UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR RECONSIDERATION DENIED: June 23, 2008

CBCA 978

THE BOEING COMPANY, SUCCESSOR-IN-INTEREST
OF ROCKWELL INTERNATIONAL CORPORATION,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Richard J. Ney and S. Jean Kim of Chadbourne & Parke LLP, Los Angeles, CA, counsel for Appellant.

Brady L. Jones, III and Kaniah Konkoly-Thege, Office of Legal Services, Environmental Management Consolidated Business Center, Department of Energy, Cincinnati, OH, counsel for Respondent.

Before Board Judges **GILMORE**, **BORWICK**, and **McCANN**.

McCANN, Board Judge.

The Department of Energy (DOE) has moved for reconsideration of the Board's decision declining to dismiss the complaint of The Boeing Company (Boeing), successor-in-interest of Rockwell International Corporation (Rockwell), or alternatively for a stay of this proceeding to allow Boeing to seek a decision from the district court on the question of whether the United States breached the plea agreement.

Background

In its original motion, DOE moved to dismiss CBCA 978 on the ground that the Board lacked the authority to determine whether certain defense costs incurred in *United States ex rel. Stone v. Rockwell International Corp.*, No. 89-C-1154 (D. Colo. filed July 5, 1989), are allowable. The costs at issue are the costs of defending counts three through five, which Boeing contends were incurred only because the Department of Justice brought counts three through five in violation of a prior criminal plea agreement.[1]

In the motion, DOE contended that this Board lacked the authority to determine whether the criminal plea agreement was breached and, thus, could not determine the allowability of the defense costs. In denying DOE's motion, we held only that we have jurisdiction to determine the allowability of costs under the contract. We made no ruling on whether, under the specific circumstances present in this case, we had the authority to determine the issue of whether the plea agreement had been breached.

DOE has moved for reconsideration of our prior decision. DOE again contends that the Board lacks the authority to determine whether the plea agreement has been breached, and, thus, it contends that we cannot determine whether the costs of defending against counts three through five are allowable. DOE cites to a number of cases that purportedly hold that only the court where the criminal plea agreement was signed can determine whether the plea agreement has been breached. *See* Respondent's Motion for Reconsideration at 5-10. DOE also argues in its reconsideration motion that the district court already ruled that the plea agreement had not been breached, and that Boeing appealed that decision and then voluntarily withdrew that appeal on mootness grounds. Thus, DOE argues, Boeing should not now be allowed to proceed at the Board for a ruling on the breach issue when Boeing could have gotten a proper ruling at the court of appeals.

Board Rule 26 provides 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

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[1] Count one of the complaint alleged False Claims Act (FCA) violations; count two, common law fraud; count three, breach of contract; count four, payment by mistake of fact; count five, unjust enrichment; and count six, additional FCA violations. Counts one through five were brought by plaintiff the United States and count six was brought by plaintiff Stone. *See* Amended Complaint, *Stone* (filed Dec. 20, 1996); Declaration of Richard Ney (Dec. 13, 2006), Exhibit 25. Rockwell was found liable only on part of count one.

equity applicable between private parties in the courts of the United States." Rule 26 further states that "[a]rguments already made and reinterpretations of old evidence are not sufficient grounds for granting reconsideration. . . ." Rule 27(a) lists a number of reasons upon which parties may rely when moving for reconsideration. These reasons include, *inter alia*, newly discovered evidence which could not have been discovered earlier, justifiable or excusable mistake, inadvertence, fraud, and misrepresentation. See *Flathead Contractors, LLC v. Department of Agriculture,* CBCA 118-R, 07-2 BCA ¶ 33,688, at 166,769.

In moving for reconsideration, DOE has essentially made the same legal and factual arguments that it made in its original motion, just in greater detail. Also, it has made an additional argument that we lack authority to rule on the breach issue because a decision has been made by the district court that the plea agreement was not breached, and that Boeing appealed that decision and then voluntarily withdrew it. With regard to the same arguments that were made in the original motion, no grounds exist for granting a motion for reconsideration. With regard to the added argument, undoubtedly, it could have been made in the original motion. The evidence that was presented regarding prior court decisions and proceedings has always been available. This is not newly discovered evidence. Therefore, DOE has failed to satisfy the newly discovered evidence ground or any of the grounds set forth in Rules 26 and 27 for the granting of a motion for reconsideration. Accordingly, the motion must fail.

Previously, in CBCA 337, 338, and 339, the parties cross-moved for summary relief on the issue of whether costs incurred in *Stone* in unsuccessfully defending against False Claims Act (FCA) violations were allowable costs under the contract. In our ruling on this issue, we found that such costs were unallowable. *The Boeing Co. v. Department of Energy*, CBCA 978, 08-1 BCA ¶ 33,822.

Boeing incorrectly interpreted our decision to mean that all of the defense costs incurred in *Stone*, including those not associated with FCA violations, were unallowable. As a result, Boeing filed CBCA 978 alleging that, since counts three through five were brought in violation of a criminal plea agreement, the defense costs for counts three through five should be treated as allowable instead of unallowable.

Boeing's argument in CBCA 978 is a contingent argument for allowability. It is contingent upon the defense costs for counts three through five being unallowable to begin with under the terms of the contract. If such defense costs are allowable under the contract terms, there is no point in making this additional argument. To resolve this initial issue of allowability, the parties have agreed in CBCA 337, 338, and 339 to address it on cross-motions for summary relief. A briefing schedule has been set.

Under these circumstances, until a decision is made on the initial allowability of defense costs for claims three through five, DOE's argument based upon an alleged breach of the plea agreement is premature.

Decision

Respondent's motion for reconsideration is **DENIED** and the proceedings will not be stayed. Respondent, however, may pursue its argument that the plea agreement was breached, should the time come when it would no longer be premature. We make no ruling here on whether the Board, under the circumstances present in this case, has the authority to rule that the plea agreement was breached.

R. ANTHONY McCANN
Board Judge

We concur:

BERYL S. GILMORE
Board Judge

ANTHONY S. BORWICK
Board Judge