

VINA INCORPORATED,)	AGBCA No. 2003-187-1
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Appellant)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

March 24, 2005

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion by Administrative Judge WESTBROOK, Presiding Judge, concurring in part and dissenting in part. Separate opinion by Administrative Judge POLLACK, representing the majority of the Board on each issue. Separate opinion by Administrative Judge VERGILIO, concurring in part and dissenting in part.

This timely appeal arises out of Emergency Equipment Rental Agreement (EERA) No. 56-91Z9-2-0031, between Vina Incorporated of Vina, California (Appellant), and the U. S. Forest Service, Mendocino National Forest, California (FS or Respondent). The FS is an agency of the U. S. Department of Agriculture. The appeal is taken from the Contracting Officer's (CO's) decision dated June 10, 2003, denying Appellant's claim for \$50,325 for damage to its Komatsu D65E bulldozer sustained while the equipment was assigned to the Biscuit fire in the Siskiyou National Forest in Oregon. The appeal was timely received at the Board September 4, 2003. After the filing of pleadings and the Appeal File (AF), proceedings were stayed from February to August 2004. During that period, the FS scanned and searched documents pertaining to the Biscuit fire to ascertain whether an accident report was included in those records. After the FS reported that the search was

complete and no accident report had been found, the parties agreed to try the appeal on the record, in accord with Board Rule 11. The parties filed simultaneous briefs and both supplemented the record. The record consists of the AF and the documents submitted with each party's brief.

The Board's jurisdiction to decide the appeal derives from the Contract Disputes Act of 1978 (CDA), 41 U.S.C. §§ 601-613, as amended.

FINDINGS OF FACT

1. The EERA provided for payment at a rate of \$117 per hour with a guarantee of 8 hours or more each day (daily guarantee of \$933). The effective date of the EERA, under which the appeal arises, is from May 1, 2002 through April 30, 2005. The EERA contains Clause 10, Loss, Damage or Destruction, providing:

The Government will assume risk for loss, damage, or destruction of equipment rented under this contract, provided that no reimbursement will be made for loss, damage, or destruction when (a) due to ordinary wear and tear, or (b) negligence of Contractor or Contractor's agents caused by (sic) or contributed to loss, damage, or destruction, or (c) damages caused by equipment defects unless such defects are caused by negligence of the Government or its employees.

(AF 20-21.)

2. Clause 7, Payments, sets out the rates and method of payment under the EERA. Clause 8, Exceptions, provides that no further payment under Clause 7 will accrue during any period that equipment under hire is not in safe or operable condition. Such equipment which cannot be replaced or repaired at the site is to be considered as withdrawn by the contractor. (AF 21.)

3. FAR 52.208-4, Vehicle Lease Payments, incorporated into the EERA, provides that rent shall accrue only for the period that a vehicle is in possession of the Government. It further provides that rent shall not accrue for any vehicle that the CO determines does not comply with the Condition of Leased Vehicles clause. FAR 52.208-5, Condition of Leased Vehicles, requires vehicles furnished under the contract to be in safe operating condition. (AF 21.)

4. The equipment rented under the EERA, a dozer type IIB, referred to as E51, was dispatched for use in the Siskiyou National Forest to fight the fire known as the "Biscuit fire." Another dozer owned by Appellant, called E50, was also dispatched to the "Biscuit fire." (Declaration of CO, Kermadine Barton (Barton decl., pages (pp.) 1-2.)

5. On August 17, 2002, the two dozers were being operated by Dick Parks (E51) and Matt Anchordoguy, Appellant's president (E52). They were assigned to Scott Ellis, who was acting as dozer boss. (Declaration of Matt Anchordoguy (Anchordoguy decl.) p. 6; Declaration of Dick Parks

(Parks decl.), p. 8.)¹ Mr. Ellis is an employee of the North Carolina Forest Service, but had been assigned to work with the U. S. Forest Service on the Biscuit fire (Deposition of Jeffrey Scott Ellis (Ellis dep.), p. 4).

6. Mr. Ellis was directed by the division supervisor to have the dozers under his supervision put in a line next to where the fire had burned out. The work is described as “to follow the black.” The dozer boss’s responsibility is to stay in communication with the division supervisor and make sure everything is safe. On August 17, Mr. Ellis, and the dozers in his charge, were to follow the black line where the fire had burned out the night before. This direction had been given by the supervisor and his assistant. In doing so, the dozers, with dozer boss, Ellis, came into heavy vegetation, called manzanita. Mr. Ellis was concerned about the dense vegetation because he could not see what was ahead. Mr. Parks, driving E51, was ahead of Mr. Anchoroguy, who was driving E50. According to procedure, the dozer boss would ordinarily be ahead of the dozer and on foot. In this case, Mr. Ellis was not always ahead of the dozers because of the density of the vegetation. He had stopped Mr. Parks, driving E51, several times, had looked ahead and asked questions. He questioned the supervisors and told them that they could not get through the thick vegetation but was told to go ahead, following the black. At one point, Mr. Ellis suggested to the supervisors that he and the dozers turn downhill toward the creek, which was a possible destination. He made that suggestion because he could have gotten through that area and walked down to it. The supervisors did not like that idea and repeated the direction to stay on the black. (Ellis dep., pp. 6-8.)

7. The three men had noticed smoke behind them. Mr. Ellis walked back to see if the fire had jumped the fire line. The dozers proceeded. When Mr. Ellis returned, after having walked perhaps a quarter mile, dozer E51 had made the downhill turn following the black. Just as he made that turn he ran into a little cliff and was not able to get traction to back up. According to Mr. Anchoroguy and Mr. Parks, they decided that Mr. Anchoroguy would back up dozer E50, cut a pad, turn the dozer around and attempt to winch the dozer uphill. As he attempted to back dozer E50 uphill, the dozer, surrounding vegetation, and dirt, slid downhill toward dozer E51, which then flipped over the cliff. (Ellis dep., pp. 9-10; Anchoroguy decl., p. 6; and, Parks decl., p. 8.) Mr. Ellis described what happened as follows:

Q And eventually does that dozer that Dick was driving roll over that cliff or hillside?

A Yes. Matt was working with it, trying to get some dirt underneath so he could get traction. And I don’t know what happened, whether it was the weight of the dozer or whether Matt had bumped it, I have no idea, but it moved just a little bit and made

¹ Page references on the Anchoroguy and Parks declarations are as shown on the declarations. On neither declaration does pagination begin with the numeral 1.

one complete roll-over turn around, then rolled down to the bottom of the hill.

(Ellis dep. p. 10.)

8. On examination by Government counsel, Mr. Ellis stated that after the roll-over, “we” discussed whether it would have been a better idea to connect the two bulldozers to pull the E51 back from the edge (Ellis dep., p. 16). The declarations of Appellant’s representatives seem to say that the plan was to do just that once dozer E50 had been turned around (Anchordoguy decl., p. 6 and Parks decl., p. 8). Mr. Anchordoguy’s August 18, 2002 handwritten report is consistent with the declarations (“E50 was digging out behind E51 to hopefully back him out with winch line help.”) (AF 68.) Mr. Parks’ contemporaneous hand-written statement states that after E51 slid down the grade on a rocky out cropping, “E50 was cutting a road so we could pull E51 back up line” (AF 67).

9. At a safety meeting the following morning, FS safety personnel made reference to the dozer roll-over accident, stating that the dozer boss should not have sent dozers down into unscouted territory and should always be out in front of the dozers marking a clear line for the fire line (Anchordoguy decl., p. 7).

10. Mr. Ellis reported the roll-over to the division supervisor and the safety office by radio. Both came to the site where the dozer rolled. (Ellis dep., pp. 14-15.) The record contains no statements from Mr. Ellis’s supervisors or from the FS safety personnel. The record also contains no accident report, although Mr. Ellis states that he prepared and turned in a Unit Log 214 describing what happened. (Ellis dep., p. 10). On August 18, the parties signed the release inspection report. The report contains notations in two different hands. The first, presumably by the FS inspector, says: “Possible claim pending as per investigation. Damage when dozer rolled over.” Following that, presumably by Mr. Anchordoguy, “Definite claim in progress.” (AF 63.)

11. Appellant’s claim is dated September 11, 2002.² Appellant stated that dozer E51 suffered damage when it rolled one to two times after being led into steep rocky terrain that had not been previously scouted or marked with ribbon by anyone. The claim letter described the conditions as smoky and windy with fire close by. Appellant did not claim a sum certain; rather it stated that a claim was being made for repairs and down time. Two estimates of the cost of repairs were included. Appellant also claimed \$1,975.61 for damaged radio equipment and down time of \$1,004 per day. The estimate of Ben’s Truck Repair, Inc. was for \$32,825, plus unspecified amounts for the parts for repair of the engine and of the swing frame, if inspections revealed such were needed. The estimate from Shanahan Equipment was for \$76,640, with the proviso that it did not include any machine work that might be needed. (AF 1- 4.)

12. The CO responded by letter dated November 13, 2002. She noted that no specific dollar amount had been claimed. She also referenced the hand-written statements of Appellant’s personnel, noting that neither statement indicated any fault or negligence of the Government. She stated she

² According to the CO’s letter of November 13, 2002, Appellant had submitted a claim on the same subject on September 9, 2002; neither party has made it a part of the record.

would review the accident investigation report, if on file, before making a final determination and asked for a detailed cost breakdown of the specific amount claimed. She also noted that the EERA

made no provision for reimbursement for down time and informed Appellant that no amount would be allowed for that portion of the claim. (AF 5.)

13. By letter dated and faxed to the FS February 14, 2003, Appellant's president, Mr. Anchordoguy, wrote the FS. This letter was apparently in response to a February 11, 2002 telephone call from FS employee, Chris Bellini, asking for a more conclusive estimate of repair cost in order for him to expedite processing of the claim. In the February 14 letter, Mr. Anchordoguy explained the qualifications of Mr. Parks, who is retired from the California Department of Forestry where he was a heavy fire equipment operator for 25 years. He stated that many in northern California considered Mr. Parks the most qualified operator in the industry. He asserted that E51 and E50 were directed by Division Chiefs Todd Knaph and Derwin Boggs to directly attack the fire by cutting a line as close to the fire as possible. He stated that Mr. Ellis was directed to lead the dozers and operators through the forest to complete this assignment. The dozers, with E51 in the lead, were then directed to remain on a course which led to a cliff. While dozer E50 was turning around in an attempt to find a way to extricate E51, dozer E51 slid over the cliff rolling 300 feet stopping in a grove of trees. The letter also reported that Safety Officer Steve Zachary investigated the incident and made it clear that the Government claimed responsibility. Mr. Anchordoguy asserts that Appellant was directed to get two quotes for repairs and submit a claim quickly. Dozer E51 was hauled back to Appellant's locale on August 18, 2002 and Mr. Anchordoguy began the process of obtaining repair quotes on August 19. He reiterated that Ben's Truck original repair quote (\$32,825) did not include all parts necessary. It left open costs for parts in two areas of work. The parts needed would be dependent on work found necessary after inspection. He reported that Ben's Truck Repair had more recently stated that it was willing to repair the dozer for no more than \$50,325. Mr. Anchordoguy stated that he had researched many alternatives and found that amount to be the most reasonable repair cost. (AF 6-8.) The record contains no statements from Messrs. Bellini, Knaph, Boggs, and Zachary.

14. The CO denied Appellant's claim in her decision dated June 10, 2003. She stated that the claim was originally for \$32,825 and had been increased to \$50,325 without documentation. The claim for radio repair was denied because the EERA contained no provision for radio equipment and none was ordered. The remainder of the claim was denied on the ground of lack of evidence or information showing that "the Government is at fault, was negligent or otherwise responsible for the damage." She stated that it was clear that Appellant was aware of the terrain and conditions present; that the operational task assigned and working in the general area "from all accounts, appeared to be reasonable and doable." She further asserted that "the working environment required careful approach and operation of which the operator may not have taken every precaution." She concluded by reiterating that there was no evidence or statements indicating Government liability or responsibility for the damage. (AF 10-11.)

15. Appellant has three discrete quantum claims: (1) \$43,486.79 for damages sustained by the dozer; (2) \$1,975.61 for damages to the CB radio on board the dozer at the time of the accident; and

(3) \$30,000 for loss of use of the dozer for the 30 days that E50 remained on the Biscuit fire after the accident rendered E51 unusable. It supports the quantum of the radio claim with an August 27, 2002 proposal from Communications Support Group of Oroville, California. (AF 4.) It calculates his monetary claim of \$30,000 for loss of use of the dozer at \$1,000 a day for 30 days. Dozer E50 remained on the Biscuit fire for 30 days after the accident. Support for those figures is in Mr. Anchordoguy's declaration in which he states that each dozer grosses approximately \$1,700 per day and after costs for operator, fuel, maintenance and wear and tear nets approximately \$1,000 per day.

16. Mr. Anchordoguy declared that he performed most of the repairs to the dozer himself. Exceptions were items required to be performed by a specialist. Attached as Exhibit (Ex.) A to the declaration are the original estimates of \$32,825 and \$76,840 cited in Finding of Fact (FF) 11. Ex. B is Mr. Anchordoguy's summary of repair costs broken down by year for 2003 and 2004. For 2003, he claims \$16,311.59 for parts and services for which invoices are attached. He also claims \$3,500 for a winch for which he paid Shawn Furtado \$3,500. No documentary evidence of this cost was presented. Mr. Anchordoguy avers that he has a canceled check. Remaining costs are for work performed by Mr. Anchordoguy in his shop. This work included his building roller guards and sweep. The claimed cost for roller guards built by Mr. Anchordoguy is \$800 (parts and labor). This amount is included in the \$16,311.59. No invoice as such is submitted. Instead, Appellant presents a sheet of descriptive literature for roller guards with handwritten list prices for two models, #6571 at \$2,148 and #6572 at \$2,170. Appellant does not specify how much of the \$800 is for parts and how much for labor. For the work in the shop in 2003, Appellant claims \$750 for shop supplies and \$10,000 for 200 hours of Mr. Anchordoguy's time at \$50 per hour. These claims for expenditures in 2003 total \$30,561.59. (Anchordoguy decl., Exs. B and C.)

17. Claimed costs for 2004 total \$12,925.20. This amount includes \$8,903.20 for parts and custom labor for which receipts are submitted. Appellant also claims \$600 for rollers purchased for which he has no receipt; \$222 for paint which appears to be duplicative of a \$224 charge for paint on a receipt (dated 5/13/04) included in the \$8,903.20 total; \$700 in shop supplies; and \$2,500 for 50 hours of Mr. Anchordoguy's time at the \$50 per hour rate. Total of the claim for damage repairs in the two years is \$43,486.79. (Anchordoguy decl., Exs. B and C.)

18. The Government's Reply Brief points out many items it considers flaws in the invoices submitted by Appellant. For example, in one instance, Appellant appears to have provided the Government duplicate copies of a 4/18/03 invoice from Fastenal Construction and Industrial Supplies contained in Ex. C to Mr. Anchordoguy's declaration. The Board's copy, however, contained only one copy. Appellant points to two invoices where totals were cut off in copying. On the 9/11/03 invoice (paginated as 22 by the Government), a handwritten total of \$523.33 has been added. The Board is satisfied with this total as it is the sum of the merchandise total of \$487.95 and \$35.38 representing the 7.25% sales tax rate shown on the face of the document. On the other invoice which Appellant cites as not including a total (Peterson CAT 8/14/03, paginated 18 by the Government), the amount used in calculation is the \$80.03 pre-sales tax figure. Other criticisms are less specific. The Government notes that the invoices are inconsistent in their descriptions of the equipment for which the supplies were purchased or on which the work was performed.

19. As the Government points out, a receipt dated June 22, 2004, from Solar Communications of Willows, California, appears to be for radio work. The total on the receipt is \$1,826.94. In a handwritten column to the right Appellant segregates a series of the cost item totaling \$1,014.49. The Board interprets this invoice as claiming the \$1,014.49 and our calculation of the total indicates that the \$1,014.49 (and not the \$1,826.94 figure) was used by Appellant. Lacking further explanation, however, we find this amount to represent the same loss as does the claimed \$1,975.61 for damage to the CB radio.

DISCUSSION

Entitlement

The agreement between the parties contains Clause 10, Loss, Damage or Destruction. By use of this clause, the Government has determined to assume the risk of loss except in the categories excluded in the clause, i.e., ordinary wear and tear, contractor negligence and equipment defect not caused by the Government. The burden is on the Government to prove that the loss or damage occurred as a result of ordinary wear and tear, the negligence of Appellant or its agents, or defect not caused by the Government, in order to escape the assumed liability pursuant to the exculpatory language of the clause. William Harvey, AGBCA No. 82-152-1, 87-1 BCA ¶ 19,577; Weyerhaeuser Co., AGBCA No. 82-119-1, 83-1 BCA ¶ 16,528; Tom Forster, AGBCA No. 77-117, 78-1 BCA ¶ 12,890; Charles E. Cope, AGBCA No. 328, 73-2 BCA ¶ 10,090; Stanley H. Stewart, AGBCA No. 327, 73-2 BCA ¶ 10,090.

The FS cites Stewart for the proposition that the doctrine of *res ipsa loquitur* shelters the Government from liability. The Board held there that the instrumentality causing injury was under the exclusive control of the Appellant and the accident was one which would not ordinarily happen if proper care were exercised. The Board held that proof of absence of negligence was more accessible to the Appellant than to the Government. In its brief in the instant appeal, the FS argued that it is unnecessary to resort to the doctrine of *res ipsa loquitur*. According to the FS, the accident did not simply “happen,” but was the direct result of Appellant’s action, i.e., “the decision not to chain the E51 to the E50 and pull the E51 away from the ledge.” The FS emphasizes the fact that the dozer boss had walked about a quarter mile back up the trail to check the fire when the dozer reached the cliff and needed extrication. The FS does not cite to the fact that the same dozer boss had reservations about “following the black” down the trail and had expressed those reservations to his supervisors but had been told to continue down a vegetation choked trail which he was unable to scout on foot. The FS direction to continue in this tenuous circumstance to a cliff edge is quite different from the fact situation in Stewart. There the contractor was on a highway traveling alone to the site of a fire when the accident occurred. Without doubt, the equipment in question there was solely under the control of the contractor. The facts in the instant case are more akin to those in Tom Forster, where the contractor was following FS instruction to pick up a load of water and haul it up a particular road in order to apply the water to the road beyond the crest of a 15% grade for dust abatement. The truck ran out of power while pulling a steep grade with a full load of water. The Board held that the Government had assumed the risk of loss except where contractor negligence

caused or contributed to the loss and damage. The Board found in the record no probative evidence to support the Government's allegation of negligence. The Board held that it was fair to conclude that the contractor did his best with the equipment accepted for the job. Here, the record demonstrates that the contractor's employees did their best to extricate the equipment from the conditions they were directed into by the FS personnel (FF 6). While the method of extrication first selected proved unsuccessful, there is no evidence to prove that the contractor was negligent in its selection of that method or in its performance. (FF 6-7.) The evidence cited by the FS to prove negligence and quoted in FF 7 above (that Mr. Anchordoguy was working with the dozer to try to get some dirt underneath and that Mr. Ellis did not know what happened) falls far short of proving negligence as the FS must do to overcome its contractual assumption of risk. The Government has not demonstrated that the contractor was negligent within the meaning of the exculpatory language in Clause 10.

Quantum

Dozer Repairs

Appellant claims \$43,486.79 for repairs to dozer E51. The amount is for repairs largely performed by Mr. Anchordoguy. His claimed costs includes supplies and specialized work for which he has presented receipts or quotes; estimates for shop supplies used in each year and estimates of his time at \$50 per hour. Appellant provided no evidence for the hours Mr. Anchordoguy worked (200 in 2003 and 50 in 2004). Also, Appellant failed to present evidence in support of the \$50 per hour rate claimed for Mr. Anchordoguy's time. We have no evidence of rates of pay in the marketplace for similar work. The FS apparently undertook no discovery seeking to ascertain exact costs. We note that the total amount now claimed (\$43,485) is in excess of the original \$32,825 estimate from Ben's Truck Repair, which purposely omitted costs for some parts until it could be determined what parts were needed. We also note that it is considerably less than the original estimate of \$76,840 from Shanahan Equipment, which likely included some contingencies for the types of unknowns that Ben's Truck Repair left open. With the exception of a \$222 amount for paint in 2004 that appears to be duplicative, and a winch for which Mr. Anchordoguy declares he has a cancelled check in the amount of \$3,500, Appellant's claims for supplies and services purchased from others are supported by invoices, quotes or receipts. We find Appellant's declaration that he performed much of the work himself credible. We accept Mr. Anchordoguy's statement that he purchased the winch for \$3,500. Because he has no proof for the shop supplies used, we allow only a portion of the amounts claimed for each year (\$500 of the \$750 claimed for 2003 and \$475 of the \$700 claimed for 2004). Similarly, while we accept his estimates of hours of his time expended in each year, we allow those rates at a lesser rate, \$25 per hour instead of \$50 per hour. We find that the \$800 for fabrication of roller guards in 2003 is in part duplicative of the labor costs. Taking judicial notice that labor to construct an item often exceeds the value of the parts, and in the absence of evidence to the contrary, we allow only \$300 of the \$800 claimed for roller guards. We do not accept the \$1,014.49 paid to Solar Communications, as it is duplicative of another claim. Thus, we find Appellant entitled to \$24,811.59 (\$30,561.59 less [\$10,000 (labor costs at higher rate) + \$250 (excess shop supplies) + \$500 (duplicate labor costs on roller guards)]) for repair work in 2003. We find Appellant entitled to \$8,963.71 (\$12,925.20 less [\$222 (duplicative paint) + \$225 (discount of shop supplies) + \$1,014.49 (Solar

Communications invoice for radio work) + \$2,500 (excess labor costs over \$25 per hour]) for repair work in 2004. Total for the two years is \$33,775.30.

Loss of opportunity to continue working on the Biscuit fire

Appellant claims \$30,000 in damages for loss of use of the dozer for the following 30 days on the Biscuit fire. The 30-day period derives from the length of use of dozer E50 (47 days) less the length of use of dozer E51 (17 days). Appellant asserts that a dozer can gross \$1,700 daily and \$700 of that gross would be spent on expenses such as operator cost, fuel, maintenance and wear and tear. Hence, Appellant's claim is for a net of \$1,000 per day times the 30-day period. (FF 15.) Appellant provides no documentary support for the expected \$1,700 earning per day or for the \$700 in expenses.

The terms of the EERA prohibit payment for days when leased equipment is inoperable. Equipment which cannot be replaced or repaired at the site within 24 hours is to be considered as withdrawn by the contractor. (FF 2, 3).

Construing Clauses 7 and 8, this Board has denied payment for a truck which burned in a fire, holding that the risk of loss of the rental rate under the agreement stays with the contractor as set out in Clause 8, inoperable equipment being treated in the same manner as equipment withdrawn by the contractor. The Board did, however, allow payment for the first day after destruction of the equipment, holding that under the agreement, the Government had assumed the risk of paying rental rates for up to 24 hours after the piece of equipment became inoperable. R. Lee Bartholomew, AGBCA No. 89-128-1, 90-3 BCA ¶ 23,237. See also John E. Martin, Jr., AGBCA Nos. 91-152-1 and 91-177-1, 92-2 BCA ¶ 25,016 (Contractor negligence obviated recovery but Government liability would not in any event extend to anticipated contract proceeds).

We do not agree that the record supports the daily rate sought by Appellant. Appellant claimed it would have grossed \$1,700 per day and have expended \$700 of that amount in costs. The EERA guarantees \$933 per day. We find that amount supportable as the daily anticipated gross. The record does not provide a breakdown of Appellant's operational costs. We conclude that Appellant would have incurred lower expenses (e.g., fuel and personnel costs and equipment wear and tear) in a day when it grossed the daily minimum than in a day when it grossed \$1,700. Thus, to calculate net, we do not subtract \$700 in costs. Instead, we apply the same percentage of gross used by Appellant. Appellant calculated that 41% (\$700 per Appellant's claim) of gross (\$1,700 per the claim) would have been used to cover costs. We therefore find 59% of \$933, or \$550.47, to be a reasonable calculation of the daily loss of use experienced by Appellant. Appellant is entitled to \$550.47 for loss of use of dozer E51 under the instant contract for one day.

Clause 8, Exceptions, prohibiting payment under Clause 7 when equipment is not in safe or operable condition is not relevant here. Clause 8 applies to payments under Clause 7 during normal operations. It does not apply to payments of damages under Clause 10 for which the Government has contractually assumed the risk.

Damage to CB radio

Appellant claims \$1,975.61 in damages for the destruction of a CB radio that was on the dozer at the time of the accident. The FS defends based on the fact that it had not required the dozer to be equipped with a radio. The test of whether the FS is liable to Appellant for destruction of the radio is whether or not the presence of the radio on the dozer was foreseeable when the parties executed the EERA. Foreseeability is a question of fact. Climatic Rainwear Co. v. United States, 115 Ct. Cl. 520, 533, F. Supp. 415 (1950). Appellant has provided no evidence to prove that such radio use was customary or that the presence of the radio was known to the FS when the parties contracted. The FS points to the absence of a contractual requirement for the radio. On this sparse record, I cannot conclude that the presence (and, hence, loss) of a CB radio on the dozer was foreseeable.

I would sustain the appeal as to damages to the dozer in the amount of \$33,775.30 and loss of use of the dozer on the Biscuit fire in the amount of \$550.47. Thus, I would find Appellant entitled to \$34,325.77, plus CDA interest from February 14, 2003. In all other respects, I would deny the appeal.

ANNE W. WESTBROOK

Administrative Judge

Administrative Judge VERGILIO, concurring in part, dissenting in part.

I concur with the panel that the contractor is entitled to recover for damage to the rented equipment. However, I conclude that the record supports payment of \$33,839.49; that is, \$32,825 for the dozer, and \$1,014.49 for radio equipment, which I determine to be part of the rented equipment. I conclude that the contractor is not entitled to additional payment for the dozer or down time. I dissent from the contrary conclusions and analysis of the panel. Accordingly, I grant the appeal, finding the Government liable to pay the contractor \$33,839.49, plus interest pursuant to statute, 41 U.S.C. § 611, from February 14, 2003, until payment thereof.

A contract between the Government and contractor arose pursuant to the terms and conditions of the Emergency Equipment Rental Agreement (EERA) previously entered into between the parties. Clause 2 of the contract addresses time under hire: "The time under hire shall start at the time agreed upon when equipment is ordered by the Government and end by notification to the Contractor by the Government that the equipment is released except as provided in Clause 8" (Appeal File at 21 (¶ 2)).

For the E51 dozer in question (with one operator), the EERA specifies a work rate of \$117 per hour (column 11), with a guarantee of \$933 per day (column 13). (Appeal File at 20). Clause 7, Payments, addresses the calculation of payment:

Rates for equipment hired with operator(s) include all operator(s) expenses. Payment

for equipment and operator(s) furnished will be at rates specified and, except as provided in Clause 8, shall be in accordance with the following:

- (1) Work rates (column 11) shall apply when equipment is under hire as ordered by the Government and on shift, including relocation of equipment under its own power.

....

- (3) Guarantee. For each calendar day that equipment is under hire for at least 8 hours, the Government will pay not less than the amount shown in column 13. If equipment is under hire for less than 8 hours during a calendar day, the amount earned for that day will be not less than one-half the amount specified in column 13.

(Appeal File at 21 (¶ 7).)

Clause 8, Exceptions, states:

- a. No further payment under Clause 7 will accrue during any period that equipment under hire is not in a safe or operable condition or when Contractor furnished operator(s) is not available.
- b. If the Contractor withdraws equipment and/or operator(s) prior to being released by the Government, no further payment under Clause 7 shall accrue and the Contractor shall bear all costs of returning equipment and/or operator(s) to the point of hire.
- c. After inspection and acceptance for use, equipment and/or furnished operator(s) that cannot be replaced or equipment that cannot be repaired at the site of work by the Contractor or by the Government in accordance with Clause 5, within 24 hours, may be considered as being withdrawn by the Contractor in accordance with Paragraph b above, except that the Government will bear all costs of returning equipment and/or operator(s) to the point of hire as promptly as emergency conditions will allow.

(Appeal File at 21 (¶ 8).)

Clause 10, Loss, Damage, or Destruction, specifies:

The Government will assume risk for loss, damage, or destruction of equipment rented under this contract, provided that no reimbursement will be made for loss, damage, or destruction when (a) due to ordinary wear and tear, or (b) negligence of

Contractor or Contractor's agents caused by [sic] or contributed to loss, damage, or destruction, or (c) damages caused by equipment defects unless such defects are caused by negligence of the Government or its employees.

(Appeal File at 21 (¶ 10).)

On August 17, 2002, at approximately 13:30, the contractor was operating the E51 dozer in question on the Biscuit fire, on a slope, when it came upon a ledge. Another dozer and operator of the contractor attempted to extricate the E51. Rather than a successful result, the E51 "rolled" down the hill, sustaining damage in the process. It ceased to be in a safe and operable condition. (Appeal File at 1.) The evidentiary record does not demonstrate that Government or contractor personnel exercised other than the degree of care which a careful and prudent person would have exercised under the circumstances. The ungrounded conjecture found in the briefs and submissions of the contractor and contracting officer, that attempts to attribute negligence to the opposing party, lacks credible factual support. References to a 2004 task book, that post-dates the incident, are not useful in establishing a standard at the time of the incident.

The vehicle release inspection form bears signatures of the contractor's owner (president) and a mechanic for the Government, with a date of August 18, 2002, and time of 12:30. The remarks section specifies: "Possible claim pending as per investigation. Damage when dozer rolled over." Under these two sentences is the statement, "Definite claim in process," followed by the initials of the contractor's owner. (Appeal File at 63.) The emergency equipment use invoice, with signatures of the contractor's president and a Government procurement employee and dates of August 18, indicates that the dozer was released at 15:00 on August 19, 2002. (Appeal File at 24-26, 46-48).

The contractor has received payment for use of the equipment through August 19, 2002. The payment includes \$1,521 for August 17 (13 hours at the hourly rate), \$933 for August 18 (the guarantee, instead of 6 hours at the hourly rate, prior to demobilization), and \$1,053 for August 19 (9 hours at the hourly rate, for travel). (Appeal File at 43, 46-48, 55.)

By letter dated September 11, 2002, the contractor submitted an initial claim to recover for repairs and down time: "Repairs are as quoted on the two estimates plus an estimate for my radio equipment at \$1975.61 and down time is \$1004. a day since the accident." With this claim, the contractor submitted to the Government three estimates. Estimates from two companies, each dated September 6, 2002, specify that the estimate "is based on a visual inspection." One estimate, for \$32,825, leaves as "open" the price for parts relating to the engine and radiator, and the swing frame and dead axles. The estimate for \$76,640, notes that the "rops open cab" line item does not include any machine work that may be needed. Neither estimate identifies damage to the winch. A third estimate (a communications equipment proposal), dated August 27, 2002, submitted with the claim is for \$1,975.61, with itemized pricing for a mobile radio, head set station, head set, speaker, antenna, and cable, as well as specified technical services. (Appeal File at 1-4.) The submission does not request a sum certain. The contracting officer so noted, in a letter dated November 13, 2002. The letter specifies: "The two handwritten statements on file describe the conditions and events leading to equipment sliding off the cliff (rocky point) and flipping down the hill. Neither statement indicates any fault or negligence of the Government." The letter concludes:

in order to evaluate reasonable costs of any amounts that may be approved, please provide a detailed cost breakdown of specific amount claimed (damage to equipment, dozer and radio only). There are no provisions under the Agreement to allow for down time (your claim stated down time \$1004 a day since the accident) and no amount will be allowed under that claim item.

(Appeal File at 5.) By letter dated February 14, 2003, the contractor provides details of the incident and demobilization. Further, the letter states that one of the estimators “told me yesterday they [are] willing to repair the tractor for no more than \$50,325. The radio equipment that was destroyed can be replaced at \$1,975. This tractor can be completely repaired for \$52,300.” In conclusion, “I have researched many alternatives and find this the most reasonable repair cost. Please let me know if this is acceptable.” (Appeal File at 6.) The contracting officer received the letter on February 14 (Appeal File at 8).

By letter dated June 10, 2003, the contracting officer references the claim letters, denies the claim and notifies the contractor of its appeal rights. Regarding the incident itself, the decision states: “The working environment required careful approach and operation of which the operator may not have taken every precaution. In any event, there is not evidence or statements that would attribute to [the] Government liability or responsibility for the damage.” (Appeal File at 10-11.) Regarding the radio, the contracting officer writes: “There are no provisions in your Emergency Equipment Rental Agreement for the radio. The radio was never ordered under a resource order. Provisions do not state that the radio is a part of the equipment, therefore, there are no provisions to allow reimbursement for equipment not ordered.” (Appeal File at 10).

In a supplemental declaration, the president/owner of the contractor declares:

There are many safety equipment features that a dozer must have before it will be allowed to partake in fighting wild fires. This equipment includes but is not limited to fire shields, hand shovels, and a two-way radio. Such equipment is mandatory and required by the government. The radio which was damaged on dozer E51 at that time of the incident in question was a mandatory piece of equipment.

(Reply Brief, Attachment.) Although the declaration and contractor offer no support for the statement that the radio was mandatory equipment, the replacement equipment was installed in the dozer during repair (Appeal File at 4; Government Reply Brief, Exhibit B at 40). Further, the contractor identified the radio as damaged equipment at the time of its initial claim (Appeal File at 1). The Government had the opportunity to investigate and dispute the allegations. Lacking any contrary evidence in the record, based upon this information, I conclude that the radio equipment had been installed in the dozer at the time that it was hired under the contract, and was part of the dozer at the time of the incident.

As stated by the Government in its reply brief, the contractor submitted with its brief an invoice for the actually purchased replacement radio equipment, with an identical model number for the mobile radio component and similar other items as found in the estimate submitted with the initial claim.

The invoice, dated June 22, 2004, identifies a total payment of \$1,826.94; of this only \$1,014.49 relates to parts and installation on the dozer in question. (Appeal File at 4; Reply Brief, Exhibit B at 40). This invoice of actual costs represents the contractor's damage better than the single estimate submitted with the initial claim.

The contractor submitted with its initial brief a claim for reimbursement of \$43,486.79 for damages to the dozer (exclusive of the radio), said to include \$29,536.79 in new and used parts, an estimated \$1,450 in shop supplies, and \$12,500 for the owner's labor (an estimated 250 hours at \$50 per hour) (Brief at 4-5). Support for these latter two costs are not buttressed by documentation, but rather, by a declaration of the president/owner of the contractor, that the estimates are accurate. The record does not demonstrate that the damage to the dozer could not have been repaired for the lower estimate, \$32,825, included with the initial and subsequent claims. The record does not indicate that the actual damage encountered made any of the estimated repair costs inaccurate or incomplete.

The contracting officer has included in the appeal file selections for what is deemed to be an applicable handbook guiding the actions of the Government. Of relevance,

The incident supervisor managing the equipment is responsible for documenting the damage and initiating the investigation. The extent of the investigation should be appropriate to the complexity and/or amount claimed. The investigator shall avoid conclusions and opinions and shall only present observations and facts. The investigation report should include the following items:

- A. Description of the damage and circumstances leading to the damage[.]

(Appeal File at 72 (¶ 26.6-3).) Further, the handbook defines "negligence": "Failure to exercise that degree of care, which a careful and prudent (reasonable) person would exercise under similar circumstances" (Appeal File at 73). Separately, the handbook states, "Investigations should be made while witnesses are available, before damages have been repaired, and prior to presentation of claims" (Appeal File at 74 (¶ 71)). The Government has proffered no evidence, apart from that garnered by the contractor, regarding the scope and extent of damage to the dozer.

Assumption of Risk

The dozer in question was damaged (it was neither lost nor destroyed). Under Clause 10, the Government assumes the risk for damage of equipment rented under the contract. Of relevance to the contentions here, no reimbursement will be made for damage when negligence of the contractor or its agents caused or contributed to the damage.

Given this clause, the contracting officer utilized the incorrect standard in concluding that absent Government negligence, the Government had assumed no liability. Rather, the burden is on the Government to demonstrate that negligence of the contractor, or its agents, caused or contributed to the damage.

Before this Board, the Government relies upon the incorrect standard as it claims no liability. It maintains that the contractor:

was directly responsible for the incident for at least two reasons. First, Appellant's principal, Mr. Anchordoguy, failed to use the best available method of removing the E51 from its precarious position, and second, Mr. Anchordoguy's operation of the E50 appears to have caused the incident, either by attempting to dig out the area so that the E51 could be driven back from the edge, or by nudging the E51 off the ledge and into a roll.

(Government Memorandum at 5.) Similarly, in its reply brief, the Government notes the contractor caused the E51 to slide and roll over; "Appellant was the direct and proximate cause of the incident" (Government Reply Brief at 2). Under the clause, the Government must demonstrate negligence by the contractor or its agents, not simply that the contractor was responsible for (or the cause of) the incident. The developed record does not demonstrate that the contractor acted negligently in selecting the method to extricate the E51 or in operation of the dozers. The actions and results do not automatically indicate negligence; no statement in the evidentiary record suggests that the contractor acted inappropriately under the circumstances.

The contractor contends that the Government's actions were negligent in permitting the E51 to proceed without someone on foot in front scouting the area, thereby resulting in the E51 upon the ledge and seemingly precarious position. The record demonstrates no negligence by the Government. The evidence does not indicate that it was inappropriate for the Government to direct the dozer to engage in work on the slope. Further, the record indicates no unwillingness by the contractor to operate the E51 in the given conditions, thereby placing the dozer in the position upon the ledge, or in attempting to extricate the dozer. Just as significantly, the contractor was in control of the other dozer when the E51 was stopped upon the ledge. I find no negligent Government actions or inactions, so Government negligence did not cause the E51 to get damaged.

In summary, the record does not demonstrate that either the contractor or Government was negligent. Therefore, under the clause, the Government assumes the risk for damage to the rented equipment. With this conclusion, the specific terms of the contract can be addressed to assess relief.

Radio Equipment

The radio was attached to the dozer when it arrived under contract and at the time of damage. The radio was part of the rented equipment. Under Clause 10, the Government assumed the risk of damage to the rented equipment. This assumption of risk extends to the radio.

Despite the single initial estimate of \$1,975.61 for replacement of the radio equipment, the contractor paid \$1,014.49 for the parts and installation on the dozer in question. This invoice of actual costs represents the contractor's actual damage, much the same as a second estimate at a lower price than the single estimate submitted with the initial claim. The contractor is entitled to recover \$1,014.49 for the radio.

Damage (Exclusive of the Radio Equipment)

In support of the damage, the contractor submitted two written estimates made by repair shops after a visual inspection of the damaged dozer. The lower estimate is for \$32,825. Although the contractor now seeks to recover \$43,486.79, the record does not indicate that the damage sustained was greater than that assessed in the initial estimate. Although the contractor was not required to repair the damaged equipment, and was not required to select the least expensive method for repair, the Government is obligated to reimburse the contractor for the damage done. By lack of proof and argument, the contractor has not demonstrated its entitlement to more than the initial estimate. The Government has not provided a basis to dispute any item of damage or the cost thereof identified in the initial estimates.¹ Based upon the record, I find the lower estimate to reflect the damage for which the Government is liable under the clause. Thus, the contractor is entitled to recover \$32,825 for the damage to the dozer (exclusive of the radio equipment).

Down Time

Despite the consistent Government position expressed initially by the contracting officer by letter in November 2002, that there “are no provisions under the Agreement to allow for down time . . . and no amount will be allowed under that claim item,” the contractor has failed to articulate a basis for recovery.

Clause 8 specifies that no payment under Clause 7 will accrue during any period that equipment is not in a safe or operable condition. This language is not subject to multiple interpretations; there are no

¹ In its answer, the Government acknowledges that the contractor submitted estimates for repair of damage to the E51, in an amount between \$33,000 and \$77,000, but “denies both the cause of the damage and the accuracy of said estimates” (Answer at 2 (¶ 12)). Relying upon unsupported conjecture, the Government has introduced into the record no evidence that causes one to hesitate to accept the independent estimates based upon visual inspections.

conditions that suggest that payment will continue to accrue despite this specific language. The contractor has not suggested that Clause 10 overrides or alters the interpretation of the express language in Clause 8. Rather, it appears that under Clause 10, the Government assumes liability only for damaged (or lost or destroyed) rented equipment; the clause is silent regarding consequential or foreseeable damages. The parties have provided no analysis or discussion of an alternate interpretation, or suggested that the history of the clause indicates a different result.²

The contractor has been paid in excess of the guarantee on the day the equipment was damaged, the guarantee on the following day, and in excess of the guarantee on the day the equipment was demobilized. The contractor is entitled to no additional payment under the contract for the dozer that was not in a safe or operable condition.

JOSEPH A. VERGILIO

Administrative Judge

Administrative Judge POLLACK, majority decision of the Board, concurring in part with Judge Westbrook and in part with Judge Vergilio.

I agree with Judge Westbrook in granting Appellant \$33,775.30 for the damage to the dozer and agree with her in granting Appellant \$550.47 for the loss of use of the dozer. I agree with Judge Vergilio that Appellant is entitled to recover for the loss of the radio in the amount of \$1,014.49. I agree that the radio was part of the rented equipment, but further note that even if not attached, I would have still allowed recovery on the basis that a two-way radio would be a common item for use with a dozer and, as such, its loss would have been foreseeable, and in my view within the scope of the contract.

² For example, in delving into the history apparently behind the clause, including statutory language, 16 U.S.C. § 502, it is noted that Senate Report No. 1629 (May 26, 1958) addresses a “number of ‘housekeeping’ provisions relating to the work of the Forest Service and dealing with (1) reimbursement for damages to rented equipment” (1958 U.S.C.C.A.N. 2691). House Report No. 1505 (Mar. 17, 1958) explains that the “first part of this section relates to reimbursement of owners of equipment for damages to the equipment occurring when in use on Forest Service work” (1958 U.S.C.C.A.N. 2691, 2692).

DECISION

The Board grants, in part, the appeal. The Appellant is to recover \$35,340.26, plus interest pursuant to the CDA from February 14, 2003.

HOWARD A. POLLACK
Administrative Judge

Issued at Washington, D.C.
March 24, 2005