UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RECONSIDERATION DENIED: June 7, 2023

CBCA 7492-R

JOHN DOUGLAS BURKE,

Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

John Douglas Burke, pro se, Rockville, MD.

Pamela R. Waldron and Ethan Chae, Office of the General Counsel, Department of Health and Human Services, Washington, DC, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **LESTER**, and **O'ROURKE**.

LESTER, Board Judge.

Appellant, John Douglas Burke, has requested reconsideration of the Board's decision dated March 10, 2023 (*John Douglas Burke v. Department of Health & Human Services*, CBCA 7492, 23-1 BCA ¶ 38,304), in which we granted the motion of the National Institutes of Health (NIH) to dismiss Mr. Burke's appeal for failure to state a claim. We held in our prior decision that, under the terms of Mr. Burke's contracts and the facts as alleged, the contracts at issue were not personal services contracts that entitled Mr. Burke to receive the same pay and benefits as federal employees. We deny Mr. Burke's motion for reconsideration.

Discussion

I. Standard of Review

"A motion for reconsideration must be based on the acquisition of newly discovered evidence or the showing of legal error." *Yates-Desbuild Joint Venture v. Department of State*, CBCA 3350-R, et al., 18-1 BCA ¶ 36,959, at 180,084 (2017) (quoting *Sims Paving Corp.*, DOT BCA 1822, 91-2 BCA ¶ 23,733, at 118,868). Such a motion "is improper when based upon 'the sole ground that one side or the other is dissatisfied with the conclusions reached by the [tribunal], otherwise the losing party would generally, if not always, try his case a second time, and litigation would be unnecessarily prolonged.'" *AT&T Corp. & Subsidiaries v. United States*, 63 Fed. Cl. 209, 211-12 (2004) (quoting *Roche v. District of Columbia*, 18 Ct. Cl. 289, 290 (1883)). The party requesting reconsideration "bears the burden of establishing that the Board's decision contains substantive errors that are substantial enough to warrant relief." *SRM Group, Inc. v. Department of Homeland Security*, CBCA 5194-R, et al., 21-1 BCA ¶ 37,869, at 183,885, *aff'd*, No. 2021-2104, 2022 WL 1089228 (Fed. Cir. Apr. 12, 2022).

II. Mr. Burke's Grounds for Reconsideration

A. Alleged Errors and Misinterpretations of Fact in the Decision

Mr. Burke first argues that the factual discussion in the Board's decision contains errors and misinterpretations of fact. He asserts that, although the Board represented in its decision that Mr. Burke had provided the price quotes that were incorporated into purchase orders that NIH's National Human Genome Research Institute (NHGRI) issued, the Board failed to understand that NHGRI invariably had prescribed the rates in those price quotes and "instructed [him] what to enter and when to submit." Appellant's Motion for Reconsideration at 1. He alleges that NHGRI provided no "room for [him] to object to the original contract's terms," as sparse as they were, and that NHGRI had a "greater level of control . . . of these matters than perhaps the Board originally understood." *Id.* at 2.

Ultimately, it makes no difference who proposed the prices that were incorporated into Mr. Burke's contracts. There is no dispute that those prices were a part of the contracts that Mr. Burke performed, and Mr. Burke never alleges that, before submitting his claim to the contracting officer, he at any time objected to those contract prices. *See John Douglas Burke*, 23-1 BCA at 185,972 ("Normally, if a contractor is aware of a defect in a contract's terms prior to award but says nothing to the Government about it, he cannot raise that defect for the first time after performance is complete and expect to increase his contract price."). An allegation of a factual error in a decision that is irrelevant to the ultimate disposition of the motion to dismiss provides no basis for reconsideration. *Professional Carpet Service*,

GSBCA 6411, et al., 82-2 BCA ¶ 15,978, at 79,236; *see Walber Construction Co.*, HUD BCA 79-385-C17, et al., 1982 WL 175910 (Sept. 2, 1982) ("If the ground for reconsideration will only have a collateral effect and will not result in a change in the decision, the motion will be denied."). The alleged factual errors that Mr. Burke describes do not affect the result here and provide no grounds for reconsideration.

Mr. Burke also complains about descriptions in counsel for NIH's briefing to the Board about the extent of his involvement in drafting and submitting statements of work (SOWs), statements of need (SONs), and other documents. Appellant's Motion for Reconsideration at 2. Mr. Burke complains that NIH used its false descriptions of his involvement as a basis for asking the Board to find the SOWs and SONs to be incorporated into Mr. Burke's contracts. *Id.* Because those factual allegations "could have influenced the Board into believing that [Mr. Burke] was privy to the existence and contents of these documents," he asserts, *id.*, he needs discovery, including depositions of NIH employees.

Yet, in our prior decision, we expressly held that, in the circumstances of this case, we could not resolve on NIH's motion to dismiss for failure to state a claim the issue of whether the SOWs or SONs were incorporated into Mr. Burke's contracts. *John Douglas Burke*, 23-1 BCA at 185,971. We also held that resolution of that issue was unnecessary to the disposition of NIH's motion and found that, even if (as Mr. Burke argued) the SOWs and SONs were not incorporated into the contracts, Mr. Burke could not prevail on his claim. *Id.* at 185,971-74. In these circumstances, Mr. Burke's complaint about NIH's descriptions of his SOW and SON activity is irrelevant to our decision and provides no basis for reconsideration.

B. Ambiguity of the Contracts

Although Mr. Burke titles the next section of his reconsideration motion as "Latent Ambiguity of the Contract," we see nothing in that section addressing ambiguities that were not reasonably noticeable when the contracts were awarded. *See Interwest Construction v. Brown*, 29 F.3d 611, 616 (Fed. Cir. 1994) ("By definition, an 'obvious void' or glaring omission can never be a latent ambiguity."). Instead, Mr. Burke, alleging patent ambiguities, asserts that he "has consistently maintained throughout these proceedings that the express contract is so minimal in terms of provisions that it is rendered meaningless, or at least ambiguous in the extreme," and that it is therefore "void or voidable." Appellant's Motion for Reconsideration at 2. He asserts that the Board "erred in its assessment of the express contract by, to put it simply, finding so much in so little." *Id.* at 3. Here, Mr. Burke simply disagrees with the manner in which the Board interpreted his contract. That is not a viable basis for a reconsideration request. *URS Energy & Construction, Inc. v. Department of Energy*, CBCA 2260-R, 12-2 BCA ¶ 35,147, at 172,522.

He also asserts that he needs discovery to determine whether "one or more SOWs or SONs may each have been used for multiple purchase orders, despite the underlying projects differing." Appellant's Motion for Reconsideration at 3. For purposes of determining whether Mr. Burke's contracts were personal services contracts, however, it ultimately does not matter if NIH re-used the same SOW or SON language in contracts for other projects. The issue before the Board was the interpretation of Mr. Burke's contract, not of contracts that NIH might have with others.

C. Alleged Level of Supervision

Crucial to Mr. Burke's opposition to NIH's motion to dismiss was his argument that the degree of supervision that NHGRI exercised over him and his work established that his contracts were illegal personal services contracts. We rejected that argument, finding, consistent with the Court of Appeals for the Federal Circuit's decision in *Lee v. United States*, 895 F.3d 1363 (Fed. Cir. 2018), that the actual terms of the written contracts themselves did not impose a contractual level of supervision sufficient to create a personal services contract. *John Douglas Burke*, 23-1 BCA at 185,973. In his motion for reconsideration, Mr. Burke complains that the evidence before the Board in considering NIH's motion to dismiss was "too scant and the purchase orders too ambiguous to arrive at" the conclusion that the Board reached. Appellant's Motion for Reconsideration at 4. "Reconsideration is not granted when a party reargues facts and theories upon which the Board has previously ruled." *Power Wire Constructors v. Department of Energy*, CBCA 2057-R, 12-2 BCA ¶ 35,165, at 172,559.

In his motion, Mr. Burke adds a new argument: that, as "was very recently brought to [his] attention," he actually "supervised and directed federal employees routinely" in such things as breeding animals, cryopreserving embryos, euthanizing animals, and testing samples, something that he believes somehow shows that he was serving under a personal services contract with NHGRI. Appellant's Motion for Reconsideration at 4-5. In support, he provides an email from 2019 that he recently located which allegedly shows his supervisory direction to NHGRI employees to "[p]lease keep and breed" five particular animals. Whatever evidentiary value the 2019 email brings, it is too late to add new evidence that was previously available (had the appellant looked in his own email account for it) and new arguments on a motion for reconsideration. *Beyley Construction Group Corp. v. Department of Veterans Affairs*, CBCA 5-R, et al., 08-1 BCA ¶ 33,784, at 167,205.

The remainder of Mr. Burke's motion for reconsideration questions our interpretation and application of the Federal Circuit's decision in *Lee*, which provides no basis for reconsideration.

Decision

Mr. Burke's request for reconsideration is **DENIED**.

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

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Kathleen J. O'Rourke
KATHLEEN J. O'ROURKE
Board Judge