LAUREL K. GOODRICH,	)	**AGBCA No. 2004-130-1**
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Appellant	)	
	)	
Representing the Appellant:	)	
	)	
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DECISION OF THE BOARD OF CONTRACT APPEALS

August 13, 2004

Before POLLACK, VERGILIO, and WESTBROOK, Administrative Judges.

Opinion for the Board by Administrative Judge WESTBROOK.

This appeal, received at the Board January 27, 2004, involves Emergency Equipment Rental Agreement (EERA) No. 56-04M3-3-0052, between Laurel K. Goodrich of Baker City, Oregon (Appellant), and the U. S. Department of Agriculture, Forest Service, Umatilla National Forest, Oregon (FS or Respondent). Under the EERA, the FS rented from Appellant a 2002 full size Dodge pickup truck for use during the 2003 fire season. Appellant claimed $1,200 for damage to the vehicle sustained when she hit a deer while operating the truck under the EERA. The Contracting Officer (CO) denied the claim and this timely appeal ensued. The parties elected to have the appeal decided on the written record pursuant to Board Rule 11.

The Board has jurisdiction to decide the appeal under the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613, as amended.

FINDINGS OF FACT

1. The FS and Appellant entered into an EERA, No. 56-04M3-3-0052, signed by the CO on July 2, 2003. The effective dates of the agreement were May 1, 2003 through May 1, 2004. Under the EERA, Appellant rented her full size Dodge pickup to the FS at a rate of $.80 per mile with a guarantee of $32 for a period of 8 hours or more. The driver was to be hired separately at the appropriate AD rate for the vehicle. (Appeal File (AF) 41, 52.)[1]

2. The EERA contained clause 10, LOSS, DAMAGE, or DESTRUCTION, reading as follows:

> The Government will assume risk for loss, damage, or destruction of equipment rented under this agreement only to the extent that the Government directed abnormal/extreme use of the equipment in direct support of fire suppression efforts. 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 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 47.)

This clause superceded general clause 10 which did not contain the language in the first sentence. General clause 10 would otherwise have applied (AF 42.)

3. The EERA incorporated by reference FAR clause 52.236-7, PERMITS AND RESPONSIBILITIES (APR 1984). (AF 42.) The EERA also contains clause 5, Repairs that specifies: "Repairs to equipment shall be made and paid for by the Contractor." (AF 42.)

4. According to an accident report dated September 10, 2003, on September 7, 2003, Appellant was driving the Dodge pickup from the La Grande Fire Cache to Umatilla Forest Ranger District in Ukiah, Oregon. The purpose of this trip was to deliver a pump for the Bull Springs fire. Appellant was traveling west on Highway 244 between mileposts 29 and 28 when a deer ran directly into her path from the left side of the highway. (AF 11.) The result was damage to the front bumper, fascia, shield, bracket and lamp. Repair estimates were $1,218.34 and $1,063.45. (AF 13-14; Affidavit of Laurel Goodrich.) The record contains photographs of the damaged truck taken by a Forest Service

[1] The Pacific Northwest Interagency Supplemental General Provisions make reference to AD/Casual Hires - Overhead & Faller Personnel and to AD operators hired for the sole purpose for use of the vehicle. Neither party has explained the relevance of the "AD" status.

employee (AF 11, 12).

5. The record contains two Emergency Equipment - Use Invoices, one covering the period September 6-11 and the other for the period September 12-18. Both contain the following release language in block 29: "Note: Contract release for and in consideration of receipt of payment in the amount shown on the 'net amount due' line 28. Contractor hereby releases the Government from any and all claims arising under this agreement except as reserves in 'Remarks' block 22." Appellant signed the use invoices on September 12 and September 19. She failed to provide a reservation of claim on either invoice. (AF 25, 26.)

6. By letter dated October 2, 2003, Appellant made a claim to the FS for damage attaching copies of the repair estimates (AF 9). The CO issued a final decision dated October 21, 2003. Addressing only the merits of Appellant's claim, the CO denied it, citing the standard version of clause 10 (omitting the first sentence which was added as a part of the Pacific Northwest Interagency Supplemental General Provisions) and the Permits and Responsibilities clause. The CO concluded that to recover Appellant would have to show how the fire itself was "responsible for the contractor's actions causing the damage, or that an employee of the Government directed the contractor to take an undue risk which resulted in the damage." He also decided that the mileage rate was intended to cover all costs of operation including a prorated amount for insurance costs. In his decision, the CO was silent on the question whether Appellant had waived her claim by signing the invoices without reserving the claim for damage to her vehicle. (AF 18-20.)

DISCUSSION

In her brief, Appellant asserts entitlement to reimbursement for damages to her vehicle on the grounds of lack of negligence. She also contends that she was fully in compliance with the Permits and Responsibilities clause. She disputes the CO's contention that the mileage rate is to cover costs for insurance. Finally, Appellant addresses her status as an AD operator. Appellant refers to the vehicle and herself being under contract to the FS. She also contends, however, that as an AD hire, she is considered a Federal employee subject to all employee requirements and that her truck is considered FS property at the time of contract. Therefore, argues Appellant, the truck should be treated as a Government vehicle and repaired at Government expense.

The FS responded to Appellant's brief by filing the Government's Motion to Strike New Claim and Brief. The FS characterized Appellant's argument that she was the equivalent to a Government employee and that her vehicle should be treated as a Government vehicle was a new claim which it contends should be stricken.

The FS further defends based on the language of clause 10, as amended in this contract, limiting Government assumption of risk for damage to rented property to those situations where the Government directed abnormal or extreme use of the equipment in direct support of fire suppression efforts. Finally, the FS asserts that Appellant waived her claim when she accepted payment without reserving the right to claim for damage to her vehicle.

Appellant's reply brief argues that she was acting in direct support of fire suppression efforts.

As a general rule, where, as here, a contractor executes a release complete on its face, the release is deemed to be binding on both parties. Alliance Oil & Refining Co. v. United States, 13 Ct. Cl. 496 (1987). There are special and limited circumstances in which a claim may be prosecuted despite the execution of a general release. See J. G. Watts Const. Co., 161 Ct. Cl. 801 (1963). Those situations include economic duress, fraud, mutual mistake, obvious unilateral mistake, and plain conduct indicating post-release consideration of a claim based on events occurring pre-release. Mingus Constructors, Inc. v. United States, 812 F. 2d 1387 (Fed. Cir. 1987); Steven E. Austin, AGBCA No. 83-193-1, 84-1 BCA ¶ 17,017. Here, the CO considered and denied Appellant's claim on the merits without asserting the releases as a defense. It is also possible, given the filing of the accident report, that execution of the releases could have been the result of obvious unilateral mistake or of mutual mistake. Because, as explained below, we find Appellant's claim to be barred by the terms of the contract, it is unnecessary for us to decide the efficacy of the releases.

Appellant has provided no authority in support of her claim that she was the equivalent of a Government employee and that her vehicle should be treated as Government property. The EERA uses the term AD operator in connection with "transportation vehicles" without explaining its ramifications; it also provides no indication that the operators have any relationship other than a contractual one. Appellant's argument that she should be treated as a Government employee and her truck as a Government vehicle are of no avail in her quest for damages.

The Board must look to the contract to determine whether the FS is liable for repairs to Appellant's truck. We find no evidence that the damage to Appellant's truck resulted from ordinary wear and tear; contractor negligence; or equipment defects. These facts do not support the CO's decision which relied on the standard clause 10. However, the version of the clause in this contract added a limitation to the standard clause. With that addition, the Government assumes risk for loss, damage, or destruction of rented equipment *only* when the Government has directed abnormal or extreme use of the equipment in direct support of fire suppression efforts. Appellant was driving her truck on a highway transporting equipment from one location to another. The parties disagree as to whether the accident took place while Appellant was operating the equipment in direct support of fire suppression efforts. The factual record here is sparse. We do not know how close Appellant was to actual fire suppression activities. However, it is clear that the activity was highway driving delivering equipment from one location to another. We do not find the activity to entail abnormal or extreme use of the equipment. The language of the contract forecloses liability.

Our decision moots the Government's motion to strike what it characterizes as a new claim.

DECISION

The appeal is denied.

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ANNE W. WESTBROOK
Administrative Judge

Concurring:

_____ _____
HOWARD A. POLLACK **JOSEPH A. VERGILIO**
Administrative Judge Administrative Judge

Issued at Washington, D.C.
August 13, 2004