UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: November 21, 2018

CBCA 6078

OUTBACK FIREFIGHTING, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Jeremiah Nuttall, President of Outback Firefighting, Inc., Corvallis, MT, appearing for Appellant.

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

Before Board Judges **BEARDSLEY**, **SULLIVAN**, and **LESTER**.

SULLIVAN, Board Judge.

Outback Firefighting, Inc. (Outback) appeals the contracting officer's decision denying its claim for costs to repair damaged equipment rented by the Forest Service, Department of Agriculture (Forest Service). The parties seek a decision on the record,

pursuant to Rule 19. 48 CFR 6101.19 (2017).[1] Because the Forest Service bore the risk of damage to the equipment pursuant to the terms of the contract, we grant the appeal.

Background

The Forest Service rented from Outback several tents and other equipment for use during firefighting operations in August 2017 under an emergency equipment rental agreement (EERA). Pursuant to this agreement, Outback was to be paid for the rental of this equipment from the time it left to the time it returned to Outback's facility. Appeal File at 6 (clause 2, Time Under Hire). The agreement assigns to the Government risk of loss, damage, or destruction of the equipment provided without an operator, unless one of three exceptions applies:

> Loss, Damage, or Destruction:
>
> (a) For equipment furnished under [the agreement] without operator, the Government will assume liability for any loss, damage, or destruction of such equipment, except that no reimbursement will be made for loss, damage or destruction due to (1) ordinary wear and tear, (2) mechanical failure, (3) the fault or negligence of the Contractor or the Contractor's agents or employees or Government employee owned and operated equipment.

Id. at 7 (clause 9). Outback provided the equipment without an operator.

On August 30, 2017, one of Outback's tents was damaged when a severe windstorm blew through the camp where the tents were set up. In its submission, Outback provided statements from employees explaining that Outback personnel were at the camp to remove the tents after the Forest Service had left the camp but had not begun to remove the stakes that secured the tents when the storm hit. These employees further stated that they secured the stakes as quickly as they could, but the wind continued to pull the stakes out of the

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[1] On September 17, 2018, the Board adopted new rules of procedure, Rule 1(a) of which provides that the presiding judge may decide whether to apply the new rules to any case pending before the Board on that date. See 83 Fed. Reg. 41,009, 41,010 (Aug. 17, 2018). Because the parties elected to submit this appeal for a decision on the record and there will be no further proceedings in this appeal, the Board applies the Board's old rules to this appeal.

ground.[2] The Forest Service acknowledges that there were no government personnel at the camp site when the storm arose.

Outback submitted a claim to the contracting officer on September 9, 2017, seeking $5947.57, the cost to repair the damage to the tent frame. Outback provided supporting invoices and pictures documenting the damage with its claim. The Forest Service does not dispute that the tent was damaged in the windstorm or that Outback incurred the costs claimed.

In October 2017, the contracting officer issued a document titled "determination and findings" in response to Outback's claim. Appeal File at 1–2. In February 2018, the contracting officer issued a decision in which he added language notifying Outback of its appeal rights to the prior determination regarding Outback's claim. *Id*. at 27, 31. In March 2018, Outback timely appealed the contracting officer's decision.

Analysis

The Board possesses jurisdiction to decide this appeal from the contracting officer's February 2018 decision. 41 U.S.C. § 7104(a) (2012). The clock for the ninety-day appeal deadline began to run when the contracting officer issued a final decision containing the appeal notice information that the Contract Disputes Act requires. *See Pathman Construction Co. v. United States*, 817 F.2d 1573, 1578 (Fed. Cir. 1987) ("A contracting officer's final decision that does not give the contractor adequate notice of its appeal rights is defective and therefore does not trigger the running of the limitations period."); *George Ledford Construction, Inc*., VABCA 6630, et al., 02-1 BCA ¶ 31,662, at 156,442 (2001).

In damaged equipment claims arising under EERA contracts, the contractor must establish the facts of liability, causation, and resultant injury. *Great Bear Transport LLC v. Department of Agriculture*, CBCA 697, 08-1 BCA ¶ 33,808, at 167,357; *Harvey*, AGBCA 82-152-1, 87-1 BCA ¶ 19,577, at 99,004 (citing *Wunderlich Contracting Co. v. United States*, 351 F.2d 956, 968 (Ct. Cl. 1965)). If and when the contractor meets its burden, the burden shifts to the Government to prove that the loss, damage, or destruction was caused

[2] The Board authorized the parties to undertake discovery, and Outback sought from counsel for the Forest Service the names of other equipment providers who were at the site when the storm arose. It appears that the Forest Service never responded to Outback's discovery request, so Outback was unable to provide further support for its submission to the Board.

by (1) ordinary wear and tear, (2) mechanical failure, or (3) the fault or negligence of the contractor or the contractor's agents. *Great Bear*, 08-1 BCA at 167,357.

Outback proved that the tent was damaged in the windstorm and proved its costs incurred to repair that damage. Thus, Outback has met its burden to prove liability, causation, and resulting damages. We now examine whether the Government avoids liability by operation of one of the three exceptions.

The Government is not liable for losses that result from ordinary "wear and tear" on the equipment. "Wear and tear" in EERA contracts is interpreted to mean conditions that "the equipment is subjected to under normal conditions and is reflected in the rates paid for the equipment." *Great Bear*, 08-1 BCA at 167,357. Based upon Outback's description, the windstorm was severe and unlike the conditions in which its equipment could be expected to be used. Accordingly, we do not find that the damage was the result of ordinary wear and tear on the equipment.

The Government is also not liable for losses that result from mechanical failure. The Forest Service asserts that this exception should be interpreted to allow it to avoid liability in this case. While mechanical failure is not defined in the EERA contract, damage from a severe weather event is not analogous to damage occurring because of a mechanical failure. A contractor's failure to perform as the result of a mechanical failure will not be excused because performing with adequate equipment is the essence of a contract and within the control of the contractor. *Paris Brothers, Inc. v. Department of Agriculture*, CBCA 932, 08-2 BCA ¶ 33,991, at 168,108. In contrast, a contractor's failure to perform as the result of an act of God or unusually severe weather will be excused because the cause is beyond the control of the contractor. 48 CFR 52.249-14 (a).

The Government is not liable for losses that occur as the result of negligence by the contractor or its employees. In the final decision, the contracting officer suggested that the tent was improperly secured, but the Forest Service acknowledges that its personnel were not present at the time of the wind storm and provides no other evidence of negligence on the part of Outback. Outback submitted statements explaining that when the windstorm arose, its personnel had not yet begun demobilizing the tents. Outback's crew tried unsuccessfully to secure the tents further as the wind pulled the stakes out of the ground. The Board finds no basis for a finding of negligence on this record.

Finally, the Forest Service suggests that it is not responsible for the damage because the equipment had been released to Outback for pick up from the site. Pursuant to clause 2, Time of Hire, the Forest Service pays Outback for the equipment from the time it leaves to the time it returns to Outback's facility, the point of hire. Moreover, the release of the

equipment and the return to the point of hire are two different events in this clause. By operation of this clause, the Forest Service remains responsible for payment and any damage to the equipment after the time the equipment is released to Outback.

Decision

The appeal is **GRANTED**. The Forest Service shall pay Outback $5947.57, plus interest calculated from the date that Outback filed its claim on September 9, 2017, in accordance with the Contract Disputes Act, 41 U.S.C. § 7109.

Marian E. Sullivan
MARIAN E. SULLIVAN
Board Judge

We concur:

Erica S. Beardsley
ERICA S. BEARDSLEY
Board Judge

Harold D. Lester, Jr.
HAROLD D. LESTER, JR.
Board Judge