GOVERNMENT OF THE DISTRICT OF COLUMBIA
CONTRACT APPEALS BOARD

APPEAL OF:

UNFOLDMENT, INC.	)	
	)	CAB No. D-1062
Under Contract No. 7KGC09	)	

For the Appellant, Unfoldment, Inc.: Brian Lederer, Esq. For the District: Andrew J. Saindon and Jennifer L. Longmeyer, Assistants Corporation Counsel, DC.

Order by Chief Administrative Judge Lorilyn Simkins with Administrative Judge Matthew S. Watson, concurring.

ORDER ON MOTION FOR RECONSIDERATION

Appellant has timely moved for reconsideration of the Board's Order, dated March 20, 2002, which dismissed or denied all of Unfoldment's claims, except for unpaid invoices, Quick Payment Act and simple interest. Unfoldment asserts that because of "new evidence not previously available to this Board" that the Board should reconsider its decision that the contract was not a multi-year contract. Appellant also asks for reconsideration of the Board's decision to permit a settlement letter written by the Contracting Officer Milton Grady to be used as evidence of Unfoldment's entitlement to certain closing and initial costs. Finally, the appellant requests reconsideration of the Board's dismissal of Unfoldment's allegations of bad faith by CFSA.

The Board Rule 117.1 (49 D.C. Reg. 2094-2095 (Mar. 8, 2002)) provides:

A party to an appeal or a protest may by motion request the Board to reconsider its decision or order for the reasons stated below:

(1) to clarify the decision;
(b) to present newly discovered evidence which by due diligence could not have been presented to the Board prior to the rendering of its decision;
(2) if the decision contains typographical, numerical, technical or other clear errors that are evident on their face;
(d) if the decision contains errors of fact or law, except that parties shall not present arguments substantially identical to those already considered and rejected by the Board.

Contrary to Appellant's assertion that the RFP is "new evidence" which the Board should consider, the legal standard associated with newly discovered evidence requires that by due diligence the evidence could not have been presented to the Board prior to the rendering of its decision. Board Rule 117.1(b). In making its argument for reconsideration, Unfoldment has failed to demonstrate that the RFP could not have by due diligence been presented prior to the rendering of the Board's decision. *See American Continental Ins. Co. v. Pooya*, 666 A.2d 1193 (D.C. 1995). It is

clear that the RFP has been available to appellant since it bid on the contract in 1997. Appellant may not use a motion for reconsideration to furnish information that was available to it but not submitted, at the time of the original decision.

Unfoldment also argues that the government had the burden of furnishing the RFP to the Board via the Appeal File. Appellant is correct that the government is required to assemble and transmit to the Board an appeal file consisting of all documents pertinent to the appeal. Board Rule 203.1, 49 D.C. Reg. 2101. However, an appellant is also required, after receipt of the appeal file, to transmit to the Board any documents which it considers relevant to the appeal. Board Rule 203.3, 49 D.C. Reg. 2101. Further, the Board may require either party to supplement the appeal file. Board Rule 203.4. During a telephone conference on October 11, 2001, both parties agreed and the Board orally ordered that the government file the Appeal File by November 1, 2001, and that the appellant by November 15, 2001 file any documents that it considered to be relevant to its appeal. Appellant had ample opportunity to file the RFP with the Board, but failed to do so. Appellant cannot now claim that it had no responsibility to submit the RFP to the Board or that the decision on the nature of the contract should be reopened because the government did not supply the RFP for the record. We therefore deny appellant's request for reconsideration of its claim that this was a multi-year contract.

Appellant also requests the Board to reconsider its ruling that Mr. Grady's settlement letter could not be used as evidence to prove that Unfoldment's contract was terminated for cause or convenience. Appellant's argument is not based on any newly discovered evidence or substantially different legal theory than it presented before. The Board's decision was based on *Pyne v. Jamaica Nutrition Holding Ltd.*, 497 A.2d 1118 (D.C. 1985), a Court of Appeals decision holding that offers of compromise or settlement agreements may not be used to prove liability for a claim or its amount. There is no basis for appellant's request for reconsideration, and it is therefore denied.

Finally, Appellant fails to raise any new argument regarding bad faith. The Board dismissed Appellant's unsupported allegations of bad faith because appellant's arguments were irrelevant in light of the fact that Appellant had failed to make an evidentiary showing, via affidavit or otherwise to demonstrate that CFSA had a specific intent to injure the appellant or that CFSA's actions were motivated by malice. *See District of Columbia v. Organization for Environmental Growth, Inc.*, 700 A. 2d 185, 199-201 (D.C. 1997). Accordingly, we deny appellant's request for reconsideration.

SO ORDERED.

DATE: July 30, 2002

/s/ Lorilyn E. Simkins
LORILYN E. SIMKINS
Chief Administrative Judge

/s/ Matthew S. Watson
MATTHEW S. WATSON
Administrative Judge