

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
Okinawa Sunset Recording Studio & Productions) ASBCA No. 52343
)
Under Contract No. NAFJB1-98-S-0020)

APPEARANCE FOR THE APPELLANT: Mr. Larry J. Alexander
Owner

APPEARANCES FOR THE GOVERNMENT: COL Nicholas P. Retson, JA
Chief Trial Attorney
LTC Richard B. O'Keeffe, Jr., JA
MAJ Gerald P. Kohns, JA, USAR
Trial Attorneys

OPINION BY ADMINISTRATIVE JUDGE LIPMAN
ON MOTION TO DISMISS

The Government moves to dismiss this appeal on grounds that we lack jurisdiction. The record consists of the contract and other documentary evidence; neither party submitted affidavits. Our findings are based on that documentary record and the undisputed facts contained therein. We grant the motion and dismiss the appeal.

FINDINGS OF FACT

1. In April 1998, the Army, acting through the Installation Morale, Welfare and Recreation (MWR) Fund, 10th Area Support Group, Okinawa, Japan, a non-appropriated funds instrumentality (NAFI) that is not an exchange service, awarded appellant the captioned contract. It called for appellant to provide sound and lighting systems services for the 1998 Torii Beach Friendship Festival, an Army-sponsored community event, at the Torii Station military installation in Okinawa, Japan from 24 to 26 April 1998. The parties agreed on a firm fixed-price of \$4,300. (R4, tab 1)

2. The contract was silent with respect to what appellant was to do with its equipment during hours when the festival was not open. It contains no clause obligating the Army to safeguard the equipment or to indemnify appellant for any damage. (R4, tab 1) The Army arranged for Military Police to patrol the area during the festival (R4, tab 4).

3. The contract contained the DISPUTES (SEP 1984) clause which states that “[t]he contract is not subject to the Contract Disputes Act of 1978 (41 U.S.C. 601-613),” and that “[a]ll disputes arising under or relating to this contract shall be resolved under this clause.” The clause defines a “claim,” provides that all claims be made in writing and submitted to the contracting officer for a written decision, provides that the contracting officer’s decision may be appealed to this Board, and that our decision is final and not subject to further appeal. (R4, tab 1 at clause I-25)

4. On 24 April 1998, the first day of the festival, the hours of contract performance were from 5 P.M. to 11 P.M. At the end of that day, appellant left its audio equipment overnight at the job site, outdoors, under a tent, and wrapped in tarp with tape to protect it from adverse weather conditions. (R4, tab 9) The equipment was positioned on a plywood flooring eight inches above ground level (R4, tab 12).

5. That night, the site experienced heavy rain and strong winds, causing most of the tents to fall (R4, tab 5). On the morning of 25 April 1998, MWR personnel discovered appellant’s equipment lying in water and advised appellant (R4, tabs 9, 12). Despite appellant’s efforts to dry and save the equipment, many items were beyond repair (R4, tab 6).

6. By letter of 1 May 1998 to the Army, appellant submitted a claim for \$13,803.99 in damages (R4, tab 9). It later increased the claim to \$19,493.99 (R4, tab 11). On 13 January 1999, the MWR contracting officer denied the claim in its entirety (R4, tab 14). Upon reconsideration, the contracting officer reiterated his denial on 3 May 1999 (R4, tab 16).

7. Appellant made timely appeal.

DECISION

Appellant seeks to recover the costs of damage to its equipment used in performance of the contract. The Government has moved to dismiss on the ground that we lack jurisdiction over the appeal.

The contract was entered into by a NAFI other than an exchange service, which is not subject to the CDA, and the DISPUTES clause of the contract itself states that the contract is not subject to the CDA. Our jurisdiction, therefore, arises from, and is governed by, the terms of the DISPUTES clause itself. *See Computer Valley International, Ltd.*, ASBCA Nos. 39658 and 40496, 94-1 BCA ¶ 26,297 at 130,796.

The contract’s DISPUTES clause limits the Board’s jurisdiction to disputes “arising under or relating to this contract.” In an appeal pursuant to that clause, we lack

jurisdiction to consider claims sounding primarily in tort unless there is a direct nexus between the Government's alleged tortious conduct and its obligations under the contract. *Donlin M. Rumley*, ASBCA No. 46460, 94-3 BCA ¶ 27,113.

In the instant case, appellant contends that the Government should be liable for damage to its equipment because the Government failed to adequately safeguard that property from vandalism. Those allegations constitute a tort action for negligence against the Government. To establish our jurisdiction over this appeal, we must locate a nexus between this alleged tort and some express or implied contractual obligation.

Our findings reflect that the contract was silent with respect to what appellant was to do with its equipment during hours when the festival was not open. It contains no clause obligating the Army to safeguard the equipment or to indemnify appellant for any damage. We, therefore, conclude that the alleged tort is not directly associated with any express contractual term.

Nor has it been established that the Government was under any implied contractual duty to safeguard appellant's property or to compensate it for damage. Appellant contends: that, because of the substantial weight of the equipment, it is unlikely that the damage was caused by wind and that vandalism was the more likely cause; that, during a briefing, the Government had informed vendors that it would provide security, including roving patrols, during off-hours as it had done during past festivals; that the Government had failed to provide security; and, that, had appellant been informed "that there would not be a patrol of the area," it would have removed its equipment at the end of each day.

With no evidence, appellant has built allegation upon supposition and has established no implied contractual obligation. Underlying appellant's allegations is its apparent contention that, under the circumstances, it reasonably believed that the Government would protect contractors' private property left overnight on the military installation. While that argument might be germane in a tort action, it is irrelevant here. Even a reasonable expectation that security would be present would not establish a Government contractual obligation to safeguard appellant's property or to compensate it for damage. Without such a contractual duty, we have no jurisdiction.

As we lack jurisdiction, the Government's motion is granted. The appeal is dismissed without prejudice to appellant's right to seek relief in an appropriate forum.

Dated: 28 February 2000

RONALD JAY LIPMAN
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
Acting 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. 52343, Appeal of Okinawa Sunset Recording Studio & Productions, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals