UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR RECONSIDERATION DENIED: January 30, 2008

CBCA 5-R, 763-R

BEYLEY CONSTRUCTION GROUP CORPORATION,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Eileen M. Rivera-Amador of Nevares & Sánchez-Alvarez, PSC, San Juan, PR, counsel for Appellant.

Kenneth B. MacKenzie, Charlma J. Quarles, and Phillipa L. Anderson, Office of the General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

Before Board Judges **PARKER**, **SHERIDAN**, and **WALTERS**.

SHERIDAN, Board Judge.

The Board granted in part appeals by Beyley Construction Group Corporation (BCG) under a contract with the Department of Veterans Affairs (VA) for development of burial areas at the Puerto Rico National Cemetery in Bayamón, Puerto Rico. *Beyley Construction Group Corp. v. Department of Veterans Affairs*, CBCA 5, et al., 07-2 BCA ¶ 33,639. Familiarity with that decision is presumed. The appellant has submitted a motion for reconsideration, which we deny for the reasons set forth below.

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 the reasons listed in Rule 27 for which the Board may grant reconsideration are newly discovered evidence that could not have been earlier discovered, even through due diligence, and justifiable or excusable mistake, inadvertence, surprise, or neglect.

Reconsideration is a matter within the discretion of the Board. *Flathead Contractors, LLC v. Department of Agriculture*, CBCA 118-R, 07-2 BCA ¶ 33,688 at 166,778. 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 at 164,063, *cited in Flathead Contractors*, 07-2 BCA at 166,778; *see also Tidewater Contractors, Inc. v. Department of Transportation*, CBCA 50-R, 07-2 BCA ¶ 33,618.

The underlying claims in these appeals arose from the VA's decision to delete certain contract work involving the excavation of a limestone hill, commonly and scientifically referred to in Puerto Rico as a "mogote." The limestone in a mogote can range from softer limestone materials to hard, recrystallized limestone. The facts established that, at the time of contract award, although the parties knew the mogote was made of limestone, they did not know how much soft limestone, as opposed to hard limestone, the mogote contained. The actual softness or hardness of the materials in this limestone mogote remains a mystery today, because most of the mogote was never excavated.

BCG planned to use the limestone excavated from the mogote as a source of fill for other parts of the project by using a bulldozer to break up the limestone into usable fill. Immediately upon beginning excavation of the mogote, BCG realized that the material at least at the surface of the mogote was harder than it anticipated based on its initial excavation efforts, and informed the VA it had encountered a differing site condition. Shortly thereafter, the VA deleted the mogote excavation work from the contract. BCG sought an equitable adjustment, asserting that it was required to import fill onto the site, since its intended source for fill, the mogote excavation, was deleted from the contract.

In these appeals, we heard several days of conflicting testimony that established to the Board's satisfaction that a mogote could be composed of anywhere from 100% soft limestone to 100% hard limestone, and could yield anywhere from 0 to 100% usable fill. The testimony also established that one could not reliably tell the softness or hardness of the limestone material in a mogote by merely looking at the vegetation on its surface.

The Board found, however, that the deletion of the excavation work constructively

changed BCG's method and manner of performance and deprived it of a source of fill that it intended to use to complete other parts of the contact work. We concluded the appellant was entitled to an equitable adjustment of $232,821.48, plus interest. BCG's recovery was based on the Board's determination that the contractor reasonably should have expected the mogote to produce 20% usable fill per cubic yard of material excavated. We obtained the 20% yield factor by looking at the composition of the material that BCG testified it excavated from a nearby similar geological formation, the northeast trending ridge. That area, which was the site of an earlier landslide, included the slopes of the northeast trending ridge, as well as a pond and a canal. BCG witnesses testified that when they excavated that area, the material excavated yielded 20% usable fill.

BCG now asks the Board to reconsider our application of the 20% per cubic yard yield factor, arguing that we erred in determining that the mogote would only yield 20% usable fill. The appellant posits that the Board had "more reliable or trustworthy evidence" that established the mogote would have yielded "softer material," and that BCG was reasonable to expect that "at least 60% of the mogote could be used as fill." The factors or evidence that the appellant references include:

> (1) the soil borings (OW-13 through OW-16) contained in a report from GeoCim Geotechnical Engineering Consultants;
> (2) the test cuts performed on the slope of the mogote;
> (3) the landslide at the lower part of the northeast trending ridge;
> (4) the vegetation on the mogote; and
> (5) the expectations of the mogote's composition as testified by Messrs. Beyley, Jurado and Ortiz.

That the soil borings, test excavation, and landslide factors serve as bases for reconsideration of our decision, and a finding that the mogote contained at least 60% usable fill, are new arguments from BCG that were not made in previous filings. To support these new arguments, the appellant generates additional proposed findings of fact not articulated or focused on during the case-in-chief.

At no time during the case-in-chief did the appellant assert that the soil borings were representative of the amount of usable fill that should have been expected to be obtained from the mogote.[1] The appellant only used evidence regarding the test excavation to dispute

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[1] In fact, the appellant proposed as a finding of fact "The data from the boring located closest to the 'mogote' (labeled as OW-16 . . .) cannot be extrapolated to the 'mogote.'" Appellant's Main Brief at 5. The appellant also noted that its consultant concluded that "the

the timing of the issuance of the change order deleting the mogote excavation work.[2] Citing testimony not argued earlier, BCG also now seems to posit that excavations in the area of the landslide "established that the inside of the mogote contains lots of usable fill." The landslide area is the same area that we referred to in our decision as the "slope of the northeast trending ridge."[3]

An appellant's belated conclusion that additional arguments might have been made or other evidence might have been highlighted is not a basis for the Board to allow reconsideration. *Mitchell Enterprises, Ltd. v. General Services Administration*, CBCA 402-R, 07-2 BCA ¶ 33,644. "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." *Flathead Contractors*, 07-2 BCA at 166,778.

As to the appellant's re-arguments that the vegetation on the mogote and its witnesses' expectations serve as a basis for reconsideration, and a finding that the mogote contained at least 60% usable fill, we disagree. What the appellant is actually positing is that we should rely on the post-dispute testimonial estimates of Messrs. Beyley, Jurado, and Ortiz that, based on their experience and observation of the vegetation on the mogote, they expected this mogote to yield more than 60% usable fill. The arguments in the motion are essentially the same arguments, based on the same facts, that the Board thought carefully about and discussed extensively in its original decision. BCG provides no new, additional, or compelling insight into these matters that we have not previously considered. The Board will not grant reconsideration based on reinterpretations of old evidence and interpretations of matters already considered by the Board. *Tidewater*; *see also Hook Construction, Inc. v. General Services Administration*, CBCA 423-R, 07-1 BCA ¶ 33,488, at 165,994 (citing *Long Lane Limited Partnership v. General Services Administration*, GSBCA 15334-R, 04-2 BCA

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soil study (containing the borings) was not applicable to the scope of work for the project because it [did] not cover the 'mogote.'" Appellant's Main Brief at 8; *see also* Appellant's Rebuttal Brief at 6.

[2] The appellant argued: "The COTR [contracting officer's technical representative] testified that the basis of the [change order] was the test cuts he requested to be performed at the base of the mogote, but his testimony showed that these test cuts were made well over one month after the issuance of the change order." Appellant's Main Brief at 14-15.

[3] Ironically, in reaching our decision we relied on BCG testimony that it "cut material from [the area containing the landslide] but it wasn't suitable for fill because it was full of rocks, full of muck," and yielded only 20% usable fill. 07-2 BCA at 166,599.

¶ 32,751).

The facts and issues presented by these appeals were fully and adequately considered in the Board's original opinion and the appellant has not shown grounds for reconsideration.

Decision

The appellant's motion for reconsideration is **DENIED**.

PATRICIA J. SHERIDAN
Board Judge

We concur:

ROBERT W. PARKER
Board Judge

RICHARD C. WALTERS
Board Judge