



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

DENIED: January 31, 2012

CBCA 2119

TKC AEROSPACE, INC.,

Appellant,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Douglas C. Proxmire and Elizabeth M. Gill of Patton Boggs, LLP, Washington, DC, counsel for Appellant.

William H. Butterfield and Julia A. Lobosco, Office of Procurement Law, United States Coast Guard, Department of Homeland Security, Washington, DC, counsel for Respondent.

Before Board Judges **GOODMAN**, **McCANN** and **DRUMMOND**.

MCCANN, Board Judge.

Appellant, TKC Aerospace, Inc. (TKCA), seeks recovery of the cost of repairing the corrosion discovered on an aircraft that it was leasing to the United States Coast Guard (USCG).

Findings of Fact

1. The USCG issued solicitation number HSCG23-05-R-DAV334 on June 17, 2005. The purpose of the solicitation was “to obtain a lease with option to purchase agreement for

a commercial aircraft that can be configured to serve as a Medium Range Command and Control Aircraft (MRCCA) for the Commandant of the United States Coast Guard and the Secretary of Homeland Security.” The period of performance was one year from the date of award, with five one-year option periods.

2. On September 16, 2005, the USCG awarded contract HSCG23-05-R-DAV334 to TKC Tech, the predecessor to TKCA. TKC Tech won the competition by proposing the use of a Challenger 604 aircraft made by Bombardier. On May 4, 2008, the contract was novated by the USCG to TKCA.

3. During the first five years of performance, both parties executed the contract with few, if any, problems or disputes. However, in December of 2009, when the aircraft arrived at Hartford, Connecticut, for scheduled depot maintenance, extensive corrosion was found in the aircraft.

4. The contract contained the following provisions pertinent to this dispute:

5.7 MAINTENANCE

5.7 General. Maintenance shall conform to FAA [Federal Aviation Administration] and Coast Guard quality standards outlined in COMDTINST [United States Coast Guard Commandant Instruction] M13020, Engineering Maintenance Management Manual. Minor and Major Phase maintenance shall be provided by an FAA-certified maintenance/repair station.

5.7.1 Based on meeting the availability requirement of 95%, the contractor shall provide a proposal which outlines its plan for maintenance of the leased aircraft. Maintenance pricing shall be specified by monthly costs for the initial contract year and subsequent option years. These monthly costs will be provided based on 500 hours and additional blocks of 50 hours of use.

5.7.1.1 A full contract maintenance plan is expected for evaluation. However, it is highly recommended that an alternative support plan shall be submitted which will provide use of Coast Guard Air Station Washington personnel to perform contractor-specified tasks for which the contractor has provided training, manuals and special tools as applicable to perform. In this alternative, Coast Guard Air Station Washington shall maintain the aircraft via contractor-provided FAA-approved computerized maintenance standards, and manage full logs in accordance with FAA procedures.

5.7.1.2 Coast Guard Air Station Washington aviation maintenance personnel are trained to perform ground handling and servicing of Coast Guard aircraft. They conduct routine and special aircraft inspections and related aviation administrative duties. The Avionics Electrical Technicians (AET rate) service and maintain all avionics systems including communications, navigation, collision avoidance, target acquisition and automatic flight-control functions. They also service and maintain aircraft batteries, AC and DC power generation and distribution systems as well as the electrical control and indication functions of all airframe systems. Aviation Maintenance Technicians (AMT rate) service and maintain aircraft bleed air, hydraulic and fuel systems, aircraft engines, auxiliary power units, and power train systems. They also maintain, and can conduct minor repairs on aircraft fuselage, wings and fixed and movable flight control surfaces. Some of the duties performed by Air Station Washington maintenance personnel include corrosion control, preflight, thru flight, postflight, and other routine inspections; organizational level on-equipment maintenance, servicing and routine checks, including removal and replacement of components and equipment maintenance capability, including, but not limited to: testing of selected LRUs [line replacement units] tire build-up, interior refurbishment, strut removal and replacement, and repair of water and latrine systems.

5.7.1.3 For applicable warranty work, phase maintenance and repairs, the aircraft will be flown to an FAA-certified service center. The flight hours incurred for travel to the service center will be charged to the Coast Guard, but the maintenance costs are incurred by the contractor if under warranty or under other provisions of the contract.

5.7.1.4 To maintain a maximum readiness posture for missions, the Coast Guard retains the option to perform repairs and servicing on the aircraft if covered under warranty or other provision of the contract. This most likely would involve simple removal and installation of parts not readily available at Coast Guard Air Station Washington, which would be shipped directly from the contractor to Coast Guard Air Station Washington to avoid unnecessary delays associated with flight to and from a repair station.

5.7.2 Scheduled Maintenance. MRCCA scheduled maintenance periods of one day per week and one week per quarter are anticipated.

5.7.3 Depot Maintenance. The contractor will provide the interval between scheduled depot maintenance and FAA equivalent inspections. Unless

approved by the Coast Guard, no new system/subsystem shall be introduced on the aircraft that shortens that interval. All work performed on the MRCCA shall comply with FAA commercial standards and shall be accomplished by a FAA approved repair facility or approved Coast Guard repair facility.

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5.17.1 Operational Availability (Ao). Availability of the MRCCA to perform its operational missions is dependent on a wide range of variables. These include availability of mission, maintenance crews, special tools, ground support and launching equipment, and spare parts. The U.S. Coast Guard has assigned a hierarchy to the MRCCA system when the system is Fully Mission Capable, Partially Mission Capable or Not Mission Capable. The MRCCA Operational Availability (Ao) percentage is designed to maximize availability to Coast Guard Air Station Washington, while meeting the manufacturer's FAA-approved maintenance requirements of the aircraft. The Ao is to be computed and verified semi-annually.

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5.17.5 Computing Availability.

Semi Annual Ao = $\text{Uptime}/(\text{Uptime} + \text{Downtime})$

Required Ao = 95%

Uptime represents the amount of time the system has been fully operational based on 8760 hours per year (365 days *24 hours/day).

Downtime represents the sum of NMCT [Not Mission Capable Time] and PMCT [Partially Mission Capable Time] in hours or fraction thereof. Outside of any normal wear and tear, any downtime which is caused by the Coast Guard will not be included in computing Availability. The Coast Guard and the Contractor have mutually agreed that downtime will be measured from the time the Contractor is notified by the Coast Guard Air Station Washington Maintenance personnel until:

- a. Full Contract Maintenance: The affected aircraft system is returned to Ready for Issue (RFI) status.

- b. Organic Coast Guard Maintenance: The affected aircraft system is returned to RFI status.

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3052.228-91 LOSS OR DAMAGE TO LEASED AIRCRAFT (DEC 2003)

- (a) the Government assumes all risk of loss of or damage (except normal wear and tear) to the leased aircraft during the terms of this lease while the aircraft is in the possession of the Government.
- (b) In the event of damage to the aircraft, the Government, at its option, shall make the necessary repairs with its own facilities or by contract, or pay the Contractor reasonable cost of repair of the aircraft.

5. Pursuant to contract line item number (CLIN) 1A of the contract, the USCG paid TKCA the sum of \$243,753 per month to lease the aircraft.

6. The USCG chose to exercise the supplemental maintenance CLIN 00002B under which USCG personnel would perform the aircraft site/line maintenance functions in accordance with paragraph 5.7.1.2, rather than CLIN 00002A under which TKCA would perform all maintenance. In the first year of the contract the cost per month of the maintenance paid to TKCA under CLIN 00002B was \$55,126.14. Had the Coast Guard elected CLIN 00002A the monthly cost would have been \$63,501.14. The difference between these two options was \$12,375 per month.

7. Throughout contract performance, pursuant to paragraph 5.7.3, Bombardier performed the depot level maintenance for TKCA at scheduled intervals at its facility in Tucson, Arizona, or Hartford, Connecticut. As part of the Bombardier Challenger 604 maintenance program, Bombardier performed periodic "structural maintenance" of the aircraft, which included removing the carpet, the seats, and all other interior finishes in the aircraft to inspect every component of the aircraft structure; this included detailed checks for, and the subsequent repairs of, corrosion damage found in or on the aircraft.

8. In December of 2009, during scheduled depot maintenance by Bombardier, corrosion was discovered under the carpets in the forward part of the aircraft on the starboard side, near the galley bulkhead. The corrosion ran from the galley bulkhead along the sill plate and floor beam under the floor boards towards the aft of the aircraft. The USCG and TKCA determined that Bombardier would immediately begin the necessary corrosion repairs during the depot maintenance.

9. The initial evaluation of the problem by the TKCA MRCCA program manager, Steve Badolato, was that Bombardier failed to discover this corrosion damage during the 2008 inspection of the aircraft at the Tucson depot maintenance. Mr. Badolato indicated that, “[i]n retrospect, the aircraft corrosive condition is a product of jets being in a fractional ownership situation as these jets are usually rode hard and put up wet.”

10. The aircraft returned to service for the USCG on January 20, 2010. Up to this point, there was no indication from TKCA that the corrosion repair was anything other than depot level maintenance, which was the responsibility of TKCA.

11. On April 2, 2010, more than two months after the corrosion repairs were completed and the aircraft returned to service, the contracting officer, James Ferguson, informed TKCA that the USCG would withhold \$631,414 from TKCA invoices for its failure to maintain a 95% availability of the aircraft from December 19, 2009, through January 18, 2010. On May 6, 2010, the USCG changed the withholding amount to \$493,988.60.

12. In a memo dated May 17, 2010, Steve Badolato indicated that it had come to his attention that there was a large amount of mold found on the padding under the carpet in the aircraft, that mold is an indication of the presence of moisture, and that he believed that this moisture was the cause of the corrosion. Again he says that “the aircraft is being rode hard and put up wet literally.”

13. By letter dated May 19, 2010, Mr. Boyle, TKCA’s chief executive officer (CEO), informed the contracting officer that, in his view, the corrosion was not the fault of TKCA, but was the responsibility of the USCG under the contract.

14. On June 23, 2010, TKCA filed a certified claim in the amount of \$629,536.18, seeking reimbursement of \$135,547 for the corrosion repair costs and \$493,988.60 in contract funds withheld from TKCA by the USCG. The contracting officer issued his final decision on November 15, 2010, denying TKCA’s claim.

15. There are signed statements in the record from various USCG personnel stationed at Coast Guard Station Washington about isolated incidents of water getting on the carpet. Petty Officer First Class Robert Judd indicated that “over the next few years there were spills and incidents in the forward cabin” Petty Officer First Class Kenneth Gamson testified that it was common in inclement weather for the carpet to get wet when the aircraft door was open. He also indicated that the galley sink would spill over when flying at times. There are also signed statements from Petty Officer First Class Judd and other USCG personnel that they virtually never saw any moisture on the carpets. Petty Officer First Class Judd indicated

that “I do not know of 1 post flight/pre flight inspection that produced a report of water seeping into the underfloor avionics bay” LCDR Goldschmidt of the USCG indicated that he never saw wet carpet or mold or interior corrosion, other than one incident of wetness near the lavatory. He indicated that he inspected the aircraft prior to every flight and would have reported any such indications. LCDR Howell of the USCG also indicated that he never observed carpet wetness and would have reported it, had he seen it.

Discussion

Appellant contends that the corrosion that was discovered in the Bombardier 360 aircraft in December 2009 was caused by moisture that had accumulated in the cabin of the aircraft. It asserts that the USCG had the responsibility under the contract to detect and remove this moisture so as to avoid the moisture’s corrosive effect. Accordingly, it argues that TKCA does not have the responsibility to pay for the repair of the corrosion because the contract does not place such responsibility upon the contractor. Appellant’s argument lacks merit.

The corrosion that was discovered in the aircraft in December 2009 was discovered during scheduled depot maintenance that was being conducted by Bombardier, the maker of the aircraft, for TKCA, the owner of the aircraft. TKCA contends that moisture near the galley, along with the USCG’s failure to remove it during routine maintenance, caused the corrosion. There is evidence in the record that, from the beginning of the contract, moisture did at times get on the carpet. However, there is no evidence in the record indicating that wet carpet was ever noticed during any inspection. Both LCDR Goldschmidt and LCDR Howell indicated that they would have reported such moisture had they noticed it.

The evidence regarding the cause of the corrosion is inconclusive. No evidence was presented indicating that anything that happened was unexpected or out of the ordinary for this aircraft during normal use. TKCA has failed to prove that any of the moisture that spilled from the galley area, or that any of the rain that wetted the carpet, caused the extensive corrosion that was found. Furthermore, there is no proof that some other intervening event did not put moisture in the cabin of the aircraft. Also, TKCA has not even proven that moisture, as opposed to some other corrosive liquid, was the cause of the corrosion. No analysis was ever performed.

The Board finds that the evidence is inconclusive and that the cause of the corrosion is undetermined. In addition, the Board finds that the evidence does not establish that the maintenance conducted by the USCG changed over the course of the contract, that the USCG failed to follow the maintenance procedures required by the contract, or that any lack of maintenance on the part of the USGC contributed to the corrosion problem.

When the aircraft arrived in Hartford, TKCA immediately assumed that repairing the corrosion was its responsibility and agreed with the USCG to proceed to have Bombardier do the repair during the depot level maintenance. No experts were contacted to determine what caused the corrosion and none testified at the hearing. No analysis of the cause of the corrosion was undertaken until after the USCG assessed the monetary penalty for failure to meet the 95% availability requirement. This assessment took place over three months after the aircraft arrived in Hartford and over two and one-half months after the aircraft had been repaired and returned to service. At that point it was difficult, if not impossible, to conduct an accurate analysis of the cause of the corrosion. All that was available at that point were some pictures and the imperfect memories of the Hartford repair personnel.

Without a known cause of the corrosion, where does the contract place the cost of the repair? The answer is, upon TKCA. As part of Bombardier's depot maintenance program, Bombardier was to look for corrosion and repair it when found. *See Finding 7.*

TKCA has never argued that remedying the corrosion was not a depot level maintenance job, and there is no dispute that depot level maintenance was the responsibility of TKCA. In fact, Bombardier foresaw corrosion as a potential problem in the aircraft. That is why its maintenance program required a search for it. For TKCA to now argue that corrosion repair is not its responsibility is contrary to its clear contractual obligations.

TKCA's argument that, since the USCG actually performed the routine maintenance it is therefore responsible for not performing it correctly, and thereby caused the corrosion, lacks merit. Under the contract, TKCA was responsible for all maintenance of the aircraft. Under paragraph 5.7, the contract states: "Maintenance shall conform to FAA and Coast Guard quality standards Minor and Major Phase maintenance shall be provided by an FAA-certified maintenance/repair facility." (The Bombardier facilities are located in Hartford, Connecticut; Tucson, Arizona; and other places.) "The contractor shall provide a proposal which outlines its plan for maintenance of the leased aircraft." Paragraph 5.7.1. "A full contract maintenance plan is expected for evaluation." Paragraph 5.7.2. "[I]t is highly recommended that an alternative support plan shall be submitted which will provide use of Coast Guard Air Station Washington Personnel to perform contractor-specified tasks for which the contractor has provided training, manuals and special tools" Paragraph 5.7.1.1.

The USCG had two options regarding routine daily maintenance. Under paragraph 5.7.1, all maintenance could have been performed by TKCA. This would have cost the USCG \$63,501.14 per month. Under this paragraph, the USCG would do no maintenance, not even "routine" maintenance. However, under paragraphs 5.7.1.1 and 5.7.1.2 the USCG could have its personnel stationed at Coast Guard Air Station Washington perform the

“routine” maintenance. This would reduce the maintenance cost to the USCG to \$55,126.14 a month, a savings of \$12,375.00 per month. There is nothing in section 5.7, or paragraphs 5.7.1.1 and 5.7.1.2 in particular, that indicates that TKCA was being relieved of its responsibility to ensure that the aircraft was being properly maintained at all times. It is just that the USCG was performing some of the maintenance.

The USCG was paying TKCA \$55,126.14 a month to maintain the aircraft. There is no merit to the argument that TKCA was not responsible to ensure that the aircraft was being properly maintained because the USCG had agreed that its personnel would actually perform “routine” maintenance. If TKCA was not responsible, the question becomes, “Just what was the USCG paying \$55,126.14 a month for?” The idea that TKCA bargained away its responsibility to ensure that the aircraft was properly maintained, even on a daily routine basis, for a small savings of \$12,375 per month is nonsense. Nothing in the contract language leads to such a conclusion. During the hearing Mr. Boyle, the CEO of TKCA, actually agreed with the Government’s interpretation. He stated:

Q. So would it be fair to say that whatever it was that they did at Air Station Washington was done under the supervision, direction, and control of you, the prime contractor?

A. It would not.

Q Then what in your opinion does that phrase (subparagraph 5.7.1.1) mean that I just read to you?

A. I think if you read this phrase literally, it would certainly lead to that conclusion

Transcript at 178.

There has been no evidence presented that the USCG was not performing the daily maintenance properly. TKCA worked with the USCG to maintain the aircraft since the beginning of the contract in 2005. Under paragraph 5.7.1.1 of the contract, the USCG was to perform the maintenance following contractor specified procedures. There is no evidence in the record indicating that the USCG failed to perform any of the routine maintenance. TKCA had ample opportunity to train and observe the USCG as it conducted routine maintenance. To conclude that, after years of maintaining the contract properly as directed by TKCA, the USCG suddenly stopped doing so and caused the corrosion problem is unsupported by the evidence.

When the corrosion was first discovered, TKCA assumed that it was responsible for the repair. It proceeded with the repair and never billed the USCG or informed it that it (the USCG) was responsible for the repair. Not until after the assessment of downtime was made,

over three months after the discovery of the corrosion, did TKCA change its position. For months, both parties interpreted the contract as placing the responsibility for the repair of the corrosion on TKCA. It is well settled that the interpretation of the contract given by the parties prior to a dispute arising is of great if not controlling weight. *Chase & Rice, Inc. v. United States*, 354 F.2d 318, 321–22 (Ct. Cl. 1965); *Centex Bateson Construction Co.*, VABCA 4802, 97-2 BCA ¶ 29,194, at 145,245.

TKCA also argues that contract clause 3052.228-91, Loss or Damage To Leased Aircraft (DEC 2003), places the risk of such a loss (corrosion) on the USGC. This clause does not apply to the corrosion damage in issue here. This clause pertains to accidental damage to the aircraft while in the possession of the USCG. It has nothing to do with corrosion or contract maintenance. Furthermore, TKCA has not demonstrated that the corrosion was not caused by simple wear and tear. In fact, it appears that is exactly what TKCA is arguing when it contends that sink overflow and rain caused the corrosion. Its argument lacks merit.

TKCA also argues that the USCG was required under contract paragraph 5.17.1 to give notice to TKCA that downtime had begun before any downtime assessment could be made. This argument also lacks merit. TKCA has taken this provision out of context and applied it incorrectly. Under paragraph 5.17.1, “Ao (operational availability) is to be computed and verified semi-annually” taking into account “a wide range of variables.” Accordingly, downtime assessments are an after-the-fact analysis of what has happened in the past and are thus “retroactive” by their very nature. The notice requirement referred to in paragraph 5.17.5 refers only to situations where the aircraft is “down” while it is at the Coast Guard Air Station Washington, or possibly, in locations where the contractor would not know that the aircraft was down and the Coast Guard Air Station Washington would. This provision does not apply in a situation where scheduled depot level maintenance is being performed and the contractor is well aware that the aircraft is “down.”

In its claim letter, TKCA states:

In December 2009, in an effort to ensure that the aircraft could be placed back in service as soon as possible, TKCA and Air Station Washington agreed that corrosion repairs should be started immediately while the aircraft was at the Bombardier maintenance facility to minimize downtime and cost for repairs. USCG authorized TKCA to complete corrosion repairs during the planned maintenance then being conducted at the Bombardier maintenance facility. The aircraft was repaired and returned to service as expeditiously as possible.

Thus, TKCA was aware that when the corrosion was discovered at the Hartford facility in December 2009, downtime was an issue. It also realized that no notice communication from the Coast Guard Air Station Washington was necessary to start the downtime clock from running. TKCA did not assert this argument in its complaint and did not address it at the hearing. Only in its brief did it belatedly posit this argument. The argument lacks merit and is inconsistent with the actions of the parties during the performance of the contract.

TKCA does not contest the calculation of the amount of the downtime assessment of \$493,988.60, except to contend that the Coast Guard Station Washington did not give TKCA notice of the downtime as TKCA alleges the contract required it to do. We have determined that this notice requirement does not apply here. Accordingly, the amount of the assessment, \$493,988.60, stands without further challenge. Further, because responsibility for the repair lay with TKCA, the contractor may not recover the \$135,547 it seeks as repair costs.

Decision

The appeal is **DENIED**.

R. ANTHONY McCANN
Board Judge

We concur:

ALLAN H. GOODMAN
Board Judge

JEROME M. DRUMMOND
Board Judge