ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
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Mohammad Darwish Ghabban Est.	)	ASBCA No. 51994
	)	
Under Contract No. F38604-98-MK560	)	

APPEARANCE FOR THE APPELLANT: Mr. Mohammad Al-Ghabban
General Manager

APPEARANCES FOR THE GOVERNMENT: COL Alexander W. Purdue, USAF
Chief Trial Attorney
MAJ Donnie W. Bethel, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE TODD

This appeal arises from a purchase order for the lease of equipment that was damaged while it was in the possession of the Government at an air base in Saudi Arabia. Appellant claims entitlement to be paid for the costs of removal and repair of a road grader and continuing rental charges. The parties agreed to process the appeal under Board Rule 11. Only entitlement is before us for decision.

FINDINGS OF FACT

On 6 March 1998, the Government awarded Purchase Order No. F38604-98-MK560 (the contract) to appellant Mohammad Darwish Ghabban Est. to lease equipment for use at Prince Sultan Air Base (PSAB), Kingdom of Saudi Arabia. The contract required appellant to provide two dump trucks, a front-end loader, and a road grader to the Government for the period 7 February to 20 April 1998. The total award amount was SR 182,250.00, or stated in U.S. dollars, $48,600.00. The contract provides for an exchange rate of 1 US D = 3.75 SR. (R4, tab 1)

The contract provided:

> The contractor shall furnish all labor, tools, parts, materials and transportation necessary to provide the following equipment to the United States Air Force. A checklist of equipment, with any damages annotated, will be provided to the Government Technical Representative prior to the release of equipment. These damages will be agreed upon and

> release documents will be signed by both parties. The Government will be responsible for any damages that occur during possession of said equipment.

(*Id.* at 3; emphasis added)

On 8 March 1998, appellant delivered two dump trucks and a road grader to the Government. The equipment was accepted as "RECEIVED IN GOOD ORDER with exceptions attached." (R4, tab 2 at 1) The only notations for the road grader were that paint was missing, the seat was bad, and the tires were worn (*id.* at 2). The road grader was approximately 15 to 20 years old (R4, tab G-15; app. reply br. at 1). Its engine had undergone a "complete overhaul" in March 1997 (app. br., attach. 6). All of the equipment was in good working order when it was delivered and accepted by the Government (R4, tab 10).

Modification No. P00001, dated 13 March 1998, deleted the front-end loader from the contract and changed the term of the lease (R4, tab 1 at 4).

Modification No. P00002, dated 9 June 1998, extended the lease for the road grader from 21 April to 20 May 1998 (*id.* at 6).

Modification No. P00003, executed 10 June 1998, extended the lease for the road grader from 20 May to 30 May 1998 (*id.* at 8).

The Government apparently used the road grader for 80 days without mechanical problems except for a hydraulic leak which appellant repaired (R4, tab G-4).

On the 81st day of contract performance, 28 May 1998, two days before the end of the contract, Staff Sergeant (SSgt) John Farley, who was trained to operate the grader, drove it 300 feet to the base fuel station. After refueling he drove it back to the job site, approximately 150 feet, and heard a rattling noise. According to his later statement, he shut down the grader, checked the oil level, and found that the oil level was full. He also checked for anything loose on the grader and found no problems. He did not stop for appellant to be contacted for information how the Government should proceed, but restarted the grader. He heard the rattling noise again and backed the grader off the job site, intending to shut it down. As he did so, the grader engine made a loud banging noise, blew off white smoke, and died. The statement makes no mention of whether SSgt Farley checked the coolant level. (R4, tab G-7)

SSgt Harper, a member of the PSAB "Civil Engineering Prime Beef Team," reported the incident to Technical Sergeant (TSgt) William A. Geary, the contracting officer. TSgt Geary recorded in a memorandum for record, dated 28 May 1998, that

SSgt Harper told him the Air Force personnel were checking the fluid levels on the grader daily and it had been running fine. (R4, tab G-6)

TSgt Geary called Mr. Steve Graves, appellant's representative, and informed him that the grader had blown an engine (*id.*).

On 30 May 1998, Captain (Capt) David Langer, a member of the PSAB Logistics Project Management Team, inspected the grader. Capt Langer's qualifications for inspecting the grader are not stated. In a memorandum, dated 30 May 1998, he recorded his observations that the ground underneath the grader appeared saturated with oil and/or other engine fluids. He found fresh oil around the area where the grader engine block was broken and around the battery casing immediately adjacent to the cracked engine block area. He concluded that his observations supported the operator's contention that the engine was properly filled with fluids prior to operation. Capt Langer recorded the following belief:

> [T]he engine block was most likely damaged when the asset was received from the contractor. Normal operation of the asset may have caused the breach in the already weakened engine block, resulting in failure of the equipment.

(R4, tab G-9) The Government did not conduct an independent evaluation of the road grader to determine the cause of the damage or the cost of repair.

On 30 May 1998, Mr. Graves contacted TSgt Geary about the cost of renting a crane to remove the grader from PSAB (R4, tab 13). TSgt Geary approved the removal in a fax message, dated 31 May 1998, that also advised appellant that the Government may or may not have responsibility for the cost of crane rental to remove the grader. The contracting officer stated his opinion that:

> If the cause of the blown engine is determined to be due to negligence or abuse on the part of the U.S. Government, we will, of course pay reasonable costs for the removal of the grader. If it is determined the cause of the blown engine is due to normal wear and tear, we will not assume any of the additional costs for removal of the grader.

(R4, tab 14) Appellant removed the grader from PSAB.

On 6 June 1998, appellant sent a letter to the contracting officer advising that the engine needed to be replaced and itemizing the additional costs to repair the grader.

Appellant estimated the total cost for removal and repair of the grader as SR 192,399.00.[1] The letter stated:

> We have received a report from our sub-contractor that the damage to the engine of the grader was due to no oil and water in the engine. The lack of oil and water made the engine overheat and freeze up, which caused the engine to break a part [sic].

(R4, tab A-4) The letter noted that the rental rate of SR 1,250[2] per day applies "until the grader is repaired or replaced" (*id.*).

On 11 June 1998, appellant submitted a claim to the contracting officer for repair and maintenance costs and rental fees for equipment leased under the contract including the grader. The amount of the claim was SR 268,049.00 or, stated in U.S. dollars, $71,479.73. (R4, tab 16) The contracting officer received appellant's claim on 11 June 1998 (R4, tab 18).

On 18 June 1998, appellant expressed concern in a letter to the contracting officer that it had not been contacted about settling the claim because the rental cost, which it considered a continuing cost, was increasing (R4, tab 17).

On 19 June 1998, the contracting officer requested that appellant separate claims which had been combined in the 11 June 1998 submission to expedite processing them (R4, tab 18).

On 21 June 1998, appellant submitted separate claims. One claim was for the removal and repair of the grader on the grounds that it had been redelivered in a damaged condition and the contract provided that the Government was responsible for any damages that occurred while the equipment was in its possession. The amount of the claim was SR 192,399.00 or, stated in U.S. dollars, $51,306.40. Appellant noted that a new engine had not been ordered and delivery would be two to three months after receipt of the order. Appellant claimed that the daily rental rate applied until the grader was repaired or replaced. (R4, tab 19)

On 15 July 1998, appellant submitted to the contracting officer a technical report in support of its opinion that the damage to the road grader engine was caused by negligence on the part of the Government. The report, dated 11 July 1998, was

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[1] This amount stated in U. S. dollars is $51,306.40.

[2] This amount stated in U.S. dollars is $333.33.

from the Technical Department of a company named Al-Obaid Est., involved with heavy machinery spare parts. The report found after examination that the engine was unserviceable and needed replacement. With respect to the cause of the damage, the report stated:

> THE DAMAGE IN THE ENGINE HAPPENED AS A RESULT OF THE HIGH TEMPERATURE OF THE ENGINE BECOUSE [sic] OF THE:
> 1-LACK OF WATER IN THE RADIATER [sic] WITHOUT CARE FOR ADDING WATER WEN [sic] IT IS SHORT.
> 2-LACK OF OIL IN THE ENGINE WITHOUT CARE FOR ADDING OIL WEN [sic] IT IS SHORT.
> BY EXAMINING THE INNER PARTS OF THE ENGINE WE DIDN'T FIND ANY DEFAULT TO LEAD TO THE DAMAGE IN THE ENGINE. THEREFONE [sic], THE MAIN RESULT FOR DAMAGE OF THE ENGINE IS OVER TEMPARATURE [sic].

(R4, tab 21 at 3) We find the report credible.

Other than the statement that Air Force personnel checked the fluid levels on the grader daily, the Government has offered no evidence that it performed routine maintenance on the grader such as oil and filter change and lubrication.

The exact sum certain amount of the portion of appellant's claim for continuing rental charges can be determined by calculation. The daily rental rate claimed was SR 1,250. The total amount of this claim can be calculated for the number of days since appellant lost use of the grader on 31 May 1998 to the time of repair of the grader by simple multiplication. The record contains no evidence that repairs have been performed. We find that by reading the text of appellant's claim and using a calendar, a sum certain amount of appellant's claim for continuing rental charges can be determined by mathematical calculation.

On 4 October 1998, Mr. Derrick J. Johnson, a successor contracting officer, forwarded to appellant a final decision, dated 14 September 1998, which had been prepared by the previous contracting officer, Christopher P. Kaes (R4, tab A-5). The final decision denied appellant's claims in their entirety (R4, tab 22). On 21 November 1998, appellant filed this timely appeal (R4, tab 35).

During discovery Mr. Mohammad Al-Ghabban, representing appellant *pro se*, requested that Government counsel provide copies of the routine maintenance records for the road grader and procedures for equipment checking (R4, tab A-8). The documents were not provided because the Government did not have them (*see* app. br. at 3). The Government has not explained the absence of these documents from the record.

DECISION

Appellant claims that the Government was responsible under the express terms of the contract for damage to its road grader while it was in the Government's possession. Appellant claims that the Government was responsible for damage that was caused by the Government's negligence. According to appellant, the Government was required to perform regular maintenance of the grader and the absence of oil and water in the engine or not changing the oil and filter on schedule was the cause of the engine failure. Appellant argues that the operator should have shut down the grader, and the Government should have contacted appellant before the damage occurred.

The Government defends against the claim on the grounds that, under the common law of bailment, it is liable only for its negligence, and appellant has failed to show that the loss resulted from any negligence or failure of care on its part. The Government has considered it more likely that the equipment failure occurred during normal operation considering the age and condition of the grader (Gov't br. at 11). The Government argues that it is not liable for any rental costs associated with the time the grader has been down for repairs. The Government further argues that appellant has not presented a valid claim for continuing rental charges because it was not stated in a sum certain. The Government submits that the Board, therefore, has no jurisdiction over this part of the appeal.

FAR 33.201, implementing the Contract Disputes Act, 41 U.S.C. §§ 601-613, as amended, requires that a "claim" for money be "in a sum certain." *Reflectone, Inc. v. Dalton,* 60 F.3d 1572, 1575 (Fed. Cir. 1995) (*en banc*). Where the amount demanded can be determined by simple mathematical calculation, a contractor's submission constitutes a valid claim over which the Board has jurisdiction. *Allstate Products Company,* ASBCA No. 52014, 00-1 BCA ¶ 30,783; *United Technologies Corporation, Pratt & Whitney Group, Government Engines and Space Propulsion,* ASBCA No. 46880 *et al.,* 96-1 BCA ¶ 28,226. We have found that the amount demanded for the portion of appellant's claim for continuing rental charges can be determined by multiplying the number of days since the loss of rent occurred by the fixed amount of daily rental claimed. Accordingly, we have jurisdiction of this portion of appellant's claim.

When the Government rents property from a contractor, a bailment for the mutual benefit of the parties is created. *Cramer Alaska, Inc.,* ASBCA No. 39071, 92-2 BCA ¶ 24,969, *aff'd on reconsid.,* 93-2 BCA ¶ 25,799; *Analog Precision, Inc.,* ASBCA Nos. 31277, 32877, 87-2 BCA ¶ 19,804; *Innovations Hawaii,* ASBCA Nos. 30619, 30627, 87-1 BCA ¶ 19,376, *aff'd on reconsid.,* 87-2 BCA ¶ 19,806. The law imposes upon the bailee the duty to protect the property by exercising ordinary care and, on the termination of a bailment, to redeliver the identical thing bailed in substantially the same condition, ordinary wear and tear excepted, or account for it in accordance with the contract. *C.G.*

Ashe, ASBCA No. 20866, 76-2 BCA ¶ 12,099; 8 C.J.S. *Bailments* § 86 at 323-24 (1988). Where there is a written contract, the rights and obligations of the parties are determined by the provisions of the contract. The bailee by express agreement or by fair implication in the contract can assume the risk of loss of the bailed item without regard to fault. *Sun Printing & Publishing Association v. Moore,* 183 U.S. 642 (1902); *H.N. Bailey and Associates,* ASBCA No. 29298, 87-2 BCA ¶ 19,763, *aff'd on reconsid.,* 88-3 BCA ¶ 21,005. The Government's return to the contractor of bailed property in a state unfit for service may give rise to a claim for damages. *See Manufactured Housing Services, Inc.,* ASBCA No. 41269 *et al.,* 92-3 BCA ¶ 25,159 at 125,407, *aff'd on reconsid.,* 93-2 BCA ¶ 25,578.

Appellant's reliance on the express terms of the contract raises the issue of whether special language in the contract enlarges the common law liability of the bailee to that of an insurer, *i.e.,* absolute liability rather than only the exercise of ordinary care. The Government argues that the Government agreed to be responsible for damage which by definition refers to loss or injury occasioned by the fault of another. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 571 (1971). In this contract, the Government agreed to be "responsible for any damages that occur" while the equipment was in its possession. "Damages" is a term for compensation imposed by law for a wrong or injury caused by the unlawful act, omission or negligence of another. *See id.;* BLACK'S LAW DICTIONARY 389 (6th ed. 1990). There was no special language whereby the Government assumed the absolute risk of loss and no consideration given to the Government for the assumption of greater risk than that in a bailment. *See Waschke Williams Olds Cadillac, Inc.,* AGBCA No. 85-129-1, 87-1 BCA ¶ 19,546. We construe the language used here as no more than an expression of the common law liability of the bailee.

Under the common law liability of a bailee, the Government's obligation was to exercise reasonable and ordinary care in safeguarding the bailed items. *Manufactured Housing Services, Inc., supra,* 92-3 BCA at 125,406. Appellant has shown that the equipment was delivered to the Government in good condition and returned in a damaged condition which gives rise to the presumption that the cause of the damage to the property was the Government's failure to exercise ordinary care or its negligence. *Universal Maritime Service Corp.,* ASBCA Nos. 22661, 22804, 81-1 BCA ¶ 15,118; *Meeks Transfer Company, Inc., Columbia Van Lines Moving & Storage Co., Inc.,* ASBCA Nos. 11819, 11820, 67-2 BCA ¶ 6567, *aff'd on reconsid.,* 68-1 BCA ¶ 7063. The Government submits that the cause of the damage was a damaged engine block that existed at the time the road grader was delivered to the Government. There is no evidence of such damage other than Capt Langer's speculation. We reject the Government's offer of this explanation of the cause of the engine failure.

The Government's position that the age of the road grader indicates that the cause of the damage was a breakdown during normal operation is also without support. The

road grader is not the same as the engine. As we found above, the engine had been completely overhauled in March 1997.

Appellant has offered a technical report which we found credible stating that the damage to the engine was caused by high temperature resulting from a lack of water and oil and that there was no indication of a latent defect in the "inner parts" of the engine. The Government has offered the operator's statement that the oil level was full and Capt Langer's memorandum. The Government did not conduct an independent evaluation to assess the likely cause of the damage. Moreover, it has not offered any evidence that it performed routine maintenance on the grader during the period of the lease other than the statement that Air Force personnel checked the fluid levels on the grader daily. Under these circumstances, we conclude that the Government has not rebutted the presumption that the cause of the damage was its failure to exercise ordinary care in operation of the equipment and that it is liable for the resulting damage. *See Manufactured Housing Services, Inc., supra; C.D. Pickett,* ASBCA No. 31318, 88-2 BCA ¶ 20,538; *C.G. Ashe, supra.*

We determine that appellant has no entitlement to the continuing rental charges that have been claimed. Appellant asserts that because the "contract for the Grader was never closed," the rental rate applies from 31 May 1998 "until this is resolved" (app. br. at 6). Appellant has no further right to the daily rental because it would not have been received from the Government after the completion of the contract term. There is no evidence that the Government would have issued a further modification to extend the lease beyond 30 May 1998.

The appeal is sustained in part and denied in part. The matter is remanded to the parties to determine the quantum of appellant's claim, including interest from 11 June 1998, the date of the contracting officer's receipt of the claim in accordance with the Contract Disputes Act, 41 U.S.C. § 611.

Dated: 15 September 2000

LISA ANDERSON TODD
Administrative Judge
Armed Services Board
of Contract Appeals

(Signatures continued)

I concur

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

I concur

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. 51994, Appeal of Mohammad Darwish Ghabban Est., rendered in conformance with the Board's Charter.

Dated:

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