UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RECONSIDERATION DENIED: April 4, 2019

CBCA 6031-R

WOOLERY TIMBER MANAGEMENT INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Charlotte Woolery, President of Woolery Timber Management Inc., Tuolumne, CA, appearing for Appellant.

John Eichhorst, Office of the General Counsel, Department of Agriculture, San Francisco, CA, counsel for Respondent.

LESTER, Board Judge.

On January 31, 2019, the Board issued its decision in this appeal, awarding appellant, Woolery Timber Management Inc. (WTM), $4008.32 in costs associated with a blocked access road to the project site, plus interest pursuant to the Contract Disputes Act (CDA), 41 U.S.C. § 7109(a) (2012), but denying the remainder of WTM's $86,674.04 claim. *See Woolery Timber Management Inc. v. Department of Agriculture*, CBCA 6031, 19-1 BCA ¶ 37,245, at 181,293. Respondent, the United States Forest Service (USFS), acting through the Department of Agriculture, seeks reconsideration of the damages award to WTM, arguing that the Board's findings of fact were incorrect and asking that we award WTM no damages.

In our prior decision, we found "it more likely than not, based upon a preponderance of the evidence, that WTM had been relying on a service road for access to the portion of the

project area that it was working, that the area was accidentally blocked, and that WTM lost thirty-two hours of work time having to take an alternative route to that project area." *Woolery Timber Management*, 19-1 BCA at 181,293. We based that finding upon significant evidence in the record, contemporaneous with the events in question, showing that WTM's vice president and project manager, Ed Woolery, was complaining to the USFS about blocked road access during this period of time. We also indicated that the contracting officer's representative (COR) did not actually go to the disputed area to check access during that time. On reconsideration, the USFS provides a declaration from the COR indicating that the latter finding is incorrect.

Discussion

This appeal is proceeding under the small claims procedure set forth in Board Rule 52, 48 CFR 6101.52 (2018). Although Rule 52(c) provides that the Board's decision in a small claims procedure case "is final and conclusive [and] shall not be set aside except for fraud," nothing in our rules expressly precludes a party from seeking reconsideration of a decision in such a case, and the Board has routinely entertained reconsideration requests in such cases. *See, e.g.*, *Native American Construction Services, LLC v. Department of the Interior*, CBCA 5232-R, 16-1 BCA ¶ 36,542, at 178,021; *G2G, LLC v. Department of Commerce*, CBCA 4845-R, 15-1 BCA ¶ 36,163, at 176,471; *Michael C. Lam v. General Services Administration*, CBCA 1213-R, 09-1 BCA ¶ 34,105, at 168,643. Accordingly, the USFS's reconsideration, timely filed under Board Rule 26(b) within thirty days following the USFS's receipt of the January 31 decision, is properly before us. Because the case was originally decided by a single judge under the Board's small claims procedure, the same single judge similarly will decide the reconsideration motion. *Michael C. Lam*, 09-1 BCA at 168,644.

On the merits of the USFS's reconsideration request, we generally do not accept new evidence—in this case, a post-hearing declaration supplementing the prior hearing testimony of a fact witness—that was or could with due diligence have been reasonably available to the party during the prior hearing. *Meredith Relocation Corp.*, GSBCA 9124, et al., 90-3 BCA ¶ 23,129, at 116,124. The declaration is submitted to convince us that, contrary to our factual finding, the COR actually visited the section of the project site where WTM alleges its road access was blocked and that the COR could find no such road, much less blockage. Most statements contained in that declaration repeat the COR's hearing testimony, and anything new could have been presented at the hearing. Accordingly, the COR's declaration is not "new" under the standard for accepting evidence on reconsideration.

Even considering the declaration, though, it does not change the result of the blocked access road issue. We do not doubt the integrity of the COR or his efforts to work with WTM to obtain proper mastication work under the contract at issue. The contemporaneous

documentary evidence is clear that, back in the spring of 2017, Mr. Woolery was complaining about blocked access to the project site that dissipated only when WTM was essentially able to create a new point of access. Although the record shows some confusion in the communications between the COR and Mr. Woolery during this time period that could have left the COR with some lack of clarity about WTM's access issues, the record shows that WTM had run across an access barrier. We decline to revisit our factual finding in WTM's favor on that point based upon the existing record.

The USFS also argues that, during a telephonic status conference on February 5, 2019, representatives of WTM contradicted the basis of the Board's idle equipment award resulting from the blocked access. In its decision, the Board made a jury verdict award to compensate WTM for the time that equipment that the Board had understood was sitting idle inside the project work area while WTM employees, because of the unavailability of an access road, were having to drive an indirect route to reach that area. *Woolery Timber*, 19-1 BCA at 181,293. During the post-decision status conference, WTM indicated that, rather than driving its own private vehicles to get to its idle mastication equipment inside the project area, WTM was driving the actual mastication equipment to and from the site each day and that it is the cost associated with that non-idle equipment for which WTM was seeking compensation. Although the USFS argues that this factual change negates any damages award to WTM, we have found that WTM is entitled to an award of damages for the time that the access issue precluded WTM from masticating acreage within the project area. A jury verdict award is used to create a fair and reasonable approximation of damages where it is not possible for the appellant to prove its actual damages with mathematical precision. *See Choctaw Transportation Co. v. Department of Agriculture*, CBCA 2482, et al., 16-1 BCA ¶ 36,579, at 178,168 (discussing purpose of jury verdict). WTM was unable to use the equipment during the time at issue to perform mastication work, and there is a damage element to that which WTM's clarification about the lack of its equipment's "idleness" does not change. The prior jury verdict award is fair and reasonable. In the circumstances here, we decline to revisit it.

Decision

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

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge