

Board of Contract Appeals

General Services Administration
Washington, D.C. 20405

MOTION FOR RECONSIDERATION DENIED: July 20, 2006

GSBCA 16079-R, 16132-R, 16487-R, 16490-R, 16491-R

MARUT TESTING & INSPECTION SERVICES, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Bradley Alan Rush, Silver Spring, MD, counsel for Appellant.

Mark R. LaFeir, Office of General Counsel, General Services Administration,
Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman) and **BORWICK**.¹

¹ The Board's decision as to which reconsideration is sought was issued by a panel which included Board Judge Edwin B. Neill as well as Board Judges Daniels and Borwick. Since the issuance of that decision, Judge Neill has retired. 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. *Stan Dieker v. General Services Administration*, GSBCA 16050-R, 03-2 BCA ¶ 32,375, at 160,188 n.1; *ICF Severn, Inc. v. National Aeronautics & Space Administration*, GSBCA 11552-C-R (11334-P), 94-3 BCA ¶ 27,162, at 135,355 n.1; *Integrated Systems Analysts, Inc. v. Department of the Navy*, GSBCA 10750-P-R, 94-1 BCA ¶ 26,257, at 132,196 n.1; *Unit Data Service Corp. v. Department of Veterans Affairs*, GSBCA 10775-P-R, 93-3 BCA

BORWICK, Board Judge.

Appellant seeks reconsideration and amendment of or relief from one aspect of our decision in the underlying appeals, *Marut Testing & Inspection Services, Inc. v. General Services Administration*, GSBCA 16079, et al. (Apr. 11, 2006). For the reasons set forth below, we deny appellant's motion. Appellant has not met the standards under Board Rules 132 or 133(a) for granting reconsideration or relief from the decision.

Background

In the underlying appeal, the Board found that appellant was entitled to an award of costs under contracts "12" and "14" representing damages to defray appellant's costs of sustaining operations during periods of inactivity of, or underutilization by, the Government. *Marut Testing & Inspection Services, Inc. v. General Services Administration*, GSBCA 16079, et al., slip op. at 50.² The Board awarded appellant \$31,066.10 for its claim for those costs, which the Board determined was the maximum relief available under the contract's Minimum/Maximum Contract and Order Limitation clause. *Id.* at 52. The award sum represented ten percent of the total evaluated bid price for the second year of contract performance and ten percent of the total evaluated bid price for the third year of contract performance. *Id.* at 51-52. However, we concluded that this award was subject to a setoff based on the Board's decision in an earlier, related case:

In our decision regarding Marut's claim for payment under Contract 13, we concluded that claimant was entitled to no more than \$4262.63 of the \$35,309.04 already received from GSA for its admitted breach of the contract's Minimum/Maximum Contract and Order Limitation clause. [Citation omitted]. This resulted in an overpayment of \$31,046.41, which has not been formally claimed by GSA and remains unpaid to the present. Since our decision in GSBCA 15412 on Marut's claim under Contract 13 is now final, we see no reason why that amount we found to have been overpaid should not be setoff against our award here of \$31,066.10, thus leaving a balance of \$19.69 still due.

¶ 25,964, at 129,126 n.1 (all citing *Universal Restoration, Inc. v. United States*, 798 F.2d 1400, 1406 n.9 (Fed. Cir. 1986)).

² All slip opinion references are to the opinion in GSBCA 16079, 16132, 16487, 16490, and 16491. Citations to an earlier opinion in GSBCA 15412 are to the applicable volume of the BCA reporter.

Id. at 52.³ Appellant seeks reconsideration of this portion of the opinion.

In GSBCA 15412, we had held:

Applying the holding in [*White v. Delta Construction International, Inc.*, 285 F.3d 1040 (Fed. Cir. 2002)] to our case leads to the conclusion that GSA has overpaid Marut. GSA guaranteed Marut minimum orders of \$93,069.60, and it ordered and paid for \$50,443.26 of services, leaving a net of \$42,626.34 worth of services that it should have ordered. Marut earned nearly an eleven percent profit the year before the contract was awarded and based its proposal upon earning a ten percent profit. Assuming that Marut would have earned a ten percent profit if it had performed an added \$42,626.34 of work, it would have earned a profit of \$4262.63. Marut has not established that it incurred any damages other than lost profits due to GSA's failure to order the minimum contract amount guaranteed by the contract. We conclude, therefore, that Marut was damaged by approximately \$4262.63 due to GSA's failure to order the minimum amount guaranteed by the contract. When GSA paid \$35,309.04 to Marut on December 29, 2000, it put Marut in a better position than it would have occupied if it had performed the additional \$42,626.34 of work. Thus, although GSA did not order the minimum guaranteed amount of services, GSA owes Marut nothing more.

Marut Testing & Inspection Services, Inc. v. General Services Administration, GSBCA 15412, 02-2 BCA ¶ 31,945, at 157,823.

In its motion for reconsideration, appellant argues that the Board dealt only “tangentially (and summarily)” with the contract modification paying appellant’s amounts due it pursuant to the contract’s Minimum/Maximum Order limitation clause, because “the Board was concerned with the question whether [appellant] was entitled to further sums under the contract.” Appellant’s Response to Respondent’s Opposition to Appellant’s Motion for Reconsideration at 2. Appellant says its claim in GSBCA 15412 was based on the assumption that the contract was a requirements contract, not an indefinite delivery

³These appeals resulted from the contracting officer’s decision on claims appellant submitted after the Board’s decision in GSBCA 15412. In his decision on those claims, the contracting officer stated that he would offset any payments found due to Marut by the amount of the overpayment the Board found due to the Government in GSBCA 15412. *Id.* at 22.

indefinite quantity (IDIQ) contract, but acknowledges that the Government defended the claim on the basis that the contract was an IDIQ contract. *Id.* Appellant says that neither party presented evidence on costs in GSBCA 15412, as neither the claim or its defense required any. *Id.* at 3.

Arguing from those premises, appellant maintains that the Board's finding in GSBCA 15412 is *dictum*. Appellant's Response to Respondent's Opposition to Appellant's Motion for Reconsideration at 2. Appellant says that the Board's finding in GSBCA 15412 was therefore conditional because the Board there ruled that it had "appeared" as if the Government had overpaid appellant. *Id.* at 3. Appellant argues that it "necessarily follows" that "if the decision in GSBCA 15412 cannot form the basis for the Government's assertion of a set-off, then this Board lacks jurisdiction over the issue." *Id.*

Discussion

The Board's finding in GSBCA 15412 that the contracting officer had overpaid appellant was neither *dictum* nor a conditional finding, as appellant urges. Whether the contract was a requirements contract or an IDIQ contract was squarely before the Board. *Marut*, 02-2 BCA at 157,820-21. The amount of costs due under the contract's Minimum/Maximum Contract and Order Limitation clause was also before the Board. In spite of appellant's claim that neither party presented evidence of costs under that clause, as noted above, the Board's opinion in GSBCA 15412 contains an extensive discussion of the amount due under that clause. *Id.* at 157,823. The Board's decision in that case became final on November 30, 2002, *see*, 41 U.S.C. § 607(g)(1)(A) (2000), and its finding and conclusions are now *res judicata*. *Zinger Construction Co. v. General Services Administration*, GSBCA 12451, 95-2 BCA ¶ 27,736. If appellant was dissatisfied with the outcome of that proceeding, or its ability to present evidence of costs on alternative theories during that proceeding, it was obligated to either seek reconsideration of the decision or submit a timely appeal to the United States Court of Appeals for the Federal Circuit.

In view of the finality of that decision, the contracting officer possessed the undoubted right to claim the overpayments against any future award. *Applied Companies v. United States*, 144 F.3d 1470, 1476 (Fed. Cir. 1998) (citing *United States v. Munsey Trust Co.*, 332 U.S. 234, 239 (1947)); *Information Consultants, Inc.*, GSBCA 8130-COM, 86-3 BCA ¶ 19,198.

Furthermore, the likelihood of offset was stated in the contracting officer's decision which was appealed in these consolidated dockets, on one of the very contracts at issue in this case. The offset was also the subject of testimony at the hearing in GSBCA 16079, et

al. *Marut*, slip. op. at 22. It is not surprising that in its decision the Board considered the setoff in determining the award amount.

Decision

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

ANTHONY S. BORWICK
Board Judge

I concur:

STEPHEN M. DANIELS
Board Judge