



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

OPINION ISSUED UNDER PROTECTIVE ORDER

DENIED: February 1, 2012

CBCA 1676

ERICKSON AIR-CRANE, INC.,

Appellant,

v.

DEPARTMENT OF AGRICULTURE,

Respondent.

Alan I. Saltman of Smith, Currie & Hancock LLP, Washington, DC, counsel for Appellant.

Elin M. Dugan, Office of the General Counsel, Department of Agriculture, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK, DRUMMOND, and SHERIDAN.**

SHERIDAN, Board Judge.

Appellant, Erickson Air-Crane, Inc. (Erickson), appealed the final decision of a Department of Agriculture contracting officer (CO) denying its claim of \$3,032,173.51 as compensation for basic ownership, operating costs, and idle personnel costs allegedly incurred

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during a period it was ordered to stop work because of a bid protest.¹ The Department of Agriculture, Forest Service (FS) asserts that Erickson is not entitled to the claimed costs because the three helicopters affected by the work stoppage were able to earn sufficient income from replacement work, and that the income from replacement work more than mitigated any costs that Erickson claimed it had incurred due to the stop work order.

Factual Background

On March 3, 2008, the FS solicited offers for the exclusive use of heavy helicopters to provide firefighting services at thirty-four locations, each of which was to be the home base for one helicopter. Each location had its own contract line item number (CLIN). The CLINs pertinent to this dispute are CLIN 3, for helicopter services based out of Silver City, New Mexico; CLIN 7, for helicopter services based out of Reno/Stead, Nevada; and CLIN 8, for helicopter services based out of Rifle, Colorado. The solicitation specified a predetermined mandatory availability period (MAP) during which a helicopter was provided for the exclusive use of the FS. The length of each MAP varied by line item, but ran generally from June to October of each year, the period during which firefighting services were most needed in those areas. During the MAP the contractor was to be paid a “daily availability rate” per day per helicopter and, if it had to fly, an “hourly flight rate” for each hour flown.²

The solicitation provided 450 hours as the estimated number of flight hours for CLIN 3 and 375 hours as the estimated number of flight hours for CLINs 7 and 8, but stated that “[t]he flight rate will be an indefinite quantity with no guarantee of flight hours given by the Government,” and that the estimated hours figures were for “estimation purposes only, the Government does not guarantee any flight hours under this contract.”

¹ During the litigation, the parties generally referred to the claim as being for “idle equipment costs.” In fact, appellant’s claim is currently based on: (1) idle helicopter ownership costs, i.e., the cost of ownership of each of three helicopters, including heavy maintenance, insurance and depreciation expenses; (2) idle crews costs, i.e., pilots’, crews’ and drivers’ labor, taxes, fringe benefits, travel expenses, overhead, and general and administrative expenses; (3) other equipment costs, i.e., fuel trucks, etc., associated with each helicopter; (4) other fees and markups, i.e., facilities cost of money fees, and a fee for profit.

² Also referred to in documents as MAP availability pay (AP) and flight pay (FP), respectively.

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On June 6, 2008, the FS awarded Erickson contract AG-24B-C-08-9345 to provide helicopters for the FS' exclusive use at the three locations (EU contract). It was a commercial item contract for a base year and two option years.

Pursuant to the terms of the EU contract, Silver City (CLIN 3) was assigned helicopter N164AC; Reno/Stead (CLIN 7) was assigned helicopter N217AC; and Rifle (CLIN 8) was assigned helicopter N247AC. During the MAP the contractor was to be paid a daily availability rate of _____ per day per helicopter, and additional flight pay of \$7145 per hour for each hour a helicopter was flown.

A notice to proceed for CLIN 3 was issued on June 14, 2008, with the MAP to end on October 10, 2008. The notice to proceed for CLINs 7 and 8 was issued on June 20, 2008, with the MAP to end on October 28, 2008. A bid protest was filed on the EU contract on June 24, 2008, affecting the award of CLINs 3, 7, and 8 to Erickson. The FS issued a stop-work order to Erickson on that same day.

Erickson stopped work on CLINs 3, 7, and 8 of the EU contract immediately. As the three helicopters that were assigned to CLINs 3, 7, and 8 (helicopters N164AC, N217AC, and N247AC) were free to provide services and earn income during the stop work period, Erickson sought and received alternative work from several sources for the three helicopters. Erickson would not have been able to perform the alternate work but for the three helicopters being available because of the stop work order.

During the pendency of the stop work order, Erickson flew the three helicopters for the FS under a "call when needed" basic operating agreement (CWN agreement), which became effective on March 1, 2008. Under the terms of the CWN agreement, Erickson had no obligation to make its helicopters available to the Government unless it accepted an order and the FS had no obligation to pay for a helicopter unless Erickson fulfilled the order made pursuant to the CWN agreement.³ The CWN agreement required the FS to pay Erickson a daily availability rate of _____ per helicopter for each day it made a helicopter available to the FS.⁴ The higher price under the CWN agreement reflects the fact that a contractor may

³ The EU contract and CWN agreement both required the same work, i.e., making the helicopters available (on a daily basis) and flying them to fight forest fires (on an hourly basis). Both used the same helicopters (N164AC, N217AC, and N247AC), equipment, and crews to do the work.

⁴ Thus, on any day during the stop work period that the FS ordered services from helicopters N164AC, N217AC, and N247AC it paid \$19,236 more under the CWN

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not receive any orders under the CWN agreement, as opposed to the guaranteed payment for the MAP under the EU contract.

FS officials testified that, in order to mitigate the impact of the stop work order, they gave and received instructions to use helicopters N164AC, N217AC, and N247AC under the CWN agreement “whenever possible,” with the intent of keeping Erickson “whole” during the stop work order. The FS also took the unusual step of assigning what it refers to as “designated managers” to the affected helicopters to facilitate the helicopters receiving more CWN work.⁵ As a result of the FS efforts to direct work to Erickson’s three helicopters and Erickson’s effective deployment of its three helicopters, Erickson received a significant amount of work for the helicopters during the period the EU contract was stopped.⁶

The stop work order remained in effect for 101 days, until October 3, 2008. Erickson received no compensation under the EU contract during that period. On October 3, 2008, the Government issued an order to resume performance on the suspended EU contract. Performance resumed on October 4, 2008.

According to Erickson, under the CWN agreement used during the stop work order, helicopter N164AC was contracted to remain available a total of sixty-eight days and was idle thirty-three days; helicopter N217AC was contracted to remain available sixty-one days and was idle forty days; and helicopter N247AC was contracted to remain available fifty-one days and was idle forty-nine days.

The contract incorporated the clause denominated at FAR 52.233-3, Protest After Award, which provides in pertinent part that:

agreement than it would have paid under the EU contract for those same services.

⁵ Normally, designated managers are only assigned to helicopters performing on EU contracts.

⁶ For helicopter N164AC, fifty-seven days of work were performed under the CWN contract for the FS, and eleven days of work were performed for other customers; for helicopter N217AC, thirty-eight days of work were performed under the CWN contract and twenty-three days of work were performed for other customers; for helicopter N247AC, fifty-one days of work were performed pursuant to the CWN contract and one day of work was performed for another customer.

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(b) If a stop-work order issued under this clause is canceled either before or after a final decision in the protest, the Contractor shall resume work. The Contracting Officer shall make an equitable adjustment in the delivery schedule or contract price, or both, and the contract shall be modified, in writing, accordingly, if –

(1) The stop-work order results in an increase in the time required for, or in the Contractor's cost properly allocable to, the performance of any part of this contract

On February 12, 2009, the CO wrote to Erickson stating the following:

As you are aware, the contract schedule of items is broken down into availability and flight. The rate for availability covers all costs and profit not associated with the direct costs of flight. The flight rate is intended to compensate the vendor for direct costs for the helicopter when it flies. Flight hours are estimated and may or may not be realized. The potential loss of availability is the only portion that we would consider for an equitable adjustment resulting from the stop work order.

Deena Cattnach, Erickson's corporate tax manager and a licensed certified public accountant (CPA), was tasked with calculating Erickson's equitable adjustment associated with the work stoppage. Erickson submitted its request for an equitable adjustment (REA) on October 30, 2008, seeking \$3,032,173.51 in increased costs for idle equipment and crews it alleged it incurred during the period the work was stopped.

The parties were unable to resolve the REA informally, and on May 4, 2009, Erickson provided proper certification, asked that its \$3,032,173.51 REA be treated as a claim, and asked that a contracting officer's final decision be issued. By letter dated July 10, 2009, the CO issued a final decision, denying the claim and stating that Erickson had not demonstrated that the stop work order had resulted in any increase in costs allocable to the EU contract, since Erickson was able to secure other contracts using the same helicopters during the suspension period. On July 31, 2009, Erickson filed a notice of appeal to this Board, where the matter was docketed as CBCA 1676.

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After the cost figures for 2008 were available and the REA was reviewed by Erickson's CPA consultant, Mark Roberts of the accounting firm of Argy, Wilse & Robinson P.C. (Argy), the amount Erickson sought was reduced to \$2,841,578. Erickson calculated this amount by taking the annual cost of ownership and direct labor per helicopter and dividing that by 244 days (the anticipated revenue producing days for 2008).⁷ This methodology derived 2008 daily ownership/operating costs of _____ per day for N164AC, _____ per day for N217AC, and _____ per day for N247AC. Those daily rates were then multiplied by the number of days Erickson contends each helicopter did not work, thirty-three days for N164AC, forty days for N217AC; and forty-nine days for N247AC, to reach a total amount of \$2,841,578. The \$2,841,578 Erickson represents it is owed are the costs that it says it incurred during the stop work period that could not be reallocated to alternative work because a particular helicopter was idle that day.

After the Board questioned the fact that Erickson had loaded all of helicopter N217AC's 2008 heavy maintenance costs _____ in its 2008 calculations, Erickson recalculated its basic ownership/operating costs by spreading the heavy maintenance costs for each of the three helicopters over a four-year period.⁸ This resulted in 2008 daily ownership/operating costs of _____ per day for N164AC, _____ per day for N217AC, and _____ per day for N247AC. Multiplying these figures by the 101 days the work was stopped, and adding the \$15,141 Erickson claims it incurred in other equipment costs, shows

⁷ Using Erickson's 2007 average use figures, Ms. Cattnach calculated that the three helicopters each produced revenue an average of 244 days a year. The 2007 average use figures included Erickson's work on the predecessor EU contract. Ms. Cattnach testified that she used 244 days, instead of 365 days, as her multiplier because the helicopters typically did not work 365 days a year and it did not make sense for Erickson to allocate its costs across 365 days. However, documents in the record show that, at one point based on 2007 activity, Erickson anticipated the three helicopters producing revenue, on average, for 264 days in 2008.

⁸ For helicopter N217AC, the alleged daily idle equipment costs were originally significantly higher than similar costs for the other two helicopters because in 2008 Erickson performed _____ in heavy maintenance on the helicopter and included all of those costs in its 2008 idle equipment cost calculations. Heavy maintenance is performed on a helicopter approximately every five years. In its subsequent calculations Erickson spread the heavy maintenance costs for the three helicopters over four years. This approach resulted in the ownership costs of helicopters N164AC and N247AC rising and the ownership costs associated with N217AC falling, but overall, being more consistent with each other.

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that Erickson would have incurred in idle equipment costs as a result of 101 days work was stopped.⁹

The FS disputes appellant's methodology for calculating its claim and contends that by looking at the revenue earned during the work stoppage period it is clear that Erickson was not damaged because it earned more through the replacement work than it would have earned had the EU contract been in operation. The Government argues that had the EU contract not been stopped helicopter N164AC would have earned in availability pay for the MAP. Because the work was stopped, and Erickson was able to take on replacement work, it actually earned in availability payments for that same period. Helicopter N217AC would have earned in availability pay under the EU contract, but through the replacement work earned . Helicopter N247AC would have earned availability pay under the EU contract, but through the replacement work it earned .

Erickson earned approximately \$12,373,202 during the 101-day period work was stopped on the EU contract. It earned \$8,003,954 from the CWN agreement on FS orders--\$4,900,857 through availability payments and \$3,103,097 from flight payments. Erickson also earned \$4,369,248 on non-FS work, to bring the total amount earned to \$12,373,202.¹⁰

Discussion

Appellant seeks an equitable adjustment to the contract price in the amount of \$2,841,578, representing that the ownership/operating costs associated with the three helicopters allocated to the EU were not fully absorbed due to a 101-day work stoppage ordered by the FS. The FS asserts that the revenue earned from replacement work absorbed and completely mitigated any costs attributable to the stop work order.

⁹ This figure does not include the percent markup Erickson included for profit , but includes all other expenses, fees, and markups, including direct expenses (maintenance, insurance, and depreciation) ; direct labor and fringes ; travel ; overhead ; selling, general and administrative (S G&A) ; facilities capital cost of money ; and other equipment costs (\$15,141).

¹⁰ Erickson's methodology used little, if any, of the \$4,369,248 it earned through the non-FS replacement work to absorb and offset its claimed ownership/operating costs.

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The point of an equitable adjustment is to “put the contractor in as good a position as it would have been but for the defendant’s action.” *Stroh Corp. v. General Services Administration*, GSBCA 11029, 96-1 BCA ¶ 28,265, at 141,130. Erickson bears the burden of demonstrating that it was injured by the government stop work order and that the amount it is claiming accurately reflects that injury. *Id.*

The parties used different methodologies to support their respective positions as to whether appellant is entitled to an equitable adjustment because of the stop work order. Erickson asserts that its cost of performing the EU contract was increased as a result of the stop work order, and the replacement work only covered a portion of the ownership/operating costs incurred during that period. It seeks \$2,841,578, the amount it says was unabsorbed by the replacement work. Appellant’s theory of recovery, however, leads to the inevitable conclusion that, no matter how much revenue it earned from work performed by its three helicopters during the 101 days of work stoppage, if any of those helicopters was idle for a single day Erickson should receive ownership/operating costs for that day at the rates it has calculated. Under its theory, its ownership/operating costs could never be fully absorbed unless all three of Erickson’s helicopters were contracted to work on other jobs every single day the stop work order was in place. How much Erickson’s replacement work earned does not appear to affect its equation, and its methodology for calculating its REA cannot withstand common sense scrutiny.

While some of ownership/operating costs Erickson claims it incurred seem to be excessive, not sufficiently supported by the record, or otherwise problematic, we elected not to parse Erickson’s calculations of daily rates because we did not need to do so to support our conclusions. To determine whether or not Erickson was damaged by the stop work order, the Board considered a variety of factors. First, we reviewed the terms of the contract. It is clear that while the FS estimated 450 hours of flight hours for CLIN 3 and 375 hours for CLINs 7 and 8, it also clearly stated that there was no guarantee of any flight hours being given by the FS and that Erickson should use those figures for estimation purposes only. Without any flight time, the maximum extent of the FS’ exposure under this contract would have been \$5,726,700, the income Erickson would have received in MAP payments for the period in which work was stopped.¹¹

¹¹ Had the work stoppage not occurred, and applying the MAP rate to the 101 days work was stopped, the Board calculates that Erickson would have earned from MAP payments $\text{\$5,726,700} \times 101 \text{ days} \times \text{three helicopters} = \text{\$1,728,426,300}$).

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Notwithstanding the fact that flight hours were not guaranteed, it is unrealistic to assume that no flight hours would have been ordered by the FS, particularly because the EU contract provided the best price for the FS. It was difficult to address the issue of the flight pay because Erickson did not provide compelling evidence as to how much flight pay it would have earned during the 101-day work stoppage.¹² We had the figures Erickson says it used in its proposal to estimate average flight hours per day, but in the absence of any explanation of how these were developed, we are reluctant to give them much weight.¹³ Presumably, flight data exists for past years but was not included in the record. Also, we were unsure how much of the \$4,369,248 in non-CWN work was availability pay as opposed to flight pay.

We made our damage calculations using Erickson's figures which showed that without replacement work Erickson would have incurred \$5,494,795 in unabsorbed ownership/operating costs had the helicopters remained completely idle during the 101 days of work stoppage. We compared that figure with the \$12,373,202 in revenue Erickson earned from the replacement work during the 101-day period. It appears to the Board that Erickson earned sufficient revenue to offset its ownership/operating costs.¹⁴

¹² Erickson represents that for proposal purposes it estimated that helicopter N164AC would have an average of three flight hours per day and helicopters N217AC and N247AC would each have an average of 2.5 flight hours per day. Factoring these averages with the days of work stoppage and the hourly flight rates shows that, per the figures used in its proposal, Erickson anticipated earning approximately \$6,313,097 in flight pay during the 101-days affected by the stop work order.

¹³ Appellant posits that it would have generated total revenue on the EU contract of \$16,452,452 during the entire MAP (as opposed to the 101 days of work stoppage). Erickson avers that the three helicopters actually generated \$15,081,652 from all sources during the MAP, \$1,370,800 less than they would have earned under the EU contract for the same period. The record does not clearly show how Erickson arrived at its estimate of \$16,452,452.

¹⁴ Most of the _____ in ownership/operating costs would be offset by the \$4,900,857 Erickson earned in availability payments through the CWN agreement as well as from the \$4,369,248 it earned with non-FS work. We note that some revenue was earned through flight pay and see no reason why a portion of this revenue should not be used to offset the ownership/operating costs.

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Erickson contends that a revenue comparison is not the proper mechanism for determining the amount of the equitable adjustment to which it is entitled. It takes the position that its total daily cost of owning and operating a helicopter during the 101-day work stoppage continued to remain properly allocated to the EU contract, except for the days during the 101-day period where alternative work was found, at which time the daily costs for that helicopter were reallocated to and absorbed by that alternative work. On the days when there was no work for the helicopters, appellant posits, the costs of ownership/operation remained allocated to the EU contract. Erickson asserts that the amount of income it earned in replacement work during the work stoppage is irrelevant to its claimed amount because its claim is based on costs. “In the case of an equitable adjustment, the sole concern is the amount by which the contractor’s costs increased and not any comparison of anticipated versus actual revenue (or profit).” Appellant argues that the ownership/operating costs are absorbed day-for-day by each helicopter working one given day. How much revenue that helicopter earns does not figure into appellant’s equation.

We find that it is reasonable to focus on whether Erickson was damaged overall by the stop work order, as opposed to looking at potential damage on a day-by-day basis. This, in our view, necessitates a review of the purported ownership/operating costs during the period of work stoppage, the income earned during the same period, and whether the income earned was sufficient to offset the income appellant would have earned but for the work stoppage. After conducting that review, we conclude that Erickson failed to provide satisfactory evidence that the \$5,494,795 incurred in ownership/operating costs were not adequately offset by the \$12,373,202 it earned in alternative work during the work stoppage. Through availability payments alone, Erickson earned \$4,900,857 under the CWN agreement. That, and the \$4,369,248 it earned on non-FS work, offset all of Erickson’s claimed costs.¹⁵ Simply stated, Erickson failed to convince us that with the replacement work it received, it was still damaged by the work stoppage on the EU contract.

It is not clear from the record before us that Erickson would have earned more revenue through the EU contract than it did from the alternative replacement work. It seems to us that the \$12,373,202 earned over the 101 days of work stoppage should more than absorb Erickson’s ownership/operating costs of . Erickson’s request that the Board award it \$2,841,578 on top of what it earned is not compelling. Erickson failed to fully factor into

¹⁵ In reaching its conclusion, the Board did not include the flight pay earned under the CWN agreement as an offset the ownership/operating costs appellant claims it incurred, however, the Board believes that a portion of \$4,369,248 of non-FS revenue does offset the ownership/operating costs.

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its REA the income it earned from replacement work. The replacement work income was revenue that Erickson would not have been able to earn without the three helicopters being freed up by the work stoppage. Erickson failed to prove it would have earned more under the EU contract than it earned through the replacement work, or that it incurred costs that were not offset by the income it earned through the replacement work. By focusing primarily on the individual days the helicopters remained idle, without considering how much it actually earned via the replacement work, Erickson failed to convince us that it was damaged at all.

Decision

The appeal is **DENIED**.

PATRICIA J. SHERIDAN
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

JEROME M. DRUMMOND
Board Judge