

**BOARD OF CONTRACT APPEALS
U.S. DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.**

**Appeal No. 4535
Contract No. JPATS-99-A1209-54**

**TAS Group (CSI Aviation Services, Inc., subcontractor)
Appellant,**

v.

**U.S. DEPARTMENT OF JUSTICE,
U.S. Marshals Service**

Respondent.

Carolyn Callaway, Esq., counsel for Appellant.

David R. Feniger, Trial Attorney, counsel for Respondent.

DECISION

ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Somers, Administrative Judge

This appeal arose from a contract between appellant, TAS Group (CSI Aviation Services, Inc., subcontractor), and the U.S. Department of Justice, U.S. Marshals Service, (the government, USMS, or respondent) for the lease of two AIM MD82 aircraft for the period of May 3, 2004, through May 2, 2005, to be operated by USMS pilots. Appellant alleges that the pilots negligently damaged one of the aircraft during a USMS mission. This opinion addresses respondent's motion for summary judgment and appellant's opposition thereto and cross-motion. For the reasons stated below, we conclude that respondent's motion for summary judgment should be denied.

FACTS

On June 1, 1999, the USMS entered into a Basic Ordering Agreement (BOA) with TAS in which TAS agreed to provide passenger aircraft to the USMS. Under the BOA, the USMS could rent aircraft on short notice for periods of one day to twelve months. The USMS could order aircraft in one of two ways. Orders issued under the

Aircraft Insurance and Maintenance (AIM) provisions required TAS to provide the aircraft, all required insurance, and all maintenance. However, the USMS provided the pilots to operate the aircraft. By contrast, orders issued under the Aircraft Crew Insurance and Maintenance (ACIM) provisions required TAS to provide pilots in addition to aircraft, insurance, and maintenance. Appeal File (AF) Tab 9.

On April 22, 2004, the USMS issued an order under the AIM provisions of the BOA, designated as Contract No. PSAJ-99-A-1209-54, to TAS for aircraft from May 3, 2004, through May 2, 2005. AF Tab 9. In accordance with the BOA and the subcontract, CSI, through TAS, provided the USMS an aircraft to be operated by USMS pilots.

Under the terms of the lease agreement, appellant was required to make an aircraft available to the Marshals Service 24 hours a day, seven days a week. The contractor was required to provide sufficient levels of manning with the required training, qualifications, and certifications to support full line servicing and line maintenance activities at Alexandria, Louisiana. Under the BOA, the Contractor maintained total responsibility for aircraft maintenance” including all costs. In addition, the BOA included a “hold harmless” provision:

The Contractor shall save and hold harmless and indemnify the Government against any and all liability claims and costs of any person or persons, and for loss or damage to any Contractor property or property owned by a third party, occurring in connection with or in any way incident to or arising out of the occupancy, use, service, operation, or performance of work under the terms of this contract, resulting in whole or in part from the negligent acts or negligent omissions of the Contractor, any subcontractor, or any employee agent, or representative of the Contractor or subcontractor.

AF Tab 9, HON 180.¹ Finally, the BOA contained language that provided an exception to the general “hold harmless” provision:

The Government shall not be liable for any injury to the Contractor’s property unless such injury or damage is due to negligence on the part of the Government and is recoverable under the Federal Tort Claims Act, or pursuant to any other Federal Statutory Authority.

¹ “HON” refers to the prefix to the stamped page number of the appeal file.

AF Tab 9, HON 181.

In December 2003, TAS (doing business as Air Charter Team (ACT)) and CSI entered into a subcontract agreement in which TAS delegated the entire performance of the contract requirements to CSI. CSI became solely responsible for the performance of the services specified in PSAJ-99-A-1209 “for the period from February 01, 2004 through May 02, 2004 and for all option periods exercised by the government in accordance with the subject contract.” Appendix to Respondent’s Motion for Summary Judgment (App) pg. 1, ¶ 2. Pursuant to the terms of the subcontract, CSI agreed:

. . . [to] provide all labor, tools, equipment, transportation, insurance, reports and facilities necessary to provide all aircraft, all maintenance (including line maintenance/line servicing/aircraft cleaning), all logistics support and all insurance in accordance with the terms, conditions, and specifications of [the BOA].

App. pg. 2, ¶ 3.2. The subcontract also stated that “[a]s necessary, CSI will secure and pay for substitute aircraft, meeting specifications of BOA-49, 50, or 51, when primary aircraft are not mechanically operational or are out-of-service for any maintenance related reason(s).” App. pg. 2, ¶ 3.8. CSI was to serve as TAS’s technical representative to the USMS, to obtain and maintain the insurance required, to provide substitute aircraft as necessary, and, furthermore:

The parties hereto expressly understand and agree that [TAS] is in no manner associated or otherwise connected with the actual performance of this Agreement on the part of CSI. CSI is an independent contractor for the performance of each and every part of this Agreement. CSI is solely and personally liable for all labor and expenses in connection therewith and for any and all claims, liabilities, damages, and debts, of any type whatsoever that may arise on account of: CSI activities; the activities of CSI employees or agents; or the performance of this Agreement. . .

App. pg. 3, ¶ 5. However, the subcontract did require TAS:

. . . to pursue all claims for equitable adjustment and/or other financial claims related to USMS Distribution Order No. TDB under the USMS BOA PSAJ-99-A-1209 on behalf of CSI to the maximum extent possible.”

App. pg. 2, ¶ 4.4.

On May 13, 2004, USMS pilots used one of the leased aircraft to fly a mission to Honduras. TAS alleges that the pilots negligently damaged the engine of the aircraft. TAS seeks an equitable adjustment of \$818,750.64, plus interest, on behalf of CSI, for costs incurred “to repair and transport the engine, to ferry the aircraft back to the United States, to lease a substitute aircraft for the use of the USMS, to lease a substitute engine, to insure the substitute aircraft, and to replace the engine in Honduras.” Complaint, ¶ 9.

ARGUMENTS

The government moves for summary judgment on the grounds that, pursuant to the *Severin* doctrine², TAS does not possess standing to assert the claims of the subcontractor against the United States. Specifically, the government alleges that the costs claimed by TAS arose from CSI’s performance of the subcontract. Because the subcontract required CSI, not TAS, to provide all aircraft and to secure and pay for substitute aircraft when the primary aircraft are not mechanically operational, the government contends that TAS is not liable for any costs. In particular, the government points to the clause in the contract that states, in pertinent part, that “CSI is solely and personally liable for all labor and expenses . . . and for any and all claims, liabilities, damages, and debts, of any type whatsoever that may arise on account of . . . the performance of this Agreement.” The government contends this clause expressly immunizes TAS from any other claims arising from the performance of the subcontract. *See App.*, pg. ¶ 5.

Appellant counters the government’s assertions, and contends that a genuine issue of material fact exists as to whether the government employees’ allegedly negligent actions caused the damages, or whether the costs fell within the parameters of the contract requirements. Appellant notes that the BOA holds the government responsible for “injury and damage due to the negligence on the part of the government.” AF Tab 9, HON 181. Finally, appellant states that the parties clearly intended TAS to pursue any of CSI’s claims, because the terms of the subcontract expressly require TAS to pursue the claims.

The Board addresses each argument below.

² *See Severin v. United States*, 99 Ct. Cl. 435, 442 (1943).

DISCUSSION

In order to resolve the cross-motions for summary judgment, the Board must determine whether the evidence is sufficient to void the applicability of the *Severin* doctrine which precludes a contractor from recovering losses suffered by its subcontractor. When evaluating summary judgment motions, we grant summary judgment where the “pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The moving party bears the burden of demonstrating these elements. *Id.*; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Applied Chemical Technology, Inc. v. U.S. Dept. of Justice, Federal Bureau of Prisons*, 2005 WL 518954, Appeal No. 4183 (DOTBCA 2005); *Steinhoff & Salder, Inc., dba SSI*, 00-2 BCA ¶ 31,145 (DOTBCA 2000).

The *Severin* doctrine arises from a case in which a prime contractor sought to recover from the government direct field costs incurred by its subcontractor. *Severin v. United States*, 99 Ct. Cl. 435 (1943); *cert. denied*, 322 U.S. 733 (1944). The Court of Claims held that the prime contractor lacked standing to bring the suit because the prime contractor could not prove that it would be ultimately liable to the subcontractor for the costs claimed. *See Severin*, 99 Ct. Cl. at 443. Thus, under the original *Severin* doctrine, the government’s exposure to so-called pass-through suits was limited to situations in which the prime contract is liable for the subcontractor’s costs. For many years, the burden of proving prime contractor responsibility to a subcontractor rested on the prime contractor. *See E.R. Mitchell Construction Co. v. Danzig*, 175 F.3d 1369, 1370 (Fed. Cir. 1999). *Also see J.L. Simmons Company, Inc. v. United States*, 304 F.2d 886, 888-89 (1962).

However, as we noted in *J.R. Roberts Corp.*, 98-1 BCA ¶ 29,680 (DOTBCA 1998), because of the harsh consequences of the *Severin* doctrine, subsequent decisions have imposed limitations upon its applicability. The burden of establishing that the prime contractor has no liability to its subcontractor for the latter’s damages is on the government. *Morrison-Knudsen Co. v. United States*, 397 F.2d 826, 835 (1968). A prime contractor is precluded from maintaining a suit on behalf of its subcontractor only

when a contract clause or release completely exonerates the prime contractor from liability to its subcontractor. *J.L. Simmons Co. v. United States*, 304 F.2d at 888-89. The subcontract or release must expressly negate any liability of the prime contractor to the subcontractor. *Donovan Construction Co. v. United States*, 149 F.Supp 898, 900 (Ct. Cl. 1957). Moreover, the prime contractor may maintain an action even if its liability to the subcontractor is extinguished merely by prosecuting the subcontractor's claims against the government or paying over to the subcontractor any recovery obtained from the government. *Umpqua River Navigation Co. v. Crescent City Harbor District*, 618 F.2d 588, 594 (9th Cir. 1980); *Keydata Corp. v. United States*, 504 F.2d 1115, 1120-21 (Ct. Cl. 1974); *Owens-Corning Fiberglas Corp. v. United States*, 419 F.2d 439, 457 (Ct. Cl. 1969); *J.L. Simmons Co. v. United States*, *supra*, 304 F.2d at 889; *Barnard-Curtiss Co. v. United States*, 301 F.2d 909, 913 (1962). The *Severin* doctrine is to be construed narrowly. *Spindler Construction Corp.*, 06-2 BCA ¶ 33376 (ASBCA 2006) citing *E.R. Mitchell Construction Co. v. Danzig*, 175 F.3d 1369, 1370-71 (Fed. Cir. 1999); *United States v. Johnson Controls, Inc.*, 713 F.2d 1541, 1552, n.8 (Fed. Cir. 1983); *Cross Construction Co., Inc., v. United States*, 225 Ct. Cl. 616, 618 (1980); *Lockheed Martin Corp.*, 03-2 BCA ¶ 32,279.

In this case, the government has not established that an iron-clad release or contract provision in the subcontract completely immunizes TAS from any and all liability to the CSI for the alleged government negligence. The government argues that paragraph 5 of the subcontract completely releases TAS from any liability to CSI. Paragraph 5 states in pertinent part that "CSI is solely and personally liable for all labor and expenses in connection therewith and for any and all claims, liabilities, damages, and debts, of any type whatsoever that may arise on account of: CSI activities; the activities of CSI employees or agents; or the performance of this Agreement. . ." However, paragraph 5 does not eliminate the provision in the subcontract, paragraph 4.4, which expressly obligates to TAS to pursue all claims for equitable adjustment and/or other financial claims related to the contract on behalf of CSI to the maximum extent possible. The obligation to cooperate in the prosecution of a subcontractor's suit is generally sufficient to preclude the application of the *Severin* doctrine. *See, e.g., Planning Research Corp. v. Dept. of Commerce*, 96-1 BCA ¶ 27,954 (GSBCA 1995); *Folk*

Construction Co., 2 Cl. Ct. 681, 686 (1980). Indeed, since the failure to pursue the claims of its subcontractors would constitute a breach of contract, appellant is not only entitled but also obligated to maintain CSI's claims. This conclusion is not thwarted by what could be construed as an inconsistency between paragraphs 4 and 5 of the subcontract.

We think it sufficiently clear that TAS merely attempted to protect itself against liability for damages beyond those which it could successfully prove were caused by the government. Elementary principles of contract interpretation dictate that a contract should be read so as to give meaning to all its parts and avoid conflicts where possible. In this case, we conclude that the general release contained in paragraph 5 does not exculpate appellant from the liability created earlier in paragraph 4. On the record before us, there remains a possibility that TAS would be liable to CSI for the payment received by TAS from the government for CSI's claims for equitable adjustment. Having found that TAS has not been totally absolved of liability to CSI, it follows that the vital prerequisite for *Severin*, i.e., insulation from any liability – is absent from this case.

CONCLUSION

TAS's claim on behalf of CSI is not barred by the *Severin* doctrine. The undisputed facts do not support respondent's argument that TAS is released from any potential liability to CSI. Accordingly, we deny the government's motion for summary judgment on the issue of whether TAS possesses standing to sponsor this appeal on CSI's behalf.

So ordered this 16 November 2006

Jeri Kaylene Somers
Administrative Judge