



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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MOTION TO DISMISS COUNT I DENIED: February 11, 2020

CBCA 6358

GRIZ ONE FIREFIGHTING, LLC,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Scott A. Everard, Stevensville, MT, counsel for Appellant.

Jody M. Miller and Jennifer T. Newbold, Office of the General Counsel, Department of Agriculture, Missoula, MT, counsel for Respondent.

Before Board Judges **DRUMMOND**, **SULLIVAN**, and **RUSSELL**.

**DRUMMOND**, Board Judge.

The Department of Agriculture, Forest Service (Forest Service), has moved to dismiss count I of the complaint<sup>1</sup> filed by Griz One Firefighting, LLC (Griz One) for lack of jurisdiction or, in the alternative, for failure to state a claim upon which relief can be granted.

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<sup>1</sup> Griz One's complaint alleges two counts and seeks damages totaling \$49,671.90. In count I, Griz One alleges that the Forest Service's negligent actions caused damage to its engine #2 (equipment) for which it seeks compensation. In count II, Griz One alleges breach of contract. The Forest Service's motion concerns only count I of the complaint.

Griz One opposes the motion. Both parties have filed supplemental arguments and exhibits. We deny the Forest Service's motion.

### Background

On June 6, 2016, the Forest Service entered into a blanket purchase agreement (agreement) with Griz One for wildland firefighting services. Under the agreement, Griz One made available water handling equipment and operators for wildland fire incidents at the Forest Service's northern region and nationwide when accepting dispatch orders from the Forest Service and other governmental agencies.<sup>2</sup>

Section C.8 of the agreement assigns to Griz One the risk of loss, damage, or destruction of the equipment provided with an operator, unless the loss, damage, or destruction was caused by "the negligence, or wrongful act(s) of government employee(s) while acting within the scope of their employment." No clause in the agreement directs the contractor to submit claims to anyone other than the Forest Service contracting officer.

In July 2017, Griz One accepted a dispatch order to supply equipment for a major fire event at the Tongue River Fire Complex in Missoula, Montana. While at the site on July 10, 2017, Griz One's equipment was damaged in an accident with a government vehicle operated by a Forest Service trainee. The Bureau of Land Management (BLM) investigated the incident and reported the conditions prior to the accident as stressful and urgent due to near zero visibility caused by excessive smoke and high winds.

In a letter dated August 28, 2018, Griz One submitted a claim to the contracting officer that, in part, asserted that a Forest Service employee while working under orders from the Government negligently or wilfully caused the accident on July 10, 2017, that damaged Griz One's equipment. Griz One claimed damages totaling \$3366.90; that is, \$1716.90 for damage to the equipment (supported by a preliminary estimate), \$1500 for diminution in value (supported by a declaration), and \$150 for three days of lost rental during repairs. The contracting officer denied this portion of the claim and advised Griz One, without any supporting citation to the contract, that the BLM, not the Forest Service, was the host agency and, as such, was the agency responsible for resolving Griz One's claim. The contracting officer made no determinations about Griz One's claimed damages.

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<sup>2</sup> The agreement refers to the Forest Service and the other governmental agencies collectively as the "Government."

Griz One filed a timely appeal and complaint. Count I of Griz One's complaint repeats the existence of a contract and that the Forest Service's negligence on July 10, 2017, caused the accident that damaged its equipment. Griz One also repeated its request for damages totaling \$3366.90.

### Discussion

Pending before us is the Forest Service's motion to dismiss this appeal for lack of jurisdiction and failure to state a claim. We deny the Forest Service's motion.

#### 1. Jurisdiction

The Court of Appeals for the Federal Circuit has instructed that where a plaintiff alleges the existence of a contract between it and the Federal Government, a court or board of contract appeals has jurisdiction to consider the case. *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1353 (Fed. Cir. 2003). The Board therefore possesses jurisdiction to decide this appeal. 41 U.S.C. § 7104 (a) (2012). The contractor filed a timely appeal from the contracting officer's final decision. There is no question that Griz One plead the existence of a valid contract. The Forest Service, while attributing the contract to the BLM, clearly concedes that a contract exists. The Forest Service alleges that the Board lacks jurisdiction because the claim should have been presented to BLM as the ordering agency, rather than the Forest Service. Putting aside factual discrepancies as to which agency ordered the equipment, there is no clause in the agreement that directs contractors to submit claims to the ordering agency. The Forest Service relies upon the payment provisions of the agreement, which reads that the ordering agency will pay for services, but without more we cannot construe those provisions as requiring submission of the claim to the ordering agency.

#### 2. Failure to State a Claim

The Forest Service has moved to dismiss count I of Griz One's complaint for failure to state a claim against the Forest Service upon which relief can be granted. The standard to resolve such a motion, is well established. "We apply essentially the same standard as would a federal trial court when ruling on a motion to dismiss for failure to state a claim." *Williams Building Co. v. Department of Veterans Affairs*, CBCA 6559, et al., slip op. at 3 (Jan. 6, 2020) (quoting *Amec Foster Wheeler Environment & Infrastructure, Inc. v. Department of the Interior*, CBCA 5168, et al., 19-1 BCA ¶ 37,272, at 181,366 (citing Board Rule 8(e) (48 CFR 6101.8 (e) (2009))). The complaint must allege facts "'plausibly suggesting (not merely consistent with)' a showing of entitlement to relief." *Id.* (quoting *Cary v. United States*, 552 F.3d 1373, 1376 (Fed. Cir. 2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007))). The Board observed in *Williams* that "[t]he *Twombly*

plausibility test altered the prior rule that a tribunal should dismiss for failure to state a claim only if ‘it appear[ed] beyond a reasonable doubt that the [claimant could] prove a set of facts . . . which would entitle it to relief.’” *Id.* (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), *abrogated in relevant part by Twombly*, 550 U.S. at 561-63).

The Forest Service urges us to dismiss this appeal for failure to state a claim because Griz One’s claim does not establish negligence by a preponderance of the evidence and, even if it does, the BLM, not the Forest Service, is the agency potentially liable for the damages. Preponderance of evidence is not the standard at this stage of the proceedings. Here, the BPA expressly addresses liability for damages to owner-operated equipment. The BPA dictates that the Government shall not be liable for any loss, damage, or destruction of such equipment, except for loss, damage, or destruction resulting from the negligence or wrongful act(s) of government employee(s) while acting within the scope of their employment. Griz One alleges that its equipment was damaged when a Forest Service employee negligently backed a government vehicle into it. These allegations, if true, state a plausible claim for relief. The issue of whether Griz One can substantiate its claim is at this point in the litigation premature for us to decide.

### Decision

The Forest Services’ motion to dismiss count I is **DENIED**. The parties shall confer and submit to the Board by February 28, 2020, a joint proposed schedule for further proceedings.

*Jerome M. Drummond*

JEROME M. DRUMMOND

Board Judge

We concur:

*Marian E. Sullivan*

MARIAN E. SULLIVAN

Board Judge

*Beverly M. Russell*

BEVERLY M. RUSSELL

Board Judge

