

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY  
LOUISVILLE DIVISION

CIVIL ACTION NO. 00-688-JBC

SIEMENS BUILDING TECHNOLOGIES, INC.

PLAINTIFF,

VS.

**MEMORANDUM OPINION AND ORDER**

BTS, INC.

DEFENDANT.

\*\*\*\*\*

This matter is before the court upon the plaintiff's motion for summary judgment (No. 37). The court, having reviewed the record and being otherwise sufficiently advised, will grant the motion in part and deny it in part.

**Factual Summary**<sup>1</sup>

On February 1, 2002, the court granted partial summary judgment for the plaintiff, finding that the parties' contract (the "Subcontractor Agreement Form") unambiguously required the defendant to provide the active components identified in specification section 16960. The court declined to enter summary judgment on the issue of damages, however, as discovery had just begun and the defendant claimed it could obtain evidence that the plaintiff failed to act reasonably in securing "cover." Additionally, the court refused to dismiss the defendant's *quantum meruit* counter-claim for the approximately 24,000 feet of cable it provided to the plaintiff on July 8, 1999. Thus, the only issues remaining in this case are the amount of damages the plaintiff is entitled to recover for the defendant's breach of

---

<sup>1</sup> A more complete statement of the facts may be found in the court's order of February 1, 2002.

contract and whether the defendant is entitled to recover \$12,762.40 (i.e., the purchase price) for the cable it provided.<sup>2</sup> The plaintiff now moves for summary judgment on the issue of damages.

On October 12, 1999, the plaintiff informed the defendant that it would hire a replacement subcontractor if the defendant did not provide active components at the agreed contract price (i.e., \$29,145.00) within five days. Soon thereafter, the defendant responded that it would provide the active components only if it received an additional \$87,238.00. The plaintiff, after declaring the defendant in breach, then solicited bids from other contractors, including Matrix Integration (“Matrix”).

On October 19, 1999, Matrix submitted its first bid to the plaintiff, which offered to provide the active components for \$76,529.00, the telephone system for \$15,418.00, and the cable for \$14,914.00. After some adjustments were made to its bid,<sup>3</sup> and certain Matrix officials visited the project site, Matrix submitted a final bid which offered to provide the active components for \$84,619.00, the cable for \$17,328.00, and the telephone system for \$12,338.00. On December 9, 1999, the plaintiff and Matrix entered into a contract in which the plaintiff agreed to pay \$101,947.00 for the cable and active components. Matrix was not asked to provide telephone systems, as that work was eliminated from the plaintiff’s

---

<sup>2</sup> The defendant’s counter-claim is not addressed here, as the plaintiff has not moved for summary judgment on that claim.

<sup>3</sup> Matrix discovered that it exceeded the contract’s requirements for the telephone system by quoting 24-line telephones for all of the telephones called for in the specifications. Thus, Matrix’s subsequent bids on the telephone system were lower than its first bid, as the later ones included twenty 12-line telephones and only one 24-line telephone.

subcontract. Matrix began work on February 21, 2000, and concluded work on March 28, 2000.

It is undisputed that the parts and labor supplied by Matrix were strictly required by the specifications of the parties' original contract, with some minor exceptions.<sup>4</sup> On July 6, 2000, the plaintiff paid Matrix \$105,329.35 for its work in completing the project. The plaintiff also paid another third party (i.e., Graybar) \$7,920.00 for 24,000 feet of cable which was required to complete the project and which the defendant failed to provide.<sup>5</sup> In total, the plaintiff claims that the defendant owes it \$86,272.10, plus pre-judgment interest, for breach of contract.

### **Analysis**

Under Kentucky law, the plaintiff, once faced with the defendant's refusal to provide the active components listed in the parties' contract, had a right to "cover" by "making in good faith and without unreasonable delay any reasonable purchase" of substitute goods. Ky. Rev. Stat. § 355.2-712. Having chosen to cover, the plaintiff is entitled to recover "the difference between the cost of cover

---

<sup>4</sup> In formulating its second bid, Matrix discovered that the network router called for in the specifications was no longer available. The replacement router chosen by the plaintiff was more expensive than the one called for in the original specifications. Additionally, Matrix's original quote did not include labor costs for server installation, as the contract was unclear as to whether installation was required. These two changes increased Matrix's bid on the active components by \$8,090.00. The plaintiff also paid Matrix \$2,414.00 to terminate video jacks and \$3,382.35 (over and above the contract price) to install additional voice and data outlets, work which the defendant did not agree to perform in the parties' contract.

<sup>5</sup> It is undisputed that the defendant provided a type of cable not called for under the parties' contract. The Index E-series drawings contemplated "double drops" cable, rather than the "single drops" which the defendant provided.

and the contract price together with any incidental or consequential damages.” *Id.*

The defendant does not dispute that the plaintiff acted reasonably and in good faith in its cover efforts. Instead, it argues only that it never agreed to provide the active components. That argument, however, was rejected in the court’s order of February 1, 2002.<sup>6</sup> Since the active components purchased by the plaintiff were below the price that the defendant quoted for active components, and since the defendant has not even alleged a dispute relevant to the plaintiff’s cover, the plaintiff has shown that it is entitled to judgment as a matter of law that it acted reasonably in securing cover from Matrix. *See Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986)(Where the moving party has the burden of proof on an issue, he must show that “no reasonable trier of fact could find other than for the moving party.”)(citation omitted). Furthermore, the defendant has produced no significantly probative evidence that the plaintiff failed to undertake reasonable mitigation.<sup>7</sup> *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Thus, no genuine dispute exists in this regard.

Despite the lack of such a dispute, the plaintiff is not, as a matter of law, entitled to all of the amounts it claims. Under KRS 355.2-712, the plaintiff is

---

<sup>6</sup> Since the defendant signed a contract which clearly required it to provide active components, and since the defendants did not plead mutual mistake, fraud, or illegality, the court was required to give effect to the plain terms of that contract. *See Jones v. White Sulphur Springs Farm, Inc.*, 605 S.W.2d 38, 42 (Ky. App. 1980).

<sup>7</sup> Neither the parties nor the court could locate a controlling Kentucky opinion regarding who has the burden of proof under KRS 355.2-712. In any event, the plaintiff has satisfactorily shown that no reasonable juror could find other than for it, and the defendant has not presented any evidence which would allow a jury to find to the contrary.

entitled to recover amounts used to purchase “substitute,” not better and more expensive, goods. “It is well established in this jurisdiction that the measure of damages for breach of contract is that sum which will put the injured party into the same position he would have been in had the contract been performed.” *Perkins Motor, Inc., v. Autotruck Federal Credit Union*, 607 S.W.2d 429, 430 (Ky. App. 1980). The total amount claimed by the plaintiff, however, seeks to hold the defendant accountable for \$8,090.00 worth of work it never agreed to perform and which the plaintiff would have needed done even if the defendant had fulfilled its contractual obligations. Specifically, the allowances made to Matrix for the purchase of a replacement router and for labor for server installation were not included in the original contract and would have been expended by the plaintiff even if the defendant had performed its part of the bargain. Thus, the plaintiff may not recover these monies. Accordingly,

**IT IS ORDERED** that the plaintiff’s motion for summary judgment is **GRANTED IN PART** and **DENIED IN PART**. The plaintiff’s damages resulting from the defendant’s breach of contract are \$70,218.00. This sum represents the difference between the Matrix contract price, \$101,947.00, less \$2,414.00 for termination of video jacks (work which the defendant never agreed to perform and which the plaintiff does not seek to recover), less \$8,090.00 for the replacement router and labor for server installation, minus \$29,145.00 (the amount of the original contract<sup>8</sup>), plus \$7,920.00 for cable which,

---

<sup>8</sup> The plaintiff is not entitled to a reduction based on the amount the defendant bid on the telephone system. Although the telephone system work may have been eliminated from the plaintiff’s subcontract, it appears that the plaintiff would have still been obligated under the parties’ contract to pay the defendant \$7,964.10 (the agreed price) for its telephone system. The plaintiff has not shown as a matter of law that it is entitled to such a reduction, and the court cannot leave

as an item of consequential damages, the plaintiff purchased from Graybar. The plaintiff shall also be awarded 8% prejudgment interest, beginning from July 6, 2000 (the date the plaintiff paid Matrix), due to the liquidated nature of its damages. *Nucor Corp. v. General Elec. Co.*, 812 S.W.2d 136, 141 (Ky. 1991)(“When the damages are ‘liquidated,’ prejudgment interest follows as a matter of course.”).

**IT IS FURTHER ORDERED** that the defendant’s motion for substitution of counsel (No. 42) is **GRANTED**. Bruce D. Atherton shall be substituted as defendant’s counsel of record.

This the \_\_\_\_\_ day of \_\_\_\_\_, 2002.

---

JENNIFER B. COFFMAN, JUDGE  
UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF KENTUCKY

---

the plaintiff in a better position than it would have been if the defendant had performed under the contract.