



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: April 15, 2010

CBCA 1888

COOPER CONTRACTING INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Paul and Lauren Cooper of Cooper Contracting Inc., Monument, OR, appearing for Appellant.

Zoey L. Kohn, Office of the General Counsel, Department of Agriculture, Portland, OR, counsel for Respondent.

VERGILIO, Board Judge.

On February 16, 2010, the Board received from Cooper Contracting Inc. (contractor) a notice of appeal disputing a contracting officer's decision dated December 7, 2009. The contractor provided a fire engine and operators under an emergency equipment rental agreement (EERA) with the Department of Agriculture, Forest Service (Government). For damage to furnished equipment, the contract limits the Government's liability to instances when the damage results "from the negligence, or wrongful act(s) of Government employee(s) while acting within the scope of their employment." During performance, while a contractor employee drove, a tree(s) fell on and damaged the fire engine. The contractor maintains that the Government employee directing operations was negligent in his actions, such that the Government is liable. The dispute concerns the interpretation and application of the contract and clause.

The contractor timely brings this appeal pursuant to the Contract Disputes Act of 1978, as amended, 41 U.S.C. §§ 601-613 (2006). The contractor has elected the small claims

procedure, such that this decision binds the parties but does not establish precedent. 41 U.S.C. § 608; Rule 52.

On April 8, during a telephone conference the presiding judge and parties discussed the facts and applicable law. The presiding judge rendered a decision, here reduced to writing. The record establishes neither a negligent nor a wrongful act of a Government employee. The contractor, not the Government, bears the risk of the damage that occurred. The Board denies the contractor's claim to be paid \$7542.20.

Findings of Fact

1. Pursuant to an EERA, the contractor provided a fire engine and operators at the Tumblebug Complex Fire in the Willamette National Forest, Oregon. Exhibit 3 (all exhibits are in the appeal file). A provision of the agreement specifies:

Equipment furnished under this agreement may be operated and subjected to extreme environmental and/or strenuous operating conditions which could include but [are] not limited to unimproved roads, steep, rocky, hilly terrain, dust, heat, and smokey conditions. As a result by entering into this agreement, the contractor agrees that what is considered wear and tear under this agreement is in excess of what the equipment is subjected to under normal operations and is reflected in the rates paid for the equipment. When such equipment is furnished to the Government, the following clauses shall apply.

Exhibit 1 at 38.

2. There follows a Loss, Damage, or Destruction clause, including the following provision:

(b) For equipment furnished under this EERA with operator, the Government shall not be liable for any loss, damage, or destruction of such equipment, except for loss damage or destruction resulting from the negligence, or wrongful act(s) of Government employee(s) while acting within the scope of their employment. The operator is responsible for operating the equipment within its operating limits and responsible for safety of the equipment.

Exhibit 1 at 39 (clause 9).

3. With a contractor employee operating the vehicle under the direction of a Government employee, a tree or trees fell on and damaged the vehicle. In the notice of appeal, the contractor describes the incident:

In this matter we were told by our Strike team leader (the government employee) to go down this particular road. We were on a night shift, this shift is a hazard to begin with. It was an extremely windy night. We were one of three contractors in our strike team of five engines who had trees hit and damage their trucks. We are really lucky no people were hurt.

....

This resulted in the damage created to our truck by the tree falling on it. In my opinion we shouldn't have been there. The government employee should have pulled us out of that area and let the winds die down before we went back to the work in that area.

4. In a declaration, the Government assistant fire management officer, who was the night operations section chief working the fire at the time of the damage, relates his version of the circumstances at the fire and of the incident: there was little or no wind, and no reason to expect that a green tree (as fell on the contractor's truck) would fall; the only trees to fall were those two that fell on or near the contractor's vehicle. Exhibit 7. The reports for the morning do not indicate high winds or unusual conditions. Exhibit 4.

5. The contractor submitted a claim to recover a total of \$7542.20; that is, \$6792.20 for damage to the vehicle (supported by a preliminary estimate) and \$750 for otherwise unquantified inconvenience and time. Exhibit 5. By decision dated December 7, 2009, the contracting officer denied the claim. The decision references the above-quoted clauses. The contracting officer determines that the Government employee was not negligent and did not commit a wrongful act, and concludes that the contractor cannot recover the amount for damages. Regarding the \$750, the contracting officer states that the Government is prohibited from reimbursing contractors for something the Government did not receive. Treating the costs as anticipatory profits, the contracting officer states that reimbursement is not allowed. Exhibit 6.

6. This appeal ensued, filed within ninety days of receipt of the contracting officer's decision.

Discussion

The contract expressly addresses liability for damages to owner-operated equipment. The unambiguous contract provision dictates that the “Government shall not be liable for any loss, damage, or destruction of such equipment, except for loss damage or destruction resulting from the negligence, or wrongful act(s) of Government employee(s) while acting within the scope of their employment.”

The contractor contends that the Government employee was negligent in directing the operator to proceed under the existing conditions. The contractor bears the burden of proof to recover.

The scenario described in the notice of appeal, Finding 3, by itself does not support a conclusion that a Government employee acted negligently or wrongly. More particular or conclusive findings, based on the record as a whole, would be less favorable to the contractor, and, therefore, are unnecessary for the Board to reach its conclusions. The record does not demonstrate that the Government employee acted negligently or wrongly at the fire, in directing the operator of the fire truck or otherwise. An accident occurred. A tree(s) fell on the truck; damage occurred without the fault or negligence of the Government. The Government is not liable for the damage to the vehicle.

Under the contract, the contractor bears the risk for the damage to the vehicle. The Government is not liable for the claimed costs of repair and associated costs that the contractor seeks to recover.

Decision

The Board **DENIES** this appeal.

JOSEPH A. VERGILIO
Board Judge