

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Qatar International Trading Co.) ASBCA No. 55533
)
Under Contract No. F38604-03-AZ001)

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OPINION BY ADMINISTRATIVE JUDGE WILSON
ON THE GOVERNMENT’S MOTION TO DISMISS

The government has filed two motions, the first contending that there are no material facts at issue and the government is entitled to judgment as a matter of law. The second argues the Board lacks jurisdiction as the alleged governmental actions sound entirely in tort, independent of the contract. Appellant opposes the motions. As we believe the claim does not have a sufficient nexus to the contract, but is an independent tort claim, we grant the government’s motion to dismiss for lack of jurisdiction.

FINDINGS OF FACT FOR PURPOSES OF THE MOTION

1. On 13 April 2003, the United States Air Force (the government) and Qatar International Trading Co. (QIT or appellant) entered into a blanket purchase agreement (BPA) for the lease of heavy equipment. The terms of the BPA stated that the ordering period would be effective from 29 April 2003 to 28 April 2008. Purchases under the BPA are referred to as “calls,” and could be either oral or in writing with a “description of the supplies or services being ordered; prices therefore; delivery schedule; FOB [delivery] point; place of inspection and acceptance; preservation, packaging and

marking requirements; designation of appropriations chargeable together with such other specifics covered elsewhere herein.” (R4, tab 1 at 1-3)

2. One of the “other specifics covered elsewhere” in the BPA was the need for the contractor to maintain insurance. Specifically, the BPA at section C-4.1.1 states:

The contractor will carry insurance to cover the cost for replacement or repair of vehicles lost, stolen or damaged through criminal acts, natural acts (commonly called acts of God), or hostile acts. This is to preclude the government from being held liable for claims generating from any of the above.

(R4, tab 1 at 9)

3. By e-mail dated 24 August 2004, the government placed a call for multiple pieces of heavy equipment, including, *inter alia*, a bulldozer equal to a brand name Caterpillar D-7 (app. opp’n to gov’t mot. for summary judgment (“app. opp’n”), ex. 1, attach. 1A-C). The FOB point for delivery was Baghdad, Iraq (gov’t mot. for summary judgment ¶ 6; app. opp’n ¶ 1). Of the equipment called for on 24 August, only the Caterpillar bulldozer is the subject of this appeal.

4. QIT requested assistance with delivery and military escort through a separate government contractor, Navstar North, Kellogg Brown and Root (KBR) (compl. ¶ 9; answer ¶ 9).

5. The Caterpillar bulldozer was never delivered to Baghdad (gov’t mot. for summary judgment ¶ 9; app. opp’n ¶ 1).

6. By letter dated 2 April 2006, QIT submitted a certified claim in the amount of \$219,178.00. The claim sought payment for the value of the bulldozer which was not delivered to Baghdad. QIT alleges therein that it attempted to deliver the bulldozer through the government’s contractor for transportation in Iraq, KBR, but that the driver of the truck carrying the bulldozer was involved in an accident and died leaving the bulldozer en route. QIT goes on to state that the government towed the trailer loaded with the bulldozer and placed it in storage at Camp Arifjan, Kuwait. (R4, tab 82) The record supports the claim that on 10 December 2004, the subject bulldozer was in storage at Camp Arifjan (app. opp’n, ex. 2 at 17, 23).

7. While in storage at the Army camp, unknown third parties approached KBR personnel at the camp with evidence that the bulldozer belonged to Fahad Alghanem & Sons and requested it be returned to them. These unknown parties provided the

bulldozer's correct serial and license number as an indication of their entitlement to have the equipment returned to them. (App. opp'n, ex. 2 at 13, 14, 23)

8. The evidence provided in the record indicates that KBR personnel questioned the men regarding their right to the equipment, and after being satisfied that the equipment did indeed belong to them, released the equipment with the government's concurrence (app. opp'n, ex. 2 at 14, 23). The government's concurrence was sought from Army Captain Carlos Gonzales, who when later questioned regarding the release, stated that while he helped release equipment from the camp, he had no memory of providing verbal authorization to release any bulldozer, nor did he have authority to release the equipment (app. opp'n, ex. 3 at 2). The record contains no evidence that the equipment has ever been recovered by appellant.

9. In its claim, appellant asserted that the Air Force breached its common law bailment obligation not to lose QIT's property (R4, tab 82 at 2). By letter dated 7 August 2006, the contracting officer denied appellant's claim (R4, tab 109). The primary basis for the denial referenced the contract's insurance clause, C-4.1.1.

10. By letter dated 10 August 2006, appellant filed a timely appeal with the Board.

11. After the pleadings were filed, the government moved for summary judgment contending that it was not liable for the loss of the bulldozer because appellant never delivered it to the contractually-required destination point and the contract required appellant to maintain insurance to cover against such a loss. Appellant filed an opposition to the motion, together with a cross-motion for summary judgment arguing that delivery and insurance coverage were irrelevant to the issue of government liability for negligence, as a bailment was created when the government diverted the bulldozer to Camp Arifjan. In response to appellant, the government added a motion to dismiss alleging the Board lacks jurisdiction over the appeal because appellant's claim sounds entirely in tort. Appellant filed a reply to the government response contending that a sufficient contractual nexus existed between the tortious conduct and the implied duty of care under the contract, thus jurisdiction is proper.

DECISION

The government's motion to dismiss is premised on the argument that the claim which is the basis of this appeal is strictly a tort action over which the Board has no jurisdiction as the Board's jurisdiction is limited to appeals rising out of or relating to a contract. Appellant does not deny that the Board's jurisdiction is limited to contract actions, but maintains that the facts of the appeal and subsequent claim are based upon a theory of bailment that is substantially linked to the contract, such that the Board does have jurisdiction to hear the appeal. We disagree.

Under the Contract Disputes Act (CDA), the Board “shall have jurisdiction to decide any appeal from a decision of a contracting officer of the Department of Defense, ... relative to a contract made by that department or agency.” 41 U.S.C. § 607(d). The Board lacks jurisdiction to entertain a claim based upon tortious conduct which is independent of a contract between the government and a prime contractor. *L&M Thomas Concrete Co.*, ASBCA Nos. 49198, 49615, 98-1 BCA ¶ 29,560 at 146,538. Where appellant can show that there is a sufficient nexus between the alleged tort and some express or implied obligation of the government, however, we have jurisdiction to render judgment on the claim. *Id.* This nexus must have a direct link between the alleged wrongdoing and some obligation imposed upon the government in the contract. The mere presence of any connection between the contract and the tortious behavior is insufficient to establish our jurisdiction. *Asfaltos Panamenos, S.A.*, ASBCA No. 39425, 91-1 BCA ¶ 23,315 at 116,919. Under the CDA, our jurisdiction over tort claims is valid only where the tort is shown to be a tortious breach of the contract as opposed to an independent tort. *Id.*, citing *H.H.O., Inc. v. United States*, 7 Cl. Ct. 703 (Cl. Ct. 1985).

Appellant principally cites two cases in support of its assertion of Board jurisdiction. In the first, *Innovations Hawaii*, ASBCA Nos. 30619, 30627, 87-1 BCA ¶ 19,376, the government disposed of a contractor’s poster rack, without notice to the contractor, after the government decided to stop selling the contractor’s posters. The Board held that the government was liable for the replacement cost of the rack because the disposal amounted to a breach of its duty under a theory of common law bailment. The Board reasoned that since the display rack was delivered by the contractor to the government’s Post Exchange store in pursuance of its performance of its contract, it was within the control of the government’s employees at the Exchange. *Id.* at 97,967.

In a second case cited by appellant, *Home Entertainment, Inc.*, ASBCA No. 50791, 99-1 BCA ¶ 30,147, the Army and Air Force Exchange Service (AAFES) had contracted with a concessionaire to provide videotaped movies to on-base customers for a rental fee. The contract contained language that prescribed the CDA for resolving disputed claims. After the contract was terminated for security reasons, the contractor, HEI, was allowed less than four days to remove its property from six different bases and forts. Subsequently, HEI was unable to secure sufficient trucks and an air-conditioned warehouse for its property before it was barred from the base. As fate would have it, some of the contractor’s property was destroyed due to a leaking roof. HEI filed an appeal to the Board of the government’s denial of its claims for damage to its property contending, *inter alia*, AAFES’ failure to safeguard its property in the warehouse as required by the contract was a breach. 99-1 BCA at 149,137. The government moved to dismiss, arguing that HEI’s claims were grounded in tort and there was no direct nexus between the alleged tortious conduct and the property. The Board held that AAFES’ alleged failure to perform its duty to repair and maintain the premises in accordance with

the contract requirements which caused damage to HEI's property was a contract claim over which the Board had jurisdiction. *Id.* at 149,137-38.

However, we find appellant's reliance on these appeals misplaced with regard to the facts in the instant appeal. In both the cited appeals, the responsibilities and duties with respect to the bailed goods relate back to the contract with the government. In one instance, the government essentially terminated the contract by its decision to discontinue selling the contractor's posters, but failed to take appropriate steps to return the contractor's equipment. In the second appeal, the government failed to terminate the contract in accordance with the guidelines established in the contract, forced the contractor to sell its inventory at a price below what was established in the contract, and failed to make necessary repairs to the building as required by the contract. The nexus between the government's breach of its common law bailment obligation and the contract was the fact that it resulted from the tortious breach of contract during the termination phase of contract administration. As we stated in the leading case on the subject matter, *Simpson Transfer and Storage Corp.*, ASBCA No. 24750, 82-2 BCA ¶ 15,949 at 79,066, *aff'd*, 706 F.2d 320 (Fed. Cir. 1983) (table), where the contractor had failed to safeguard stored goods, "appellant's obligations and duties with respect to the bailed goods have their source in the contract it made with the government."

In the instant appeal, we found that the equipment was never delivered under the purchase order (finding 5). The Army's action in recovering the bulldozer after the driver died and placing the bulldozer in storage was a policing and security action. While the government personnel who transported the bulldozer to Camp Arifjan may have been performing their duties as United States military personnel, their acts were distinctly separate and independent of the contract. The parties involved had no obligation under the contract, and their alleged failure to maintain possession of the bulldozer, if subsequently proven in a court of competent jurisdiction, was an independent tort.

The only connection between the contract and the current claim is the fact that had the government not made a call under the BPA for delivery of a bulldozer in Baghdad, the bulldozer would not have ended up missing en route. In discussing the test of whether a tort has a sufficient nexus to a contract to establish the Board's jurisdiction, we have held that "it is not enough, however, for the alleged tort to be merely related in some general sense to the contractual relationship between the parties." *Asfaltos, supra*, 91-1 BCA at 116,919. Appellant's "but for" test casts too wide a net, potentially catching numerous actions which are outside the purview of the CDA. *See id.* Therefore, it is not enough that "but for" the contract, the bulldozer would not have been shipped to Baghdad, which exposed it to the theft which occurred en route.

Based on the foregoing, we need not reach a decision on the parties' motions for summary judgment, as they are rendered moot.

CONCLUSION

The appeal is dismissed for lack of jurisdiction.

Dated: 19 March 2008

OWEN C. WILSON
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

MARK N. STEMLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 55533, Appeal of Qatar International Trading Co., rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals