dissenting in part.

I would grant the Government's motion for reconsideration based upon the reference to page 353 and the request to make factual findings and legal conclusions supported by the record (e.g., the profit and overhead rates, and the conclusion that work constituted a change under the majority's interpretation of the contract). I would deny the entirety of the contractor's motion.

At the hearing and in briefing, the Government identified page 353, instead of page 352, as an exhibit supportive of a specific aspect of its analysis. This error enticed the Board to overlook a relevant exhibit in rendering its decision. Relief is available, at the discretion of the Board, for mistakes, inadvertence, and excusable neglect. I would grant the request

for reconsideration and reach a determination on the merits while considering the correct page of the record.

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JOSEPH A. VERGILIO
Board Judge