

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of -- )  
 )  
AECOM Government Services, Inc. ) ASBCA No. 56861  
 )  
Under Contract No. W91GY0-08-D-0001 )

APPEARANCES FOR THE APPELLANT: Karen L. Manos, Esq.  
Christyne K. Brennan, Esq.  
Dace Caldwell Martinez, Esq.  
Gibson, Dunn & Crutcher LLP  
Washington, DC  
  
Jack Stein, Esq.  
AECOM Government Services, Inc.  
Fort Worth, TX

APPEARANCES FOR THE GOVERNMENT: Craig S. Clarke, Esq.  
Army Chief Trial Attorney  
Raymond M. Saunders, Esq.  
Deputy Chief Trial Attorney  
LTC Dana J. Chase, JA  
Erica S. Beardsley, Esq.  
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE TUNKS  
ON APPELLANT'S REQUEST FOR LEAVE TO FILE A MOTION FOR  
RECONSIDERATION

Alleging newly discovered evidence, appellant seeks leave to file a motion for reconsideration of our denial of its partial motion for summary judgment and the granting of the government's motion for summary judgment in part in *AECOM Government Services, Inc.*, ASBCA No. 56861, 10-2 BCA ¶ 34,577. The decision is dispositive of appellant's claim that the government breached its implied warranty of the covenant of good faith and fair dealing. The period for seeking reconsideration has passed and appellant's motion for leave to file out of time is denied. However, we have inherent authority to vacate or correct a decision "upon grounds similar to" those available under Rule 60(b) of the Federal Rules of Civil Procedure. See *SUFI Network Services, Inc.*, ASBCA No. 55306, 10-1 BCA ¶ 34,327 at 169,533-34; *Weststar, Inc.*, ASBCA Nos. 52837, 53171, 04-1 BCA ¶ 32,501 at 160,789. Accordingly, we deem this motion to be one for relief from judgment on the basis of newly discovered evidence pursuant to Rule 60(b)(2).

In support of its request, appellant proffers excerpts from the deposition transcript of MAJ Renee Russo, the government's price evaluator and source selection evaluation board chairman. According to appellant, MAJ Russo's testimony establishes that "the Government did in fact know that AECOM was exempt from FICA taxes at the time the parties entered into the Contract" (mot. at 2). In AECOM's view, this proves that the contract contained a bargained-for benefit similar to that in the Assistance Agreements in *Centex Corp. v. United States*, 395 F.3d 1283 (Fed. Cir. 2005).

Relief under Rule 60(b)(2) is an extraordinary remedy that is granted only in exceptional circumstances. *E.g.*, *Jones v. Lincoln Electric Co.*, 188 F.3d 709, 732 (7<sup>th</sup> Cir. 1999). To obtain relief under Rule 60(b)(2), appellant must show that the proffered evidence meets all of the following requirements: (1) the evidence was discovered following the closing of the record on the motion for summary judgment; (2) the moving party must show due diligence in discovering the evidence; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) admission of the evidence will probably produce a different result. *Id.* at 732.

The fact that offshore subsidiaries of United States corporations were not required to pay FICA taxes at the time of contracting is not newly discovered evidence. Newly discovered evidence is evidence that could not have been discovered with the exercise of due diligence prior to the closing of the record. *E.g.*, *General Universal Systems, Inc. v. Lee*, 379 F.3d 131, 158 (5<sup>th</sup> Cir. 2004). Moreover, MAJ Russo's personal awareness that AECOM's offshore subsidiary was exempt from FICA taxes at the time of contract award falls far short of proving that the contract contained a bargained-for benefit similar to that included in the *Centex* contracts. *Centex*, 395 F.3d at 1287-88. Contrary to AECOM's arguments, there is no evidence that the parties negotiated any special benefit relative to FICA taxes and the contract does not contain any such provision. Thus, the evidence offered by appellant is cumulative, immaterial, and not likely to change the outcome of the case.

Appellant's motion is denied.

Dated: 14 January 2011

---

ELIZABETH A. TUNKS  
Administrative Judge  
Armed Services Board  
of Contract Appeals

(Signature continued)

I concur

I concur

---

MARK N. STEMLER  
Administrative Judge  
Acting Chairman  
Armed Services Board  
of Contract Appeals

---

EUNICE W. THOMAS  
Administrative Judge  
Vice Chairman  
Armed Services Board  
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 56861, Appeal of AECOM Government Services, Inc., rendered in conformance with the Board's Charter.

Dated:

---

CATHERINE A. STANTON  
Recorder, Armed Services  
Board of Contract Appeals