

**Board of Contract Appeals**  
General Services Administration  
Washington, D.C. 20405

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MOTION FOR RECONSIDERATION DENIED:  
January 15, 2004

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GSBCA 16127-TD

CORNING CONSTRUCTION CORPORATION,

Appellant,

v.

DEPARTMENT OF THE TREASURY,

Respondent.

Joseph H. Kasimer of Kasimer & Annino, PC, Falls Church, VA, counsel for Appellant.

Marvin Kent Gibbs and Diane Mullaney, Office of Chief Counsel, Bureau of Engraving and Printing, Department of the Treasury, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman) and **HYATT**.<sup>1</sup>

**HYATT**, Board Judge.

Pursuant to Rule 132 of the Board's Rules of Procedure, 48 CFR 6101.32(a) (2002), respondent, the Bureau of Engraving and Printing (BEP), Department of the Treasury, has moved the Board to reconsider its decision granting as to entitlement the claim of appellant, Corning Construction Corporation, for an equitable adjustment for extra work it was required to perform under its contract to replace the roof of the BEP main building in Washington, D.C. Corning Construction Corp. v. Department of the Treasury, GSBCA 16127-TD, 03-2

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<sup>1</sup> Appellant elected to have this case processed in accordance with the accelerated procedure applicable to matters in which \$100,000 or less is in dispute. Accelerated decisions are decided by the panel chair with the concurrence of one other judge. Rule 203(b).

BCA ¶ 32,302. BEP maintains that the Board's decision is erroneous as a matter of law. For the reasons stated, we deny the motion.

### Background

The Board's entitlement decision held that Corning was entitled to additional compensation for extra work necessitated by the unexpected presence of deflections and irregularities on the surface of the roof deck.<sup>2</sup> The existence of irregularities was first noted following early demolition work. Corning's subcontractor, Prospect, submitted a proposal to Corning for an equitable adjustment to cover the increased cost of contract performance resulting from the irregularities initially revealed. Prospect's proposal stated that its pricing was based on the assumption that the level of deflection on the sections of the roof which had not yet undergone demolition would be similar to that on the exposed area of roof. Corning submitted a request for an equitable adjustment to BEP, attaching Prospect's proposal and providing a cover sheet that added its own costs to Prospect's projected costs attributable to the roof deflection issues. Shortly thereafter, Corning and BEP executed a bilateral modification of the contract in the amount requested by Corning. This modification extended the contract completion date and added \$174,242 (the full amount requested by Corning) to the contract price pursuant to an attached statement of work and the contractor's proposal. The modification also provided that the contractor would release the Government from any additional liability under the contract for further equitable adjustment due to the modification. There is no evidence in the record of any discussions between the parties concerning the contractor's proposal and the subsequent modification.

Once the additional surface areas on the concrete deck were exposed, it became clear that the deflections on remaining portions of the roof were substantially more severe than those upon which Prospect's proposal had been based. The Government rejected appellant's request for an additional equitable adjustment, asserting, inter alia, that the original modification constituted an accord and satisfaction barring any further claim for costs attributable to irregularities in the roof deck surface.

In resolving the entitlement issue raised in this appeal, the Board rejected the Government's accord and satisfaction defense, noting that Corning attached and referred to Prospect's proposal in its own request for an equitable adjustment. The modification, which adopted the Corning proposal, did not delete or otherwise address the qualifying language contained in Prospect's initial proposal, which the Board found was part and parcel of Corning's own proposal. Because of this qualifying language, the Board concluded that the essential elements of an accord and satisfaction, namely the requisite meeting of the minds so as to preclude further claims predicated upon the condition of the roof, had not been met. Corning, 03-2 BCA at 160,351-52.

### Discussion

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<sup>2</sup> For a more complete discussion of the underlying facts concerning the irregularities in the surface of the roof, see the Corning decision cited above.

Respondent, in its motion for reconsideration, argues that the Board's decision was incorrect as a matter of law. In this regard, it is well-established that the Board does not grant reconsideration on the basis of arguments already made and reinterpretations of old evidence. Rule 132(a); Tom & Tony's Auto Wrecker Service v. General Services Administration, GSBCA 15698-R, 03-1 BCA ¶ 32,217; accord Program and Construction Management Group, Inc. v. General Services Administration, GSBCA 14149-R, 00-1 BCA ¶ 30,771; Hof Construction, Inc., GSBCA 8354-R, 92-1 BCA ¶ 24,669 (1991); Gilroy-Sims & Associates, GSBCA 8720-R, et al., 88-3 BCA ¶ 21,085. To warrant reconsideration, the moving party must make a satisfactory showing that it is appropriate to revisit the matter. Zinger Construction Co. v. General Services Administration, GSBCA 11039-R, 92-3 BCA ¶ 25,039 (citing Government Technology Services, Inc., GSBCA 10389-P-R, 90-2 BCA ¶ 22,913). Respondent has not made such a showing here. As is explained in more detail below, we fully considered BEP's arguments in arriving at our decision to grant the appeal as to entitlement, and we are no more persuaded by them now than we were initially.

Respondent argues that Prospect's change proposal, with its qualification as to the condition of the deck surface, was simply attached to Corning's proposal and not explicitly incorporated by reference therein so as to put BEP on notice that Corning's proposal was predicated on Prospect's proposal. Thus, BEP maintains, the Prospect proposal was not incorporated by reference into the bilateral contract modification, which incorporated only Corning's proposal by reference.

As with any exercise in contract interpretation, the determination of whether one document has been incorporated into another by reference rests on the facts and circumstances of the particular transaction. Here, Corning, via its cover letter, supplied BEP with a copy of Prospect's detailed proposal for accomplishing the added work, and a summary page showing the full amount requested, which consisted principally of Prospect's itemized cost breakdown and further included Corning's more modest costs for supervisory labor, equipment, overhead, and profit. Appeal File, Exhibit N. "It is not necessary, in order to incorporate by reference the terms of another document, that such purpose be stated *in haec verba* or that any particular language be used." United States Steel Corp., ASBCA 29111, 85-1 BCA ¶ 17,761 (1984). Given the brevity and summary nature of Corning's cover document, and the interrelationship of the two pricing documents, it is fair to conclude that the Prospect proposal, representing the lion's share of the costs to be incurred, was intended to be treated as part and parcel of Corning's proposal. The Board thus concluded that, under these circumstances, the cover document operated to include the Prospect proposal and effectively incorporated it by reference, even though Corning did not use any particular language to that effect in forwarding its request for an equitable adjustment.

Respondent's citation to and reliance on Sucesion J. Serralles, Inc. v. United States, 46 Fed. Cl. 773, 785-86 (2000), does not compel a contrary conclusion. The court in Serralles similarly scrutinized complex facts and circumstances to ascertain whether the terms of a completely separate land lease entered into between the contractor and a local government entity (the Puerto Rico Department of Natural Resources (PRDNR)) had been incorporated by reference into the contract giving rise to the litigation. The supply contract in question, between Serralles and the Army Corps of Engineers, specifically referred to the land lease, made performance of the supply contract contingent on the execution of the land lease, and included a draft of the land lease as an attachment. Serralles attempted to argue

that a provision of the land lease obligated the Army, which was not a party to the lease, to "aesthetically dress" the land from which the clay had been excavated and supplied to the Army for purposes of constructing a dam. The court concluded that the two documents, while related by virtue of a certain commonality, did not constitute an integrated contract, and further, that the terms of the land lease had not been incorporated by reference into the supply contract. The court reasoned:

Nothing in the above referenced provisions of the supply contract between [the Army Corps of Engineers] and Serralles, however, serves to incorporate the specific terms of the land lease between Serralles and PRDNR. Most importantly, there is no language whatsoever in the supply contract which refers to any "aesthetic dressing" requirement for Serralles' land or which purports to incorporate the "aesthetic dressing" provision of the land lease. Making the performance of the supply contract contingent on the prior execution of a land lease and attaching a draft copy of the land lease to the contract solicitation certainly establishes the close interrelationship of the two contracts. But it does not satisfy the legal requirements for incorporating the terms of the land lease into the supply contract.

Id. The facts of Serralles that operate to support the court's conclusion in this regard are highly distinguishable from the subject dispute. Corning's proposal attached and referred to Prospect's costs and conditions for performing work expressly required under the prime contract. These are not issues that are tangential to the underlying purpose of the primary contract to be performed.

In any event, even if we were to adopt BEP's narrow view that, absent more specific language, the Prospect proposal was not incorporated by reference into the Corning proposal that was expressly included in the modification, BEP would not necessarily prevail. We would still deem it appropriate to refer to this document in ascertaining the intent of the parties in executing the modification. This, in turn, would be a factor in determining whether the requisite meeting of the minds had occurred such that the release language of the modification operated to bar this claim under the principle of accord and satisfaction. Accordingly, the attachment of Prospect's proposal to Corning's proposal still supports the conclusion that this element of the accord and satisfaction defense was not established by the Government.

Decision

The motion for reconsideration is **DENIED**.

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CATHERINE B. HYATT  
Board Judge

I concur:

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STEPHEN M. DANIELS  
Board Judge