UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF DENIED: September 30, 2008

CBCA 582, 1195

CHARLES ENGINEERING CO.,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

J. Michael Littlejohn and Pavan I. Khoobchandani of Akerman Senterfitt Wickwire Gavin, Vienna, VA, counsel 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), **HYATT**, and **SHERIDAN**.

SHERIDAN, Board Judge.

This appeal arises out of a dispute between appellant, Charles Engineering Co. (CEC), and respondent, the Department of Veterans Affairs (VA), under contract V786C-472, to perform gravesite development at the Culpeper National Cemetery, Culpeper, Virginia. CEC seeks $106,383.93 in legal, consultant, and arbitral fees it says it incurred as a result of an arbitration proceeding conducted with its roofing subcontractor. Appellant avers that as a result of the VA issuing a verbal "constructive stop work order" and breaching contract V786C-472, the roofing subcontractor, Miller Brothers, Inc. (MBI), filed a claim against

CEC seeking additional costs associated with the stop work order. Pursuant to the terms of the subcontract between CEC and MBI, the parties engaged in binding arbitration to resolve this claim, as well as several other claims that had also been submitted by each party to the subcontract. In the arbitration proceeding, CEC prevailed on the claim related to the VA's alleged stop work order; MBI was not awarded damages for this claim. However, on the other claims that were resolved via the arbitration proceeding, MBI was awarded damages for some of its claims and CEC was awarded damages for some of its claims. The arbitral award ordered the two parties to each bear their own legal and consultant costs incurred in the arbitration, and to share equally the fees incurred for using American Arbitration Association (AAA) administrative services and the AAA panel of arbitrators. Now, CEC claims that as a result of the arbitration proceeding, legal, consultant, and arbitral fees which it incurred should be passed on to the VA. CEC also asks the Board to order the VA to reassess its unfavorable rating as to CEC's quality of work and effective management of the contract, and to issue a rating of at least satisfactory as to those elements.

We note that in an earlier decision on this same appeal, *Charles Engineering Co. v. Department of Veterans Affairs*, CBCA 582, 07-2 BCA ¶ 33,698, we dismissed a portion of appellant's claim seeking lost profits. Pursuant to the Board's order of February 20, 2008, appellant provided a brief explaining why it believed CEC was entitled to pursue its claim for costs associated with arbitration with its subcontractor. On April 18, 2008, respondent filed a motion for summary relief, arguing that there are no material facts in dispute and that the costs that appellant seeks "are not allowable as a matter of law and were the result of actions of appellant's own volition." Motion at 1. Appellant responded to respondent's motion, arguing that: the VA stopped MBI's work on the roof, due to its own defective specifications; the VA breached its duty not to hinder performance by failing to cooperate when it refused to release to CEC its roofing consultant's report; and appellant is entitled to be paid the legal, consulting, and arbitral fees it incurred as a result of the VA's stopping the roofing work. For the reasons discussed below, we deny respondent's motion for summary relief.

The record considered by the Board in issuing this decision consists of the pleadings, the appeal file (Exhibits 1 through 71), appellant's brief in response to the Board's order of February 20, 2008 (with Declaration of Paul L. Charles (Mar. 20, 2008)), respondent's motion for summary relief, and appellant's response to the motion for summary relief.

Background

On September 25, 2002, the VA National Cemetery Administration (VA NCA) awarded CEC contract V786C-472, in the amount of $2,524,625, for gravesite development at the Culpeper National Cemetery in Culpeper, Virginia. Appeal File, Exhibit 1. This was a small business set-aside design/build contract in which CEC was responsible for developing approximately 12.26 acres of the cemetery. Mr. Paul Charles is the president of

CEC, a licensed civil/architectural engineer, and a general contractor. Charles Declaration ¶ 4. The contract was awarded pursuant to section 8(a) of the Small Business Act.[1] In addition to designing and preparing the construction documents for the project, CEC was required to demolish and remove the existing structures, and construct a new public information building, maintenance building, and communal shelter. Mr. Robert Lee Capers, Jr., was the contracting officer, and Mr. Mike Mersky, the NCA project manager, was also designated the contracting officer's technical representative (COTR)/senior resident engineer (SRE) pursuant to VA Regulation 801.603-70. Appeal File, Exhibit 2.

Among other Federal Acquisition Regulation (FAR) clauses, the contract contained the FAR 52.242-14, Suspension of Work (APR 1984), and the FAR 52.246-12, Inspection of Construction (AUG 1996), clauses. Appeal File, Exhibit 1 at 75. As part of the design portion of the project, CEC was given certain VA-wide "master specifications" and agreed to:

> Prepare and submit complete construction documents . . . for approval by the VA in accordance with standard professional practice, the VA RFP [request for proposal] drawings and specifications, and prevailing codes. The specifications must be edited to represent the specific design and construction proposed by the contractor. A commercial level of design, material, and construction quality is required.

Id., Exhibit 1 (Instructions to Bidders/Offerors, Scope of Work, section D1.A.1).

CEC was required to design within the parameters set by the VA-provided master specifications and drawings. Appeal File, Exhibits 1, 44; Charles Declaration ¶ 4. The VA-provided to CEC "master" specification section 07610, which required that: "Uninsulated metal wall and roof panels shall be single sheets, of approximate overall depth and configuration shown on drawings. Connection between panels shall be by interlocking joints filled with sealing compound . . . . Furnish roof panels in one continuous length of roof span . . . . Construct panels as follows . . . . 2. Roof panels: a.//0.8//1.0//mm (// 0.032 // 0.040 // inch) thick aluminum." Appeal File, Exhibit 44; Charles Declaration ¶ 4. The specifications that CEC prepared, based on these "master" specifications, called for constructing the roof with the thickest aluminum that was specified by the VA in its master specifications -- 0.040 inch thick aluminum. Appeal File, Exhibit 45; Charles Declaration ¶ 6.

A notice to proceed was issued on October 23, 2002, and the project completion date was established as April 15, 2004. Appeal File, Exhibit 45. Subsequently, Mr. Dana W. Ivey

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[1] 15 U.S.C. § 637(a) (2000).

became the contracting officer on July 15, 2003, and a new completion date, June 14, 2004, was established. *Id*., Exhibit 5.

CEC contracted with MBI to perform the roof installation.[2] MBI, in turn, subcontracted with Arizon Roofing Company, Inc. (Arizon) for the fabrication of the roofs. On July 28, 2003, CEC made its roofing submittals to the VA, which approved them on August 14, 2003. Appeal File, Exhibits 6, 7.

During construction, on or about February 20, 2004, issues arose regarding some possible defects in the roofs being installed on the three buildings, particularly the roof on the maintenance building. Appeal File, Exhibit 8. Mr. Charles wrote to Mr. Ken Miller at MBI stating that the VA "would not accept the roof with undulation (waves) . . . . Further research has indicated that [the roof] is neither 22 gauge galvanized steel nor 0.040 [inch] 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." *Id*. Thickness tests performed on February 25, 2004, by Culpeper Machine & Supply, a firm retained by the VA, indicated that the roof material was (on average) .035 inches thick. *Id*., Exhibit 9. On March 5, 2004, the VA informed CEC that "all roof [work] is to cease until all problems are resolved and all damaged roof panels have been replaced." *Id*., Exhibit 10.

In the daily log for March 5, 2004, the VA's project manager, Mr. James Griffin, notes:

> Today at app[roximately] 1:16 [p.m.] the RE [VA Resident Engineer Mr. Hunter Kidd] came to CEC and demanded all work on the roof of the maintenance building be stopped until all repairs to damaged panels [are] fixed. We (CEC, RE and MBI [Mr.] Kerry Maggard) need to make a list of the panels that will need to be replaced on all three buildings. Then at app[roximately] 1:20 [p.m.] Mr. Charles told MBI superintendent [Mr.] Maggard to have all work being done on the roof of the maintenance building

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[2] Appellant in correspondence with MBI referred to "written agreement (AGC 455)." AGC [The Associated General Contractors of America] 455 is a "Standard Form of Agreement Between Design-Builder and Subcontractor (Where the Design-Builder and the Subcontractor Share the Risk of Owner Payment)," and is appropriate for use between a design-build contractor and a subcontractor where the subcontractor has not been retained to provide substantial portions of the design for the project. AGC Contract Documents at a Glance, at 11 (1999), www.agc.org/contractdocuments. Pursuant to AGC 455, the payment of the design-build contractor to the subcontractor is conditioned on the contractor having received payment from the owner. *Id*.

> stopped. [Mr. Maggard] then asked to let the guys work to get the rest of the panels [and] hips on to dry-in the building. Mr. Charles stated that all work needs to stop and to use plastic (that is on-site) to weather-tight the building. I noticed Arizon [employees] working on the roof while their other helper was installing plastic. I then told [Mr. Maggard] and [Mr.] Mike Overton [MBI project manager] to stop all work on the roof but the guy installing the plastic. Also, during the walk-thru Mr. Charles stated to [Mr. Maggard] that there is sway in the roof of the shelter. [Mr. Maggard] stated he knows there is a problem in the roof of the shelter.

Appeal File, Exhibit 11.

Mr. Overton, from MBI, wrote to CEC on March 8, 2004: "This letter is to confirm that you have instructed us to cease all work on the standing seam roofing . . . . We understand you gave this order verbally to our superintendent [Mr. Maggard] on March 5, 2004 . . . . We have yet to receive any written correspondence from you on this matter, including any specific reasons for the stop work order . . . . Please be aware that this directive to stop work will affect our cost and the completion date of the project, and we expect to be compensated accordingly." CEC responded to MBI that same day 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." Appeal File, Exhibit 12. The contracting officer wrote to CEC on March 10, 2004, noting his concern about "an ongoing pattern of deficient subcontractor workmanship and materials at the job site," and gave as an example the "installation of roof flashing and the thickness of the standing seam metal roofing panels installed on the new buildings." *Id*., Exhibit 14. He asked CEC to send a written proposal to solve the problems within seven days. *Id*.

On or about March 16, 2004, MBI retained the services of Restoration Engineering, Inc. (REI), a civil/structural engineering firm, to measure the thickness of the metal roofing and evaluate MBI's quality of workmanship. Appeal File, Exhibit 51. REI concluded in its report issued March 19, 2004, that the roofing panels "were fabricated from 0.040 inch prefinished aluminum and were installed in accordance with the project specifications and approved submittals and shop drawings." *Id*. CEC provided the REI report to the VA on March 22, 2004. Complaint (CBCA 1195) ¶ 17.

On April 6, 2004, Mr. Ivey wrote CEC that:

> The project manager, [Mr.] Mersky, and the VA inspector, [Mr.] 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.

Appeal File, Exhibit 14. The VA elected to retain an engineering consultant, MACTEC Engineering and Consulting, Inc. (MACTEC), to inspect the roofs, but several days of poor weather delayed the roof inspection until around April 9, 2004. *Id*., Exhibits 16-18. CEC wrote to Mr. Ivey on April 19, 2004, 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." *Id*., Exhibit 19.

The VA received the MACTEC report around April 26, 2004. Appeal File, Exhibit 20. The report concluded: "In our opinion, the material currently in place, while not meeting the project specified thicknesses, does fall within acceptable industry standards." *Id*. at 5. As to concerns about the panels' "waviness" or "oil-canning," MACTEC noted that some amount of waviness was observed on all three buildings, but it was not excessive given the material and seam spacing used. *Id*. at 6. 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. *Id*. at 7. MACTEC also made note of various other items that needed to be fixed, including, but not limited to, screws penetrating through gutter sides and the step flashing. *Id*. at 7-10. Although CEC repeatedly requested the MACTEC report, the VA refused to release the report to CEC until well after the contract work was completed. *Id*., Exhibit 39.

On April 27, 2004, MBI wrote CEC asserting that "the roofing is compliant" and "until we obtain a copy of the [MACTEC] report . . . we will not act on a [VA] directive, or other [directive], unless it is supported by a report from a professional engineer articulating any alleged deficiencies." Appeal File, Exhibit 21. After it received the MACTEC report the VA approached CEC to negotiate a resolution for the roofing issues; CEC wrote MBI on April 29, 2004, that "in the spirit of avoiding further delay and having the job completed" the VA had offered to "no longer question [the] roof thickness and oil-canning" if the step flashing at the restroom was repaired, the dented and bent roof panels were repaired or replaced, and the vent line and siding work were finished. *Id*., Exhibit 22. CEC told MBI that it hoped MBI would perform the work, but, if not, CEC would make other arrangements to have the work performed. *Id*. MBI finished the roofing work. *Id*., Exhibit 23.

CEC and the VA entered into a "no cost" supplemental agreement on June 8, 2004, granting CEC a forty-five calendar-day time extension and changing the contract completion date to July 29, 2004. Appeal File, Exhibit 24. The final inspection was conducted on August 19, 2004, the contract was found to be substantially complete, and a custody receipt was signed. *Id*., Exhibit 25. On August 31, 2004, the VA forwarded a punch list to CEC. *Id*., Exhibit 26. In acknowledging receipt of the punch list on September 3, Mr. Charles noted: "we reserve our rights to an equitable adjustment and/or claim previously submitted and [items] 13 [and] 20 of the punch list." *Id*. Item 13 was described as "remove crushed stone from edges of roads" and item 20 was listed as "miscellaneous."

The punch list was completed on November 18, 2004. Appeal File, Exhibit 27. 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." *Id*. Mr. Ivey wrote CEC again on March 10, 2005, asking it to submit an invoice. *Id*., Exhibit 28. CEC forwarded to the VA the following statement on March 11, 2005: "As per [CEC's] lawyer, we cannot release any lien due to the fact that we have not received a lien release from our sub[contractor MBI]. As you know, they have stated [that] upon project completion they will file claims." *Id*., Exhibit 29.

On September 22, 2005, Mr. Griffin completed an evaluation of CEC's performance on the contract and gave it an unsatisfactory overall evaluation. Specifically, the VA noted that the quality of the work and the effectiveness of management were unsatisfactory. Additionally, the VA indicated that the project was delivered late, all the work had been subcontracted, and CEC was unable to control its subcontractors. Appeal File, Exhibit 30.

CEC informed the VA on September 28, 2005, that "on May 28, 2005 . . . MBI filed [a] claim against CEC [and,] thus[,] indirectly [against] NCA or VA." Appeal File, Exhibit 31. Notwithstanding this statement, the record reveals CEC and MBI each made several claims against the other. CEC appears to have sought $2,005,471.53 from MBI in disputed claims. *Id*., Exhibit 46. MBI appears to have made claims against CEC seeking the unpaid subcontract balance of $172,607 (a sum which was not in dispute), additional compensation for changes ($199,498), damages for delayed performance ($105,589), disruptions and inefficiencies ($13,930), and the roofing stop work order ($10,642). *Id*. CEC and MBI engaged in binding arbitration to resolve their disputes using arbitrators from the AAA. *Id*. An arbitration award was issued on June 8, 2006. *Id*., Exhibit 62. CEC was found liable to MBI for $29,580.10 for changes and $172,607 for the unpaid subcontract balance. *Id*. The arbiters denied MBI's claims for delayed performance, disruptions and inefficiencies, and the roofing stop work order. *Id*. MBI was also found liable to CEC for $43,877.08 in credits for work not performed. *Id*.

Referencing some of the costs it incurred as a result of the prime/subcontract arbitration, on June 27, 2006, CEC wrote to Mr. Fred Neun, the NCA's project manager then assigned to administer the contract. Appeal File, Exhibit 34. CEC enclosed a "claim summary," and proffered that the claim amounts it was submitting were "awarded by a panel of arbitrators" after having been been asserted by MBI as the result of a "'roofing work stop order issued by the VA.'" CEC asserted it was entitled to recover from the VA -- $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 for costs that CEC expended in connection with the arbitration action with MCI; $57,353.49 in legal fees and expenses; $22,063.28 for expert witness fees; $11,250 in administrative costs paid to the AAA; $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. *Id*. In explaining its claimed costs for the arbitration action, appellant stated, "[A]s a result of CEC's efforts, the arbitration panel ruled that CEC and VA did not delay or disrupt [MBI's] work and denied to award [MBI] any amounts on account of alleged delay and disruption originating from the VA's review of the roofing materials used on the project [and] its order stopping work on that portion of the project." *Id*. CEC noted, however, that the alleged stop work order, together with the lack of expert testimony from the VA, "generated the MBI claim that cost CEC a lot of money to defend." The June 27 claim was properly certified. *Id*.

Mr. Charles also wrote the VA on May 31, 2006, asking to have the unsatisfactory performance evaluation upgraded to a satisfactory or outstanding rating. Appeal File, Exhibit 34. In referencing "some of the events that had to be overcome," he represented that CEC "was not able to close the project because . . . one of our subcontractors did not want to submit its release of claims . . . . Such circumstances were beyond our control. As prime contractor . . . we had to stand for what we think was right. It took some time[,] but the truth prevailed and the subcontractor reduced its claim to about [a] tenth of its value." *Id*., Exhibit 34.

CEC invoiced the VA for the final payment on July 12, 2006, enclosing a release of claims dated June 27, 2006, which excepted the claims that CEC submitted on June 27, 2006. Appeal File, Exhibit 35. The contracting officer issued a final decision on October 12, 2006, granting CEC equitable adjustments in the amount of $16,024 for the work associated with the increased slab capacity and $6377 for the extra HVAC work. Appeal File, Exhibit 40. Mr. Ivey denied the $106,383.93 claim for legal and arbitral fees associated with the prime/subcontractor arbitration, asserting that the VA did not issue a stop work order, delay, or disrupt CEC or MBI. *Id*. 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. *Id*.

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, 3391-95 (2006). VABCA 7627 was redocketed as CBCA 582. In a decision issued on October 16, 2007, the Board dismissed CEC's $254,761 claim for lost income for failure to state a claim upon which relief can be granted, and left intact for future resolution CEC's claim for costs incurred during its litigation and arbitration with MBI. *Charles Engineering Co. v. Department of Veterans Affairs*, CBCA 582, 07-2 BCA ¶ 33,698.

CEC submitted a revised claim to the contracting officer on February 14, 2008, averring that its claim arose from:

> VA's roof design which lead to unreasonable delay and suspensions on the contract from March 5 until April 27, 2004, from the VA's breaches of contract arising from the suspensions, and from the VA's failure to provide CEC with a project-related inspection report or provide other assistance in resolving certain roofing issues with CEC's subcontractor.

Appeal File, Exhibit 58. CEC claimed it should be paid $108,877.85, which was composed of: $57,353.49 in legal fees paid to the firm of Katz & Stone; $26,967.22 in fees paid to AAA and the arbitration panel; $22,063 for consulting fees paid to its witness, East Coast CPM Consulting, Inc.; and $2494.14 in legal fees paid to Morin & Barkeley. *Id*., Exhibits 34, 46. When the contracting officer failed to issue a timely final decision this matter was appealed to the Board, where it was docketed as CBCA 1195. CBCA 581 and 1195 were subsequently consolidated for purposes of processing and decision.

Discussion

Respondent moves the Board to grant summary relief in its favor, arguing that the types of fees appellant seeks -- legal, consultant, and arbitral fees -- are not allowable as a matter of law. Respondent avers that appellant incurred the fees as a result of its own actions, and that the fees it incurred were not "directly related to the performance of" or incurred "in connection" with the contract. The motion is based on the theory that the legal, consultant, and arbitral fees sought by appellant are made unallowable by FAR 31.205-47(f)(5).

Appellant acknowledges that the award of legal, consultant, and arbitral fees incurred in another litigation is atypical; however, CEC argues that a contractor is entitled to recover such fees where the Government breaches a contractual duty during performance of a contract. Appellant explains that the fees were incurred in connection with an arbitration it had with its roofing subcontractor where it was "essentially defending" respondent's actions. Appellant goes on to assert that the VA breached its contractual duties in three ways: (1) in the VA's implied warranty of the roof design that it provided as part of the contract; (2) in

unreasonably suspending the contract from March 5 until April 27, 2004, because of VA design problems; and (3) in refusing to share with CEC a report that the VA independently commissioned to review the roof work and determine whether that work was in compliance with the contract specifications.

Summary relief is properly granted when there is no genuine issue of material fact and the moving party is clearly entitled to judgment as a matter of law. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *US Ecology, Inc. v. United States*, 245 F.3d 1352, 1355 (Fed. Cir. 2001); *Olympus Corp. v. United States*, 98 F.3d 1314, 1316 (Fed. Cir. 1996). As the moving party, respondent bears the burden of establishing the absence of any genuine issue of material fact. *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1390 (Fed. Cir. 1987); *Armco, Inc. v. Cyclops Corp.*, 791 F.2d 147, 149 (Fed. Cir. 1986). A fact is considered to be material if it will affect the Board's decision, and an issue is genuine if enough evidence exists such that the fact could reasonably be decided in favor of the non-movant after a hearing. *Fred M. Lyda v. General Services Administration*, CBCA 493, 07-2 BCA ¶ 33,631.

There are no material facts in dispute in the narrow matter before the Board, whether the legal, consultant, and arbitral fees sought by appellant are made unallowable by FAR 31.205-47(f)(5).

Respondent argues that the arrangement appellant had with its subcontractor constitutes "an agreement or contract concerning a teaming arrangement, joint venture, or *similar arrangement of shared interest*," and that such costs are unallowable under federal contracts as a matter of law. FAR 31.205-47(f)(5) addresses and makes unallowable:

> Costs of legal, accounting, and consultant services and directly associated costs incurred in connection with the defense or prosecution of lawsuits or appeals between contractors *arising from* either (i) an agreement or contract concerning a teaming arrangement, a joint venture, or similar arrangement of shared interest; or (ii) dual sourcing, co-production, or similar programs, *are unallowable*, except when (A) incurred as a result of compliance with specific terms and conditions of the contract or written instructions from the contracting officer, or (B) when agreed to in writing by the contracting officer.

48 CFR 31.205-47(f)(5)(2007)(emphasis added). Other than citing to the regulation, respondent provides no authority for its argument that FAR 31.205-47(f)(5) applies to the facts present here.

It is not apparent from the facts that the fees appellant seeks "arise from" a type of sharing arrangement such that appellant would be prohibited from recovering those fees as a matter of law. The cost recovery prohibition set forth by FAR 31.205-47(f)(5) is similar

in nature to other prohibitions contained in subparagraph (f), making unallowable several of the costs that a business may incur that are incidental to structuring and running the business, such as organization and reorganization costs. 48 CFR 31.205-47(f)(2).[3] The evidence indicates that the arrangement between appellant and its subcontractor was that of a traditional prime contractor - subcontractor relationship, and not an "arrangement of shared interest" similar to a teaming arrangement or joint venture. We therefore deny respondent's motion for summary relief.

Although the theory on which respondent bases its motion is not well taken, this does not mean that appellant should prevail in this case. It is not at all clear to us that any of the three alleged breaches appellant asserts were actually breaches of the contract. For example, appellant successfully argued respondent's position as to the roofing issues during the contract and in the arbitration proceeding with its subcontractor. We do not understand why that position, which appellant thought reasonable earlier, should constitute breaches of contract now.

Generally, the rule is that where relief is available under the contract, recovery is not also available on the basis of breach or equitable grounds. *Nicon, Inc. v. United States*, 331 F.3d 878, 886 (Fed. Cir. 2003) citing *Triax-Pacific v. Stone*, 958 F.2d 351, 354 (Fed. Cir. 1992) ("noting that a delay in issuing a notice to proceed is not remediable as a breach but that costs may be recovered as an equitable adjustment under the suspension of work clause")). If appellant proves that respondent unreasonably stopped the roofing work, appellant's recovery may appropriately be made pursuant to the remedy-granting Suspension of Work clause contained in the contract. Appellant also has the burden of proving that the types of costs it seeks -- legal, consultant, and arbitral fees associated with disputes with its subcontractor -- would be properly recoverable under the Suspension of Work clause.

Finally, even if appellant is to persuade us that it is entitled to some relief, it must support its quantum claim "by evidence of the nature and scope of the service furnished." 48 CFR 31.205-33(f). The factors required by this FAR provision must be addressed in detail. In particular, appellant must distinguish the costs it incurred in defending the roofing matter from the costs it incurred in pursuing other disputes which were addressed during the arbitration proceeding.

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[3] The FAR identifies several other areas that may necessitate incurring legal, consultant, and other professional fees to help structure or operate a business but where allowability is denied or limited. These provisions include: FAR 31.205-3, "Bad debts"; FAR 31.205-20, "Interest and other financial costs"; FAR 31.205-22, "Lobbying and political activity costs"; FAR 31.205-27, "Organization costs"; FAR 31.205-28, "Other business expenses"; FAR 31.205-30, "Patent costs"; and FAR 31.205-38, "Selling costs."

Decision

Accordingly, the respondent's motion for summary relief is hereby **DENIED**.

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PATRICIA J. SHERIDAN
Board Judge

We concur:

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STEPHEN M. DANIELS
Board Judge

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CATHERINE B. HYATT
Board Judge