UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: February 4, 2010

CBCA 1544

MEDTEK, INC.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Michael T. Farrell of Farrell Law Firm, Media, PA, counsel for Appellant.

Kate Gorney, Office of the Regional Counsel, Department of Veterans Affairs, Philadelphia, PA, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **STEEL**, and **SHERIDAN**.

DANIELS, Board Judge.

Medtek, Inc. (Medtek) claims that in fulfilling a construction contract with the Department of Veterans Affairs (VA), it "incurred $410,000 in additional expenses to correct a design defect caused by [VA's] engineer, loss of revenue and the necessary legal expenses that [Medtek] had to incur to defend its position." Complaint ¶ 4. VA moves for summary relief, contending that none of these costs are allowable. We grant the motion and deny the appeal.

Background

On October 10, 2002, VA awarded to Medtek a contract to renovate the x-ray suite on the third floor of the Philadelphia, Pennsylvania, Veterans Affairs Medical Center. Respondent's Statement of Undisputed Facts (RUSF) ¶ 1.

As part of this contract, Medtek was to furnish and install an uninterruptible power supply (UPS). RSUF ¶ 2. The purpose of the UPS is to provide instantaneous power to essential medical and diagnostic equipment whenever normal power is lost. *Id.* ¶ 3. Medtek installed the UPS. *Id.* ¶ 4.

Under the terms of the contract and direction from the contracting officer, Medtek was supposed to complete all work by June 23, 2003. Appeal File, Exhibit 2. By August 2003, however, the contracting officer was expressing concern that the work had not been completed. She asked Medtek's surety, Colonial Surety Company (Colonial), to provide on-site supervision. Appeal File, Exhibit 12. Among the items she noted was "[c]omplete all remaining punchlist items on the UPS unit to provide power for the current equipment installation in the Angio Suite by an outside contractor." *Id.*, Exhibit 14.

During the last four months of 2003, the contracting officer threatened to terminate the contract for default and Medtek quarreled with Colonial; a subcontractor; and the supplier of the UPS, MGE UPS Systems, Inc. (MGE). In the disputes with the subcontractor and MGE, Medtek was represented by the law firm of Nitti & Nitti. Appeal File, Exhibits 16-20.

In October 2003, during diagnostic testing of the UPS unit, a VA technician noted that what the agency calls an "artifact" -- a series of wavy lines passing through images -- appeared on the monitor to which the unit was attached. RSUF ¶ 4, 5.

In November 2004, the contracting officer informed Medtek that "[t]he one outstanding item that remains on the punch-list is the satisfactory installation and start up of the . . . UPS." The contracting officer directed Medtek to complete this work by December 31, 2004, and asked Colonial to help accomplish this objective. Appeal File, Exhibits 21, 22. By January 2005, however, the work was still not complete, and Nitti & Nitti, on behalf of Medtek, was still discussing with MGE how to resolve the matter. *Id.*, Exhibits 24-26. MGE suggested adding an isolation transformer near a scanner. Notice of Appeal, Attachment. In April 2005, another law firm, Cohen Seglias Pallas Greenhall & Furman PC (Cohen Seglias), wrote to VA on behalf of Medtek, noting that the UPS issue was still unresolved. Appeal File, Exhibit 29.

At some point -- a May 6, 2005, letter from the contracting officer to Cohen Seglias mentions the thought -- Medtek passed along MGE's suggestion that an isolation transformer be installed as a solution to this problem. RSUF ¶ 7; Appeal File, Exhibit 30. On May 10, Medtek agreed to perform the installation if it was paid the costs of doing so. Appeal File, Exhibit 31. The contracting officer agreed to this proposal. *Id.*, Exhibit 32.

On September 28, 2005, the parties executed contract modification SA (supplemental agreement) #3, which provided as follows:

> The Contractor shall furnish all labor, materials, equipment and supervision required to make the following changes:
>
> > a. Install the new isolation Transformer in accordance with the sketches E-1 and E-2 which are included in this Supplemental Agreement.
>
> This shall be done for the consideration of $19,500.00, [sic] after careful review Government considers this price to be fair and reasonable. This change represents full and complete compensation for all costs direct and indirect, associated with the work and time agreed to herein, including but not limited to, all costs incurred for extended overhead, disruption or suspension of work, labor inefficiencies, and impact costs.

RSUF ¶ 9; Appeal File, Exhibit 3.

The isolation transformer was installed at some time after October 25, 2005. *See* Appeal File, Exhibit 34. Once the isolation transformer was installed, the artifact disappeared. RSUF ¶ 10.

Disputes among Medtek, Colonial, MGE, and VA regarding payment continued between October 2005 and June 2007. Appeal File, Exhibits 34-38. In October 2007, the contracting officer told Medtek that "everything regarding the . . . contract has been completed to the satisfaction [of] this Medical Center. Therefore, you may submit your final payment on this contract." *Id.*, Exhibit 42. In response, Medtek asked for "$350,000.00 for all delays, legal fees and losses incurred by Medtek, Inc. as result of the [VA's] failure to include the isolation transformer as part of the specifications." *Id.*, Exhibit 43. The contracting officer declined to comply with the request. *Id.*, Exhibit 44.

On April 21, 2008, final payment under the contract was made to Medtek. RSUF ¶ 11.

By letter dated October 16, 2008, Medtek claimed entitlement to $410,000 in "additional compensation." Specifically, Medtek listed the following elements of its claim:

--	Colonial Surety legal fee	$117,917.53
--	Cohen Seglias legal fee	97,620.55
--	Nitti & Nitti legal fee	2,610.00
--	Medtek, Inc. loss	135,265.92
--	UPS transformer	20,586.00
--	CMS construction supervision fee	24,000.00
--	Jerry Smith Electrician	12,000.00

Notice of Appeal. The contracting officer denied this claim on January 8, 2009. Appeal File, Exhibit 45. Medtek has appealed her decision.

During discovery in this case, VA asked Medtek for documentation and data which supported and explained the various elements of the claim. Medtek provided rudimentary information in response to some of the discovery requests and did not respond to other requests. In response to motions to compel and Board orders, Medtek promised to supplement its answers, but never did so. Ultimately, the Board imposed on Medtek the sanction that it could not produce evidence which would be responsive to the discovery requests it had not answered, and could not produce evidence in significantly greater detail than the answers it provided to the requests to which it had provided rudimentary information. *Medtek, Inc. v. Department of Veterans Affairs*, CBCA 1544, 09-2 BCA ¶ 34,285, at 169,368.

Discussion

According to VA's motion for summary relief, Medtek is entitled to none of the costs it claims. Resolving a dispute on a such a motion is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the non-movant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Nevertheless, to defeat a motion for summary relief, the non-moving party must come forward with specific facts showing the existence of a genuine issue for trial. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). With these principles in mind, we evaluate the elements of Medtek's claim.

Construction costs

Three elements of the claim pertain to construction itself: $20,586 for the isolation transformer, $24,000 for a construction supervision fee, and $12,000 for the cost of the electrician who presumably installed the transformer. These items can be disposed of quickly. Medtek has offered no proof that it actually paid $20,586 or any other amount for the transformer. When asked to admit that it was not billed for the transformer and that neither it nor its surety has tendered payment for that piece of equipment, Medtek did not respond. As a consequence of the sanction imposed by the Board, we must conclude, for the purpose of this case, that Medtek did not pay for the transformer. Medtek may have paid the construction supervisor and the electrician, but it cannot recover the cost of their services here. In contract modification SA #3, on September 28, 2005, the contractor accepted $19,500 as compensation for all costs associated with installation of the transformer. That modification foreclosed further recovery for such costs. Thus, all three of the construction elements of the claim must be denied.

Contractor's loss

Another element of the claim is $135,265.92 for "Medtek, Inc. loss." The nature of this alleged loss is not entirely clear. In the claim itself, the contractor described this element as "loss and compensation for the delay due to the UPS System Transformer." No more specific mention of delay damages has ever been mentioned, however. In the complaint filed in this case, the contractor explained more fully that "it has incurred significant damages because Respondent failed to include an isolation transforme[r] in its plans and specifications therefore failed to close bond #CSC-208407 in a timely manner (July, 2004). This action in part of the Respondent resulted in Appellant not being able to secure performance bonds for other jobs, thereby losing revenue." Complaint ¶ 13. Medtek now contends, in its response to VA's motion for summary relief, that "VA has breached the contract by wrongfully waiting years to declare it complete when the agency knew that Medtek had installed the UPS in 2003." Appellant's Brief in Opposition to Motion at 4 (unnumbered).

The law regarding recovery of profits lost due to a breach of contract was well explained in *Western Aviation Maintenance, Inc. v. General Services Administration*, GSBCA 14165, 00-2 BCA ¶ 31,123:

> Breach damages are recoverable only if, at the time the contract was made, the breaching party had reason to foresee that such damages were the probable result of a breach. Damages are foreseeable either if they are the natural and ordinary consequence of a breach, or if they are due to special circumstances of which the breaching party was aware at the time of contracting. Lost profits

> that the non-breaching party claims it would have realized from "other independent and collateral" contracts, if not for the Government's breach, are not recoverable because such profits are not directly caused by the breach and are not the natural and ordinary consequence of the breach.
>
> In addition to being recoverable only if they are the foreseeable result of a breach, breach damages are recoverable only in the amount that can be established with reasonable certainty. Reasonable certainty does not mean mathematical certainty. However, in order for the Board to make an award of damages, the appellant must present sufficient evidence to permit us to make a "fair and reasonable approximation" of the amount of damages.

Id. at 153,740 (citations omitted); *see also Charles Engineering Co. v. Department of Veterans Affairs*, CBCA 582, 07-2 BCA ¶ 33,698, at 166,824-25; *Hughes-Groesch Construction Corp.*, VABCA 5448, 00-1 BCA ¶ 30,912, at 152,522-23 (applying rule in case where losses resulted from problems with bonding capacity).

Under these tests, it is plain that even if Medtek could prove that VA breached the contract, it could not recover the money it claims. We have no information as to what that money represents. VA asked Medtek in discovery, "To the extent that you are claiming any damages based on not being able to take on new or additional work until this project was completed, please indicate what damages you are claiming." The contractor replied only, "Medtek, Inc. loss in the value of $135,265.92." As a consequence of the sanction imposed by the Board, Medtek may not present any evidence which is in significantly greater detail than this unhelpful answer; we cannot learn what the number represents. Thus, we cannot find that the damages were foreseeable at the time of contracting. And even if we could make that finding, we have no basis for determining the amount with any reasonable certainty. This element of the claim is denied.

Attorney fees

The remaining three elements of the claim, totaling $218,148.08, are all attorney fees. Precisely what the various lawyers did to earn these fees is uncertain. In the documents attached to the claim, the portion attributable to Colonial's lawyers consists solely of a spreadsheet listing numbers; the portion attributable to Cohen Seglias consists of a spreadsheet showing "Bill" as the explanation of each charge; and the portion attributable to Nitti & Nitti shows time spent on matters involving Medtek and VA, Colonial, MGE, and various other entities, but does not indicate what those matters were. VA asked Medtek, in discovery, "For any attorney fees being claimed, please indicate for what representational matters these fees are being claimed." Medtek responded simply, "Contract # V642C-509,"

which is the contract in question. Due to our sanction for failure to provide promised, further detail as to these fees, Medtek could not present any more detailed evidence were the case to proceed.

We do have a bit of information about Medtek's use of attorneys: The documentary record shows that lawyers represented the contractor in disputes with Colonial, MGE, VA, and others. Medtek's reponse to VA's motion for summary relief says that the contractor paid for its own lawyer and Colonial's in defending itself against a lawsuit brought by Colonial. None of this information, however -- and certainly not the discovery response -- is sufficient to show that any of the attorney fees were incurred to assist Medtek in performing the contract. Consequently, none of these fees may be recovered through this appeal.

Decision

In response to VA's motion for summary relief, Medtek has failed to demonstrate that it could possibly succeed in this case as to any of the elements of its claim. Consequently, the appeal is **DENIED**.

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STEPHEN M. DANIELS
Board Judge

We concur:

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CANDIDA S. STEEL
Board Judge

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PATRICIA J. SHERIDAN
Board Judge