UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR RECONSIDERATION DENIED: February 4, 2009

CBCA 1072-R

OREGON WOODS, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

Rick Herson, President of Oregon Woods, Inc., Eugene, OR, appearing for Appellant.

Richard A. DeClerck, Office of the Regional Solicitor, Department of the Interior, Portland, OR, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **VERGILIO**, and **McCANN**.

DANIELS, Board Judge.

The Board found that the Fish and Wildlife Service (FWS), a bureau of the Department of the Interior, had a reasonable basis for terminating for the convenience of the Government a contract it had awarded to Oregon Woods, Inc. (Oregon Woods). *Oregon Woods, Inc. v. Department of the Interior*, CBCA 1072, 09-1 BCA ¶ 34,014 (2008). The contractor moves for reconsideration of that decision.[1] The contractor correctly points out

[1] Oregon Woods' communication actually "requests that the full Board of Contract Appeals reconsider its Decision." The Board's rules of procedure provide (continued...)

one mistake in the decision, as to the month in which a contract modification occurred. The Board is issuing an order correcting this error, which has no impact on the analysis or holding of the decision. The contractor fails to raise a valid basis for reconsideration, however. We therefore deny the motion.

Oregon Woods recites the following as reasons for reconsideration:

1. The FWS did not adhere to the Board's rules regarding organization of the appeal file, and it did not include in the appeal file documents the contractor had interest in reading.

2. One document in the appeal file contains a date of August 24, 2007, for contract award, though the actual date of award was September 4, 2007.

3. The FWS should not have evaluated offers which the contracting officer misplaced and discovered shortly after she had informed Oregon Woods of the award of the contract.

4. The date of modification 2 to the contract was October 12, 2007, rather than September 12, 2007. According to Oregon Woods, the misstatement of the date in the Board's decision was an "inadvertent mistake."

5. The reason cited by the contracting officer for denying Oregon Woods' November 16, 2007, claim was incorrect; the requisite form was submitted to the contracting officer.

6. The Board overlooked or ignored disputed material facts, principal among them that the contracting officer reinstated the evaluation process in order to take advantage of a cheaper price for the contract work. This action by the contracting officer was evidence of bad faith.

---

[1] (...continued)
separately for motions for reconsideration by the panel which issued a decision and motions for full Board consideration. Rules 26, 28 (48 CFR 6101.26, .28 (2008)). Because a motion for full Board consideration may only be made after a panel has issued a decision on a motion for reconsideration, Rule 28(a)(2), we have treated Oregon Woods' communication as a motion for reconsideration by the panel which issued the decision.

7. Although a termination is valid if adequate cause for it is found, the Government may not cure a bad faith breach of a contract by employing a termination clause.

8. The FWS regional engineer's statements about the contract's specifications being inadequate, needing evaluation, and probably needing redesign were contrived as a result of coaching by the contracting officer's supervisor. Oregon Woods' president says that he reached this conclusion based on the engineer's statement to him on September 14, 2007, that the engineer had had no knowledge of the project until the supervisor had contacted him on the previous day. Further, the reissued request for proposals, in the view of Oregon Woods' president, does not reflect cardinal changes to the design.

9. The presiding judge engaged in *ex parte* discussions with the FWS' counsel. Oregon Woods' president says that he reached this conclusion based on the judge's comment, during a scheduling conference, that he understood that settlement negotiations between the parties had not been fruitful. The judge could not have known of the outcome of the negotiations, according to the contractor, unless the lawyer had advised him of it privately.

The Board's Rule 26 explains that reconsideration 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.

None of the reasons given by Oregon Woods meets Rule 26's standards of good grounds for reconsideration. The Board determined that the FWS' termination of the contract for the convenience of the Government was justified on the basis of the regional engineer's belief that the contract's specifications and drawings were inadequate, required evaluation, and probably required redesign. Reasons 1, 2, 3, 4, 5, 6, and 9 have nothing to

do with this conclusion.[2] The best that might be said for any of them is that they establish disagreements about immaterial facts. As we held in granting the agency's motion for summary relief, only genuine issues of *material* fact will defeat such a motion. Reason 7 is simply argument similar to contentions the contractor made earlier. Rule 26(a) clearly states, "Arguments already made and reinterpretations of old evidence are not sufficient grounds for granting reconsideration."

The only reason given by Oregon Woods which is even applicable to the Board's reasoning in upholding the termination for convenience is number 8, that the FWS regional engineer's statements about the contract's specifications were contrived as a result of coaching by the contracting officer's supervisor. The asserted fact supporting this supposition is that the engineer told the contractor's president, after award, that he had no knowledge of the project until the supervisor had contacted him on the previous day. We have no reason to doubt the validity of this assertion, which is consistent with a fact the Board included in the Background section of its original decision. How one gets from there to the posited conclusion is not apparent to us, however. In our judgment, the connection between the two is so extremely tenuous that no judge or jury could find a verdict for the contractor on the basis of this evidence. Consequently, our grant of the motion for summary relief was appropriate. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-52 (1986). Oregon Woods' additional asserted fact supporting reason 8, that the reissued request for proposals does not reflect cardinal changes to the design, would not change our decision even if it could be proved. We held that the agency's need for an indefinite length of time to reevaluate the specifications justified the termination. Whether the specifications turned out to be reasonable or not is beside the point.

---

[2] In reason 4, Oregon Woods correctly points out that modification 2 was issued on October 12, 2007, not on September 12, 2007. The date of the modification is immaterial to our decision, however, so changing it does not merit reconsideration.

We note that reason 9, the allegation of *ex parte* communications between the presiding judge and the FWS' counsel, is pure fantasy. As the FWS points out in opposing the motion, the Board had announced that the scheduling conference to which Oregon Woods adverts was to have been convened only if the parties reported that settlement negotiations had failed. The judge knew the result of the negotiations only because at least one party had reported to his assistant that the conference would have to go on because the condition which would have obviated it had not occurred. Response to Appellant's Motion for Reconsideration at 3 n.1; Board Order at 2 (June 3, 2008).

Decision

Oregon Woods' motion for reconsideration is **DENIED**.

_____
STEPHEN M. DANIELS
Board Judge

We concur:

_____
JOSEPH A. VERGILIO
Board Judge

_____
R. ANTHONY McCANN
Board Judge