



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF OR, IN THE ALTERNATIVE, FOR PARTIAL
SUMMARY RELIEF DENIED: JANUARY 13, 2011

CBCA 1820, 2194

J. GOODISON COMPANY, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Melissa M. Horne of Winograd, Shine & Zacks, P.C., Providence, RI, counsel for Appellant.

J. Stephen Brophy, Office of Procurement Law, United States Coast Guard, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **GILMORE**, **STERN**, and **SHERIDAN**.

GILMORE, Board Judge.

ORDER

J. Goodison Company, Inc. (appellant or Goodison) appealed the final decision of a contracting officer of the Department of Homeland Security, United States Coast Guard (respondent or Coast Guard), denying appellant's claim for costs it incurred to remobilize after the blower it was installing aboard a Coast Guard ship fell during installation. Appellant's claim is in the amount of \$32,686. This appeal was docketed as CBCA 1820.

After this appeal was docketed, a Coast Guard contracting officer issued a final decision advising appellant that it owed the Coast Guard \$43,904.09 for costs the Coast Guard incurred in repairing the damaged blower and remobilizing personnel to complete the blower's installation. Appellant appealed this final decision and it was docketed as CBCA 2194. The two appeals were consolidated since they involved the same subject matter.

Respondent has filed a motion for summary relief, or for partial summary relief, contending that the material facts are not in dispute and respondent is entitled to relief as a matter of law. Respondent's position is that the undisputed facts show that appellant was responsible for the proper installation of a blower, but performed in a negligent manner, causing damage to the blower, and is thus responsible for costs the Coast Guard expended in repairing and installing the blower.

Appellant, in its response to the motion, contends that there are material facts in dispute which preclude granting summary relief to respondent. Appellant contends that the technical representative the respondent hired to supervise the installation, and not appellant, was the party that caused the damage to the blower, resulting in added costs to repair and install the blower. For reasons stated below, we cannot grant the Coast Guard's motion for summary relief on either entitlement or quantum, because we find that there are material facts in dispute which preclude the granting of such relief.

Background

On June 19, 2009, appellant and respondent entered into a firm fixed-price contract that required appellant to remove a 3000 pound blower from the main engine of a Coast Guard ship and to install a similar replacement blower. Appeal File, Exhibit 1 at 9. The contract amount was \$68,850. *Id.*, Exhibit 5. Work was to start on June 22, 2009, and be completed on June 29, 2009. The replacement blower was a reconditioned blower that was manufactured by Fairbanks Morse Engine Company (FMEC) and furnished by respondent. The contract provided that respondent would provide an on-site technical representative ("Tech Rep") under whose supervision Goodison would perform the blower replacement. *Id.*, Exhibit 1 at 9. Respondent awarded a separate contract to FMEC for the Tech Rep services. Appellant's Appendix to Statement of Genuine Issues of Fact, Tab 3. FMEC designated William Porter to be its Tech Rep on the blower replacement contract. Appeal File, Exhibit 45 at 1.

The contract stated that an arrival conference would normally be held within forty-eight hours of the scheduled start date. Appeal File, Exhibit 2 at 5. It is not clear from the record who was responsible for scheduling the arrival conference or who was required to attend the arrival conference. A meeting was held on June 22, 2009, between representatives of both appellant and respondent. The Tech Rep was not at the meeting and did not arrive at the ship until after the meeting had ended.

The replacement blower was inspected by the Coast Guard and the Tech Rep when it arrived on site; the timing gears checked out and the blower spun freely. Appeal File, Exhibits 14, 45 at 1. On June 24, 2009, the Tech Rep removed the drive gear from the old blower and installed it on the replacement blower. *Id.* It appears that on this same day, the plywood covering on the top of the blower had been removed by the Tech Rep and not reinstalled before the blower was moved. Appeal File, Exhibits 21-22. Around 3:00 p.m. on June 24, 2009, while Goodison was moving the replacement blower between the ship's main engines, the forward beam clamp slipped. This caused the blower to drop approximately six inches to the deck, pinning a Goodison employee between the blower and the ship's safety rail. Complaint ¶ 16; Answer ¶ 8. The employee's injuries are not a part of the disputes in these appeals. The Tech Rep had already left the ship by the time Goodison started moving the replacement blower into the engine room, and he was not present when the accident occurred.

On June 25, 2009, the day following the incident, the Tech Rep tried to rotate the blower shaft and found that it would not rotate. Appeal File, Exhibit 45 at 2. The blower was sent to the manufacturer, FMEC, to determine the cause of the blower's failure. Goodison had asked for permission to witness the inspection and was not provided a response to its request. Appeal File, Exhibit 17. FMEC determined that debris had gotten into the blower, including a "small rivet or machine screw" that had locked up the blower. Appeal File, Exhibit 20. The debris that FMEC found in the blower, including the screw or rivet, was not provided to Goodison to examine. There are pictures in the appeal file showing the debris and rivet found in the blower. *Id.* The blower was repaired and sent back to the ship on July 7, 2009.

On July 10, 2009, the appellant returned to the ship and installed the blower, with the Tech Rep supervising the installation. FMEC billed the Government \$16,181.70 for Tech Rep services provided from July 9 through 16, 2009, and \$27,722.39 for repair of the blower. The Coast Guard contends that appellant is responsible for these costs, which total \$43,904.09.

Discussion

Summary relief is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The moving party bears the burden of establishing the absence of genuine issues of material fact. All reasonable inferences must be drawn in favor of the party opposing summary relief. *North Wind, Inc. v. Department of Agriculture*, CBCA 1779, 10-1 BCA ¶ 34,419, at 169,905 (citing *Celotex Corp. v. Catrett*, 488 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)).

While the facts surrounding the dropping of the blower itself are not in dispute, there are facts in dispute regarding how and when the debris, including the small rivet, entered into the blower shaft, as well as who was responsible for covering the top of the blower prior to

installation. The debris in the blower, and not the dropping of the blower, appears to be the cause of the blower's failure. The Coast Guard contends that appellant was the party that was responsible for the proper installation of the blower and performed the installation in a negligent manner. The Coast Guard, thus, argues that appellant is the party that is liable for the damage to the blower and the costs expended by respondent to repair the blower and to compensate the Tech Rep for the additional installation services. Appellant counters, stating that its contract with the Coast Guard required it to install the blower under the Tech Rep's supervision. Appellant cites evidence in the record showing that the Tech Rep was directing its work and had removed the plywood cover on top of the blower and failed to reinstall the cover before the blower was moved. Appellant contends that the failure to reinstall the cover allowed debris to get into the blower shaft, causing the blower to fail. Appellant has also questioned the reasonableness of the costs paid to FMEC for the added Tech Rep services and repair of the blower. The initial contract between the Coast Guard and FMEC for Tech Rep services was in the amount of \$11,292.94, and the amount paid for the Tech Rep to return to the site for the later installation was \$16,181.70. The cost for FMEC to repair the blower was \$27,722.39, and the estimated cost to purchase the reconditioned blower that was repaired was \$21,475. Respondent did not address these cost issues.

The burden is on the moving party to show that there are no material facts in dispute and that it is entitled to judgment as a matter of law. Respondent has not made the required showing. There is a genuine factual dispute regarding the contractual obligations of appellant and the Tech Rep under their respective contracts with the Government. The exact supervisory duties required of the Tech Rep are not clearly defined in the present record. The record shows that the Tech Rep installed the drive gear on the new blower after it arrived on site. It is also not clear who was responsible for maintaining the cover on the blower during installation, and how and when the rivet found in the blower at the time of the later inspection entered the blower shaft. Regarding respondent's claim costs, there is a genuine factual dispute regarding the costs for the repair of the blower and the additional Tech Rep services. Respondent did not explain why the Tech Rep's services for the later installation were more costly than the cost estimated for the Tech Rep services under the initial contract, and why the cost to repair the blower was more than the cost to purchase the blower.

Decision

In conclusion, respondent has not established that there are no material facts in dispute and that it is entitled to relief as a matter of law. Respondent's motion for summary relief or, in the alternative, for partial summary relief, is **DENIED**.

BERYL S. GILMORE
Board Judge

We concur:

JAMES L. STERN
Board Judge

PATRICIA J. SHERIDAN
Board Judge