UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR PARTIAL SUMMARY JUDGMENT DENIED: January 19, 2022

CBCA 6885, 7051

ROCJOI MEDICAL IMAGING, LLC,

Appellant,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

Joseph A. Camardo, Jr. of Camardo Law Firm, P.C., Auburn, NY, counsel for Appellant.

David G. Fagan, Office of General Counsel, Department of Veterans Affairs, Portland, OR; and Jared M. Levin, Office of General Counsel, Department of Veterans Affairs, Brockton, MA, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **ZISCHKAU**, and **CHADWICK**.

CHADWICK, Board Judge.

Count I of the appellant's complaint asserts a claim for which the respondent paid the appellant $39,489.51 before these appeals were filed. Counts II and III of the complaint seek, in part, increased costs paid to subcontractors, as damages for the agency's failure to perform under an indefinite quantity contract. The respondent moves for partial summary judgment. It argues that the arithmetic underlying the quantum of count I is "fundamentally flawed" and that the appellant would have paid its subcontractors "regardless of any alleged breach." We deny the motion for lack of support in the record.

Background

The Board previously addressed this case in *RocJoi Medical Imaging, LLC v. Department of Veterans Affairs*, CBCA 6885, 20-1 BCA ¶ 37,746, and *RocJoi Medical Imaging, LLC v. Department of Veterans Affairs*, CBCA 6885, et al., 21-1 BCA ¶ 37,899. We summarize here the background necessary to understand the instant motion.

We previously held that the indefinite quantity contract at issue guaranteed that the respondent, Department of Veterans Affairs (VA), would order a minimum of 7000 radiological "studies" from the appellant, RocJoi Medical Imaging, LLC (RocJoi), during the life of the contract. VA awarded the contract in September 2017. "Although performance was originally expected to start in October 2017, in September 2018, the parties bilaterally modified a task order issued under the contract to reset the base year to August 2018 through July 2019. . . . VA did not exercise its option to extend the contract past the base year." *RocJoi Medical Imaging*, 20-1 BCA ¶ 37,746.

In June 2020, the contracting officer issued a decision granting in part and denying in part a certified claim by RocJoi. She determined that RocJoi was entitled to $39,489.51 for the agency's having ordered fewer than 7000 studies. RocJoi appealed to the Board from that decision but invoiced VA for the $39,489.51, which VA paid.

After the Board issued the two decisions cited above and consolidated these two appeals for resolution, RocJoi filed a consolidated complaint in September 2021 setting forth its remaining live claims. RocJoi alleges in count I of that complaint:

> The gross amount that ROCJOI should have received for the 7,000 studies at the average of $35.29 per study would be $247,030.00. The VA has made payment to date of $145,176.51, leaving a difference of $101,853.49. The estimated overhead and profit would be approximately 30%, which would then be applied to the $101,853.49, leaving the balance due to ROCJOI to be $23,504.65.

For purposes of its motion, VA accepts the figure of $35.29 per study and the estimated markup of 30% and bases its argument solely on RocJoi's "own figures."

Although the claimed dollar amount is broken out separately only in the narrative portion of the complaint, RocJoi seeks in counts II and III of the complaint, in part, $11,746 as "[a]dditional costs for IT [information technology] subcontractors due to the connectivity issues caused by the VA." VA's statement of undisputed facts under Board Rule 8(f)(1) (48 CFR 6101.8(f)(1) (2020)) mainly summarizes the course of proceedings in the case to date and does not say anything about IT subcontractors.

Discussion

We may grant summary judgment on all or part of a claim if the moving party shows it "is entitled to judgment as a matter of law based on undisputed material facts." Rule 8(f). A party opposing summary judgment need only show that "one or more" facts on which the moving party relies are "genuinely in dispute" and legally "material." *Amini Innovation Corp. v. Anthony California, Inc.*, 439 F.3d 1365, 1368 (Fed. Cir. 2006). A "non-movant is required to provide opposing evidence . . . only if the moving party has provided evidence sufficient, if unopposed, to prevail as a matter of law." *Saab Cars USA, Inc. v. United States*, 434 F.3d 1359, 1369 (Fed. Cir. 2006).

VA's extremely narrow argument about count I is unpersuasive. RocJoi is entitled to damages sufficient to put it in the financial position it would have occupied, absent the shortfall in orders below the minimum guarantee. *See White v. Delta Construction International, Inc*., 285 F.3d 1040, 1043 (Fed. Cir. 2002). VA argues, "The point being made by the VA is simply that ROCJOI's math is fundamentally flawed." VA does not and cannot dispute, however, that 7000 times a putative average price of $35.29 is $247,030, as RocJoi alleges, nor does VA controvert any of RocJoi's other arithmetic. Instead, VA argues that RocJoi "should have" multiplied the $35.29 average price by the number of studies (1553) that RocJoi alleged in discovery represented the shortfall of VA's orders. This, VA notes, would yield a gross missing order value of $54,805.37, a net 30% of which for lost profit and overhead is significantly less than the amount VA has already paid on the claim.

The hole in VA's argument is that neither party points to evidence in the summary judgment record that reliably shows how many studies VA ordered during the contract term, or even the total amount that VA paid RocJoi. RocJoi, which bears the burden of proof, may or may not elect to stand behind the figure of 1553 unordered studies, or an average price of $35.29, at a hearing. At this juncture, based on VA's very limited argument, RocJoi need not decide. The parties are simply using different methods—neither one fully supported as far as we can tell—to put an estimated value on the ordering shortfall. We cannot say that VA's method is correct "as a matter of law." *See* Rule 8(f); *Twigg Corp. v. General Services Administration*, GSBCA 14386, et al., 00-1 BCA ¶ 30,772 ("It is true, of course, that the proof of damages need not be exact. A reasonable basis is enough[.]").

RocJoi justifiably criticizes VA for not filing a statement of undisputed facts setting forth and supporting all of the facts on which VA's arguments rely. *See* Rule 8(f)(1). With regard to the IT subcontractors, VA argues that "the evidence shows[] that ROCJOI's costs associated" with two specific subcontractors "were fixed throughout the life of the Contract and incurred by ROCJOI regardless of any alleged breach." VA does not, however, propound any facts under Rule 8(f)(1) relating to the subcontracts—such as, for example, who the IT subcontractors were or what their subcontracts said. VA asserts in a footnote in

its reply that RocJoi "failed to produce any contracts with its IT subcontractors to the VA" in discovery. We do not understand how, in that case, VA can argue that "the evidence shows" anything about the subcontract prices. Nor will we speculate as to other arguments VA might have made concerning the absence of the subcontracts from the record. Again, VA cites no evidence entitling it to prevail "as a matter of law based on undisputed material facts." *See* Rule 8(f).

Decision

We **DENY** VA's motion for partial summary judgment.

Kyle Chadwick
KYLE CHADWICK
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Jonathan D. Zischkau
JONATHAN D. ZISCHKAU
Board Judge