

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA

v.

CRIMINAL NO. 3:08CR014

ROBERT L. MOULTRIE, et al.

**GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANTS'  
MOTION TO EXCLUDE OTHER CONTRACTS**

Comes now the United States of America in response to defendants motion to exclude evidence of other contracts. In opposition thereto, the United States would show unto the Court the following.

Defendants, by and through counsel, have moved the Court to exclude from the government's case evidence that The Facility Group has entered into other contracts with other individuals and entities pursuant to Rule 404(b), Federal Rules of Evidence. They contend that such evidence has nominal probative value, which would be substantially outweighed by the prejudice it would cause. The United States submits that the defendants' motion is without merit and should be denied.

Defendants interpretation that this evidence constitutes "other act" proof under 404(b) is mistaken. The government intends to use the other contracts as direct proof of fraudulent intent that is "inextricably intertwined" with the proof in this case. "Other act" evidence is "intrinsic" when the evidence of the other act and the evidence of the crime charged are "inextricably intertwined" to the crimes charged. United States v. Williams, 900 F.2d 823 (5th Cir. 1990); United States v. Torres, 685 F.2d 921, 924 (5th Cir. 1982).

In the instant matter, the defendants claim to have used a multiplier, that is multiplying salaries by two to recoup indirect costs associated with their labor billings. As will be more fully explained at the upcoming Daubert hearings, items included in their use of the multiplier, such as employee inefficiency or yet to be paid bonuses, are not costs, direct or indirect, and have resulted in overbillings in this case. The contract in the instant matter does not contain a provision to use such a multiplier. While the use of multipliers in construction contracts may be an acceptable practice, it is not where it has not been negotiated and is not in the contract. The Facility Group has entered into contracts with other individuals and entities that contain negotiated provisions for the use of a multiplier. Thus, the evidence is direct proof of a regular business practice that when a multiplier has been negotiated and agreed to, it is in the contract.

Thus, the evidence should be evaluated under a different analysis than that under Rule 404(b). Rule 401, Federal Rules of Evidence, defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” There are two requirements in the rule: (1) the evidence must tend to prove the matter sought to be proved, and (2) the matter sought to be proved must be one that is on consequence to the determination of the action. United States v. Hall, 653 F.2d 1002, 1005 (5<sup>th</sup> Cir. 1981). Rule 403, Federal Rules of Evidence, provides that “relevant” evidence may be inadmissible “if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” The trial judge has broad discretion in ruling on questions of “relevancy” and in balancing the probative value of relevant evidence against any undue prejudice. United States v. Guerrero, 650 F.2d 728, 734 (5<sup>th</sup> Cir. 1981).

The evidence is both direct and circumstantial evidence of the commission of the alleged crimes in Counts Two through Sixteen of the Superseding Indictment, that is, a scheme to defraud. The evidence is relevant in that it tends to prove the matter sought to be proved and is of consequence to the determination of the action, that is, their use of the multiplier in this matter was fraudulent. In addition, while all relevant is prejudicial, that is, it is evidence of the commission of crimes, its probative value substantially outweighs the danger of undue prejudice, confusion of the issues or misleading the jury.

Assuming *arguendo* that the evidence is extrinsic, it should be admitted under Rule 404(b), Federal Rules of Evidence, which provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Whether to admit evidence of “other acts” is committed to the sound discretion of the district court and the district courts ruling will be reversed rarely and only after a clear abuse of discretion. United States v. Maggitt, 784 F.2d 590, 597 (5th Cir. 1986); United States v. Shaw, 701 F.2d 361, 367 (5th Cir. 1983), cert. denied, 465 U.S. 1067 (5th Cir. 1984), 79 L. Ed. 2d 744, 104 S. Ct. 1419 (1984). In determining the admissibility of bad acts evidence, under Rule 404(b), a trial judge is accorded “broad discretion.” United States v. Acosta-Cazares, 878 F.2d 945, (6th Cir.), cert. denied, 493 U.S. 899 (1989).

In United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) (en banc), cert. denied, 440 U.S. 920, 99 S. Ct. 1244, 59 L.Ed.2d 472 (1979), the Fifth Circuit set forth a two-pronged test for determining the admissibility of extrinsic offenses:

First, it must be determined that the extrinsic offense evidence is relevant to an issue other than the defendant’s character.

Second, the evidence must possess probative value that it is not substantially outweighed by its undue prejudice and must meet the other requirements of Rule 403.

The Supreme Court has firmly rejected any test stricter than that set out in Beechum or Rule 404(b), and its admission is favored:

[I]f 404(b) evidence is offered for such a proper purpose, the evidence is subject only to general strictures limiting admissibility such as Rules 402 and 403.” Huddleston v. United States, 485 U.S. 681, (1988) ...

Rule 404(b) is a rule of inclusion .... which admits evidence of other acts relevant to a trial issue except where such evidence tends to prove only criminal disposition ... The Rule is exclusionary only as to evidence admitted to establish bad character as such; it very broadly recognizes admissibility of prior crimes for other purposes.

United States v. Shaw, 701 F.2d 367, 386 (5th Cir. 1983) cert. denied, 465 U.S.1067 (1984).

Evidence of other contracts with a negotiated multiplier is relevant to demonstrate intent and lack of mistake in the instant matter. It will not prolong the trial. And, as set forth above, its probative value substantially outweighs any, if at all, prejudicial effect.

For the above reasons, defendants’ motion to exclude evidence should be denied.

Respectfully submitted,

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By: */s/ William C. Lamar*  
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CERTIFICATE OF SERVICE

I, William C. Lamar, certify that I electronically filed the foregoing GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE OTHER CONTRACTS with the Clerk of the Court using the ECF system which sent notification of such filing to the following:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non-ECF participants: None.

This the 4<sup>th</sup> day of August, 2008.

*/s/ William C. Lamar*  
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