



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: September 10, 2019

CBCA 5698

STOBIL ENTERPRISE,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Billie O. Stone, Chief Executive Officer of Stobil Enterprise, San Antonio, TX, appearing for Appellant.

Mary A. Mitchell, Office of General Counsel, Department of Veterans Affairs, Houston, TX, counsel for Respondent.

Before Board Judges **KULLBERG**, **SULLIVAN**, and **RUSSELL**.

RUSSELL, Board Judge.

Pending before the Board are appellant's motion for summary judgment and respondent's motion for summary relief.¹ In this appeal, Stobil Enterprise (Stobil) seeks a price adjustment for increased labor costs under Federal Acquisition Regulation (FAR) clauses implementing provisions of the Service Contract Act (SCA), 41 U.S.C. §§ 6701-6707

¹ Both parties are moving for the same relief, with appellant characterizing its motion as one for summary judgment and respondent characterizing its motion as one for summary relief. Since these appeals were filed, a revision in the Board's rules renamed motions for summary relief as motions for summary judgment. 48 CFR 6101.8(f) (2018) (Rule 8(f)).

(2012), and the Fair Labor Standards Act (FLSA), 29 U.S.C. § 206.² Stobil additionally seeks costs for equipment and supplies lost or damaged during contract performance, and administrative costs (associated with both its claim for increased labor costs and its claim for lost or damaged equipment and supplies). Stobil also seeks relief based on the Department of Veterans Affairs' (VA) alleged failure to conduct a contractor performance evaluation. For reasons stated below, the appeal is denied.

Statement of Facts

The Contract

In January 2009, the VA awarded a firm-fixed-price contract to Stobil to provide dietary and housekeeping services (the housekeeping services contract) at a VA facility in San Antonio, Texas. The contract included a base year, from January 1 to December 31, 2009, and four option years. In June 2014, the VA awarded a second firm-fixed-price contract to Stobil to extend the housekeeping services contract for a six-month period, from July 1 to December 31, 2014. By modification, this second contract was extended to January 2015. Both contracts incorporated FAR 52.222-41, requiring Stobil to comply with the SCA, and FAR 52.222-43, allowing for price adjustments to the contract pursuant to the SCA and the FLSA. 48 CFR 52.222-41, -43 (2008). Both the SCA and FLSA establish minimum wages and other benefits that must be paid to private employees.

In August 2014, Stobil submitted three invoices and a quote to the VA that are relevant to this appeal. Invoice 2231 covered Stobil's request for \$110,000 in wage rate increases and associated administrative costs. Invoice 334456 covered Stobil's request for \$425 for food loss due to inoperative government equipment and associated administrative costs. Invoice 773990 covered Stobil's request for \$840 to replace damaged soap dispensers and associated administrative costs. The quote covered Stobil's request for \$569.31 for compensation for two items of equipment – a worktable and rack.

² The SCA was located at 41 U.S.C. §§ 351-357 (2006) when the parties entered the contract at issue in this appeal.

Department of Labor (DOL) Investigation

In May 2015, after the contract closed, DOL sent a letter to the VA contracting officer stating that DOL, through an investigation, found that Stobil had “failed to pay the required SCA prevailing wage and fringe benefits, and the required [Contract Work Hours and Safety Standards Act] overtime.” DOL stated that the “alleged violations resulted in \$104,510.57 due . . . [to Stobil] employees in unpaid wages.” Also in its letter, DOL requested that the VA withhold amounts otherwise due to Stobil under the housekeeping services contract until the full amount due to Stobil employees in back wages was paid. In January 2016, DOL sent a letter informing the VA that it was amending its initial withholding request from \$104,510.57 to \$99,780.98 and, similar to its request in May 2015, asking the VA to transfer all contract funds due to Stobil to DOL until the remaining back wages due Stobil employees (at the time \$62,117.37) were paid.

Equitable Adjustments

In May 2015, Stobil submitted time cards for the periods 2010–2014 to the VA to support Stobil’s request for increased labor costs under FAR 52.222-43.³ From these records, the VA determined that it owed Stobil only \$21,865.37 in health and welfare fringe benefits. In February 2016, the VA and Stobil executed a modification to effectuate an equitable adjustment in the amount of \$21,865.37 based on Stobil’s invoice 2231 for a wage rate increase. The modification included the following release language:

In consideration of the modification(s) agreed to herein as complete equitable adjustments for the Contractor’s Final Invoice #2231, dated [August 20, 2014], the contractor hereby releases the Government from any and all liability under the contract for further equitable adjustments attributable to such facts and circumstances giving rise to the proposal for adjustment, except for Dispute of Claims for back wages, from [Stobil’s] letter dated 21 January 2016.

In the referenced letter of January 21, 2016, the “dispute” at issue focused on Stobil’s challenge to the VA’s finding that Stobil was only entitled to a price adjustment of \$21,865.37 for health and welfare fringe benefits, and nothing for wage rate increases. The VA subsequently transferred the amount due under the February 2016 modification (\$21,865.37) to DOL to comply with that agency’s withholding request.

³ Neither party produced these records to the Board.

Also in February 2016, the parties executed a second modification to effectuate resolution of Stobil's claim for an equitable adjustment for loss of or damage to equipment and supplies. This second modification included the following release language:

In consideration of the modification(s) agreed to herein as complete equitable adjustments for the Contractor's Final Invoice #s 773990, 334456, dated [August 20, 2014] and Quote #120370, dated [August 24, 2014], the contractor hereby releases the Government from any and all liability under the contract for further equitable adjustments attributable to such facts and circumstances giving rise to the proposal for adjustment, except for Dispute of Claims for back wages, from [Stobil's] letter dated 21 January 2016.

The referenced invoices and quote included Stobil's request for compensation for damaged soap dispensers, food lost due to inoperative government equipment, a work table and rack, and associated administrative costs. As with the equitable adjustment for the back wages, the VA transferred the amount due under the modification (\$1132.82) to DOL to comply with DOL's withholding request.

Stobil's Claim to the Contracting Officer

On November 26, 2016, Stobil submitted a certified claim to the VA contracting officer seeking its costs for increases in wages and fringe benefits under FAR 52.222-43, loss of or damage to equipment and supplies, administrative costs, harm and damage, and interest.

By letter dated March 30, 2017, the VA contracting officer denied Stobil's claims. The contracting officer found that the parties had resolved Stobil's claim for lost or damaged equipment and supplies through the February 2016 bilateral modification signed by both parties. The contracting officer determined that Stobil's request for wages and fringe benefits was untimely pursuant to FAR 52.222-43(f), requiring a contractor to submit a request for increased wages and fringe benefits within thirty days after receipt of a new DOL wage determination identifying minimum wages and benefits that must be paid to the contractor's employees. 48 CFR 52.222-43(f). Nevertheless, the contracting officer determined that Stobil was due \$21,865.37 for health and welfare benefit increases which had already been paid. In his decision, the contracting officer stated that he based this amount on actual hours worked by Stobil employees using copies of SCA classifications and annual hourly wage rates that Stobil had submitted for each employee. The contracting officer denied Stobil's other claims, finding that Stobil provided no supporting documentation to substantiate its request for payment on the claims.

The Appeal

In April 2017, Stobil appealed the VA contracting officer's decision to the Board. In its appeal, Stobil seeks a price adjustment for increased wage rate costs incurred to comply with the SCA and FLSA, as well as costs for losses of or damage to equipment and supplies (i.e., the damaged soap dispensers, food lost due to inoperative government equipment, a work table, and a rack), harm and damage, and interest. In its appeal, Stobil also added a claim based on the VA's alleged failure to provide Stobil with a performance evaluation.

The parties subsequently engaged in discovery followed by the filing of their motions for summary judgment. After the motions were filed, the Board issued orders requesting additional information and briefing from the parties. In one, the Board ordered Stobil to produce a schedule of costs to include "a description of the specific record(s) or other document(s) supporting the cost (for example, an invoice, an affidavit, a response to an interrogatory, a document produced in discovery)." The Board explained that the description must include "the location where such records or other documents can be found if already provided to respondent (for example, pointing to a specific exhibit in the Rule 4 [file] or supplement to the Rule 4 [file], or a specific exhibit attached to a filing, or a response to a previously-provided discovery request)."⁴ The Board added that "[i]f the record or document supporting the cost item has not previously been provided to respondent, appellant shall attach the supporting record or document to appellant's Schedule of Costs."

In response, Stobil filed a chart including, among other costs, amounts for its wage claim (\$95,001.03). As supporting documentation for this particular claim, Stobil cited FAR 22.1007, describing the service contracts for which contracting officers must obtain wage determinations, and FAR 22.1015, describing DOL's obligations when determining that a contracting officer had made "an erroneous determination that the Service Contract Labor Standards statute did not apply to a particular acquisition or failed to include an appropriate wage determination in a covered contract." Stobil also referenced records in the Rule 4 file containing the VA's calculations of the amount due which Stobil, in its schedule of costs, characterized as erroneous.

The Board also issued orders requesting supplemental briefing from the parties, including on the issues of the Board's jurisdiction over Stobil's performance evaluation claim, the release language in the contract modifications, and Stobil's damages. As for the

⁴ See Rule 4 (discussing respondent's obligation, shortly after the docketing of an appeal, to file with the Board all documents relevant to the appeal and appellant's option to supplement the appeal file with non-duplicative documents).

latter, both parties were provided the opportunity to supplement their pending motions with any additional evidence.

Discussion

I. Board's Jurisdiction Over Challenge to Performance Evaluation

The Contract Disputes Act (CDA) provides the Board with jurisdiction to resolve claims disputes between contractors and executive agencies. 41 U.S.C. §§ 7101-7109; *Bass Transportation Services, LLC v. Department of Veterans Affairs*, CBCA 4995, 16-1 BCA ¶ 36,464, at 177,688. However, “[t]here can be no CDA litigation without a preceding CDA claim.” *Elkton UCCC, LLC v. General Services Administration*, CBCA 6158, 18-1 BCA ¶ 37,103, at 180,593. Specifically, before the Board can exercise its jurisdiction, the contractor must have submitted a written demand to the agency contracting officer requesting a decision on a claim. *I-A Construction & Fire, LLP v. Department of Agriculture*, CBCA 2693, 15-1 BCA ¶ 35,913, at 175,563. If the contracting officer fails to render a timely decision on the claim or the contractor is otherwise dissatisfied with the decision, the contractor may then seek relief from the appropriate board of contracts appeals or the United States Court of Federal Claims. 41 U.S.C. § 7103(f); *Stobil Enterprise v. Department of Veterans Affairs*, CBCA 5246, 16-1 BCA ¶ 36,478, at 177,742; *Red Gold, Inc. v. Department of Agriculture*, CBCA 2259, 12-1 BCA ¶ 34,921, at 171,722 (2011).

The VA argues that Stobil’s claim based on the agency’s failure to conduct a contract evaluation should be dismissed for lack of jurisdiction because Stobil did not present a request for a contracting officer’s final decision on the claim prior to filing the instant appeal. Stobil disputes that the Board lacks jurisdiction over the claim, relying on an email dated December 22, 2015, from the contracting officer stating that, as of the date of the email, Stobil had not received a performance evaluation. We find that the email on which Stobil relies does not evidence that Stobil requested a performance evaluation in writing pursuant to the CDA, and that the request was denied by the contracting officer in writing or could be deemed denied.⁵ *Pros Cleaners v. Department of Homeland Security*, CBCA 5871, 17-1

⁵ We note that “a contractor’s challenge to a performance evaluation can constitute a matter within the Board’s subject matter jurisdiction.” *Sylvan B. Orr v. Department of Agriculture*, CBCA 5299, 16-1 BCA ¶ 36,522, at 177,929. However, the Federal Circuit has “made clear that not every aspect of a performance evaluation is subject to challenge as a contract ‘claim.’” *Id.* Specifically, a contractor must do more than allege a procedural violation as relates to a performance evaluation to establish subject matter jurisdiction under the CDA; the contractor must also allege injury or prejudice resulting from

(continued...)

BCA ¶ 36,904, at 179,807 (“An appeal filed before there is a contracting officer’s decision (either written or through a deemed denial after the statutory deadline has passed) is premature, . . . and [therefore, the Board] lack[s] jurisdiction to entertain it.”) (internal quotations omitted). Accordingly, the Board dismisses this aspect of Stobil’s appeal for lack of jurisdiction.

II. The Parties’ Summary Judgment Motions

A. Standard of Review

Rule 56(a) of the Federal Rules of Civil Procedure mandates the entry of summary judgment upon motion after there has been adequate time for discovery “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also P&C Placement Services, Inc. v. Social Security Administration*, CBCA 391, 07-1 BCA ¶ 33,492, at 166,010 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). “No genuine issue of material fact exists when a rational trier of fact only could arrive at one reasonable conclusion.” *Hallwood Plaza, Inc. v. United States*, 84 Fed. Cl. 804, 809–10 (2008). Any doubt on whether summary judgment is appropriate is to be resolved against the moving party. *Celotex Corp.*, 477 U.S. at 325.

“The fact that both parties have moved for summary judgment does not mean that the [Board] must grant judgment as a matter of law for one side or the other” *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987). Rather, each motion is evaluated on its own merits and reasonable inferences are resolved against the party whose motion is being considered. *Marriott International Resorts, L.P. v. United States*, 586 F.3d 962, 968–69 (Fed. Cir. 2009); *see also Turner Construction Co. v. Smithsonian Institution*, CBCA 2862, et al., 15-1 BCA ¶ 36,139, at 176,392.

B. Loss of Equipment and Supplies, and Associated Administrative Costs

In this appeal, Stobil seeks costs for lost or damaged equipment and supplies (i.e., the food, soap dispensers, work table, and rack), and associated administrative costs. The VA

⁵(...continued)

the procedural violation. *Todd Construction, L.P. v. United States*, 656 F.3d 1306, 1315–16 (Fed. Cir. 2011). Here, given our finding that the Board lacks subject matter jurisdiction because of Stobil’s failure, as a threshold matter, to present its claim to the VA contracting officer, we do not address whether the Board could render a decision on Stobil’s complaint regarding the VA’s failure to issue a performance evaluation.

asserts that the claims are barred by the release language in the second bilateral modification of February 2016 signed by the parties.

It is well settled that a release is contractual in nature and thus to be “interpreted in the same manner as any other contract term or provision.” *Bell BCI Co. v. United States*, 570 F.3d 1337, 1341 (Fed. Cir. 2009) (citing *Metric Constructors, Inc. v. United States*, 314 F.3d 578, 579 (Fed. Cir. 2002)). The Board has recognized that “contract interpretation presents a question of law that is often amenable to summary disposition.” *Jose Gustavo Zeno v. Department of State*, CBCA 4867, slip op. at 6 (May 6, 2016). When a contractor executes a release that is complete on its face and reflects the contractor’s unconditional acceptance and agreement with its terms, the release will be binding on both parties. *Turner Construction Co. v. General Services Administration*, GSBCA 15502, et al., 05-1 BCA ¶ 32,924, at 163,097. Thus, the intent of a release is to “put an end to the matter in controversy.” *Mingus Constructors, Inc.*, 812 F.2d at 1394.

In considering Stobil’s claim to recover its costs for the damaged or lost equipment and supplies, and associated administrative costs, we examine the language of the release. “If the provisions of [the] release are ‘clear and unambiguous, they must be given their plain and ordinary meaning.’” *Holland v. United States*, 621 F.3d 1366, 1378 (Fed. Cir. 2010) (quoting *Bell BCI Co.*, 570 F.3d at 1341). Here, the language of the release relating to the lost or damaged equipment and administrative costs is clear – in a bilateral modification, Stobil released the Government from “any and all liability under the contract for further equitable adjustments attributable to such facts and circumstances giving rise to the proposal for adjustment” for these items.

Stobil argues that the modification does not contain a complete release of claims. We agree. However, the reservation only covers Stobil’s right to pursue a contract price adjustment for wage increases under FAR 52.222-43 – not any additional amount for losses of or damage to Stobil’s equipment and supplies, nor for related administrative costs. As for the latter, Stobil does not, in its appeal or complaint, identify any specific administrative costs preserved or “carved out” from the release.

Thus, given the clear and unambiguous language of the release, Stobil is precluded from pursuing its claims for additional compensation for the damaged or lost equipment and supplies, and associated administrative costs. See *P.I.O. GmbH Bau und Ingenieurplanung v. International Broadcasting Bureau*, GSBCA 15934-IBB, 04-1 BCA ¶ 32,592, at 161,245 (“[E]xcept in narrow circumstances, a release bars further consideration of any claim not expressly exempted from its scope.” (citing *Trataros Construction, Inc. v. General Services Administration*, GSBCA 15344, 03-1 BCA ¶ 32,251)). We grant summary judgment to the VA on these claims.

C. Price Adjustment for Increased Wage Costs

Under FAR 52.222-41, a contractor is required to pay its service employees wage rates and fringe benefits established by the Secretary of Labor to be prevailing for the job classification in which the employees work. The wage rate and fringe benefits required to be paid are set forth in a wage determination issued by DOL. Under FAR 52.222-43, a contractor is entitled to a price adjustment to its contract to reflect actual increased labor costs associated with complying with revised wage determinations. 48 CFR 52.222-43. Any adjustment made to the contract price is limited to increases in wage and fringe benefits, and accompanying increases or decreases in social security and unemployment taxes and workers' compensation insurance. *Id.* 52.222-43(e). Stobil challenges the VA's determination providing a price adjustment for health and welfare increases but not an adjustment for wage rate increases under FAR 52.222-43. As the proponent of the claim, Stobil has the burden of proof. *Tecom, Inc.*, ASBCA 51880, 00-2 BCA ¶ 30,944, at 152,738.

The VA has moved for summary judgment, arguing that Stobil (1) released its claim for any additional labor costs through the first bilateral modification of February 2016 effectuated by the parties, (2) failed to provide timely notice of any changes in DOL wage determinations to receive any commensurate increase in the contract price, and (3) failed to produce evidence showing entitlement to any labor costs over the amount determined by the contracting officer (\$21,865.37).

1. Release

As for the VA's argument regarding release, the parties effectuated two bilateral modifications in 2016 providing Stobil with an equitable adjustment under the housekeeping services contract at issue in this appeal. Both modifications contain similar language – with Stobil releasing the Government from liability under the contract for further equitable adjustment attributable to facts and circumstances giving rise to the proposal for adjustment, except for dispute of claims for back wages as set forth in Stobil's letter dated January 21, 2016. In the referenced letter, Stobil disputes the VA's finding that Stobil was entitled to only \$21,865.37 for increases in labor costs under FAR 52.222-43. Given this letter, the record is clear that the parties' bilateral modifications expressly reserved Stobil's rights to dispute the VA's assessment limiting compensation to \$21,865.37 for SCA-related labor costs. Accordingly, we find that the VA is not entitled to summary judgment based on the release language in the modifications.

2. Notice

The parties dispute whether Stobil provided timely notice as required by FAR 52.222-43, which requires a contractor to notify the contracting officer of any increase in wages and fringe benefits within thirty days of receiving a new wage determination. 48 CFR 52.222-43(f). However, even assuming that the VA is correct and Stobil failed to provide timely notice, a predecessor Board has held that “a late notice does not defeat a contractor’s claim unless a contract clearly states an untimely submission will cause a contractor to lose rights, or unless an agency can demonstrate it was prejudiced by a late notice.” *Air Masters Corp. v. General Services Administration*, GSBCA 16327, 04-2 BCA ¶32,688, at 161,746. Neither contract at issue in this appeal states that Stobil will lose its rights if it fails to provide a notice within the time required under the contract. Thus, the VA would only be entitled to summary judgment if it was prejudiced by Stobil’s failure to provide timely notice. *Id.* The VA did not argue that it was prejudiced and, therefore, is not entitled to summary judgment based on this argument.

3. Stobil’s Materials In Support of Its Claim for Labor Costs

The VA’s final argument is that Stobil has not entered into the record of this appeal any documentation, particularly payroll records, showing that there is a genuine issue in dispute on whether Stobil is entitled to a price adjustment for increased wage costs. A moving party is entitled to summary judgment if it can show that there is an absence of evidence to support the nonmoving party’s case. *Celotex Corp.*, 477 U.S. at 325; *see also Simanski v. Secretary of Health & Human Services*, 671 F.3d 1368, 1379 (Fed. Cir. 2012) (“[W]hen the non-moving party bears the burden of proof on an issue, the moving party can simply point out the absence of evidence creating a disputed issue of material fact. The burden then falls on the non-moving party to produce evidence showing . . . a disputed factual issue in the case.”).

In reviewing a motion for summary judgment, the Board may not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 US 133, 150 (2000). “Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts” are to be made by the Board only when serving as factfinder at a hearing or when a party elects to submit its case on the record without a hearing. *Id.* at 150–51 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)); Rules 18, 21. However, there is no issue requiring a hearing unless there is sufficient evidence favoring the nonmoving party for the Board to return judgment for that party. *Anderson*, 477 U.S. at 248. “If the evidence is merely colorable . . . or is not significantly probative, . . . summary judgment may be granted.” *Id.* at 249–50 (citations omitted).

In considering the VA's motion, we examine both Stobil's opposition and other materials in the record. *See* Fed. R. Civ. P. 56(c)(3) ("The court [or Board] need consider only the cited materials [when deciding a motion for summary judgment], but it may consider other materials in the record."). We note that Stobil was given multiple opportunities throughout this appeal to include materials in the record consistent with Rule 56(c) to support its claim.⁶ Stobil had the opportunity to supplement the record pursuant to Board Rule 4 and did so through multiple filings. Further, the parties engaged in discovery prior to filing their motions. After the filings of the motions, the Board twice provided Stobil the opportunity to submit materials on the record to support its own motion as well as materials that could have been used to support its opposition to the VA's motion.

Notwithstanding multiple opportunities to do so, Stobil has produced no evidence showing that a genuine issue exists on whether an additional amount is due on its claim for a wage rate price adjustment under the SCA and FLSA. As for the amount that Stobil alleges is due, the Rule 4 file includes a chart prepared by Stobil purporting to show wage rates and hours for Stobil's employees for the contract period. The chart does not show actual hours worked by Stobil employees, but instead shows the annual full-time hours (2080) that employees are projected to work in a year. Using these projected work hours, Stobil calculates its cost due to increases in wage rates and fringe benefits as \$116,866.40. The VA paid Stobil \$21,865.37 by modification so, according to Stobil, \$95,001.03 remains due. However, by law, any adjustment to the contract price due to increased wage rate and fringe benefit costs is based on the contractor's *actual* increases in applicable wages and benefits. FAR 52.222-43. Thus, under the applicable regulation, Stobil cannot receive the amount that it seeks. Stobil asserts that the numbers in the chart are correct because DOL used projected

⁶ Rule 56(c) of the Federal Rules of Civil Procedure states that

[a] party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for the purposes of the motion only), admissions, interrogatory answers, or other materials; or . . . showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

hours to calculate back wages due to Stobil employees. However, Stobil produces no evidentiary support for the assertion.

Turning to Stobil's opposition to the VA's motion, Stobil submitted two documents to support its argument that there is a disputed issue on the amount owed on its claim for increased wage costs – a statement from Stobil's former contract manager and an affidavit from the company's owner.⁷ In his statement, the contract manager asserted that the VA failed to pay applicable cost increases of both wages and benefits over the years of the contract. However, the contract manager does not provide the amount purportedly due from the VA to Stobil based on wages actually paid to employees, reference any payroll or other cost documentation that would support his assertion, or otherwise support Stobil's claim with evidence from the record. We find that the statement from Stobil's former contract manager regarding the VA's failure to pay wage and benefit increases lacks factual support and, thus, is insufficient to raise a disputed fact on whether the VA owes Stobil additional compensation on Stobil's wage claim. *Shaboon v. Duncan*, 252 F.3d 722, 736 (5th Cir. 2001) (“[U]nsupported affidavits setting forth ‘ultimate or conclusory facts and conclusions of law’ are insufficient to either support or defeat a motion for summary judgment.” (quoting *Orthopedic & Sports Injury Clinic v. Wang Laboratories, Inc.*, 922 F.2d 220, 225 (5th Cir. 1991))); *Doe v. United States*, 58 Fed. Cl. 479, 483 (2003) (“[S]elf-serving affidavits without factual support in the record will not defeat a motion for summary judgment.” (quoting *Shank v. William R. Hague, Inc.*, 192 F.3d 675, 682 (7th Cir. 1999))).

The affidavit of Stobil's owner is similarly lacking. In his affidavit, Stobil's owner asserts that the VA erred in its calculation of back wages owed, and that Stobil is entitled to an amount in addition to what has already been paid by the VA under the parties' bilateral modification. However, the mere assertion that the Government erred in its calculation and that additional monies are due is not sufficient to raise genuine issues of material fact and prevent the award of summary judgment. *Mingus Constructors, Inc.*, 812 F.2d at 1390–91 (“[T]he party opposing summary judgment must show an evidentiary conflict on the record; mere denials or conclusory statements are not sufficient.”); *see also Young-Montenay, Inc. v. United States*, 15 F.3d 1040, 1042 (Fed. Cir. 1994) (“conclusory, speculative affidavits of . . . company officials cannot raise” genuine issue of fact); *Wachovia Bank, N.A. v. Federal Reserve Bank of Richmond*, 338 F.3d 318, 323 n.5 (4th Cir. 2003) (an affidavit that is “unsupported by any evidence[] amount[s] to nothing more than a legal conclusion that carries no weight for purposes of summary judgment”).

We note that, when asked by the Board to file a schedule of costs, Stobil responded by citing various provisions in the FAR and referencing records in the Rule 4 file containing

⁷ We construe the statement as the same as a declaration.

the VA's calculations of amounts due which Stobil, without any evidentiary support, characterized as erroneous. Notably, although disputing the VA's calculation of the amount due on its wages and benefits claim, Stobil did not supplement the Rule 4 file in this appeal with the employee time records on which the VA based its calculation.

Stobil, in support of its own motion for summary judgment, relies on the depositions of two VA contracting officers assigned to Stobil's contract. However, the cited excerpts do not show that Stobil is entitled to summary judgment. To the contrary, the excerpts support the VA's position that the agency's calculation as to the amounts owed to Stobil for additional wages and benefits was correct, and no additional amount is due. Stobil, neither in the supporting materials to its summary judgment motion nor in its other submissions to the record, has produced the type of evidence requiring entry of summary judgment. *See Rich v. Secretary, Florida Department of Corrections*, 716 F.3d 525, 530 (11th Cir. 2013) ("When the *moving* party has the burden of proof at trial, that party must show *affirmatively* the absence of a genuine issue of material fact: it must support its motion with credible evidence that would entitle it to a directed verdict if not controverted at trial.") (quoting *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1438 (11th Cir. 1991)(en banc)); *Torres Vargas v. Santiago Cummings*, 149 F.3d 29, 35 (1st Cir. 1998) ("The party who has the burden of proof on a dispositive issue cannot attain summary judgment unless the evidence that he provides on that issue is conclusive." (citing *Calderone v. United States*, 799 F.2d 254, 258 (6th Cir. 1986))).

The rule on summary judgment is to be "construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the [r]ule, prior to trial, that the claims and defenses have no factual basis." *Celotex Corp.*, 477 U.S. at 327. The VA has persuasively argued that Stobil has not met its burden under Rule 56 to defeat the VA's motion for summary judgment on Stobil's claim for a price adjustment for increased labor costs under FAR 52.222-43. *See ASW Associates, Inc. v. Environmental Protection Agency*, CBCA 2326, 18-1 BCA ¶ 36,983, at 180,142 (granting summary judgment to agency because contractor failed to provide proof or factual detail supporting monetary claim); *Swanson Group, Inc.*, ASBCA 54862, 05-2 BCA ¶ 33,058, at 163,867-68 (summary judgment granted where non-moving party failed to support claim with record support and failed to raise a genuine issue of material fact). We therefore grant the VA's motion on this ground.

D. Administrative Costs Under FAR 52.222-43

We note that Stobil would not be entitled to administrative costs even if it were to prevail on its wages and benefits claim. FAR 52.222-43(e) expressly states payments for

increases in wages and fringe benefits do not include “any amount for general and administrative costs, overhead, and profit.” The VA’s motion on this claim is therefore granted.

E. Harm and Damage

Stobil requests \$800,000 for harm and damage including damages for lost business opportunities based on factual allegations that cannot be tied to the two contracts at issue in this appeal. Our appellate court, the United States Court of Appeals for the Federal Circuit, has long held that damages which are not an outgrowth of the contract itself, like those being sought by Stobil, are too remote and speculative to be recoverable. *Scott Timber Co. v. United States*, 333 F.3d 1358, 1372 (Fed. Cir. 2003); *Olin Jones Sand Co. v. United States*, 225 Ct. Cl. 741, 742 (1980) (damages unavailable based on inability to obtain new contracts or new work)⁸; *Northern Helex Co. v. United States*, 524 F.2d 707, 720 (Ct. Cl. 1975); *Charles Engineering Co. v. Department of Veterans Affairs*, CBCA 582, 07-2 BCA ¶ 33,698, at 166,824–25 (citing cases); *see also Smokey Bear, Inc. v. United States*, 31 Fed. Cl. 805, 808 (1994) (“[D]amages for the loss of future profits and lost profitable business opportunities arising from potential contracts with others are *per se* unrecoverable.”). Thus, the VA’s motion is granted on this claim.

F. Interest

Stobil requests \$2,313,640 in interest on its claims. FAR subpart 33.208 requires the Government to pay interest on a contractor’s claim on the amount found due and unpaid from the date that the contracting officer receives the claim. 48 CFR 33.208. Given the costs in dispute, we doubt that Stobil would be entitled to such a considerable sum in interest on its claims even if it were to prevail. In any event, pursuant to 48 CFR 33.208, Stobil is not entitled to interest because we find that there is no amount due and owing on Stobil’s claims, and therefore, the VA’s motion is granted on this claim.

Decision

Appellant’s motion for summary judgment is denied, and respondent’s motion for summary relief is granted. The appeal is **DENIED**.

⁸ The United States Court of Claims was the predecessor court to the United States Court of Appeals for the Federal Circuit.

Beverly M. Russell
BEVERLY M. RUSSELL
Board Judge

We concur:

H. Chuck Kullberg
H. CHUCK KULLBERG
Board Judge

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge