UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR LACK OF JURISDICTION DENIED;
DISMISSED IN PART FOR FAILURE TO STATE A CLAIM: October 16, 2007

CBCA 582

CHARLES ENGINEERING CO.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Paul L. Charles, President of Charles Engineering Co., Fairfax, VA, appearing for Appellant.

Tracy Downing, Office of the General Counsel, Department of Veterans Affairs, Augusta, GA; and Charlma J. Quarles and Phillipa L. Anderson, Office of the General Counsel, Department of Veterans Affairs, Washington, DC, counsel for Respondent.

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

SHERIDAN, Board Judge.

This appeal involves two claims by the appellant, Charles Engineering Company (CEC), seeking $361,144.93 from the respondent, the Department of Veterans Affairs (VA). The claims arise out of contract V786C-472, awarded to CEC by the VA National Cemetery Administration (NCA) on September 25, 2002. In one claim, CEC seeks $106,383.93 for costs it incurred during litigation and arbitration with its subcontractor. CEC also seeks

$254,761 for lost income as a result of the VA's alleged verbal "constructive stop work order" and breach of the contract.

The respondent has submitted a motion to dismiss the appeal, arguing that the Board lacks jurisdiction to entertain the appellant's claim for costs associated with the litigation and arbitration with its subcontractor, and that the claim in which CEC seeks lost income should be dismissed because the appellant has failed to state a claim upon which relief can be granted. CEC opposes the respondent's motion.

We deny the respondent's motion to dismiss the appellant's claim of $106,383.93 for costs incurred during its litigation and arbitration with its subcontractor. We grant the respondent's motion to dismiss the appellant's claim of $254,761 for lost income.

In considering the respondent's motion to dismiss for lack of jurisdiction, we may look beyond the pleadings to decide the facts, even in dispute, which are necessary for a determination of the jurisdictional merits. *Detroit Housing Corp. v. United States*, 55 Fed. Cl. 410, 412 (2003) (citing *Pride v. United States*, 40 Fed. Cl. 730, 732 (1998)); *see also Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1584 (Fed. Cir. 1993) (when jurisdiction is at issue, the tribunal is not limited to the pleadings). We have looked to the documents submitted with the motions to evaluate the jurisdictional issues presented by this appeal.

Background

On September 25, 2002, CEC was awarded contract V786C-472, in the amount of $2,524,625, to provide "Design/Build Gravesite Development" at the Culpeper National Cemetery, Culpeper, Virginia. As part of the contract work, CEC was required to build a new public information building, maintenance building, and communal shelter on the site. Mr. Robert Lee Capers, Jr., was the contracting officer. Mr. Mike Mersky was the project manager and designated the contracting officer's technical representative (COTR).

During construction, issues arose regarding possible defects in the roofs being laid on all three buildings, but particularly the maintenance building. A VA inspector noted that the VA would not accept the roof with undulation (waves). CEC wrote to MBI, its roofing subcontractor, stating: "[f]urther research has indicated that [the roof] is neither 22 gauge galvanized steel nor 0.040" aluminum. We know that roofing is a critical path [item] and this is brought to your attention in order that MBI can start fixing it before 2/25/04."

The VA resident engineer's logs show that CEC was informed that all roof work was "to cease until all problems are resolved and all damaged roof panels have been replaced."

CEC took the position with MBI that it had received "a formal order from the COTR to stop working on the roof and change all panels in need of replacement due to poor workmanship and/or physical damage." Mr. Dana Ivey, who had replaced Mr. Capers as the contracting officer, wrote CEC on April 6, 2004:

> The project manager, Mike Mersky[,] and the VA inspector, Hunter Kidd, have documented an ongoing pattern of deficient subcontractor workmanship and materials at the job site. For example, there have been deviations from approved submittals concerning the installation of roof flashing and the thickness of the standing seam metal roofing panels installed on the new buildings.
>
> The VA is concerned and request[s] your written proposal [for] solving these issues and eliminating their occurrence in the future. Your response is due in my office within 7 days after receipt of this notice.

On April 19, 2004, CEC wrote Mr. Ivey, assuring him that all deficiencies in the roof would be corrected, but that "[t]his work will be limited to temporary correction until you notify us to proceed with the roof. We are awaiting the report you commissioned and will provide you with a complete plan of action regarding the balance of the roofing issues once we receive it." MBI took the position with CEC that the roof was compliant and that it would not act on an "owner directive, or other . . . unless it is supported by a report from a professional engineer articulating any alleged deficiencies."

Meanwhile, the VA retained an engineering consultant, MACTEC Engineering and Consulting, Inc. (MACTEC), to inspect the roofs. MACTEC provided its report to Mr. Mersky on April 26, 2004, stating: "In our opinion, the material currently in place, while not meeting the project specified thicknesses, does fall within acceptable industry standards." As to concerns about the panels' "oil-canning" or waviness, MACTEC noted that some amount of waviness was observed on all three buildings, but was not excessive given the material and seam spacing used. Problems were found with the gutter attachment not being installed in conformance with the manufacturer's standard gutter installation detail, and MACTEC recommended that the gutters be removed and reinstalled with a means of attachment that precluded the use of exposed fasteners. MACTEC also made note of various other items that needed to be fixed, including screws penetrating through gutter sides and the step flashing.

On April 29, 2004, without turning the MACTEC report over to CEC, the VA offered not to pursue the roof thickness and oil-canning issues if CEC repaired and finished certain items associated with the roof installation. A no-cost supplemental agreement was entered

into between the VA and CEC on June 8, 2004, granting CEC a forty-five calendar-day time extension and changing the contract completion date to July 29, 2004. The supplemental agreement also provided that "[t]he consideration 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, supervision, disruption or suspension of work, labor inefficiencies, and this change's impact on unchanged work."

A final inspection was conducted on August 19, 2004, and the contract was found to be substantially complete. The punch list was completed on November 18, 2004. Mr. Ivey wrote CEC on January 19, 2005, that the VA considered the project to be "accepted and completed" and "[a]gain, we are **requesting** that you submit an invoice for all remaining funds (approximately $153,630.00) and a **signed** copy of the Release of Claims, for processing. The Government has no reason to withhold these funds." Mr. Ivey again wrote CEC on March 10, 2005, asking it to submit an invoice for all remaining funds.

Around May 28, 2005, CEC brought an action against MBI in the Virginia courts seeking $2,005,471.53 in disputed claims. MBI filed a counter-claim against CEC seeking $362,625 in disputed claims. Among other things, MBI's counter-claim sought damages for delayed performance ($105,589), disruptions and inefficiencies ($13,930), and the roofing stop work order ($10,642). MBI also sought the unpaid subcontract balance of $172,607, the sum of which was not in dispute.

CEC and MBI engaged in binding arbitration to resolve the Virginia action around June 8, 2006. As a result of the arbitration, CEC was found liable to MBI for $29,580.10 in disputed damages and $172,607 for the unpaid subcontract balance. MBI was found liable to CEC for $43,877.08. The arbiters denied MBI's claims for delayed performance, disruptions and inefficiencies, and the roofing stop work order.

On June 27, 2006, the appellant submitted a claim to Mr. Fred Neun, the VA NCA's project manager assigned to administer this contract. Referencing a "breach of contract", CEC sought $12,667 for additional costs relating to increased slab capacity; $5041 for extra work associated with the heating, ventilation, and air-conditioning (HVAC) system; $163,127 that CEC expended to defend against the Virginia action with MBI; $57,353.49 in legal fees and expenses in connection with the MBI litigation; $22,063.28 for an expert witness to defend against the delay claim asserted by MBI; $11,250 in administrative costs paid to the American Arbitration Association (AAA) associated with the MBI litigation; $15,717.22 for AAA arbitrator fees; and loss of income in the amount of $254,761 allegedly caused by the VA's stopping the roof work.

CEC invoiced the VA for the final payment on July 12, 2006, enclosing a release of claims dated June 27, 2006, that excepted the claims that CEC submitted on June 27, 2006. The contracting officer issued a final decision on October 12, 2006, granting equitable adjustments for the work associated with the increased slab capacity and the HVAC. Mr. Ivey denied the $106,383.93 claim for legal and arbitral fees associated with the MBI litigation, asserting that the VA did not issue a stop work order, delay, or disrupt CEC or MBI. In denying CEC's loss of income claim, Mr. Ivey noted that as far as the VA was concerned, it was CEC's own decision to delay its acceptance of the final payment.

CEC timely appealed the final decision to the VA Board of Contract Appeals, where the appeal was docketed as VABCA 7627. The VA Board was, pursuant to statute, consolidated into the Civilian Board of Contract Appeals (CBCA or Board) on January 6, 2007. Pub. L. No. 109-163, § 847, 119 Stat. 3136 (2006). VABCA 7627 was redocketed as CBCA 582. Via CBCA 582, CEC seeks $361,144.93 in damages.

Discussion

This case arises out of the appellant's attempt to recover certain costs that it says it incurred as a result of a verbal "constructive stop work order" issued by the VA in contract V786C-472 at the Culpeper National Cemetery. The stop work order, CEC claims, prevented it and its subcontractors from completing the roof work and "incited its roofing subcontractor, MBI, to file a delay suit against CEC . . . for about $600,000." As a result of this suit, CEC claims it has incurred "a total loss of at least $361,144.93 ($106,383.93 + $254,761.00)."

The respondent's motion asserts that the Board lacks jurisdiction to review the portion of the appellant's claim seeking costs associated with CEC's litigation and arbitration with its subcontractor. In asserting its argument for lack of jurisdiction, the respondent posits:

> The arbitration costs claimed by the appellant are the direct result of a contract between his company and one of his subcontractors on the project. However, VA was not a party to that contract and cannot be held liable for those costs. It is well settled that "[a] plaintiff must be in privity with the United States to have standing to sue the sovereign on a contract claim." *S. Cal. Fed. S&L Assn. v. United States*, 422 F.3d 1319 (Fed. Cir. 2005) *See also Anderson v. United States*, 344 F.3d 1343, 1351 (Fed. Cir. 2003). Because there is no privity of contract between appellant and VA in relation to the costs being sought, the CBCA lacks jurisdiction to hear this part of the appellant's complaint.

The appellant contests the motion and avers that the litigation with its subcontractor arose out of the VA's stopping the roof work, and that CEC was essentially "defending the VA" in its litigation with MBI.

The respondent's application of the above-cited case law and legal principle to the facts of this case is incorrect. Here, the damages CEC claims are sought under its contract with the VA. So too, CEC, the party bringing the action, is in privity with the VA in contract V786C-472. While it appears there may be several other reasons for a summary disposition of this portion of the claim, the respondent's relief does not lie in arguing the Board's lack of jurisdiction. The respondent's motion to dismiss the appellant's claim of $106,383.93 for costs it alleges it incurred as a result of the Virginia action brought by its subcontractor is denied.

By its claim for $254,761, CEC seeks lost income, averring that "the VA's irresponsibility . . . caused CEC to lose money at the end of 2004, 2005, and 2006." In its reply, CEC clarifies the nature of its claim to be comparable with claims for lost profits:

> Being a small engineering business, during the period preceding the arbitration outcome, because of the suit, appellant was not able to compete for like government or civilian contracts. As a result, appellant was not able to take advantage of its last 2 years, the most critical, in the Small Business Administration (SBA) 8(a) program.[1]

The respondent moves the Board to dismiss the appellant's claim for lost income, arguing that the appellant has failed to state a claim upon which relief can be granted. A motion to dismiss for failure to state a claim upon which relief can be granted is appropriate when the facts asserted by the claimant do not entitle it to a legal remedy. *Boyle v. United States*, 200 F.3d 1369 (Fed. Cir. 2000). Controlling precedent at the Court of Appeals for the Federal Circuit, noted recently that "[i]n reviewing a dismissal for failure to state a claim, we must assume all well-pled factual allegations are true and indulge in all reasonable inferences in favor of the nonmovant." *Anaheim Gardens v. United States*, 444 F.3d 1309, 1314-15 (Fed. Cir. 2006) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed.

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[1] CEC was designated as a subcontractor in the program authorized by section 8(a) of the Small Business Act. 15 U.S.C. § 637(a) (1994). That program offers assistance to small, disadvantaged, minority businesses. Regulations promulgated by the SBA give it the authority to enter into contracts with Government agencies and negotiate subcontracts for performance of those contracts with 8(a) subcontractors. *See* 13 CFR pt. 124 and 48 CFR pt. 19 (1995).

Cir. 1991)). Dismissal for failure to state a claim should not be granted unless it appears beyond doubt that the appellant cannot prove any set of facts in support of its claim that would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Icenogle Construction Management, Inc.*, VABCA 7534, 06-2 BCA ¶ 33,325 at 165,271; *South Carolina Public Service Authority*, ASBCA 53701, 04-2 BCA ¶ 32,651 at 161,607; *Thai Hai*, ASBCA 53375, 02-2 BCA ¶ 31,971 at 157,920, *reconsideration denied*, 03-1 BCA ¶ 32,130, *aff'd*, 82 F.App'x 226 (Fed. Cir. 2003).

As indicated *supra*, the appellant asserts that the VA unreasonably stopped the roof work. The appellant also claims that the VA refused to provide the MACTEC report in a timely manner and by failing to do so breached the contract. The appellant concludes that it is entitled to an equitable adjustment for additional services it provided as a result of roof work ultimately found to be acceptable. However, the appellant has not claimed costs for additional services. Instead, CEC seeks $254,761 for the income it claims it would have received during 2005 and 2006 from other contracts but for the VA's breach.

In asserting its motion the respondent argues:

> [A]lthough appellant has presented information to prove probable future loss of income . . . such information does not substantiate a claim because it is too remote, consequential, and speculative. Consequently, losses of income, as a matter of law, "are not recoverable in any event." *William Green Construction Co. v. United States*, 477 F.2d 930, 934, 936, 201 Ct. Cl. 616 (1973); *Ramsey v. United States*, 101 F. Supp. 353, 357, 121 Ct. Cl. 426 (1951); *CCM Corp. v. United States*, 15 Ct. Cl. 670, 671-72 (1988). Further . . . one element of loss of income, "[a]nticipated but unearned profit[,] is never recoverable." *Dairy Sales Corp. v. United States*, 219 Ct. Cl. 431, 593 F.2d 1002, 1005-06 (Ct. Cl. 1979). Therefore, because loss of income is too arbitrary . . . a claim to substantiate, the appellant has failed to state a claim upon which relief can be granted.

Longstanding case law of the Federal Circuit and its predecessor court, the Court of Claims, has held that for a contractor to recover lost profits those losses must flow from the contract the contractor has with the Government, and not from prospective, independent, or collateral undertakings. For this proposition, the courts have generally followed case law established by the 1897 Court of Claims decision in *Myerle v. United States,* which held that:

> If the profits are such as would have accrued and grown out of the contract itself, as the direct and immediate results of its fulfillment, then they would form a just and proper item of damages, to be recovered against the delinquent

> party upon a breach of the agreement. These are part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into. But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit.

33 Ct. Cl. 1, 26-27 (1897).

The analysis set forth in *Ramsey v. United States*, 101 F.Supp. 353 (Ct. Cl. 1951), provides a test to apply in determining whether certain damages may be recovered. The contractor in *Ramsey* suffered a shortage of capital due to the Government's delays in payment. It sought interest on the money it was forced to borrow as a result of the Government's breach. *Id*. at 357-58. In analyzing the case prior to granting the Government's motion for judgment on the pleadings, the court wrote:

> [T]here is a distinction by which all questions of this sort can be easily tested. If the profits are such as would have accrued and grown out of the contract itself, as the direct and immediate results of its fulfillment, then they would form a just and proper item of damages, to be recovered against the delinquent party upon a breach of the agreement. These are part and parcel of the contract itself, and must have been in the contemplation of the parties when the agreement was entered into. But if they are such as would have been realized by the party from other independent and collateral undertakings, although entered into in consequence and on the faith of the principal contract, then they are too uncertain and too remote to be taken into consideration as a part of the damages occasioned by the breach of the contract in suit.

Id. (citing *Myerle*, 33 Ct. Cl. at 26-27).

Subsequent cases, primarily framed as seeking lost profits but also formulated as demanding lost income and lost business opportunity, make a distinction between lost profits damages sought from the subject breached contract and lost profits sought from other separate, independent, prospective, or anticipated contracts. Damages for profits lost on transactions not directly related to the contract that was breached have routinely been deemed by the Court of Claims and the Federal Circuit to be, as a matter of law, too uncertain, remote, and consequential to be considered as a part of the damages occasioned by the breach of a contract. *Wells Fargo Bank v. United States*, 88 F.3d 1012, 1022-23 (Fed. Cir. 1996) (plaintiff may not recover anticipated profits of its entire business enterprise); *Olin Jones*

Sand Co. v. United States, 225 Ct. Cl. 741 (1980) (recovery denied for general loss of business, loss of the entire company's net worth, and lost bonding capacity as too remote and consequential); *Northern Helex Co. v. United States*, 524 F.2d 707 (1975) (costs for the operation of plant denied because such costs are too remote, speculative, and consequential); *William Green Construction Co. v. United States*, 477 F.2d 930, 936 (Ct. C1. 1973) (damages such as general loss of business and loss of entire net worth considered too remote and consequential to be recovered); *see also Precision Pine & Timber, Inc. v. United States,* No. 98-720 C, slip op. at 56 (Fed. Cl. Sept. 14, 2007) (acknowledging that plaintiffs in the Federal Circuit are entitled only to damages that flow from the subject matter of the breached contracts and as a matter of law are not entitled to recover for general loss of business).

As previously mentioned, the Government argues the position that "losses of income, as a matter of law, 'are not recoverable in any event.'" This statement is overly broad. Whether alleged lost profit damages result directly from a contract that was breached may be a question of fact. *See California Federal Bank v. United States*, 245 F.3d 1342 (Fed. Cir. 2001) ("Lost profits are 'a recognized measure of damages where their loss is the proximate result of the breach and the fact that there would have been a profit is definitely established, and there is some basis on which a reasonable estimate of the amount of the profit can be made.'") (quoting *Neely v. United States*, 285 F.2d 448, 433 (Ct. Cl. 1961); *see also Energy Capital Corp. v. United States*, 302 F.3d 1314 (Fed. Cir. 2002) (a *per se* bar against lost profits does not exist for a new business venture that was not performed). Notwithstanding its erroneous broadening of the aforementioned principle, the Government's application of the case law to the appeal before us is appropriate. Here, the appellant seeks lost income from anticipated contracts that it says it was unable to obtain because of the Government's alleged breach.

For the respondent to recover lost income as damages for a breach of contract, the losses must be directly related to the contract that was breached. Lost profits are not recoverable if they result only from a contractor's hope of additional contracts. Thus, even if this Board were to find that the respondent breached the contract in issue, the appellant cannot recover because the lost income it seeks is unrelated to the contract that was allegedly breached. The respondent's motion to dismiss the portion of the appellant's claim seeking $254,761 for lost income is granted.

Decision

The respondent's motion to dismiss the portion of the appellant's claim seeking $106,383.93 for costs it incurred in litigation with its subcontractor is **DENIED**. The respondent's motion to dismiss the portion of the appellant's claim seeking $254,761 for lost

income is granted, and the portion of the appeal seeking $254,761 for lost income is hereby **DISMISSED**.

PATRICIA J. SHERIDAN
Board Judge

We concur:

STEPHEN M. DANIELS
Board Judge

ROBERT W. PARKER
Board Judge

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