



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: March 12, 2009

CBCA 1323

BARRIOS DISTRIBUTING, INC.,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Robert H. Barrios, President of Barrios Distributing, Inc., San Diego, CA, appearing for Appellant.

Dionis M. Gauvin and William Robinson, Office of General Counsel, Federal Bureau of Prisons, Department of Justice, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **VERGILIO**, and **SHERIDAN**.

SOMERS, Board Judge.

This appeal arises from a purchase order for the lease of beverage dispensers. Appellant, Barrios Distributing, Inc. (Barrios), contends that the Government damaged the dispensers by improperly preparing them for shipment at the end of the lease period. The appeal is submitted for decision on the record under Board Rule 19 (48 CFR 6101.19 (2008)). For the reasons set forth below, we deny the appeal.

Background

In 2003, the Department of Justice, Bureau of Prisons (the Government or BOP), awarded a multi-year contract to Barrios for the provision of soft drink products and

beverage dispensers for federal correctional facilities, including the Federal Transfer Center (FTC) Oklahoma City. Appeal File, Exhibit 1. When BOP did not exercise the option for the third year of the original contract, FTC Oklahoma City awarded Barrios a separate contract for the provision of two beverage dispensers for the period of December 2006 through February 2007. *Id.*, Exhibits 5, 11. At the beginning of the initial contract, Barrios arranged for a local contractor to install the equipment.

The original contract included a statement of work which stated, in relevant part, that “all equipment provided shall remain the property of the contractor and shall be retrieved at the contractor’s expense upon completion of the resulting contract.” Accordingly, the contracting officer believed that Barrios would be responsible for uninstalling the equipment and preparing it for shipment. Respondent’s Record Submission, Declaration of Roy E. Franklin (Jan. 14, 2009) ¶¶ 4, 5. Nothing in the original contract or the subsequent contract required the Government to prepare the equipment for shipping. In addition, the original purchase order incorporates Federal Acquisition Regulation (FAR) 52.212-4¹ by reference and places the risk of loss on the contractor. The subsequent contract does not change this aspect of the original contract.

At the conclusion of the second contract period, the contracting officer contacted Mr. Robert Barrios, the President of Barrios Distributing, Inc., to arrange pickup of the dispensers from the FTC Oklahoma City. Appeal File, Exhibits 12, 19; Franklin Declaration ¶ 7. Barrios requested that the Government put the beverage dispensers on pallets and “shrink wrap” them in preparation for the removal. Franklin Declaration ¶ 8. Accordingly, government warehouse employees wrapped the dispensers with shrink wrap and placed them on pallets. *Id.* ¶¶ 12, 13. The pallets were placed in storage at the FTC Oklahoma City’s outside depot, awaiting pickup by Barrios. Respondent’s Record Submission, Declaration of Marc Chavez (Jan. 15, 2009) ¶¶ 4, 6.

The Nedlog Company (Nedlog),² on behalf of Barrios, contends that it provided the Government with additional instructions for preparing the dispensers for shipment in a letter dated April 10, 2007, as well as with a contact number for pickup. Appellant’s Record Submission at 2. Barrios asserts that the Government did not follow all of the instructions when it prepared the dispensers for shipment. *Id.* The Government denies that it received the April 10, 2007, letter. Franklin Declaration ¶ 10. Barrios states that the Government

¹ FAR § 52.212-4(j) stated, in relevant part, that “unless the contract specifically provides otherwise, risk of loss or damage to the supplies provided under this contract shall remain with the Contractor.” 48 CFR 52.212-4(j) (2003).

² The record does not explain the relationship between Nedlog and Barrios.

would not have known to contact Nedlog for pickup. *Id.* The Government argues that the record evidence shows that the contracting officer contacted Barrios, not Nedlog, to arrange pickup. Respondent's Reply Record Submission at 3. Based upon the record, the Board concludes that the Government did not receive the letter.

Map Transportation (a shipping company hired by Nedlog/Barrios) picked up the beverage dispensers on June 19, 2007. BOP representatives noted that the beverage dispensers were in good condition and had been packaged with care. Franklin Declaration ¶ 14. The record provides no details concerning how the dispensers were transported by the shipper, nor does it state whether the shipper or the Government placed the equipment onto the transport vehicle.

Two days later, on June 21, 2007, the shipping company delivered the beverage dispensers to Nedlog. A representative of Nedlog signed a proof of delivery form, attesting that the beverage dispensers were "received in good condition." Appeal File, Exhibit 17. Later that day, however, the same representative sent Barrios pictures alleged to show damage to the equipment, and contended that the equipment had been damaged in transit. Nedlog asserted that the damage occurred because the equipment was shipped upright and had not been strapped to the pallets. *Id.*, Exhibit 15 at 14. There is nothing in the record to show that the dispensers in the photographs are the same as those originally delivered to the Government. In addition, we cannot determine based upon the record whether Nedlog's supposition as to the cause of the alleged damage to the equipment is accurate.

On July 2, 2007, Barrios sent BOP an electronic mail message stating that the beverage dispensers were damaged beyond repair and must be replaced. Appeal File, Exhibit 9 at 1. Nothing in the record indicates how Barrios determined that the dispensers could not be repaired and must be replaced.

On September 10, 2007, Barrios sought reimbursement for the damaged equipment, asserting that the items were "damaged at your Federal Transfer Center located in Oklahoma City," and alleging that the damage occurred because the items were not correctly shipped. Appeal File, Exhibit 9 at 5. The Government responded by letter dated October 18, 2007, denying any responsibility for the damaged beverage dispensers. *Id.*, Exhibit 12. Barrios filed a claim with the contracting officer on November 15, 2007, seeking between \$3000 and \$3400 in damages. *Id.*, Exhibit 13. Upon receipt of the contracting officer's decision denying its claim, Barrios filed this appeal.

Discussion

_____As noted above, nothing in the language of the original contract places the Government under an affirmative obligation to uninstall, package, or ship Barrios' beverage equipment. The statement of work specified that the equipment would be retrieved at the contractor's expense upon completion of the contract. In addition, the contract provided that the risk of loss or damage to the supplies would remain with the contractor. Therefore, to the extent that the equipment had been damaged, the risk of loss remained with Barrios. Thus, the Government is not liable to Barrios for damage to the equipment.

Alternatively, if we assume that the risk of loss did not remain with Barrios, and that the Government assumed some degree of responsibility beyond that required by the contract, we next look to the common law principles of a bailment. In accordance with those principles, Barrios must show that the equipment was delivered to the Government in good condition and returned in a damaged condition. Such evidence can give 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. *Mohammad Darwish Ghabban Est.*, ASBCA 51994, 00-2 BCA ¶ 31,114, at 153,672 (citing *Universal Maritime Service Corp.*, ASBCA 22661 et al., 81-1 BCA ¶ 15,118; *Meeks Transfer Co.*, ASBCA 11819, et al., 67-2 BCA ¶ 6567, *aff'd on reconsideration*, 68-1 BCA ¶ 7063).

The parties do not dispute that the dispensers were delivered to the Government in good condition. In support of its claim that the dispensers were returned damaged, Barrios has submitted photographs.³ Some of the photographs appear to show damage underlying shrink wrap that has been partially removed, with one photograph in particular showing what appears to be a bent leg. Appeal File, Exhibits 9, 10, 15. We note that nothing in the record shows that the dispensers in the photographs are the same ones as those originally delivered to the Government. Nor is it possible to determine whether the equipment had been damaged beyond repair based solely upon the photographs.

The Government contends that the photographs do not show that the Government's actions or inactions resulted in damage to the equipment. The Government presented evidence to show that the dispensers were in good condition when Map Transportation, the carrier, retrieved them from the Government. Franklin Declaration ¶ 14. The record also contains a receipt of delivery form upon which a representative from Nedlog attested that the beverage dispensers were "received in good condition." Appeal File, Exhibit 17. The

³ Barrios originally submitted the photographs as an attachment to its July 2, 2007, electronic mail message setting forth its claim. Appeal File, Exhibit 10.

Government avers that Barrios has failed to prove that the equipment was damaged or to show, if the equipment had been damaged, what caused the damage and when it occurred.

We agree that Barrios has not shown that the Government's actions or inactions caused the damage to the dispensers. Assuming for the sake of argument that the record supports Barrios' claim that the dispensers have been damaged, Barrios has presented nothing to show how the damage occurred. It is impossible to determine the extent of any damage based upon the record evidence. Barrios has not met its burden of proof regarding entitlement or quantum.

Indeed, the only evidence to support its claim that the Government caused the damage to the equipment by improperly packing the dispensers is the statement from Nedlog that the dispensers had been shipped upright rather than on their backs. This statement, however, is insufficient to establish that the Government's actions or inactions caused the damage to the items, particularly in light of Nedlog's signature indicating that it had received the items in good condition. In the absence of evidence showing that the Government acted negligently or without due care in preparing the items for shipment, and that the damage resulted from the Government's negligence or lack of due care and not from other actions which may have occurred during shipping, we cannot conclude that the Government is responsible for the damages.

Decision

For the reasons stated above, the appeal is **DENIED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

JOSEPH A. VERGILIO
Board Judge

PATRICIA J. SHERIDAN
Board Judge