THOMAS B. PRESCOTT,	)	**AGBCA No. 98-151-1**
	)	
Appellant	)	
	)	
Representing the Appellant:	)	
	)	
Thomas B. Prescott	)	
443 No. Johnson Place	)	
Porterville, California 93257	)	
	)	
Representing the Government:	)	
	)	
James E. Andrews	)	
Office of the General Counsel	)	
U. S. Department of Agriculture	)	
33 New Montgomery, 17th Floor	)	
San Francisco, California 94105-4511	)	

DECISION OF THE BOARD OF CONTRACT APPEALS

October 7, 1999

OPINION BY ADMINISTRATIVE JUDGE ANNE W. WESTBROOK

This appeal arose under Emergency Equipment Rental Agreement (EERA or "the agreement") No. 56-9A40-6-1P045 between the U. S. Department of Agriculture, Forest Service (FS or Government) and Thomas B. Prescott (Appellant or Prescott) of Porterville, California. The agreement, signed May 18, 1996, was for rental of two separately listed vehicles with a driver/operator. Only the 1988 Ford pickup one ton 4X4 crew cab License #3F1325 is here at issue. Appellant's appeal is from the Contracting Officer's (CO's) denial of his claims for (1) increased compensation over the daily rate specified in the agreement and (2) damage to his truck.

The Board received Appellant's timely appeal February 20, 1998, and has jurisdiction under the Contract Disputes Act (CDA) of 1978, 41 U.S.C. §§ 601-613.

At the election of the parties, this appeal is being decided under Board Rule 11 on the record without a hearing.

FINDINGS OF FACT

1. On May 18, 1996, the parties executed EERA No. 56-9A40-6-1P045 which provided for the possible future rental, with driver, of Prescott's 1988 Ford pickup truck and another truck for use by the FS in the event needed to fight fires. The rate specified in the agreement for the 1988 pickup truck with driver was 97 cents per mile with a guarantee of at least $97 per day. (Appeal File (AF) 5.) The rate was consistent with the rate for all 9001-11000 GVW 4X4 pickup trucks (AF 158) as specified in the California Interagency Emergency Hire of Equipment Rental Rates used by the FS for FY 1996-1999 emergencies (AF 147-201). Neither the EERA nor the rate schedule differentiated between vehicles of like categories when used for different tasks or under different conditions. It is not unusual for the rate of compensation for two pieces of equipment to be the same even though one is used more heavily and incurs more expense, wear and tear. (David Allasia (Allasia) Declaration.)

2. The Interagency Fire Business Management Handbook provides that the hazardous nature of emergency firefighting work was considered in establishing grade levels for emergency firefighters and no additional pay is authorized for hazardous duty. Among the position classifications to which this provision applies is "light truck or car operator." (Unnumbered Exhibit to Government Brief, page (p.) 13. 6--14.)

3. The agreement contained Federal General Provisions to Emergency Rental Agreement Form OF-294. (AF 26-34.) Pertinent excerpts from the Federal General Provisions include:

> Since the equipment needs of the Government and availability of contractor's equipment during an emergency cannot be determined in advance, it is mutually agreed that, upon request of the Government, the Contractor shall furnish the equipment listed hereon to the extent the Contractor is willing and able at the time of order. At time of dispatch a resource order number will be assigned. Contractor must furnish this number upon arrival and check in at the incident. When such equipment is furnished to the Government the following provisions shall apply:
>
> . . . .
>
> 7. Payments
>
> a. Rates of Payments - Rates for equipment hired with operator(s) include all operator(s) expenses except those items provided by the Government under Clause 9. 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.

(2) Special Rates, column 12, shall apply when specified.

(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. The guarantee is not applicable to equipment hired under the Daily rate. Equipment under transport is time under hire and compensated through the Guarantee. If equipment is transported under its own power, it is compensated under the work rate.

(4) Daily Rate. (column 11) - Payment will be made on basis of calendar days. For fractional days at the beginning and ending of time under hire, payment will be based on 50 percent of the Daily Rate for periods less than 8 hours.

(b) Method of Payment. Lump-sum payment will normally be processed at the end of the emergency. Payment for each calendar day will be made for (a) actual units ordered and performed under Work or Daily and/or Special rates or (b) the guarantee earned, whichever is the greatest amount.

8. Exceptions

. . . .

(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.

. . . .

10. Loss, Damage, or Destruction - 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 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 26-27.)

4. The agreement did not specify a location where Appellant might be called upon to perform nor did it describe specific conditions. The agreement by its terms anticipates use under emergency conditions. (AF 25-26.)

5. On or about August 16, 1996, Appellant responded to a call to report under the terms of the EERA to what the record refers to as the Ackerson Fire or Ackerson Fire Complex (AF 7, 37A; Walsh Declaration; Allasia Declaration), located in the Yosemite National Forest in California. For the first 4 days, Appellant worked at the base camp, Camp Mather. On August 20, he and his truck were assigned to haul supplies up and down the 3-mile-long road to the Miquel Spike Camp (Miquel Spike). It is disputed between the parties whether Appellant willingly accepted the reassignment to Miquel Spike. Appellant states that he initially declined the assignment and was ordered by Bill Brown to report to Miquel Spike. (AF 7.) Mr. Brown, a Battalion chief with the Kern County Fire Department served as Ground Support Unit Leader on the Ackerson Complex Fire. He states that "we" assigned Prescott to "that location" and that he had no recollection of Prescott refusing the assignment when it was first given to him. (William A. Brown (Brown) Declaration.) Beverly Walsh states that she assigned Prescott to Miquel Spike to haul supplies. (Beverly Walsh (Walsh) Declaration.)

6. Appellant transported crews and supplies. (AF 7; Walsh; Robert L. Dorman (Dorman); and Gary Lehnhausen (Lehnhausen) Declarations.) Beverly Walsh, whose responsibility it was to assign pickup trucks, states that she specifically told Appellant to haul only as many passengers as he had seats and seat belts. (Walsh Declaration.) Larry Amerjan (Amerjan), an FS mechanic inspector who was assigned to the Ackerson Fire, states that Appellant told him that he carried six persons in a rear seat designed to hold four. (Amerjan Declaration.) Both Ms. Walsh and Mr. Amerjan, recall Appellant stating that he felt sorry for crews walking up the hill and would carry as many as possible in his truck. (Walsh and Amerjan Declarations.) Appellant contends that he did not make this remark. (Appellant's Reply Brief, pp. 4-5.)

7. The Miquel Spike fire covered several hundred acres. (Dorman Declaration.) The 3-mile-long road into the camp was narrow, rough, and brush-covered (AF 7); rutted and rocky (Walsh Declaration); "an extremely rough 4X4 road" (AF 97); and only 7' to 8' wide with brush and trees growing out into the roadway (AF 99). Ms. Walsh also referred to it as a "true four-wheel drive road," not beyond the limits of a conventional 4X4 vehicle. (Walsh Declaration.) Photographs in the record confirm these descriptions. The photographs also show scratches on the truck and worn rear seat upholstery. (AF 42-51.)

8. During the course of his assignment to Miquel Spike, Appellant complained that the conditions there entitled him to a higher rate of compensation for himself and his truck than that

specified in the agreement (AF 7, 8; Walsh; Allasia; Brown; Amerjan; and Dorman Declarations). Government employees told Appellant that the CO or contracting department was the party able to make a change in the contract rates (Walsh and Amerjan Declarations). The CO, David Allasia, states that Appellant approached him several times to discuss a modification of the pay rate for his pickup truck and further states that he never indicated that he would change the contract rate. Appellant never discussed damage to the truck with Mr. Allasia. All discussions related to a change of rate, although no amount was specified. The specific request Appellant made to Mr. Allasia was that he view the site in order to better understand the desire for an increase in the rate. (Allasia Declaration.)

9. During Appellant's assignment to Miquel Spike, Appellant returned to the base camp for supplies on August 24 and again on August 27 (AF 7-8). The record indicates that Appellant was still at the base camp on August 28 and 29 (AF 8). During this period there was apparently some discussion of Appellant's being demobilized (AF 8; Walsh Declaration). The parties disagree regarding the reasons why Appellant stayed. Appellant says that Rick Alexander asked him to reconsider leaving. (AF 8.) Ms. Walsh states that Appellant did not leave after she told him that she was not yet in a position to release him and if he left then he would not be paid for his return trip (Walsh Declaration).

10. At the time of Appellant's September 1, 1996 release, Appellant signed and submitted the two page Emergency Equipment-Use Invoice. The invoice was submitted employing the mileage rate of 97 cents and the daily rate of $97. Block 29 of the invoice contains the following note: "Contract release for and in consideration of receipt of payment in the amount shown on 'net amount due' line 28. Contractor hereby releases the government from any and all claims arising under this agreement except as reserved in 'Remarks' block 22." In block 22, "Remarks," the phrase "No claim for damage" is written. (AF 4.)

11. The record contains "Vehicle/Heavy Equipment Safety Inspection Checklist" indicating that Appellant's truck was inspected before and after its use under the EERA. The form records a check of 23 items. Both before and after usage the "yes" column was checked for every item except "clutch pedal" which was noted as inapplicable. Notes under "Remarks" show that the cooling system was a little low; the oil was ½ quart low; there were two minor dents on the right rear of the cab and the rear seats were rotted in the rear. The form does not indicate whether these conditions were noted on the date of the pre-use inspection (Aug. 16, 1996) or on the date of the release inspection (Sept. 1, 1996). (AF 35.)

12. At the request of Beverly Walsh, Mr. Amerjan inspected Appellant's pickup truck on August 29, 1996 and found no damage. At the request of Ground Support, he also performed the release inspection on Prescott's vehicle. He was asked to do so because Prescott had complained of scratches on his truck and he (Amerjan) had experience with paint and bodywork. Mr. Amerjan found that the scratches on Prescott's vehicle were minor and would have come out with a good wax job. He found no damage to the underside of the vehicle and did not know why Appellant thought the truck needed an alignment job. The body panels had shifted. Mr. Amerjan

concluded that this was because the pickup has a very long wheelbase which will bend a lot when driven over rough terrain. According to Amerjan, the FS offered to realign the body panels there at the fire camp, but Appellant declined the offer. (Amerjan Declaration.)

13. In a document dated December 16, 1996, Appellant made two claims. First, he sought damages in the amount of $3,462.90 for damage to his truck. This damage included scratches from brush; damage to front end alignment; torn rear seat upholstery; dents to back of cab; and, shifting of crew cab. The quantum of his claim was broken down by service provider ($39.95, Porterville Tire; $181.75, Buster's Upholstery; $1,883.20, Clevenger Ford; and $1,358, Truck Rental [14 days at $97 a day]). His second claim was for $5,910 for the difference between what he was paid for the truck and driver at the contract amount and the amount he calculates he would have been paid at the rate of $46 an hour for 207 hours from the period August 20 through September 1, 1996. (AF 12-14.)

14. The record also contains a Standard Form (SF) 95, "Claim for Damage, Injury or Death" on which Appellant claims $9,374.39. Thereon, he states that the truck and driver were assigned to Miquel Spike Camp where the work performed included moving men and supplies on off-road conditions. He states that in order to drive 30 miles, it took over 5 hours of continuous driving, and that his truck did the work of four buses. He concludes that management at the fire was unwilling to change the rate of pay for work being performed. When asked to describe the property, nature and extent of damage and the location where the property may be inspected, he states that wear and tear exceeded compensation for truck. (AF 6.)

15. The record contains what appear to be invoices from Porterville Tire (AF 71) and Buster's Upholstery (AF 72) and an estimate from Clevenger Ford (AF 73-75). The record does not contain an invoice for truck rental. The Porterville Tire invoice was in the amount of $39.95 for tire rotation, wheel balance and wheel alignment. The Buster's Upholstery invoice of $1,883.20 is illegible except for the amount of $181.75 and "Ford crew cab." The Clevenger Ford estimate of $1,883.20 was for painting the truck and replacing the stripe tape.

16. On January 30, 1998, the CO issued a decision denying the claim. The CO denied the claim for damage to the truck based upon the release language on the final invoice. He denied the claim for an increase in the rate of compensation reiterating that the rates were contractual and that by signing the contract Appellant had agreed to the rates set out therein. He also stated that because Appellant had performed at many incidents, he was aware of the type work involved. (AF 2-3.)

17. The appeal was received February 20, 1998. In his appeal letter, Appellant stated that he protested the words "no claim for damages" in block 22 of the September 1, 1996 invoice. (AF 15.) He stated that the significance of blocks 22 and 29 of the invoice was misrepresented by "the agent's representative" at the time he signed the invoice. He did not identify either the agent or the agent's representative. The Board treated Appellant's appeal letter as a Complaint and the Government filed an Answer. After filing of pleadings and the Appeal File, the Board held

several telephonic conferences with the parties. On November 2, 1998, Appellant filed another letter containing allegations and argument. On November 23, 1998, the Government filed an amended Answer to the original Complaint. In the amended Answer, the Government admitted that at the time the release was signed, the Government was aware that Appellant wished to assert a claim for additional compensation.

18. The Board held an additional telephonic conference with the parties on February 26, 1999, during which the parties expressed their desire to submit the appeal on the record pursuant to Rule 11 and to conduct discovery.

19. In discovery, Appellant served "Statement(s) of Admission" on the Government for signature by persons involved with the EERA believed to have CO authority. The individuals were asked to indicate whether they admitted or denied the statement. The statement read as follows:

> I am not aware of any provisions, clauses, and/or directives that would preclude a contracting officer, acting within their authority and within the limits set by the Incident Agency at a fire, from amending or adjusting Emergency Equipment Rental Agreement rates when a current emergency warrants obtaining the mutual consent of the contractor to perform unique or special service due to special circumstances not contemplated at the time of signing the original agreement, if there is a bonifide [sic] need for the equipment, and the rates are considered reasonable.

The following persons checked the statement "I admit to the foregoing statement:" and signed beneath: Nancy R. Ruggeri; Dave Allasia; Thad Waterbury; Patrick Gallegos; and, Jeanne Robertson. (Exhibit to Appellant's Brief.)

20. The parties have submitted briefs and reply briefs.

DISCUSSION

Appellant's Contentions

Appellant argues that he unwillingly provided services under the EERA. He argues that he detrimentally relied on Government personnel who directed him to continue working and file a claim. He would have preferred that the Government immediately modify the rate of compensation in the EERA. He also makes several arguments related to the release language on the final invoice. Further, he charges that FS policies against altering the natural environment in the Yosemite National Forest resulted in an intentional directive to have equipment damaged. Appellant argues that the fact that buses which transported fire fighters to the Miquel Spike Camp were unable to travel the final few miles because of their size vis-a-vis the width of the road is grounds to conclude not only that the FS ordered unneeded services, but also that Appellant is

entitled to be paid the rental rate for a bus. Appellant contends that because various COs were authorized to settle claims, they were, therefore, required to adjust his contractual rate. He disputes the Government declarations that he was free to leave at any time. (Appellant's Brief.)

The Government's Contentions

The Government contends that the assignment to Miquel Spike did not warrant a rate increase, as rough terrain, such as that Appellant encountered, is to be expected and is the reason that the FS opted to rent four-wheel drive vehicles such as Appellant's, rather than two-wheel drive pickups which rent at a lower rate. In addition, the Government points to the fact that Appellant has cited no contract language supporting the requested rate increase. The FS cites the Interagency Fire Business Management Handbook for the proposition that the rental rates take into account the hazardous nature of the work and therefore hazardous conditions are not grounds for increased rates. The Government also asserts that, not only is there no evidence that the Government promised a rate increase to Appellant, but also that Appellant does not suggest that such promises were made. Further, the Government contends that Appellant was free to refuse the Miquel Spike assignment and leave the fire. Regarding the vehicle damage claim, the Government no longer contends that the claim is barred by the release, agreeing that the "no claim for damage" language had been inserted prior to the invoice with release being presented to Appellant. Rather, the Government contends that Appellant has failed to show damage to the truck which would trigger the Government's burden under the Loss, Damage, or Destruction clause in the EERA to show that the damage resulted from contractor fault.

Claim for Rate Increase

The agreement between Appellant and the FS is governed by the terms and conditions of the EERA. That agreement clearly set out the mileage rate for the rental of Appellant's truck with driver. The rate was determined pursuant to published rates categorized by the size and type of equipment, not by particular assignments or locales. It was not unusual for two contractors renting similar equipment to be paid the same daily rate even though one vehicle might be exposed to greater or more strenuous usage and resultant wear and tear. (Finding of Fact (FF) 1.) The contractor voluntarily entered the agreement and provided the truck and driver; the Government did not commandeer them.

Appellant has done a prodigious job of researching the various manuals relating to policy and procedures related to firefighting in the national forests. However, the documents he cites are irrelevant to the issue before the Board. The contract between the parties governs whether Appellant is entitled to an equitable adjustment for a change in the agreement between him and the Government. The burden of proving entitlement falls on Appellant. It is well established that a contractor must meet his essential burden of establishing the fundamental facts of liability, causation, and resultant injury. William Harvey, AGBCA No. 82-152-1, 87-1 BCA ¶ 19,577.

Appellant has failed to meet that burden. Appellant has not shown that the Government required more from Appellant than called for in the agreement. The EERA did not specify the place of performance. While Appellant may not have liked the assignment at Miquel Spike, there was nothing in the agreement requiring the Government to assign Appellant to a less arduous location. In fact, the agreement was silent as to location. (FF 4.) Appellant was providing a 4X4 vehicle. The parties therefore contemplated that the conditions to which Appellant and his vehicle might be assigned would be a location with "off-road" conditions. (FF 7.)

Appellant argues that no clauses or provisions prohibited a CO from increasing the rate of pay under the contract. Appellant ignores the basic proposition that the CO's actions must conform with the contract and with general principles of Government contract law. Appellant has cited no contract provision requiring the CO to increase the rate specified in the contract. The authority of COs to enter into modifications or amendments to contracts is limited to agreements based on new consideration or benefit to the Government. See Beavers Construction Co., AGBCA No. 83-125-1, 84-1 BCA ¶ 17,067, holding that there is no authority to enter into modifications unsupported by the framework of the contract or by any new consideration, and that performance of pre-existing duty is not sufficient consideration for a supplemental agreement. An EERA standing alone is not a contract. The mere existence of an EERA places on the Government no legal obligation to order even a minimum quantity of supplies or services. It also does not obligate the non-Government party to provide them if ordered. However, if they are ordered and delivered, then an express contract incorporating the terms and conditions of the EERA comes into being with regard to the supplies or services requested and delivered. Means Co., AGBCA No. 95-128-1, 95-2 BCA ¶ 27,837. When Appellant was asked to report to the fire and, in fact, did so, his duty to perform at the agreed upon rate came into being. With performance, a contract existed, which established the obligations of the parties.

We have considered Appellant's argument that his truck met the definition for a bus and that he should therefore be compensated at the rate payable for buses. The contractual rate for rental of Appellant's truck was based on its being a 4X4 pickup truck weighing between 9001 and 11,000 pounds. We are not persuaded that a particular usage transformed the truck into a bus for the purpose of identifying the appropriate rental rate.

Claim for Damage

Appellant claims damage to the truck valued at $3,462.90. He asserts that his truck suffered damage because brush had not been allowed to be cut from trail sides to reduce unnecessary wear and tear to vehicles. In addition, he claims damage to front end alignment, rear seat upholstery, dents and that the crew cab shifted off frame. (AF 58.) Other than what appear to be invoices for re-upholstering, wheel balancing and alignment and an estimate for painting (FF 15), Appellant has not supported the monetary claims with evidence. There is no evidence of when, if or why any rental took place.

Clause 10, Loss, Damage, or Destruction, provides for Government assumption of risk of loss, damage, or destruction of the rented equipment except where it is due to ordinary wear and tear or Contractor negligence, or equipment defect (FF 3). The contractor must initially show that damage occurred. The contractor must meet his burden of establishing the fundamental facts of liability, causation and resultant damage. William Harvey, supra, and WRB Corp. v. United States, 183 Ct. Cl. 409, 425-26 (1968). Thereafter, under the Loss, Damage, or Destruction clause, the Government has the burden of proving that the damage was due to either ordinary wear and tear or to contractor negligence. William Harvey, supra. The Government argues that Appellant has not shown that compensable damage occurred. We agree. Appellant has not proved the three prongs of the liability, causation and damage test as to any of the claim items.

Appellant's claim document alleged scratches from brush; damages to front end alignment; torn rear seat upholstery; dents to back of cab; and shifting of crew cab.

It is clear from photographs in the record that Appellant's truck had scratches (FF 7). Appellant has failed to prove that the scratches took place during the rental period. Moreover, the FS has presented evidence that there were minor scratches which could have been remedied by a good wax job. (FF 12.)

Regarding front end alignment, there are three pieces of evidence. The safety inspection report does not show alignment as a defect, either before or after use under the EERA (FF 11). Mr. Amerjan's affidavit states that he found no damage to the underside of the vehicle and did not know why Appellant thought the truck needed an alignment job (FF 12).

The third piece of evidence is an invoice in the amount of $39.95 for tire rotation, wheel balance and wheel alignment. Appellant has failed to prove his truck sustained alignment damage, much less during the rental period, or that these repairs reflected other than routine maintenance.

Appellant's claim alleges his truck sustained torn rear seat upholstery. The inspection report states that the rear seat upholstery was rotted (FF 11). Photographs showed worn rear seat upholstery (FF 7). Appellant has not proven damage to rear seat upholstery during the EERA period. We find the upholstery to be of a condition occurring over a period of time due to wear and tear.

Appellant claims dents to the rear of the cab of his truck. The inspection report indicates two minor
dents on right rear of cab. Like all the other remarks, there was no indication whether it pertained to the pre-use inspection or the release inspection. (FF 11.) Regardless, Appellant has not shown that these dents on a 8-year-old vehicle to be the result of anything other than ordinary wear and tear.
Finally, Appellant's claim indicates shifting of the crew cab. The only piece of evidence in the record regarding the shifting of the crew cab was the Amerijan declaration which states that the body panels had shifted. Mr. Amerjan stated that the FS offered to realign the body panel at the fire camp but Appellant declined. Appellant's quantum claim includes no amount for repair or

realignment of the crew cab or body panels. Apparently, Appellant has not found it to be damage worthy of repair. We find he has not proved liability, causation or damages for shifting of the crew cab.

We find Appellant has proved neither liability nor causation. Failing proof of liability and causation, damages are not payable. We do address damages briefly, however, to note that the bulk of the amount claimed stems from alleged costs of painting and 2 weeks' rental of another truck, presumably while painting was taking place. The only evidence proffered regarding painting was an estimate, not an invoice. There is no evidence that the truck was repainted. Previous discussion of the claim regarding scratches indicates one finding that the scratches did not require painting. There is no proof that a rental even took place.

Appellant's claim for damage to the truck must also fail.

DECISION

The appeal is denied.

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ANNE W. WESTBROOK
Administrative Judge

Concurring:

_____ _____

EDWARD HOURY
Administrative Judge

JOSEPH A. VERGILIO
Administrative Judge

Issued at Washington, D.C.
October 7, 1999