



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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MOTION FOR RECONSIDERATION DENIED: December 1, 2023

CBCA 6453-R, 6560-R

BES DESIGN/BUILD, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Todd A. Jones and Peyton D. Mansure of Anderson Jones, PLLC, Raleigh, NC, counsel for Appellant.

Jennifer L. Hedge, Office of General Counsel, Department of Veterans Affairs, Pittsburgh, PA; and Laetitia C. Coleman, Office of General Counsel, Department of Veterans Affairs, Lakewood, CO, counsel for Respondent.

Before Board Judges **RUSSELL** and **ZISCHKAU**.<sup>1</sup>

**RUSSELL**, Board Judge.

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<sup>1</sup> This appeal was initially decided in April 2023 by a three-judge panel for which Judge Jerome M. Drummond served as the presiding judge. Sadly, in June 2023, while appellant's motion for reconsideration was pending, Judge Drummond passed away. "On reconsideration, a board of contract appeals may not change the panel of judges to which the case is assigned. This decision is consequently being issued by the two remaining members of the original panel." *Dieker v. General Services Administration*, GSBCA 16050-R, 03-2 BCA ¶ 32,375, at 160,188 n.1.

Appellant, BES Design/Build, LLC (BES), seeks reconsideration under Board Rule 26 (48 CFR 6101.26 (2022)) of the Board's April 7, 2023, decision. *See BES Design/Build, LLC v. Department of Veterans Affairs*, CBCA 6453, et al., 23-1 BCA ¶ 38,319. That decision upheld the termination for default of the contract and denied BES's claims for compensation under pay application number 32 and for a fifty-nine-day delay. Familiarity with the decision is presumed.

BES argues that testimony given on January 27, 2023, from the contracting officer's representative (COR) in a separate matter, *Mountain Mechanical Contractors, Inc. v. BES Design/Build, LLC*, No. 5:20-CV-05141 (W.D. Ark.) (*Mountain Mechanical Contractors*), is newly discovered evidence which provides valid grounds for reconsideration. BES also argues that the Board erred in applying case law, including *DeVito v. United States*, 413 F.2d 1147 (Ct. Cl. 1969); *AmerescoSolutions, Inc.*, ASBCA 56811, 10-2 BCA ¶ 34,606; and *Technocratica*, ASBCA 47992, et al., 06-2 BCA ¶ 33,316, to the termination for default.

### Discussion

#### Standard for Reconsideration

Decisions by the United States Court of Appeals for the Federal Circuit and this Board have established that there are three primary grounds that justify reconsideration: (1) an intervening change in the law; (2) the availability of new evidence; and (3) the need to correct clear error or prevent injustice. *Delaware Valley Floral Group, Inc. v. Shaw Rose Nets, LLC*, 597 F.3d 1374, 1383 (Fed. Cir. 2010); *Stobil Enterprise v. Department of Veterans Affairs*, CBCA 5698-R, 20-1 BCA ¶ 37,513, at 182,217. It is not the purpose of reconsideration to give litigants "a second bite at the apple." *Dixon v. Shinseki*, 741 F.3d 1367, 1378 (Fed. Cir. 2014).

#### BES's Motion for Reconsideration is Denied

BES was sued by one of its subcontractors in *Mountain Mechanical Contractors*. On January 27, 2023, the COR gave testimony at trial in the case. BES claims that this testimony is newly discovered evidence. Newly discovered evidence must have been unavailable prior to resolution of the matter for which reconsideration is being denied. *See Delaware Valley Floral*, 597 F.3d at 1384 (finding that witness declarations were not newly discovered evidence because the defendant could have made efforts to locate the witnesses prior to judgment); *see also Ingham Regional Medical Center v. United States*, 155 Fed. Cl. 1, 12-13 (2021) (interpreting the Federal Circuit's decision in *Delaware Valley Floral*).

The COR's testimony in *Mountain Mechanical Contractors* was not new to BES when the Board issued its decision in April 2023. BES was the defendant in *Mountain*

*Mechanical Contractors* and conducted cross-examination of the COR at trial. That testimony occurred more than two months before the Board issued the decision for which BES now seeks reconsideration. Thus, the testimony was not unavailable prior to the Board's decision and does not constitute newly discovered evidence.

BES also argues that the Board erred in its legal rulings when it upheld the termination for default and denied BES's claims for payment under pay application number 32 and for a fifty-nine-day delay. BES's arguments on reconsideration do not establish that the Board's decision contains "substantive errors . . . 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), but, instead, reflect a request for reinterpretation in its favor of already-considered evidence. Here, BES previously advanced its arguments on the termination for default and its claims based on the pay application and delay, and the Board rejected them. "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. It is not "available to retry a case." *Bryan Concrete & Excavation, Inc. v. Department of Veterans Affairs*, CBCA 2882-R, 16-1 BCA ¶ 36,549, at 178,033. Therefore, we deny BES's motion.

#### Decision

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

*Beverly M. Russell*

BEVERLY M. RUSSELL  
Board Judge

I concur:

*Jonathan D. Zischkau*

JONATHAN D. ZISCHKAU  
Board Judge