ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Slingsby Aviation Limited	)	ASBCA No. 50473
	)	
Under Contract No. F33657-91-C-0004	)	

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OPINION BY ADMINISTRATIVE JUDGE MOED
ON THE GOVERNMENT'S MOTION FOR RECONSIDERATION

The government has moved for reconsideration of our initial decision in this appeal, dated 25 April 2003 and published at 03-1 BCA ¶ 32,252. With leave of the Board, the government has supplemented the motion with an additional memorandum (add. mem.). Although familiarity with the initial decision is presumed, contents of that decision have been repeated as needed for clarity and context. The findings referred to herein are in the initial decision.

Appellant (SAL) obtained a Federal Aviation Administration (FAA) production certificate, at the direction of the government, for assembly of the aircraft by SAL's subcontractor, Northrop Worldwide Aircraft Services, Inc. (NWASI) at Hondo, Texas. 03-1 BCA at 159,491. In the initial decision, we held that SAL was not required under the contract to obtain the production certificate, and, therefore is entitled to recover the additional costs incurred for carrying out that direction. In the present motion, the

government asserts that the initial decision was erroneous and should be set aside because (1) the contract, by its terms, required SAL to obtain a FAA production certificate and (2) SAL's quality program did not qualify as a "foreign equivalent" (add. mem. at 2).

Requirement For a Production Certificate

The first basis cited by the government for a contract requirement that SAL obtain a production certificate is Clause H-022 SPECIFICATION AND STANDARDS as follows:

> The EFS Aircraft shall be designed and produced in accordance with FAA standards and FAA approved Contractor standards and processes, and certified by the FAA. Military specifications and standards shall be used when specifically required by the terms and conditions of this contract.

(Contract at 30 of 42)

Implicit in an interpretation of Clause H-022 as obligating SAL to obtain an FAA production certificate is that SAL was required under the contract to institute a FAA-approved quality control system. Such a system was a prerequisite to issuance of a production certificate (findings 20-21). Such a requirement, however, would be in conflict with SOW § 3050.2.4 which gave SAL the option maintaining a quality program which was the "foreign equivalent" of a program under FAvR Part 21 (Subpart G of which relates to issuance of production certificates) (finding 35). Provisions of a contract will not be construed as redundant or in conflict with others unless no other reasonable interpretation is possible. *Hol-Gar Manufacturing Corp. v. United States*, 351 F.2d 972, 979 (Ct. Cl. 1965).

The conflict and redundancy can be avoided if Clause H-022 is viewed as pertaining to conformity of delivered aircraft to the type certificate rather than as relating to the quality program for production of the aircraft. As so viewed, Clause H-022 is complementary of the line item description of the aircraft as "an airworthy EFS commercial FAA Acrobatic type certificated aircraft" (finding 3) and Clause H-012 which required certification, prior to delivery and acceptance, that the aircraft had been "manufactured in conformity with data forming the basis of" the type certificate (finding 10).

The government interprets System Specification § 3.2.3.2 (Airframe) also as requiring a production certificate. That provision states that:

> 3.2.3.2. AIRFRAME. The basic airframe shall be constructed in accordance with the current FAA or equivalent type and production certification and shall retain Type certification after incorporation of all modifications.

(Finding 26)

The government's interpretation of § 3.2.3.2 is unreasonable on several bases. First, a production certificate is issued for the manufacture of an aircraft, aircraft engine, or propeller as to which a type certificate has been issued (finding 19). There is no provision in the FAvR for issuance of a type certificate for a "basic airframe." Accordingly, there is no possibility of obtaining a production certificate for that component. It is also unreasonable to believe that the government would require a type certificate for the entire aircraft but would desire a production certificate for only the "basic airframe."

The government cites various statements in the record purporting to show that SAL interpreted the contract, before and after award, as requiring a production certificate (mot. at 6-7; add. mem. at 4). The only cited statement expressly referring to such certificate was that made by SAL's representative, Mr. Pollock, at the pre-BAFO meeting (finding 23). The government does not contest our holding, in the initial decision, that said statement did not result in a contract obligation to obtain that certificate. 03-1 BCA at 159,491.

All of the other cited statements contain references by SAL to certification which the government interprets as relating to production certification (add. mem. at 4-5). One of these was made prior to issuance of the EFS RFP (ex. A-19). Others were made after SAL had been directed to obtain a production certificate (finding 18; R4, tabs 91, 123, 224). The timing of these statements makes them inherently unpersuasive as to SAL's interpretation of the contract at the time of award.

The government also points to Figure D-21 of the Manufacturing Plan of SAL's proposal, titled "[NWASI Assembly] Facility Production Ready Schedule." Figure D-21 shows "FAA Certification and Quality Assurance" planned for completion in mid-December 1992, with a milestone date of one week later. The government cites no evidence of record to support the view that this refers to production certification. That event is followed, on the schedule, by "FAA Type Certification 3rd Aircraft" with a later milestone date of 1 January 1993. That sequence militates against the interpretation that the prior event was production certification inasmuch as issuance of a type certificate was a condition for, and therefore would have preceded, the issuance of a production certificate (finding 19). Also negating an interpretation of "FAA Certification" as referring to production certification is the statement in § 2.16.4.4 (Certification Procedures) of the proposal that "[t]he objective of the program is to achieve FAA type [c]ertification for this aircraft" (proposal at 2-98).

SAL's Quality Program as a Foreign Equivalent

The government takes issue with our holding that SAL's quality program qualified as a foreign equivalent under SOW § 3050.2.4. 03-1 BCA at 159,492. SOW § 3050.2.4 required SAL to "maintain a quality program which meets or exceeds the requirements of

[FAvR] Part 21 (or foreign equivalent)" (finding 35). In the initial decision, we held that the quality program proposed by SAL as modified to meet the requirements of MIDO for issuance of the production certificate, was a program which "meets or exceeds the requirements of [FAvR] Part 21"and that the quality program proposed by SAL was "equivalent" thereto (03-1 BCA at 159,491-92).

The government characterizes as "inexplicable" the proposition that the modified and unmodified quality programs could be "equivalent" (add. mem. at 9). In the initial decision, because of the absence of a definition of "equivalent" in the contract, we gave that term its ordinary meaning. The facts of record show that an aircraft under this contract, built in accordance with the unmodified quality program, would have qualified for a C of A issued by the U.K. CAA and, in turn, on the basis of reciprocity, for a C of A issued by the FAA. (03-1 BCA at 159,492) The sole purpose of a production certificate is to enable the holder to obtain an FAA C of A for aircraft built under the certificate (tr. 11/187). The ordinary meaning of "equivalent" was "equal in value, force, amount, effect or significance" (03-1 BCA at 159,492). Applying that definition to the identicality of results obtained from the modified and unmodified quality programs shows that the latter program, proposed by SAL, was "equivalent" under SOW § 3050.4.2.

The government also argues that once SAL made the business decision to produce aircraft Nos. 3-113 in the United States, "the concept of foreign equivalence no longer applied" and "it then became the responsibility of the FAA to determine the sufficiency of the quality control program at Hondo." The government says that we erred in holding that the quality program proposed by SAL was "equivalent" under SOW § 3050.4.2 inasmuch as this was a decision to be made by FAA pursuant to its statutory responsibility for the safe and efficient management of the navigable airspace of the United States. (Mot. at 9-10)

These arguments are without merit because they rest on the erroneous premise that the production of these aircraft was subject to regulation by FAA pursuant to statute. The aircraft under this contract, however, were exempt from such regulation. C of A's from FAA were not required by law for operation of these aircraft. Title 49, U.S. Code app. § 1430(a)(1) (1992) provided that a "civil aircraft" may not be operated "in air commerce without an airworthiness certificate in effect." "Public aircraft," however, were excluded from the category of "civil aircraft." 49 U.S.C. app. § 1301(a)(17) (1992). The T-3A Firefly aircraft qualified as "public aircraft" under 49 U.S.C. app. § 1301(36) (1992) which included within that term "[a]n aircraft used exclusively in the service of any government."

The absence of a statutory requirement for C of A's meant that there could be no statutory requirement for type certification, which was needed for issuance of a C of A, 49 U.S.C. app. § 1423(c) (1992), or for obtaining a production certificate, the purpose of which was to facilitate obtaining a C of A (finding 19). In the absence of statutory requirements for these certificates, the role of FAA in the construction of these aircraft

would be only as agreed to by the parties in the contract with the normal rules of contract interpretation being applicable to resolve any questions concerning the duties of SAL in that regard.

The motion disputes our holding of equivalency on the additional ground that NWASI "did not have nor would it be eligible for CAA approval for the aircraft assembly operation" (mot. at 9). The basis of that challenge is a letter, dated 4 June 1993 (ex. A-136), from CAA to FAA asking whether "FAA [was] fully aware of the CAA position in respect of aircraft assembled in the [United States]" and, specifically, whether FAA was "aware that [NWASI] do not have [and would not] be eligible for, CAA approval for this activity neither do they hold [CAA] approval as a subcontractor" to SAL for assembly of aircraft in the United States. That letter was issued after the government had directed SAL to obtain a production certificate and after NWASI had begun efforts by to obtain the certificate. (Finding 30) Accordingly, the letter has no bearing on whether the quality program, which SAL proposed to implement, qualified as a "foreign equivalent" under SOW § 3050.2.4.

Under its A1 Primary Company approval, SAL was permitted to use subcontractors, such as NWASI, which had not been approved by CAA. In that event, SAL was obligated to perform quality control surveillance of work performed by such subcontractors to "ensure that the required standards of airworthiness are achieved." SAL was required to "satisfy itself that the origin of each item supplied [by the non-approved subcontractor] is identified and [to] satisfy itself that the item is acceptable and suitable for the intended purpose." (BCAR A8-1, ¶¶ 3.12, 3.12.1). That is the process which SAL intended to follow under this contract, as indicated by the detailed exposition in the proposal of the quality control measures which would be implemented for NWASI's operations (finding 41).

CONCLUSION

We have considered the views expressed in the government's motion and additional memorandum and have responded to those which merited comment. We have taken into account appellant's memorandum urging that the initial decision be upheld. For the reasons set forth above, the initial decision is affirmed in all respects.

Dated: 3 October 2003

PENIEL MOED
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

EUNICE W. THOMAS
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 50473, Appeal of Slingsby Aviation Limited, rendered in conformance with the Board's Charter.

Dated:

EDWARD S. ADAMKEWICZ
Recorder, Armed Services
Board of Contract Appeals