

In the United States Court of Federal Claims

NOT FOR PUBLICATION

No. 00-475C

(Filed May 19, 2009)

* * * * *

TECOM, INC.,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

* * * * *

ORDER

Defendant has filed a “Motion to Alter or Amend Judgment Pursuant to RCFC 59” (“Def.’s Mot.”). In this motion the government argues, for the first time in this case, that FAR section 31.205-47(f) precludes the award of the costs of preparing plaintiff’s request for equitable adjustment (“REA”). See Def.’s Mot. at 2 (citing 48 C.F.R. § 31.205-47(f)). For the reasons explained below, the defendant’s motion is DENIED.

In the first place, the government’s Rule 59 motion is deficient as it fails to articulate how the amendment sought meets the criteria for granting such a motion. A Rule 59 motion “must be supported ‘by a showing of extraordinary circumstances which justify relief.’” *Caldwell v. United States*, 391 F.3d 1226, 1235 (Fed. Cir. 2004) (quoting *Fru-Con Constr. Corp. v. United States*, 44 Fed. Cl. 298, 300 (1999)). The rule states that a motion for reconsideration may be granted:

- (A) for any reason for which a new trial has heretofore been granted in an action at law in federal court;
- (B) for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court; or
- (C) upon the showing of satisfactory evidence, cumulative or otherwise, that any fraud, wrong, or injustice has been done to the United States.

RCFC 59(a)(1). To prevail under this rule, the movant must “show that: (a) an intervening change in controlling law has occurred; (b) evidence not previously available has become

available; or (c) that the motion is necessary to prevent manifest injustice.” *Prati v. United States*, 82 Fed. Cl. 373, 376 (2008) (citing *Bishop v. United States*, 26 Cl. Ct. 281, 286 (1992)). Defendant not only fails to explain how the circumstances presented satisfy any of these criteria, it fails to mention them and cites not one case applying Rule 59. *See* Def.’s Mot. at 1-8.

As no “intervening change in controlling law” is argued, nor new evidence identified, the Court presumes that the government’s motion rests on the ground that reconsideration is “necessary to prevent manifest injustice.” *See Prati*, 82 Fed. Cl. at 376. Defendant argues that the Court was in “error” to have “award[ed] damages for preparation of the REA when the REA was submitted as a certified claim.” Def.’s Mot. at 1. In finding that the REA preparation costs were incurred for purposes of contract administration, *see Tecom, Inc. v. United States*, 86 Fed. Cl. 437, 459, 467 (2009), the Court, defendant argues, “misapplied the precedent announced in *Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541 (Fed. Cir. 1995).” Def.’s Mot. at 2. The problem with the government’s argument, however, is that in its post-trial brief it stated the following:

Tecom is also seeking close to \$84,000 in claim preparation fees. Such fees are ordinarily recoverable. *See Bill Strong Enterprises, Inc. v. Shannon*, 49 F.3d 1541 (Fed. Cir. 1995) (holding that legal and consulting are recoverable if the costs were incurred as part of contract administration and not to prosecute a claim.).

Def.’s Post-Trial Br. at 5 n.4; *see also Tecom*, 86 Fed. Cl. at 459. The *Bill Strong* case is mentioned no other place in defendant’s brief, and the only reason given by the government for denying the REA preparation costs was its interpretation of the maintenance backlog provision of the contract as limiting damages to direct labor and material costs. *See* Def.’s Post-Trial Br. at 17.

Thus, the government cited *Bill Strong* to show that REA preparation costs “are ordinarily recoverable,” Def.’s Post-Trial Br. at 5 n.4, and then made no argument distinguishing Tecom’s circumstances from the “ordinar[y].” It now contends that the Court failed properly to interpret *Bill Strong* in light of the subsequent Federal Circuit opinion *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1996), which overruled prior precedent concerning what constitutes a Contract Disputes Act (“CDA”) claim. Def.’s Mot. at 2-5. As the Court noted at the outset, what the defendant is really arguing is that 48 C.F.R. § 31.205-47(f), which had gone unmentioned in its post-trial brief and was not raised by the government at any time prior to this motion, is the reason why REA preparation costs may not be awarded. *See* Def.’s Mot. at 2.

In either event, it is well-settled that “an argument made for the first time in a motion for reconsideration comes too late, and is ordinarily deemed waived.” *Bluebonnet Savings Bank v. United States*, 466 F.3d 1349, 1361 (Fed. Cir. 2006) (citations omitted). When moving under Rule 59, “making new arguments not previously presented is impermissible.” *Int’l Air Resp., Inc. v. United States*, 81 Fed. Cl. 364, 366 (2008). The mutual predecessor to our Court and to the Federal Circuit has held that this “general principle that requests for post-decision relief will

be rejected if the [movant] has, without sufficient excuse, failed to make his point prior to the decision,” applies to the government as well as to claimants. *Gen. Elec. Co. v. United States*, 189 Ct. Cl. 116, 118 (1969). The argument that the REA preparation costs, sought by and awarded to Tecom, were connected to claim prosecution and thus precluded, should have been raised earlier by the government. It is no manifest injustice to deny defendant a second chance at making its case. *See, e.g., Caldwell*, 391 F.3d at 1235; *Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990); *Four Rivers Invs., Inc. v. United States*, 78 Fed. Cl. 662, 664-65 (2007); *Matthews v. United States*, 73 Fed. Cl. 524, 526 (2006).

Finally, even were the Court to reconsider the issue, the government incorrectly infers that the basis for this part of the award was the conclusion that the REA when submitted was not a certified claim for CDA purposes. *See* Def.’s Mot. at 4-7. The Court has no doubt that it was. But the mere fact that a CDA claim was ultimately submitted does not necessarily mean that the costs of preparing a request for equitable adjustment were incurred for purposes of claim prosecution, rather than contract administration. *See, e.g., SAB Constr., Inc. v. United States*, 66 Fed. Cl. 77, 90-91 (2005); *Johnson v. Advanced Eng’g & Planning Corp., Inc.* 292 F.Supp.2d 846, 851-54 (E.D. Va. 2003). Before the bulk of the maintenance costs that were at issue in this case were incurred, the government directed plaintiff to perform this over-and-above work first, and submit equitable adjustment invoices after the contract year was finished, in order to recover the money owed under the maintenance backlog provision of the contract. *Tecom*, 86 Fed. Cl. at 446, 450, 459, 467. The Court has found that this method of contract administration, chosen by the government, shifted contract administration costs into the REA preparation process. The government has provided no reason to reverse this judgment.

Defendant has failed to articulate adequate grounds for reconsidering the award of REA preparation costs as breach of contract damages, and impermissibly seeks to raise an argument for the first time under a Rule 59 motion. For the reasons stated above, defendant’s motion to alter or amend the judgment is **DENIED**.

IT IS SO ORDERED.

s/ Victor J. Wolski

VICTOR J. WOLSKI
Judge