UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

RECONSIDERATION DENIED: May 26, 2021

CBCA 5194-R, 5938-R

SRM GROUP, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

G. Scott Walters of Smith, Currie & Hancock LLP, Atlanta, GA, counsel for Appellant.

James C. Caine and Stephanie Kearney-Quilling, Office of Chief Counsel, Federal Law Enforcement Training Centers, Department of Homeland Security, Glynco, GA, counsel for Respondent.

Before Board Judges **SOMERS** (Chair), **HYATT**, and **LESTER**.

LESTER, Board Judge.

After the Board issued its decision denying this appeal on March 11, 2021, appellant, SRM Corporation (SRM), filed a motion identifying three alleged significant errors that it believes warrant reconsideration of the decision. For the reasons set forth below, we deny SRM's reconsideration request.[1]

[1] When the Board issued its decision on March 11, 2021, Judge Jeri Kaylene Somers was the assigned presiding judge in this appeal. Although Judge Harold D. Lester, Jr., has been substituted as presiding judge since that decision was issued, the composition of the

Reconsideration, which is discretionary with the Board, "need not be granted unless the [Board] finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Stobil Enterprise v. Department of Veterans Affairs*, CBCA 5698-R, 20-1 BCA ¶ 37,521 (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996)). The party seeking reconsideration bears the burden of establishing that the Board's decision contains substantive errors that are substantial enough to warrant relief. *CH2M-WG Idaho, LLC v. Department of Energy*, CBCA 6147-R, 19-1 BCA ¶ 37,408. We address the three grounds for SRM's reconsideration request below:

1. SRM argues that reconsideration is warranted because "the Board erroneously found that Contract Modifications P00016 and P00043 were bilateral and negotiated to resolution between the parties." Appellant's Motion at 2. SRM is correct that, in an introductory paragraph on the first page of the March 11 decision, the Board incorrectly referred to modifications 16 and 43 as "bilateral" when they actually were issued by the contracting officer unilaterally. As SRM recognizes in its motion, however, when the Board provided detail in the decision about modifications 16 and 43, it explained that, although the contracting officer originally prepared them as bilateral modifications (believing that SRM was going to sign them), she ultimately issued them unilaterally after SRM declined to sign. *SRM Corp. v. Department of Homeland Security*, CBCA 5194, et al., slip op. at 2-3 (Mar. 11, 2021). The inadvertent error on the first page of the decision did not affect the Board's understanding of the facts of this case.

Further, the result in this appeal did not in any way depend upon whether modifications 16 and 43 were unilateral or bilateral: DHS did not argue an accord and satisfaction, and the Board did not find or rely in its decision upon accord and satisfaction, rendering any misdescription of the modifications irrelevant to the ultimate result. "Reconsideration is not warranted when the result would not change." *Control Data Corp. v. Department of the Navy*, GSBCA 11376-P-R, 92-1 BCA ¶ 24,739.[2]

---

panel has not changed. The same three-judge panel involved in the March 11 decision is considering and deciding SRM's reconsideration motion. *See ICF Severn, Inc. v. National Aeronautics & Space Administration*, GSBCA 11552-C-R(11334-P), 94-3 BCA ¶ 27,162 (precluding changes in the composition of the panel on reconsideration).

[2] SRM also cites as error our reliance on expert witness testimony that referenced bilateral modifications, asserting that, since modifications 16 and 43 were unilateral rather than bilateral, the expert witness testimony was in error and unreliable. Yet, the cited expert witness testimony did not relate to modifications 16 and 43, but to other modifications that were, in fact, bilateral. The record does not support SRM's effort to tie all discussion about modifications to the two unilateral modifications upon which it now wishes to focus.

2. SRM next argues that, in rejecting SRM's quantum amount, the Board relied upon an $800,000 estimate that the Government's expert witness, Mark Hudak, presented, but misunderstood what it represented and assumed incorrectly that it encompassed more costs associated with the contract changes than it did. In our March 11 decision, we stated that "Mr. Hudak concluded that the addition of the two buildings [for which SRM is seeking additional costs in this appeal] increased [SRM's] costs by approximately $800,000." *SRM Corp*., slip op. at 8. SRM complains that, in his testimony, Mr. Hudak stated that his $800,000 figure encompassed direct costs but did not include mark-ups for overhead, other indirect costs, and profit and that we should add those to what Mr. Hudak opined SRM should have been paid.

We clarify our decision to reflect that the $800,000 figure that Mr. Hudak identified was for direct costs, not inclusive of mark-ups, and, to the extent that identification of Mr. Hudak's $800,000 figure can be read as indicating what Mr. Hudak would have agreed SRM was due for the modification 16 changes, we understated it by not referencing mark-ups. Nevertheless, in reviewing the record, we discovered that we understated *another* dollar figure in the same paragraph in which we identified Mr. Hudak's opinion. We indicated in the March 11 decision that the amount that Mr. Hudak believed SRM should have been paid for the modification 16 changes was "far less than the $1,509,836.15 paid by DHS to SRM through contract modifications 16 and 43." *SRM Corp*., slip op. at 8. In reviewing the record in preparing this reconsideration decision, we realized that, in identifying the $1,509,836.15 figure paid through modification 43, we omitted an earlier *initial* payment of $627,165.35 that DHS had made to SRM to cover costs for modification 16 changes, an additional amount that DHS acknowledges in modification 43. That is, the total amount that DHS had already paid SRM for the modification 16 changes is not $1,509,836.15, but $2,137,001.50.

Ultimately, our omission of mark-ups in identifying the $800,000 figure that we attributed to Mr. Hudak is irrelevant to the result here. As we explain below, our decision denying SRM's appeal rested on SRM's failure to prove that it is entitled to recover anything more for the modification 16 changes than what DHS has already paid for those changes. Nevertheless, we clarify our March 11 decision to reflect that the amount already paid is $2,137,001.50.

3. Lastly, SRM complains that the Board improperly placed a burden on SRM to explain why it had abandoned the opinions of its prior expert witness, whose report and analysis SRM had previously added to the appeal file pursuant to Board Rule 4 (48 CFR 6101.4 (2019)), in favor of a new expert witness analysis that advocated for a much higher damage award. Because SRM "did not rely on [the prior expert's opinions] at the evidentiary phase of the hearing," SRM argues, "any negative inference that the Board assigned to SRM

based on a perceived failure of SRM to explain these prior opinions [was] improper." Appellant's Motion at 2.

SRM misconstrues the role of the Rule 4 appeal file. Under Board Rule 9(a), "[t]he record on which the Board will decide a case includes," among other things, "Rule 4 appeal file exhibits other than those to which an objection is sustained," other documents or parts thereof admitted as evidence at a hearing, and transcripts of testimony before the Board. Accordingly, in reaching a decision in an appeal following a hearing, the Board is not limited to the testimony presented and exhibits introduced at the hearing but may also "rely upon any evidence contained within the appeal file." *Springcar Co. v. General Services Administration*, CBCA 530-R, et al., 10-2 BCA ¶ 34,534. Here, not only did SRM not raise any objection to the inclusion of its prior expert's report and analyses in the appeal file, SRM actually placed them there. During the hearing, the Board expressly reminded SRM that the prior expert witness reports were a part of the record, Transcript at 185, yet SRM did not request that they be stricken. SRM has identified no valid basis for limiting our ability to consider those appeal file exhibits in deciding this appeal.[3]

SRM's real complaint is that we did not find its expert witness analysis credible. The expert upon whom SRM eventually settled described his analysis as an "actual cost" analysis, but, in reality, SRM was asking the Board to make a form of a jury verdict damages award based upon its expert's self-generated estimates of how much work he thought was probably performed on this task or that task over time and his distribution of actual costs to those tasks. *See, e.g.*, Transcript at 152-53. The expert made judgment calls about the extent to which he thought that certain costs were representative of SRM's overall experience, the extent to which he thought that the changes that DHS made through modification 16 caused cost increases, and how he thought such costs should be allocated across different aspects of the project. Yet, SRM's prior expert had a different take on what the cost increases resulting from the modification 16 changes were, and, as DHS established at the hearing of this appeal, SRM's numbers changed dramatically and repeatedly after SRM first presented its original request for an equitable adjustment. *See, e.g.*, *id.* at 63. SRM did nothing to explain why its latest assumptions and figures were any better than prior assumptions and figures that it had placed into the record, given that all of them appeared to be based mostly on the same underlying information. Although revisions to damages calculations "are entirely permissible and foreseeable" as litigation progresses, *Glassalum International Corp. v. Floh*

---

[3] To the extent that SRM is complaining that its prior expert's analyses are inadmissible because they are hearsay, we are not precluded from considering hearsay in the same manner that Federal courts are, *AT&T Technical Services Co. v. Department of Veterans Affairs*, CBCA 6171, 19-1 BCA ¶ 37,324, but, in any event, SRM raised no such objection before the record in this appeal closed.

Corp., No. 04-CIV-5796, 2006 WL 8461412, at *1 (S.D.N.Y. Mar. 20, 2006), the absence of any explanation for them, particularly where the changes are dramatic, is plainly a factor that the Board can take into account when evaluating the credibility of the appellant's numbers and cost support. *See Consolidated Marketing Network, Inc.*, DOT CAB 1680, et al., 86-3 BCA ¶ 19,181 (inconsistencies in testimony and other record evidence can adversely affect credibility).

Ultimately, it was SRM's obligation to prove the extent to which modification 16 caused it to incur additional costs and the amount of those costs. *Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 767 (Fed. Cir. 1987); *Nu-Way Concrete Co. v. Department of Homeland Security*, CBCA 1411, 11-1 BCA ¶ 34,636 (2010). We did not leave SRM uncompensated for the modification 16 changes, as DHS has already paid SRM more than $2.13 million for them. We merely did not find SRM's efforts to obtain *more*, through expert analysis of the effect of changes on cost that (at least in the manner it was presented) sometimes seemed to be pulled out of thin air, to be credible. That is the reason that we denied SRM's request for more money than DHS has already paid, and there is no reason to reconsider that result.

Decision

For the foregoing reasons, SRM's motion for reconsideration is **DENIED**.

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

We concur:

Jeri Kaylene Somers
JERI KAYLENE SOMERS
Board Judge

Catherine B. Hyatt
CATHERINE B. HYATT
Board Judge