UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR RECONSIDERATION DENIED: January 14, 2016

CBCA 4594(3048)-REM-R

RELIABLE CONTRACTING GROUP, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Reginald A. Williamson and William E. Dorris of Kilpatrick Townsend & Stockton LLP, Atlanta, GA; and Gregory C. Thomas, General Counsel of Fisk Electric Company, Houston, TX, counsel for Appellant.

Benjamin Diliberto and Charlma Quarles, Office of General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

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

**SHERIDAN**, Board Judge.

Appellant has filed a motion for reconsideration of the Board's decision in *Reliable Contracting Group, LLC v. Department of Veterans Affairs*, CBCA 4594(3048)-REM, 15-1 BCA ¶ 36,114. Familiarity with that decision is presumed. For the reasons below, we deny the motion.

## Background

This appeal arose from a claim in which Reliable Contracting Group, LLC (Reliable) sought additional costs for the Department of Veterans Affairs' (VA's) alleged rejection of back-up emergency generators provided for a project at the VA medical center in Miami,

Florida. The parties in this appeal elected, pursuant to Rule 19 of the Board's Rules of Procedure, to submit the case for decision on the written record without a hearing. 48 CFR 6101.19 (2013).

The Board concluded that the generators, which had been in storage for four years, could not be factory-tested and did not meet the requirement of being "new." We also found that at the time the units were delivered, and the VA questioned whether the generators were in compliance with the applicable contractual requirements, neither Reliable nor its electrical subcontractor, Fisk Electric Company (Fisk), characterized the generators as "new" or asserted that the units met the specification in response to the VA's specific request for confirmation that this was the case. *Reliable Contracting Group, LLC v. Department of Veterans Affairs*, CBCA 3048, 14-1 BCA ¶ 35,475 (2013). Reliable appealed that decision.

The United States Court of Appeals for the Federal Circuit, in *Reliable Contracting Group, LLC v. Department of Veterans Affairs*, 779 F.3d 1329, 1334 (Fed. Cir. 2015), held that Reliable was required to install "new" generators and stated that this term meant that the generators were to be in "fresh condition," "not . . . used," and "free of significant damage, i.e., damage that was not cosmetic." The Court vacated the Board's decision and remanded the appeal to the Board with instructions "to determine whether the damage to the generators during the four-year period between the original manufacture and the date of delivery to the VA site was significant enough to render the generators not 'new.'" *Id*. at 1335.

Following the remand, the Board issued another decision denying Reliable's claim, concluding, among other things, that there was insufficient evidence in the written record to make a finding that the generators were "new" when they were delivered to the VA site and that when the VA asked Reliable about the generators, both Reliable and Fisk characterized the generators as unacceptable, were either unwilling or unable to represent the generators as "new," abandoned the generators shortly after delivery, and only began arguing that the generators should have been accepted approximately three years later when Reliable filed its claim. *Reliable*, 15-1 BCA at 176,308-10. After the issuance of the decision Reliable filed this motion.

In the motion Reliable reveals that after the remand, but prior to the Board issuing its decision, the parties engaged in settlement negotiations. As a culmination of these settlement negotiations, on September 15, 2015, the parties reached an agreed settlement amount of "$550,000 'all in' from Reliable's claimed quantum of $1,138,662.95, plus CDA [Contract Disputes Act] interest . . . shook hands on the deal, and committed to getting the paperwork finalized as soon as possible." Appellant's Motion ¶¶ 10, 11.

On September 16, 2015, respondent's counsel sent appellant's counsel a draft settlement agreement. Appellant's Motion ¶ 12. Over the next ten days respondent's counsel reviewed the draft settlement agreement with Fisk's counsel and prepared a draft joint motion for judgment on stipulation of settlement. On September 28, the Board issued its decision denying the claim. On September 29, the VA informed Reliable that it was withdrawing the draft settlement agreement.

Appellant's motion for reconsideration references Rule 27(a)(1) and (6) and asks the Board "to reconsider its decision in light of the compelling circumstances of the parties' settlement negotiations [asserting that] where both parties agreed to settle this case for $550,000 before the decision, strong equitable factors justify relief from the decision so that the parties may proceed with settlement." The motion was styled as "joint."

Respondent responded to the motion noting that the VA "has not joined appellant in its motion for reconsideration and any characterization of the motion for reconsideration as 'joint' is inaccurate." Respondent also clarified certain facts not pertinent to this discussion.

A conference call was conducted on November 12, 2015, between the presiding judge and parties' counsel to discuss the motion for reconsideration. During that call, respondent's counsel advised that the VA was willing to continue with finalization of the settlement if the Board would vacate its decision. The VA asserted that it needed the decision to be vacated so that a stipulated judgment could be entered and payment could be made from the permanent indefinite judgment fund, 31 U.S.C. § 1304 (2012) (judgment fund).

## Discussion

While styled as a motion for reconsideration, appellant asks that the Board vacate its decision denying Reliable's claim for extra costs associated with providing the electrical generators on the VA Miami project. Reliable asks us to vacate our decision so that the "handshake" settlement it negotiated with the VA, prior to the issuance of the decision, can be finalized and ultimately a "stipulated judgment" be entered by the Board so that the $550,000 that the VA agreed to pay Reliable can be paid out of the judgment fund. While the VA does not "join" in the motion, it has indicated that it is willing to continue with finalization of the settlement agreement if the Board vacates the decision. According to the VA, it is critical that the agency be able to access the judgment fund for the payment, and the fund cannot be accessed if the decision remains in place.

Pursuant to Board Rule 26, "[r]econsideration may be granted, *a decision or order may be altered or amended*, or a new hearing 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

as between private parties in the courts of the United States." (Emphasis added.) Rule 27(a) provides the following grounds, which appellant asserts apply here, for relieving a party from the operation of a final decision or order:

> 1. Newly discovered evidence which could not have been earlier discovered, even through due diligence;
> . . . .
>
> 6. Any other ground justifying relief from the operation of the decision or order.

Appellant asserts that:

> the parties' current situation appears to fall within the ambit of CBCA [Rule] 27(a)(1) as the fact that the parties had engaged in extensive settlement discussions culminating in a mutually satisfactory, "handshake" agreement is new evidence and new facts to be considered by the Board. Otherwise, the general catch-all grounds of CBCA [Rule] 27(a)(2) [sic][1] provides the Board justification for reconsidering its decision. Under either factor, Reliable asks the Board to reconsider its decision in light of the parties' settlement agreement, allowing the parties to move forward with a Joint Motion for Judgment on Stipulation of Settlement.

Other than characterizing the "extensive settlement discussions culminating in a mutually satisfactory, 'handshake' agreement" as "new evidence and new facts," appellant's motion does not explain what "[n]ewly discovered evidence which could not have been earlier discovered, even through due diligence" that it is asking the Board to consider. Clearly, the "handshake" agreement which occurred well after the record had been closed and two Board decisions had been issued is not newly discovered evidence as envisioned by Rule 27(a)(1). *See Accurate Information Systems, Inc. v. Department of the Treasury*, GSBCA 12978-P-R, 95-1 BCA ¶ 27,348, at 136,283 (1994) (newly discovered evidence is such that if the case were retried, a new outcome would likely result).

In arguing that Rule 27(a)(6) serves as a catch-all ground for reconsidering or vacating our decision in "extraordinary circumstances," appellant references what it characterizes as an "analogous situation" in which the Federal Circuit upheld a vacatur of a judgment when

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[1] Based on appellant's motion, the Board concludes that appellant intended to reference Rule 27(a)(6).

a settlement mooted the action on appeal. *See U.S. Philips Corp. v. Windmere Corp.*, 971 F.2d 728, 731 (Fed. Cir. 1992).

Reliable also posits that:

> [g]iven the extraordinary circumstances of the timing of the decision in light of the parties' settlement negotiations, Reliable requests the Board grant this joint motion for reconsideration of its decision. Granting this motion will allow the parties to proceed with a joint motion for judgment on stipulation of settlement, such that the decision on the parties' joint motion for judgment on stipulation of settlement would serve as an adjudication of the case on the merits pursuant to Rule 25(b).[2]

When *Philips* was issued in 1992, the Federal Circuit noted that "[a]lthough in the Federal Circuit vacatur is the general rule, we do not hold that vacatur must always be granted, whatever the circumstances." 971 F.2d at 731.[3] Two years later, in *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), the Supreme Court took a less expansive view of vacatur that changed the legal landscape on whether an appellate court should vacate a lower court opinion. *Bancorp* has become the seminal case for federal appellate courts, trial courts, and tribunals considering vacatur of decisions due to mootness.[4]

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[2] Board Rule 25(b) provides that:

> When an appeal or application is settled, the parties may file with the Board a stipulation setting forth the amount of the award. The Board will adopt the parties' stipulation by decision, provided the stipulation states the parties will not seek reconsideration of, or relief from, the Board's decision, and they will not appeal the decision. The Board's decision under this paragraph (b) is an adjudication of the case on the merits.

[3] It is worth noting that under the facts of this case settlement has not mooted the appeal. Neither party has asserted that the settlement agreement was ever finalized. Nevertheless, the Board has elected to address the issue of vacatur and case precedent as if a settlement agreement had been finalized.

[4] After the mortgagor of a mall which had been scheduled for a foreclosure sale filed in the United States Bankruptcy Court for the District of Idaho, the mortgagee argued that the plan was unconfirmable as a matter of law and moved to suspend the automatic stay

When a case is moot, the Supreme Court in *Bancorp* explained that "[t]he principal condition to which we have looked [in determining whether vacatur is appropriate] is whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Id*. at 24. The Supreme Court held:

> [M]ootness by reason of settlement does not justify vacatur of a judgment under review. This is not to say that vacatur can never be granted when mootness is produced in that fashion. As we have described, the determination is an equitable one, and exceptional circumstances may conceivably counsel in favor of such a course. It should be clear from our discussion, however, that those exceptional circumstances do not include the mere fact that the settlement agreement provides for vacatur – which neither diminishes the voluntariness of the abandonment of review nor alters any of the policy considerations we have discussed.

*Id*. at 29.

The Federal Circuit, has subsequently cited *Bancorp* in addressing the relationship among settlement agreements, mootness, and vacatur, noting that the Supreme Court in *Bancorp* rejected a request for vacatur, "holding that absent exceptional circumstances, '[w]here mootness results from settlement, . . . the losing party has voluntarily forfeited his legal remedy by the ordinary process of appeal or certiorari, thereby surrendering his claim to the equitable remedy of vacatur.'" *Aqua Marine Supply v. AIM Machining, Inc.*, 247 F.3d 1216, 1217 (Fed Cir. 2001) (quoting *Bancorp*, 513 U.S. at 25 (footnote omitted))[5]. *See also*

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of foreclosure imposed by 11 U.S.C. § 362(a). The Bankruptcy Court granted the motion, the United States District Court for the District of Idaho reversed the judgment of the Bankruptcy Court, and the United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court. After the United States Supreme Court granted the mortgagee's petition for a writ of certiorari and received briefing on the merits, the parties stipulated to a consensual plan of reorganization which was approved by the Bankruptcy Court. The parties agreed that confirmation of the plan constituted a settlement that mooted the case. However, the mortgagee filed a motion requesting that the Supreme Court exercise its power under 28 U.S.C. § 2106 to vacate the judgment of the Court of Appeals, which motion the mortgagor opposed. As discussed above, the Supreme Court denied the motion to vacate.

[5] Typically, federal appellate courts have reviewed the vacatur of federal district courts and other specialized court decisions pursuant to Federal Rule of Civil Procedure (FRCP) 60(b). In *Valaro Terrestrial Corp. v. Paige*, 211 F.3d 112, 117 (4th Cir. 2000), the

*King v. Corporacion Habansos, S.A.*, 560 F. App'x 999 (Fed. Cir. 2014) (vacatur denied because party should not be permitted to benefit by vacatur for mootness caused by its own willful noncompliance with the Patent Board's orders); *Ohio Willow Wood Co. v. Thermo-Ply, Inc*, 629 F.3d 1374, 1376 (Fed. Cir. 2011) (Moore, J., concurring) (vacatur is an "extraordinary remedy" that should not be granted merely at the request of the litigants); *see also Reidell v. United States*, 47 Fed. Cl. 209, 213-14 (2000) (the court denied vacatur, concluding that its decision serves the public interest even though the settlement was conditioned on the vacatur); *MAPCO Alaska Petroleum, Inc. v. United States*, 30 Fed. Cl. 153, 154 (1993) (vacatur denied because the parties' settlement did not depend on the granting of vacatur). *But see Tessera, Inc. v. International Trade Commission*, 646 F.3d 1357, 1371 (Fed. Cir. 2011) (vacatur appropriate where the mootness occurs through happenstance); *Tafas v. Kappos*, 586 F.3d 1369, 1371 (Fed. Cir. 2009) (vacatur "is appropriate if the mootness arises from external causes over which the parties have no control").

Citing *Bancorp* for authority, the Board has previously addressed vacatur in circumstances similar to those found here. In *Libbey Physical Medicine Center & Hot Springs Health Spa v. Department of the Interior*, CBCA 1305, 09-2 BCA ¶ 34,249, the parties jointly moved to vacate an earlier Board ruling, attaching a stipulation for conditional settlement. In denying the motion, we found that the parties had failed to demonstrate the existence of "exceptional circumstances" that justify vacatur and noted:

> The Supreme Court, in *Bancorp*, addressed how and when vacatur is to be used and underscored the fundamental value of judicial precedent to our system of law, even where a matter has been settled after the decision is issued:
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> > Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.
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> The Court explained that, barring "exceptional circumstances," vacatur should only apply to cases involving mootness that has been brought about by "happenstance," i.e., mootness resulting from "circumstances unattributable

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court concluded that the standard the Supreme Court used in *Bancorp* in addressing vacatur due to mootness, 28 U.S.C. § 2106, was "essentially the same" as FRCP 60(b). While the Board is not bound by the FRCP, we use the FRCP as guidance and note that FRCP 60(b) is substantively the same as our Rule 27(a).

> to any of the parties," rather than mootness that is the result of the parties' decision to settle and thereby forego their rights of appeal.

*Id*. at 169,249 (citations omitted).

Under the principles established in *Bancorp* and its progeny, the Board reviews the facts of the case now before us in terms of the reasons for vacatur proffered and the public interest and determines that the facts and law do not favor vacating our decision. In this matter, both parties caused the mootness by waiting too long to settle the appeal. The Board recognizes that its refusal to vacate the decision will likely have the consequence of preventing the proposed settlement as it is currently structured. The Board's decision may also result in an appeal to the Federal Circuit and further litigation even though the Board encourages settlements. Nevertheless, the decision contains important clarifications to our original decision, in compliance with the remand by the Federal Circuit.

Both our original decision and our decision on remand (that which appellant asks us to vacate) concluded that Reliable was not entitled to extra costs associated with providing back-up emergency generators at the VA Miami project. Vacating the decision would leave standing the Federal Circuit decision on this matter which we believe raised issues that needed to be fleshed-out and discussed for future precedent, namely, whether a contractor who acquiesces without complaint to the Government's concerns that equipment to be installed on a construction project is non-conforming should be able later to recover the extra costs associated with providing conforming equipment. We consistently concluded that such were the circumstances in this case and that Reliable is not entitled to recovery. We also conclude that the discussion and conclusions in our decision on remand are valuable to the legal community as a whole.

Finally, it seems to us that to vacate our decision denying recovery, and then enter a judgment in favor of Reliable for the stipulated amount of $550,000, where we have concluded that no recovery is due, would weaken the judicial process. We are unwilling to do so.

Decision

Appellant's motion for reconsideration is **DENIED**.

PATRICIA J. SHERIDAN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

CATHERINE B. HYATT
Board Judge