

NOTE: This order is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

TOTOLO/KING JOINT VENTURE,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

2010-5037

Appeal from the United States Court of Federal
Claims in Case No. 09-CV-104, Judge Christine O.C.
Miller.

ON MOTION

Before LOURIE, *Circuit Judge.*

ORDER

Totolo/King Joint Venture ("Totolo/King") moves to abate its appeal pending a ruling upon a motion Totolo/King has indicated that it will file in the Court of Federal Claims. The government moves to dismiss the appeal as moot on the basis that Totolo/King is not an interested party.

Totolo/King's motion for abatement requests a remand to the Court of Federal Claims in order to move that court for relief from its judgment based on an alleged discovery that the government put in the record a falsified document with the intent to mislead the court. Because Totolo/King has not offered a reasonable basis for its failure to challenge the government's evidence before the Court of Federal Claims, in advance of its appeal, we deny its motion. Totolo/King may make such a motion at the Court of Federal Claims, *see* R. Ct. Fed. Cl. 60(b) (allowing Court of Federal Claims to reopen proceedings for "excusable neglect" or "newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under RCFC 59(b)"), but we will not open the record for such evidence in this appeal, *see Moore U.S.A. v. Std. Register Co.*, 229 F.3d 1091, 1116 (Fed. Cir. 2000) ("We are especially reluctant to expand the record on appeal where, as here, the party seeking expansion of the record offers no reasonable basis for its failure to produce the proffered evidence at an earlier time.").

The government's motion to dismiss asserts that, on April 16, 2010, William Totolo, owner of Totolo/King died. According to the government, because Mr. Totolo, the veteran owner of Totolo/King, is deceased, Totolo/King is not an interested party, as it is no longer a Service Disabled Veteran Owned Small Business. Thus, the government argues, Totolo/King does not have standing. Rather than rule on the substantive issues raised by the government, we deem the better course is for the parties to address the issues raised by the government's motion in their briefs, if appropriate.

Accordingly,

IT IS ORDERED THAT:

- (1) Totolo/King's motion for abatement is denied.

(2) The government's motion to dismiss is denied without prejudice to the parties raising the issues in the briefs.

FOR THE COURT

SEP 09 2010

Date

/s/ Jan Horbaly

Jan Horbaly
Clerk

cc: James Edward Krause, Esq.
John S. Groat, Esq.

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

SEP 09 2010

JAN HORBALY
CLERK