



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION TO DISMISS FOR LACK OF JURISDICTION DENIED: March 12, 2024

CBCA 7767

WOIRHAYE LOGGING COMPANY, LLC,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Lawson E. Fite of Schwabe Williamson & Wyatt PC, Portland, OR, counsel for Appellant.

Jennifer T. Newbold, Office of the General Counsel, Department of Agriculture, Missoula, MT, counsel for Respondent.

Before Board Judges **BEARDSLEY** (Chair), **SHERIDAN**, and **O'ROURKE**.

O'ROURKE, Board Judge.

Appellant, Woirhaye Logging Company, LLC (Woirhaye), seeks reimbursement of expenses incurred when a wildfire consumed timber that had been cut and skidded but remained in the sale area. Woirhaye argues that the agency was negligent when it reassured Woirhaye that the fire would not reach the sale area, failed to take actions to protect the sale area, and then prohibited access to the sale area when there was still time to remove the timber. The agency contends that the Board lacks subject matter jurisdiction to decide disputes based on negligence because they are tort claims, not contract claims. Because we find a sufficient nexus between the agency's alleged conduct and its obligations under the contract, we deny the motion.

Background

On September 21, 2021, the agency awarded the Tolan 1 Firewood Timber Sale contract to Woirhaye, under which the Forest Service agreed to sell, and Woirhaye to purchase, cut, harvest, and remove, timber and forest products from a specified area (the sale area). On February 1, 2022, Woirhaye ceased operations for the season.

Woirhaye resumed work for the new season on August 17, 2022. On August 26, it received notice that a fire had started approximately four miles from the sale area. According to Woirhaye, the initial report relayed that the fire was at the end of a single log on flat terrain close to two roads and that it was being monitored. Woirhaye stayed in contact with fire personnel and the timber sale administrator, who reassured Woirhaye that the fire would not reach the timber sale. The Forest Service issued a closure order for the sale area on September 8, 2022, which required Woirhaye to cease operations and leave the sale area for safety reasons. At that point, Woirhaye had cut and skidded approximately 75% of the sale area but had not removed all of the processed timber.

By September 28, 2022, the fire had spread to the sale area and consumed the remaining timber product. After the closure order was lifted, Forest Service personnel surveyed the damage and determined that the remaining timber was “severely burned and no longer met minimum saw timber specifications.” The agency notified Woirhaye of its determination and formally closed the timber sale by letter dated December 20, 2022.

Woirhaye submitted a claim to the contracting officer in the amount of \$48,480 for “out of pocket expenses” incurred to pay for labor, equipment time, mobilization, administrative wages, fuel costs, and costs to process the product that was consumed by the fire. The contracting officer denied the claim on the basis that the contract did not permit recoupment of such expenses. Woirhaye timely appealed the decision to the Board.

Woirhaye’s appeal and complaint blamed the agency for the costs it incurred due to the agency’s failure to take appropriate actions at the outset of the fire, when it could have easily been put out. Woirhaye contends that the agency was negligent because it allowed the fire to grow and expand into the sale area and consume timber that Woirhaye had purchased and cut but had not yet removed. Woirhaye further maintains that twenty days elapsed between the time that it received the notice of closure and when the fire burned through the remaining timber product. Woirhaye stated that it needed only four days to remove the processed timber, but the agency’s actions, and inaction, deprived Woirhaye of that opportunity. Had Woirhaye not received constant reassurance from agency personnel that the fire would not reach the sale, it would have ceased all other operations and removed the remaining cut timber.

After docketing and submission of pleadings, the agency filed a motion to dismiss the appeal for lack of jurisdiction, arguing that Woirhaye's claim of negligence cannot be heard by the Board because it sounds in tort, not in contract. "Appellant's claim is not and cannot be that the United States breached the Contract, but that the Government acted negligently. This is a tort claim for which the sole Congressional waiver of sovereign immunity is the [Federal Tort Claims Act]." As such, the agency urges the Board to dismiss the claim for lack of subject matter jurisdiction.

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." *Bear Mountain Cutters, Inc. v. Department of Agriculture*, CBCA 7323, 22-1 BCA ¶ 38,189, at 185,460 (quoting *Griz One Firefighting, LLC v. Department of Agriculture*, CBCA 6358, 20-1 BCA ¶ 37,514, at 182,219); see *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353 (Fed. Cir. 2011). There is no dispute that a contract existed between the parties in this case or that Woirhaye's claim and subsequent appeal were submitted pursuant to that contract. Nevertheless, the Forest Service contends that the Board lacks jurisdiction to hear this dispute because Woirhaye's claim does not assert a breach of a contractual duty. Rather, the agency couches the dispute as "a traditional tort claim" that speaks to the manner in which a *non-contractual duty* (managing the fire) was performed. We disagree.

Although the Board lacks jurisdiction to entertain pure claims of negligence which sound in tort, it is widely recognized that the Board can decide an action "that 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, LLC v. Department of Agriculture*, CBCA 6358, et al., 22-1 BCA ¶ 38,021, at 184,641 (quoting *Goodfellow Brothers, Inc.*, AGBCA 80-189-3, 81-1 BCA ¶ 14,917, at 73,805). To make this determination, we look for a "direct nexus between the Government's alleged tortious conduct and its obligations under the contract." *Bear Mountain Cutters, Inc.*, 22-1 BCA at 185,460 (quoting *Asfaltos Panemenos, S.A.*, ASBCA 39425, 91-1 BCA ¶ 23,315, at 116,919 (1990)); see *Innovative (PBX) Telephone Services, Inc. v. Department of Veterans Affairs*, CBCA 12, et al., 07-2 BCA ¶ 33,685, at 166,764; *TAS Group, Inc. v. Department of Justice*, CBCA 52, 07-2 BCA ¶ 33,630, at 166,566-67.

When a contract defines the parties' obligations and allocates risks between them, a "sufficient nexus" exists between the Government's alleged tortious conduct and breach of its obligations for the Board to exercise jurisdiction over the appeal. See *Bear Mountain Cutters, Inc.*, 22-1 BCA at 185,460 (where the Board found jurisdiction over a dispute that blamed the Forest Services' instructions for the loss of heavy equipment destroyed by a wildfire); see also *Sierra Pacific Airlines*, AGBCA 82-112-1, 82-1 BCA ¶ 15,710

(jurisdiction was established where a pilot complied with a Forest Service representative's instruction to park an aircraft in a particular location and the engine was damaged by volcanic ash). Here, Woirhayé's claim arose under its contract with the Forest Service, which imposes obligations, both express and implied, on each party to ensure performance of the contract, including the duty not to hinder performance. Whether a party failed to comply with its duties is a matter to be decided on the merits. We have jurisdiction to consider the dispute.

Decision

The agency's motion to dismiss for lack of jurisdiction is **DENIED**.

Kathleen J. O'Rourke

KATHLEEN J. O'ROURKE

Board Judge

We concur:

Erica S. Beardsley

ERICA S. BEARDSLEY

Board Judge

Patricia J. Sheridan

PATRICIA J. SHERIDAN

Board Judge