A long-time reader, who wishes to remain anonymous, recently emailed to urge us to write about **this** **ASBCA decision** in which the Board addressed a Government Motion for Reconsideration. By filing the motion, the Government was asking the Board to vacate its prior decision. According to the American Bar Association's "Practicing Before the Federal Boards of Contract Appeals" legal manual—

BCAs generally grant motions for reconsideration in two circumstances: (1) to allow a party to present significant, newly discovered evidence; or (2) to address the board's own mistake of fact or law. Do not re-argue positions already presented to and rejected by the board, and do not present arguments that could have been made earlier. When presenting significant, newly-discovered evidence in a motion for reconsideration, attach the newly-discovered evidence to the motion, explain where it came from, why it was not available earlier, and why it is relevant and should alter the board's decision. If the motion is based on a mistake of fact or law by the board, the party must explain the mistake and why the decision would be different if the mistake was corrected.

We already discussed the original decision, in **this article** . You need to read that article before this one, because we're not going to repeat ourselves.

In fact, and as noted in our article, that "original" decision wasn't really the original decision. It

was the second decision. The first decision dealt with “entitlement” and the second decision dealt with “quantum”. The Government won on the first decision—that it was entitled to damages. But the Government lost on the second decision, because the Board found that there were, in fact, no damages. The Government was entitled to *nothing*.

As part of that second decision (which we quoted at some length in our article), the Board noted that the Government’s position was based on a flawed theory created by DCAA and endorsed by a Contracting Officer, *over the objections of DCMA’s own pension experts*. Judge Peacock, writing for the Board, stated “The government has failed to sustain its burden of proving that any of the disallowed amount was or will be amortized as part of the transition obligation and claimed during the post-transition years. Its argument is founded on theoretical constructs that have no factual basis or evidentiary support here.”

The Government filed a Motion for Reconsideration of that second decision. It did not fare well.

Judge Peacock, again writing for the Board, stated—

Upon reconsideration, we affirm the quantum decision. There are no inconsistencies among the quantum decision and the Board's earlier entitlement decisions. The government's assertions that the Board contradicted the ‘law of the case,’ i.e., the entitlement decisions, are based on the government's untimely raised and unreasonable ‘interpretation’ of the entitlement decisions. Moreover, the government has ignored the quantum remedy for noncompliance established in FAR 31.201-2(c). In addition, it has misapplied fundamental concepts of cost ‘incurrence’ and ‘disallowance.’

Later in the decision, Judge Peacock wrote—

The gravamen of this dispute has always been whether the government was damaged, i.e., in the words, of FAR 31.201-2(c) whether the contractor claimed (or the government paid) any disallowable ‘excess’ PRB costs as a consequence of appellant's noncompliance. The ultimate overriding fact is that the government did not pay any ‘excess.’ It cannot overcome that basic fact that there was no ‘excess’ by parsing through the entitlement decisions trying to find ‘inconsistencies,’ actual or implied in the supposed ‘philosophy and intent’ of those decisions. …

The concept of cost incurrence ‘by operation of law’ in a government contract accounting ‘allowability’ context is indeed novel, extraordinary, unique and unprecedented. The government has failed to adduce even one analogous case supporting its position. The government contemporaneously exercised common sense during the pre-transition years and knowingly, willingly, declined to challenge appellant's accounting for its claimed PRB costs that resulted in lower costs to the government during the pre-transition years. The ‘common sense’ government position in this regard in the pre-transition years comported with FAR 31.201-2(c). The government now ignores its own regulatory remedy. In doing so it has created an extraordinary new category of costs, incurred not by the contractor's own accounting measurement, accrual or assignment methodology, but allegedly ‘required’ to be incurred by ‘operation of law,’ without regard to NGC's accounting procedures. To the contrary, the operative ‘law’ in this case is the common remedy prescribed for noncompliance in FAR 31.201-2(c). The government's duty is to evaluate costs actually incurred and claimed *by the contractor* under the pertinent cost principle for compliance. If non-compliant, any ‘excess’ is unallowable, not costs that were never incurred or claimed by the contractor.

(Emphasis in original.)

But wait. There’s more stuff to quote. Read this part about what a cost disallowance is (or should be):

The term ‘disallowance’ presupposes that the contractor has sought an ‘allowance’ for the cost in question, i.e., it has included those costs in contemporaneous cost-related filings and claimed, charged or been reimbursed for said costs. *Here, the government has ‘disallowed’ costs for which the contractor has never sought an ‘allowance.’*
The contractor has not and will never claim the costs in dispute here for the reasons detailed in the underlying opinion. The ‘excess,’ if any, is to be derived from cost/pricing, payment, and reimbursement submissions, including incurred cost data transmitted to the government from the contractor. There is no mention in any of these foundational, core documents that appellant ever incurred the costs in dispute, much less claimed their reimbursement. There was no ‘excess’ to disallow …

(Emphasis added.)

Do we need to inform you that the Motion for Reconsideration was denied?

Our anonymous reader concluded his email with the following thoughts—

After the LMIS case published last year the DCMA issued guidance to only question costs based on a cost principle or contract clause. The Northrop case started way before LMIS was decided. I wonder if DCMA will reissue their guidance again with some minor tweaks. Such as, don't demand repayment for a 'cost' that was never billed.

Well, we don't know the answer to that question. In fact, we were unaware of the DCMA "guidance" in question until our anonymous reader mentioned it. If you have a copy (or a link) to that document, please send it to us!

As a final point, let's remember that, although there have been at least three decisions already issued in this dispute, the parties still have appeal rights. This brouhaha may not be over. We could see another decision on this dispute issued by the Federal Circuit.