

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
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Piril Insaat Tic. Bilgisayar Elek. Buro) ASBCA No. 55605
Donanim Ltd. Sti.)
)
Under Contract No. F61358-03-A-0024)

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APPEARANCES FOR THE GOVERNMENT: Col Neil S. Whiteman, USAF
Chief Trial Attorney
Capt Christy J. Kisner, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE FREEMAN
ON THE GOVERNMENT'S MOTION TO DISMISS OR,
IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

Appellant (Piril) appeals the deemed denial of its claim for loss of a truck, trailer and cargo from hostile action while performing a supply contract in Iraq. The government moves to dismiss on the ground that the claim arises in tort, or in the alternative for summary judgment. Piril opposes. We grant the motion to dismiss.

STATEMENT OF FACTS (SOF) FOR PURPOSES OF THE MOTIONS

1. On 23 June 2003, Piril and the government entered into the captioned Blanket Purchase Agreement (BPA) for Piril to procure, transport and deliver bottled water to designated locations in Iraq when requested by the BPA contracting officer or her designee (R4, tab 1 at 1, 3). The contracting agency for the government was the Department of the Air Force, 39th Contracting Squadron, Incirlik Air Base, Turkey (R4, tab 1 at 1, tab 6). The term of the BPA was 23 June 2003 through 23 June 2004, but both parties reserved "the right to terminate this BPA any time within this period" (R4, tab 1 at 3). Among other provisions, the BPA incorporated by reference the FAR 52.212-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (FEB 2002) clause and the FAR 52.247-34, F.O.B. DESTINATION (NOV 1991) clause (R4, tab 1 at 4).

2. The CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS (FEB 2002) clause stated in relevant part:

(j) Risk of loss. Unless the contract specifically provides otherwise, risk of loss or damage to the supplies provided under this contract shall remain with the Contractor until, and shall pass to the Government upon:

....

(2) Delivery of the supplies to the Government at the destination specified in the contract, if transportation is f.o.b. destination.

3. The F.O.B. DESTINATION (NOV 1991) clause stated in relevant part:
(b) The Contractor shall –

....

(4) Be responsible for any loss of and/or damage to the goods occurring before receipt of the shipment by the consignee at the delivery point specified in the contract;...

4. Purchases under the BPA were requested by a “BPA Call” issued by the contracting officer (R4, tab 7). On 4 December 2003, a Piril truck with a cargo of bottled water was en route in Iraq pursuant to BPA Call No. 10, issued on 14 November 2003. Piril’s truck was traveling in a military-escorted convoy under military command as required at the time by the U.S. Army military occupation authority in Iraq. While en route in the convoy, Piril’s truck was damaged by rifle fire. The driver was rescued, but the truck and cargo were abandoned by the convoy and later found destroyed. (R4, tabs 7 at 9, 8 at 21, 9 at 3)

5. On 4 December 2003, Piril notified the contracting activity of the loss, and on 23 January 2004, it submitted an uncertified claim to the contracting officer for the alleged value of the truck (\$99,013.54), trailer (\$40,098.50) and cargo (\$4,884.09). The claim did not state any facts constituting a contractual basis for relief. (R4, tab 9 at 3) The contracting officer referred the claim to a foreign claims commission (FCC) for consideration under the Foreign Claims Act, 10 U.S.C. § 2734.¹ The FCC (Captain Perry) denied Piril’s claim on the ground that the loss arose from combat activities of the U.S. armed forces. (R4, tab 12 at 1)

¹ That statute provides for compensation to inhabitants of foreign countries for property damage, loss, personal injury or death caused by or incident to noncombat activities of the U.S. armed forces.

6. On 8 February 2005, Piril submitted a certified claim in the amount of \$143,996.13 for the loss of the truck, trailer and cargo to the contracting officer under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-611 (CDA). The certified claim described the circumstances leading up to the loss as follows:

Piril began performance on the contract August 5, 2003. Piril delivered an average of 100 trucks of water per week to the various destinations in Iraq as per the contract requirements. At the Iraqi border town of Zakho, the United States Army, directed Piril into its convoy. The United [States] Army would not permit Piril to proceed without the convoy escort.

On December 4, 2003, a day when Piril was forced into the US escort convoy, the convoy was attacked by sniper terrorists. One of Piril's trucks was hit and the front wheel was immobilized. The United States Army removed the driver from the truck and left the truck at the scene of the attack area.

Immediately after Piril learned of the accident, the company sent a crew to investigate the situation and to ascertain the damage to the truck. The crew found the truck in flames, with all cargo destroyed.

(R4, tab 14 at 2-3)

7. After recounting the circumstances of the loss, the certified claim described Piril's attempts to obtain reimbursement for the loss from the government. However, apart from stating that its 23 January 2004 uncertified claim "should have been considered under the Contractor [sic] Disputes Act," the certified claim cited no contractual indemnification provision, no contractual provision that was breached by the government and no other contractual basis for relief. (R4, tab 14 at 6 and *passim*)

8. When no decision was issued by the contracting officer on the certified claim, Piril appealed the deemed denial to this Board on 19 September 2006 (R4, tab 15). Piril's complaint to the Board is a copy of its certified claim to the contracting officer with handwritten numbers inserted for each paragraph.

9. Neither the BPA itself nor any of the calls issued thereunder included a War Risk clause or similar provision promising to indemnify Piril for any damage to its property caused by armed combat while engaged in performing a call (R4, tabs 1 and 7). No government contracting personnel were involved in requiring Piril's truck to proceed

in the convoy, the command of the convoy, or the decision to abandon the damaged truck and cargo.²

DECISION

The government moves to dismiss on the ground that the claim sounds in tort – not contract, or in the alternative for summary judgment (gov’t mot. at 5-6). Piril’s certified claim to the contracting officer and its complaint on appeal state the circumstances of the loss of its truck, trailer and cargo, but no contractual basis for relief (SOF ¶¶ 6-8). In its opposition to the motion, Piril cites as grounds for contractual jurisdiction (i) constructive/cardinal change, (ii) a putative War Risk indemnification clause, (iii) mutual mistake, and (iv) government acceptance of the cargo by requiring that it be transported in a military-controlled convoy (app opp’n at 2-3).

We find no colorable basis for contractual jurisdiction in any of the cited grounds. Constructive/cardinal change and government acceptance of the cargo require acts of the government in its contractual capacity. The hostile rifle fire that damaged the truck was not an act of the government. The requirement for the truck to proceed in the military-controlled convoy and the decision to abandon the truck were acts of the government in its sovereign capacity as the military occupation authority in Iraq. With respect to the cargo, these sovereign acts did not change the risk of loss provision in the F.O.B. Destination clause of the contract. *See* SOF ¶ 3. There was no War Risk or other indemnification provision in the contract (SOF ¶ 9), and Piril’s opposition has cited no statute or regulation requiring such clause to be included in the contract. Nor does the claim or complaint allege any facts constituting a mutual mistake for which reformation can be granted. One of the requirements for reformation upon the basis of mutual mistake of fact is that the parties were mistaken in their belief regarding a fact existing at the time the agreement was entered into. Reformation is not available for a mutual mistake in failing to anticipate future events affecting contract performance. *See International Oil Trade Center, ASBCA No. 55377, 08-2 BCA ¶ 33,916 at 167,830-31.*

There being no colorable contractual basis for relief in the certified claim or complaint, the appeal is dismissed for lack of jurisdiction.

² The only provision in the BPA or call documents regarding conduct of the trucks in Iraq was the following at paragraph 3.2 of the Statement of Work: “All vehicles will need to be identified by a color coded placard. A letter will be provided to identify which colors correspond to the particular locations along with any other specific instructions needed for transporting the water.” (R4, tab 1 at 9)

Dated: 28 October 2008

MONROE E. FREEMAN, JR.
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. 55605, Appeal of Piril Insaat Tic. Bilgisayar Elek. Buro Donanim Ltd. Sti., rendered in conformance with the Board's Charter.

Dated:

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