UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO RECONSIDER AND REOPEN
THE RECORD DENIED: November 9, 2011

CBCA 1495-R

W. G. YATES AND SONS CONSTRUCTION COMPANY,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Stephen B. Hurlbut and Pavan I. Khoobchandani of Akerman Senterfitt LLP, Washington, DC, counsel for Appellant.

Lesley M. Busch, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **HYATT**, and **STEEL**.

HYATT, Board Judge.

Respondent, the General Services Administration (GSA), moves the Board to reconsider its decision granting the claim of appellant, W.G. Yates and Sons Construction Company (Yates), on behalf of its electrical subcontractor, KenMor, Inc. (KenMor). *W.G.*

Yates & Sons Construction Co. v. General Services Administration, CBCA 1495, 11-1 BCA ¶ 34,638 (2010). GSA also asks the Board to reopen the record to permit it to submit new evidence.

Yates appealed a contracting officer's decision with respect to the calculation of an equitable adjustment for the impact of a revised Davis-Bacon Act wage adjustment that was incorporated after award into its contract to build the Federal Bureau of Investigation's (FBI's) field office in Houston, Texas. Ken-Mor's bid was based on an out-of-date wage determination incorporated into the contract by the Government. Subsequently, the contractor was directed to pay the higher wage rates to its laborers, both retroactively and prospectively. Ken-Mor submitted a request for equitable adjustment based on the actual hours it expended on the project. The contracting officer requested an audit from the Regional Office of the Inspector General (IG). The IG auditor determined the hours that had been proposed in Ken-Mor's bid and advised the contracting officer that the equitable adjustment must be restricted to the hours originally planned by Ken-Mor. Those hours were less than the hours actually worked. The IG auditor did not audit the actual hours worked for any purpose, including whether they were actually devoted to the contract or had been properly documented. The Board granted the appeal, holding that, as a matter of law, the equitable adjustment reflecting the increased amount of wages Ken-Mor was required to pay should not be limited to the hours planned in Ken-Mor's bid, but should include the hours actually worked by the subcontractor's affected labor force.

GSA contends that the Board should grant reconsideration and reopen the record for two reasons. First, it asserts that there is newly discovered evidence that could limit the number of hours for which Ken-Mor would be paid in connection with the project. Second, GSA argues that certain of the Board's conclusions, in particular its inference that the parties were not contesting the actual number of hours Yates worked under the higher wage rate, were not supported by substantial evidence.

These motions are subject to the standards enunciated in the Board's Rules of Procedure. As the Board has stated:

> The Board's Rule 26 [48 CFR 6101.26 (2010)] 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.

Oregon Woods, Inc. v. Department of the Interior, CBCA 1072-R, 09-1 BCA ¶ 34,063, at 168,431-32, *aff'd sub nom*. *Oregon Woods, Inc. v. Salazar*, 355 F. App'x 403 (Fed. Cir. 2009); *see also Springcar Co. v. General Services Administration*, CBCA 1310-R, et al., 10-2 BCA ¶ 34,534, at 170,332. Rule 26(a) further cautions that "[a]rguments already made and reinterpretations of old evidence are not sufficient grounds for granting reconsideration, for altering or amending a decision, or for granting a new hearing." *Accord Springcar Co.*; *Beyley Construction Group Corp. v. Department of Veterans Affairs*, CBCA 5-R, et al., 08-1 BCA ¶ 33,784, at 167,203. As the Board observed in *Beyley*:

> 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.

Id. at 167,203-04. Further, reconsideration is not available to retry a case or introduce arguments that could have been made previously. *Confederated Tribes of Coos, Lower Umpqua,& Siuslaw Indians v. Department of Health and Human Services*, CBCA 237-ISDA-R, 10-2 BCA ¶ 34,476, at 170,043.

New Evidence

Respondent advises that a second certified claim on the project was submitted by Yates to the GSA contracting officer in September 2010, subsequent to the filing of the parties' reply briefs in this case in August 2010, and prior to the issuance of the Board's decision in December. According to GSA, this additional claim demonstrates that appellant "misrepresented" that the "actual hours worked on the project were reasonable." Respondent states that:

> [T]he submission of KenMor's second certified claim creates a situation where the representations and arguments made by Appellant regarding the reasonableness of the hours worked on the project were in fact not true and unsupported. Furthermore this evidence would likely have changed the Board's decision. Therefore the proper equitable adjustment for the increased wage rates must be awarded based on the planned hours at the time of bid until the dispute between the parties regarding delay and inefficiency on the project is settled.

GSA maintains that the filing of a claim for delay completely contradicts the assertion that the hours Ken-Mor spent on the project were reasonably spent.

Appellant disagrees that this "new" claim, which was filed after a request for an equitable adjustment had been pending with the contracting officer for approximately fifteen months,[1] presents any new evidence relevant to the subject appeal. Appellant also clarifies that KenMor does not, in this claim, seek compensation for delay other than extended job site and home office overhead costs attributable to Government-caused delay. It does not seek labor inefficiency costs or compensation for electrician labor hours on account of delays, other than for specific and discrete change order costs. KenMor acknowledges that any amounts allowed for those electrician labor hours would need to reflect a credit for the incremental wage costs awarded in the Board's decision.

The second claim is simply immaterial to the issue resolved by the Board's decision. Even assuming, as GSA contends, that none of the electrician labor hours expended over and above those estimated in Ken-Mor's bid are compensable, the risk of loss that Ken-Mor assumed under the contract was that it would have to absorb the cost of labor hours needed in excess of its bid at the wage rate GSA told it to use in calculating its bid. The Government directed a change to the wage rate. The analysis adopted by the Board simply compensated Ken-Mor for costs it would not have incurred but for the Government's directive. GSA has not offered any persuasive evidence or argument to support its contention that KenMor misrepresented any facts or somehow obtained an unfair judgment in its favor. The mere existence of a newly certified claim, given that the existence of the underlying request for equitable adjustment was known by respondent prior to the hearing, does not establish a convincing basis for reopening the record to entertain additional evidence on this issue.

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[1] Indeed, because this delay and inefficiency claim was in the works, GSA filed a motion in limine prior to the trial, seeking the exclusion of any evidence pertaining to delay.

Substantial Evidence

GSA also asserts that certain statements made by the Board in its discussion and analysis are not supported by substantial evidence in the record. With respect to the Board's conclusions, GSA points to three statements on page ten of the slip opinion. To provide these sentences in context, we reproduce the paragraph in full, with the language singled out by GSA highlighted in bold:

> Although GSA is correct that this was a fixed price contract and that KenMor should not be permitted to use the Davis-Bacon Act adjustment to compensate it for a loss position in performing the contract, **KenMor's approach does not in fact change KenMor's position with respect to its bid**. GSA included a wage determination in the contract that bidders were required to comply with. It then modified the contract, retroactively, to require that wages be paid in accord with a substantially revised wage determination that was in effect at the time of award but had been overlooked. This caused KenMor to have to pay more than the base salary it offered in compliance with the initial wage determination. KenMor was obligated to pay the higher wages for all hours worked, whether included in the planned hours or not. Whether the planned hours were more or less than the actual hours is immaterial; **both parties agree that the actual hours were reasonably devoted to the project**. KenMor is not asking to be reimbursed anything other than the incremental increase above the rate for which it was responsible to pay its workers under the old determination. **Payment of the incremental costs for all hours worked leaves KenMor's profit or loss position unchanged. With that payment, KenMor is in the same position it would have been in but for the revised wage determination.**

11-1 BCA at 170,705. GSA further argues that there is no substantial evidence to support the statement in Finding 25 that "Yates presented considerable evidence at the hearing in support of its claimed costs."[2] *Id.* at 170,704.

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[2] Finding 25 provided:

> Yates presented considerable evidence at the hearing in support of its claimed costs. KenMor's bid was formulated using the wage rate included in the original RFP. Transcript at 60. The increase sought by Yates represents the baseline difference between the wages paid under the contract as it was

GSA takes particular exception to the Board's inference in its legal analysis that "the parties agreed that the hours were reasonably devoted to the project." This conclusion was based on the Board's finding that the contracting officer had recognized that she had no basis to dispute that the actual hours included in the claim were associated with contract work that Ken-Mor was required to perform. The testimony was clear that no audit was undertaken to show that the hours actually worked by the electricians were inflated or in any other way inaccurate. Nor did GSA make a significant effort to discredit the hours as not appropriately attributable to contract work. In contrast, as appellant points out in its response to GSA's motion, KenMor offered credible sworn testimony from the executive in charge of field operations with respect to its strategies in planning, deployment, and management of the project so as to maximize labor productivity. KenMor also provided documentary and testimonial evidence of how it tracked and calculated the hours expended on the contract. The Board relied on this evidence in its findings and conclusions. It reasoned that the parties agreed on this point because GSA, apparently choosing to rely on its position that the increased wage costs must be limited to the planned hours in KenMor's bid, offered virtually no testimonial or documentary evidence showing that the hours were inaccurate or somehow inflated.

Presumably GSA understood that the merits hearing covered both entitlement and quantum and that all relevant evidence and arguments should be presented. If GSA had a basis to disagree with the number of hours actually claimed by KenMor other than that they exceeded the planned hours, it should have adduced the appropriate evidence during the hearing. Even if we concede GSA's point that it did not "agree" the hours were reasonable, the preponderance of the evidence available to the Board established that the hours were actually devoted to the project. The award did not address Ken-Mor's entitlement to compensation for the additional hours beyond those planned. It held only that it was entitled to recover the additional cost of paying its workers the difference between the original and the higher Davis-Bacon Act wages for all electrician labor hours attributable to the project.

With respect to the highlighted phrases and sentences, GSA simply disagrees with the Board's legal determination that the equitable adjustment should include the Davis-Bacon

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awarded and the increased wage rate that KenMor was required to pay following the adoption of the revised wage determination. The claimed costs were based on the incremental increase in the wage rate plus labor burden incurred on these costs, project management cost, project accountant cost, overhead, profit and bond costs. Appellant's Hearing Exhibit 1; Transcript at 192-94.

wage increase applicable to actual hours worked by the electrical subcontractor and not just hours estimated in Ken-Mor's bid, and continues to press this argument in its motion. This does not justify reconsideration. Nor does the filing of the omnibus delay claim by Yates constitute "new evidence" that would warrant reopening the record.

Decision

Accordingly, the motion to reconsider the Board's decision and to reopen the record is **DENIED**.

CATHERINE B. HYATT
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

CANDIDA S. STEEL
Board Judge