



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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MOTION TO DISMISS FOR LACK OF SUBJECT-MATTER  
JURISDICTION DENIED: September 8, 2022

CBCA 7323

BEAR MOUNTIN CUTTERS, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Joel Penoyar and Edward Penoyar of Penoyar Law Offices, South Bend, WA; and Jonathan A. DeMella of Davis Wright Tremaine LLP, Seattle, WA, counsel for Appellant.

Richard A. Grisel, Office of the General Counsel, Department of Agriculture, Portland, OR, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **VERGILIO**, and **SHERIDAN**.

Opinion for the Board by Board Judge **BEARDSLEY**. Board Judge **VERGILIO** concurs.

**BEARDSLEY**, Board Judge.

Appellant, Bear Mountin Cutters, Inc., appealed the denial of its claim for damages to its equipment in the amount of \$451,782.33. The Department of Agriculture (USDA or agency) moves to dismiss the appeal for lack of subject-matter jurisdiction, asserting that appellant's claim sounds in tort, not contract. For the following reasons, we deny the motion.

### Background

In 2021, appellant entered into an “Incident Blanket Purchase Agreement” (I-BPA) with the USDA Forest Service for miscellaneous heavy equipment (feller buncher, mulcher/masticator, road grader, and skidder) for use on a local, regional, and nationwide basis in the protection of lands from fire and hazardous incidents. Pursuant to the I-BPA, appellant accepted a resource order from the Bureau of Indian Affairs – Colville Agency for a “Boom Mounted Type 2 Masticator” to assist in clearing areas of brush affected by the Summit Trail Fire. The I-BPA, included section C.8, titled, “LOSS, DAMAGE OR DESTRUCTION,” that states:

(b) For equipment furnished under this agreement 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.

Appellant reported to the fire incident headquarters with the ordered equipment (the “masticator”) and its own equipment operators. “The Forest Service directed that the masticator be ‘walked’ (top speed 1.2 [miles per hour]) up a remote logging road to widen the brush cleared area, for an attempted fire break in front of the approaching fire. This was done even though the Forest Service was [allegedly] well aware of threatening weather conditions in the upcoming days and of the impossibility of moving the masticator out of harm’s way in an emergency.” Appellant alleges that there was not the “usual Forest Service heavy equipment boss on scene (whose duties include scene safety).” Due to an alleged “breakdown in staffing and the usual safety protocols,” there was “no time to ‘walk’ the masticator out and it was totaled.” Appellant claims that the Forest Service was “grossly negligent and acted recklessly in directing appellant to ‘walk in’ the masticator the day before the fire” and “directing appellant to work in front of the approaching fire the day the masticator was destroyed.”

Appellant submitted a claim to the agency for \$451,782.33, the replacement cost of the masticator, which the contracting officer denied. Subsequently, appellant appealed to the Board, asserting that under clause C.8 of the contract, the agency is liable for damages because “the loss was caused solely by the negligence and wrongful acts of Government employees.” In response, the agency filed a motion to dismiss for lack of subject-matter jurisdiction. The agency seeks dismissal on the grounds that “the contract between the parties does not contain any negligence-related performance obligation, the Complaint does

not allege any breach of contract, and the lone mention of negligence in the contract is best understood as referencing a cause of action available under the waiver of sovereign immunity in the Federal Tort Claims Act (FTCA).” The agency, therefore, asserts that the contractor’s sole remedy arises under the FTCA, 28 U.S.C. § 1346(b) (2018).

### Discussion

“[W]here a plaintiff alleges the existence of a contract between it and the Federal Government, a court or board of contract appeals has jurisdiction to consider the case.” *Griz One Firefighting, LLC v. Department of Agriculture*, CBCA 6358, 20-1 BCA ¶ 37,514, at 182,219 (citing *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353 (Fed. Cir. 2003)). Here, appellant’s complaint, construed in appellant’s favor, alleges the existence of a Federal Government contract.<sup>1</sup> *Brent Packer v. Social Security Administration*, CBCA 5038, et al., 16-1 BCA ¶ 36,260, at 176,896 (“[I]n considering a motion to dismiss for lack of jurisdiction, we look to the allegations contained in the complaint, construed favorably to the pleader.”); see also *Innovative (PBX) Telephone Services, Inc. v. Department of Veterans Affairs*, CBCA 12, et al., 07-2 BCA ¶ 33,685, at 166,758.

The Board, however, lacks jurisdiction to entertain claims of pure negligence which sound in tort. *Griz One Firefighting, LLC v. Department of Agriculture*, CBCA 6358, et al., 22-1 BCA ¶ 38,021, at 184,641 (citing *Dungaree Realty, Inc.*, HUDBCA 95-G-102-C1, 97-2 BCA ¶ 29,189, at 145,213). Under the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–7109, the Board can decide an action “which arises primarily from a contractual undertaking even though the loss may have resulted from the negligent manner in which the contract was performed.” *Griz One Firefighting*, 22-1 BCA at 184,641 (quoting *Goodfellow Brothers, Inc.*, AGBCA 80-189-3, 81-1 BCA ¶ 14,917, at 73,805 (finding jurisdiction in a similar context). Even so, there must be a “direct nexus between the Government’s alleged tortious conduct and its obligations under the contract.” *Asfaltos Panemenos, S.A.*, ASBCA 39425, 91-1 BCA ¶ 23,315, at 116,919 (1990); *Innovative (PBX) Telephone Services, Inc. v. Department of Veterans Affairs*, CBCA 12, 07-2 BCA ¶ 33,685, at 166,763 (quoting *TAS Group, Inc. v. Department of Justice*, CBCA 52, 07-2 BCA ¶ 33,630, at 166,566-67).

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<sup>1</sup> The Board has jurisdiction to decide claims arising out of the resource orders placed pursuant to the I-BPA. *Coast to Coast Computer Products v. Department of Agriculture*, CBCA 3516, et al., 17-1 BCA ¶ 36,827, at 179,485. “Individual authorized call orders actually placed under a BPA do . . . create a contractual obligation.” *Id.* (citing *Zhengxing v. United States*, 204 F. App’x 885, 886-87 (Fed. Cir. 2006)).

Appellant asserts that respondent owes damages for the masticator pursuant to section C.8 of the I-BPA.<sup>2</sup> This contract clause allocates risks between the parties, setting forth performance obligations as a result of a contractual undertaking. *Sierra Pacific Airlines*, AGBCA 82-112-1, 82-1 BCA ¶ 15,710; *Fort Vancouver Plywood Co.*, AGBCA 83-139-1, 84-1 BCA ¶ 16,982, at 84,568 (1983) (finding that “several provisions of the sale contract pertain to title, risk of loss, etc. These provisions control the rights and obligations of the parties for the timber loss.”). There exists, therefore, a sufficient nexus between the Government’s allegedly tortious conduct and breach of its contractual obligations so as to allow this Board to exercise jurisdiction over this appeal.

Decision

Respondent’s motion to dismiss for lack of subject-matter jurisdiction is **DENIED**.

*Erica S. Beardsley*  
ERICA S. BEARDSLEY  
Board Judge

I concur:

*Patricia J. Sheridan*  
PATRICIA J. SHERIDAN  
Board Judge

**VERGILIO**, Board Judge, concurring.

I concur with the decision to deny the motion to dismiss. The contractor alleges that it is entitled to relief under clause C-8 of the contract. Whether or not this may be asserted as a tort claim, as the agency maintains, the Board need not decide. The claim raises a contract claim over which the Board has jurisdiction. Precedent supports Board jurisdiction

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<sup>2</sup> All terms and conditions of the I-BPA became part of the separate resource order or contract. *Hewlett-Packard Co.*, ASBCA 57940, et al., 13 BCA ¶ 35,366, at 173,551-52. Any interpretation required of the terms of the I-BPA is treated as an interpretation of the terms of the resource order. *Id.*; see also *Brent Packer* (interpreting the termination clause in the BPA in finding jurisdiction over call orders).

here, *Outback Firefighting, Inc. v. Department of Agriculture*, CBCA 6078, 19-1 BCA ¶ 37,208 (2018) – a case not referenced by either party.

*Joseph A. Vergilio*  
JOSEPH A. VERGILIO  
Board Judge