ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
David J. Needham	)	ASBCA No. 57133
	)	
Under Contract No. CHARF-08-C-0028	)	

APPEARANCE FOR THE APPELLANT: Mr. David J. Needham
Sole Proprietor

APPEARANCES FOR THE GOVERNMENT: Richard L. Hanson, Esq.
Air Force Chief Trial Attorney
Capt John M. Page, USAF
Trial Attorney

OPINION BY ADMINISTRATIVE JUDGE DELMAN
PURSUANT TO BOARD RULE 12.3

David J. Needham (appellant) seeks $30,465 arising out of the termination of his lease contract. The contract was a lease agreement between appellant and the "Aero Club," a non-appropriated fund (NAF) instrumentality of the Department of the Air Force (government or Club) for the use of appellant's 1980 Beechcraft 76 Duchess aircraft for a period of 12 months, plus option periods. This appeal is taken under the Disputes clause of the lease agreement, General Provisions, ¶ 2. It is not governed by the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-13. Appellant elected to prosecute this appeal under Board Rule 12.3. The parties waived hearing and submitted their positions on the record under Board Rule 11. Our summary findings and conclusion are set forth below.

SUMMARY FINDINGS OF FACT

1. On or about 18 March 2008 the government and appellant entered into the subject lease. Appellant agreed to lease to the Club his 1980 Beechcraft 76 Duchess aircraft for the use of the Club and its members for 12 months with options to extend the agreement. In essence, this lease was a profit-sharing type arrangement between the parties. The Club charged the users of the aircraft a fee per flying hour and that fee was shared with appellant. Under the lease, appellant's share of the fee was set at $60.00 per flying hour. The lease did not provide for an estimated or a guaranteed number of flying hours. During negotiations of the lease, appellant and the Club manager discussed a planning assumption of 30-35 flying hours per month (app. rebuttal evid., tab A at 3), but these figures were not part of the lease that appellant signed.

2. Under the lease, the Club agreed to pay for all fuel during its operation of the airplane and for insurance on the aircraft. The Club agreed to base the airplane at Charleston Air Force Base, S.C., and to provide and use proper tie-down facilities. (R4, tab 10 at 3)

3. Under the lease appellant agreed to perform all inspections, oil changes and all routine and minor maintenance recommended by either the manufacturer or the Federal Aviation Administration (FAA), but the Club reserved the right to perform line maintenance and to purchase parts at appellant's expense to maintain the scheduled use of the aircraft. Appellant also agreed to provide all replacement parts and major overhauls of engines and airframe. (R4, tab 10 at 3)

4. Article 13 of the lease stated that the NAF General Provisions were incorporated under the lease agreement as an attachment (R4, tab 10 at 4). These provisions were not physically attached to the lease that appellant signed, but appellant did not ask to see them before he signed the lease. Insofar as pertinent, the General Provisions included the Disputes clause, paragraph 2, and the Termination for Convenience clause, paragraph 8, which subjected the contract to FAR 49.1 and 49.2 if the contract was for supplies. (R4, tab 10 at 7) We find that, in essence, this was a supply type contract rather than a contract for services, with appellant providing the aircraft to the Club for its use for a specified period of time. See note 1, *infra*.

5. Shortly after lease award there was a change of management at the Club. Appellant was of the view that the new Club general manager did not sufficiently promote and support the use of his aircraft by the Club members. By letter dated 22 June 2008, over three months after award of the lease, appellant advised the contracting officer (CO), *inter alia*, that the planning assumptions and related operational matters to which appellant and the prior Club general manager had agreed during the negotiation of the lease were not in the lease agreement that appellant had signed (R4, tab 22). There is nothing of record showing that the prior Club general manager was a contracting officer or otherwise had the authority to bind the government to any terms and conditions under the lease. In addition, appellant failed to object to any of the claimed omissions before reading and signing the lease prior to award.

6. Appellant's letter also indicated he was operating under the lease at a loss, stating: "The $60.00 per hour would seem to be almost covering my variable costs, but I am not covering my fixed costs" (R4, tab 22). Apparently, the aircraft was not being flown as often as appellant had anticipated, and the Club's payment to appellant of $60.00 per hour of flying time was not covering appellant's costs. Appellant requested that the lease be rewritten with various changes, including the following:

a. The vendor name should be changed from "David Needham" to "Emerald Aviation LLC."

b. Increase the hourly rate to $80 per hour and add language that the rates will be negotiated after each 100-hour maintenance cycle.

c. After covering both the appellant's and the government's variable costs, the difference between the total rental rate and the variable costs be split between the parties in proportion to their individual fixed costs.

d. Provide appellant with free Aero Club membership through the life of the contract.

e. Give priority scheduling to appellant's aircraft, including the option to "bump" other aircraft off of the schedule.

f. Provide appellant the right to purchase fuel at the government's cost.

g. Name "Marty's Maintenance" to perform all oil changes and inspections.

h. Send appellant a monthly itemization showing aircraft usage hours and costs deducted.

i. Make all changes retroactive.

(*Id.* at 3)

7. The parties exchanged emails and phone calls, and on 18 August 2008, appellant and the CO met to discuss appellant's proposed changes to the lease. Appellant presented to the government his maintenance and other expenses. The record does not show that the government disputed the nature or amount of these charges.

8. Pursuant to unilateral Modification No. M0002, the government agreed to increase appellant's compensation from $60.00 to $75.00 per hour, and designated "Marty's Maintenance" to perform the maintenance work (R4, tab 30). Pursuant to unilateral Modification No. M0004, the government also agreed to eliminate appellant's normal tie-down costs and monthly club membership dues (R4, tab 39).

9. Appellant was not happy with these limited changes and pressed for adoption of the changes he had originally requested. The government refused to make these changes.

10. On 30 October 2008, the government discovered that appellant had put the subject aircraft up for sale on the website "Controller" (R4, tab 50). Appellant had listed the aircraft for $129,995 and had given no indication in the advertisement that the aircraft was at the time obligated to the government until March 2009.

11. The government decided to terminate the lease for convenience. On 13 November 2008 the CO emailed a proposed lease modification to appellant, seeking appellant's agreement to cancel the lease (R4, tab 54). Appellant refused to sign the modification.

12. On 19 November 2008, the government unilaterally terminated the lease contract for convenience, effective 30 November 2008 (R4, tab 4).

13. On 1 December 2008, appellant reclaimed possession of the aircraft from the Aero Club (R4, tab 61). Appellant rented out the aircraft to others through the expiration date of the original 12-month lease and generated rental income in the amount of $1,875. In or around July 2009, appellant sold the aircraft for $125,000 (R4, tab 20 at 1-2). It is undisputed that appellant's income from the Club attributable to the flying of the aircraft under the lease was $5,417. Appellant also received payment beyond fuel expenses incurred, in the amount of $1,279.86, for the "business use" of the aircraft during the lease term (R4, tab 18 at 25). Appellant credited these amounts to the government in his termination settlement proposal.

14. On 25 July 2009, appellant filed a claim with the CO, requesting $26,131.44 as compensation for losses on his capital investment. Appellant listed his capital investment as $131,382.95 (R4, tab 20 at 2 of 2). On 26 October 2009, the CO responded that the government could not process appellant's claim because appellant had not submitted the claim on the proper forms in accordance with the FAR (R4, tab 21). On 9 November 2009, appellant submitted a termination proposal using standard forms 1436 and 1438. Appellant requested $53,688.16. (R4, tab 19 at 1-2)

15. On 10 December 2009, appellant submitted a revised termination proposal in the amount of $32,162.07 (R4, tab 18). Appellant's proposal, as revised, used the total cost basis for computation purposes.

16. By decision dated 19 January 2010, the terminating contracting officer (TCO) allowed $587.06 as the termination settlement amount, which primarily consisted of appellant's costs to prepare and submit the termination proposal (R4, tab 17). The TCO revised this determination by letter dated 1 February 2010, adding appellant's legal costs related to the preparation of the termination proposal in the amount of $1,110, for a total termination settlement amount of $1,697.06 (R4, tab 14). The government paid this amount to appellant.

17. Appellant filed a notice of appeal to the Board from this revised determination, and sought the unpaid balance of his proposal.

18. Appellant's revised termination proposal seeks the following:

Direct Labor	$ 7,325.00
Other Costs (Sch. B)	140,849.58
General and Administrative Expenses (Sch. C)	8,463.29
Total Costs	156,637.87
Profit (Sch. D)	5,255.32
Total	161,893.19
Settlement Expenses (Sch. E)	3,840.74
Total	165,733.93
Disposal & Other Credits (Sch.G)	133,571.86
Net Proposed Settlement	32,162.07

(R4, tab 18)

DECISION

Under a termination for convenience, appellant is generally entitled to payment for his settlement expenses, his costs incurred for the work done under the contract plus a fair and reasonable profit unless it appears that appellant would have sustained a loss had the entire contract been completed. *See* FAR 49.201, 49.203.

Basis for Settlement Proposal

Appellant used the total cost basis for his settlement proposal. The government contends that this was improper, and that the inventory-basis method was required.

We do not agree with the government. Clearly this was the type of contract – an aircraft lease – that by its very nature did not and could not generate any "inventory," however broadly defined, to which costs could be fairly allocated. While we agree that the inventory basis is generally preferred, the total cost basis may be used where the former is not a practicable basis to measure cost, which is the case here. *See generally* FAR 49.206-2. We believe that the use of the total cost basis was reasonable under the circumstances.

Direct Labor ("Personal Time") (0)

Appellant contends that he worked as a mechanic's helper to help reduce maintenance costs, for which he has claimed automobile mileage to the maintenance area *infra*, and a labor rate for himself at $25/hour. The record fails to show the type of work performed by appellant and its reasonableness, nor does the record show that appellant actually incurred the proposed labor costs. These claimed costs are not allowable.

Schedule B: Beechcraft Duchess N6714R, Capital Investment (Depreciation) ($6,392)

Appellant's settlement proposal seeks to "direct cost" his capital investment, *i.e.*, the purchase price of the 1980 Beechcraft Duchess aircraft and the cost of various capital improvements to the aircraft. However we believe such capital assets should be depreciated.[1] We acknowledge that in the case cited by appellant, *Blue Ridge Leasing Co.*, ENG BCA No. 4666, 82-1 BCA ¶ 15,734, there was no depreciation granted for the leased vehicle, but we are not bound to follow the decisions of other boards. Moreover the contracts in the cases are materially different. The contract in *Blue Ridge* was a standard lease for a vehicle for a specified period at a specified monthly rental; the subject contract was in essence a profit-sharing arrangement between the parties in which appellant provided the income-producing asset.

Appellant identifies an amount of annual depreciation for the aircraft in the amount of $9,936.80, consisting of depreciation for the airframe ($2,600), engine/propeller ($6,480) and "airframe hours" ($856.80) (app. rebuttal evid., tab F; R4, tab 22). The depreciation figures for the airframe and the engine/propeller appear to reflect a reasonable measure of appellant's capital investment/acquisition cost over a reasonable useful life of the aircraft. However, the "airframe hours" depreciation figure is not explained, and we question it. We allow the annual depreciation figures, as adjusted, in the amount of $9,080, properly allocated over the duration of this lease, *i.e*, 257 days, for a total amount of $6,392.[2]

Schedule B: Aircraft Maintenance: Repair, Maintenance Expenses and Fuel ($5,306)

Appellant furnished a detailed spreadsheet specifying the dates and purposes of all of these charges. It appears that appellant made his maintenance expenses available to the Club during their discussion on lease modifications (finding 7) and the Club never took issue with the nature and amount of the expenses claimed by appellant, nor did the CO do so in his termination settlement determination. Given all the circumstances, we believe these expenses are credible and reasonable. We allow the repair and maintenance charges incurred to the effective date of termination, in the amount of $4,633.64, plus the related maintenance fuel expenses of $672.48, for a total of $5,306.

[1] While the Termination for Convenience clause in the lease provides for the settlement of non-recurring costs for capital investment where the contract is one for services, General Provisions, ¶ 8, this lease is not a services contract, *i.e.*, it does not directly involve the time and effort of a contractor to perform an identifiable task, but rather furnishes an end item of supply for a prescribed period of time. *See* FAR 2.101 ("Supplies"), 37.101.

[2] For ease of computation, the allowable costs stated herein are rounded to the nearest dollar.

Schedule B: Automobile Mileage, Government Mileage Rates (0)

This amount refers to appellant's claim for automobile mileage related to his work as a mechanic's helper. For reasons stated in the section "Direct Labor" above, this amount is not allowable.

Schedule B: Business Travel: Actual Costs to Inspect and Pick Up Aircraft (0)

Appellant seeks $951.62 related to the inspection and pick-up of the aircraft incident to his acquisition of the plane. We believe these costs are reasonably related to the cost of acquisition of the aircraft, and as such, have been already duly considered in the allocation of the airplane's acquisition cost through a reasonable depreciation allowance. We disallow this charge as a direct cost to the settlement.

Schedule C: Office Supplies and Consumables ($141)

Appellant specifies in detail a number of minor miscellaneous expenses related to contract performance. We find these expenses to be reasonably necessary to performance and allow them, less the MasterCard Annual Fee ($75), and the "after the termination" entry of 15 June 2009 ($35), for a remaining total of $141.

Schedule C: Loan Interest and Bank Fees (0)

Appellant seeks $7,459.93 in bank fees and finance charges related to the financing of the aircraft. Such costs are not allowable, FAR 31.205-20.

Schedule C: Taxes and Licenses ($115)

Appellant seeks $110 for an aircraft radio station license and $5 for an FAA registration fee. These appear to be reasonably necessary expenses incident to performance, and we allow them. Appellant also has sought to recover fees based upon his business decision to reorganize as an LLC. Appellant has not shown that these costs and those related to the claimed TurboTax software were reasonably necessary for performance of this lease. We disallow these charges as direct costs to the termination settlement.[3]

Schedule D: Profit (0)

Appellant seeks a profit of 4% on his capital investment for one year as part of his termination settlement. Appellant was operating under the lease at a loss (finding 6), and it appears, absent evidence otherwise, that appellant would have sustained a loss on the

[3] Appellant does not seek a G&A percentage markup as part of his termination claim.

contract through the 12-month performance period given the same pattern of plane usage. Indeed, appellant's claim letter of 25 July 2009 admitted to a loss of $26,131.44 on his capital investment (finding 14). Under these circumstances, profit is not allowable. FAR 49.203(a).

Appellant argues that he should be allowed profit because government actions or inactions under the lease caused him to operate at a loss. The record does not support this contention. With respect to his allegation regarding the planned assumptions and agreements made with the prior Club general manager during the negotiation of the lease, appellant does not show that the Club general manager was authorized to bind the government with respect to such matters. In addition, appellant did not object to the lease he signed that failed to contain these matters. The record also shows the government made efforts during the lease term to increase appellant's profitability under the lease, *i.e.*, increasing his share of the hourly fee from $60.00 to $75.00 and waiving of normal tie-down cost and Aero Club membership dues. (Finding 8)

Appellant also contends that additional pages were wrongfully added to his contract after he signed it. Presumably this refers to the General Provisions that were identified in the lease that he read and signed but were not physically attached to the lease agreement. Appellant had reason to know of these provisions but failed to inquire about them before he signed the lease. Appellant has also taken advantage of a number of these provisions, *e.g.*, the Disputes clause and Termination for Convenience clause. Appellant fails to show any damage or prejudice with respect to this matter.

We have duly considered all of appellant's contentions. Appellant has not shown any wrongful government action or inaction under the lease that caused appellant to operate at a loss. Hence, we cannot allow any profit as part of appellant's termination settlement proposal.[4]

Schedule E: Aircraft Insurance (0)

During the contract lease period the government paid for insurance on the aircraft. Once the lease was terminated, appellant reclaimed the aircraft, used it for personal, business and/or income-producing purposes and eventually sold it, during which period appellant paid for the insurance. There is nothing of record to indicate that appellant sought and received the authorization of the TCO to incur these post-termination insurance costs. Appellant has not shown that these insurance costs were sufficiently

[4] Neither the TCO nor the government on appeal calculated an adjustment to the settlement amount to reflect the amount of loss, FAR 49.203(a). The record contains no evidence of appellant's estimated cost to complete the entire contract, FAR 49.203(c), and lacking this information, we make no such adjustment.

related to the performance of the contract so as to be allowable as part of the termination settlement.

Schedule E: Advertising (0)

Appellant seeks reimbursement for advertising costs incident to the sale of the aircraft after the contract period. Generally, advertising costs, with limited exceptions, are unallowable, FAR 31.205-1, and it does not appear that any of the limited exceptions apply here. We would also think that these same costs would have been incurred by appellant after the expiration of the lease contract if the lease had never been terminated. We believe that these costs are not allowable as part of appellant's termination settlement proposal.

Schedule E: Legal Review/Letter (and Related Settlement Expenses) ($1,697)

Appellant seeks the following costs related to the preparation and submission of his termination proposal: legal review ($1,110); claim preparation ($550) and mail expenses ($37.06). The government does not dispute these amounts, and we find them allowable.

Schedule G: Disposal and Other Credits ($6,697)

As credits to the termination settlement we allow the contract payments to appellant made by the Club ($5,417) plus the amounts received over and above fuel expenses for the business use of the aircraft during the performance period ($1,280), for a total credit of $6,697. For reasons stated above, since the capital investment/acquisition cost of the aircraft has not been direct costed to the settlement proposal, the sales price of the aircraft is not a proper credit in the settlement proposal. We also exclude the proposed credit for "rental income" of $1,875 since it appears that this income was generated after the lease was terminated.

CONCLUSION

We conclude that appellant is entitled to the following termination settlement:

Depreciation	$ 6,392
Repair, Maintenance and Fuel	5,306
Office Supplies/Consumables	141
Licenses and Fees	115
Legal Review/Settlement Expenses	1,697
Subtotal Settlement	13,651
Less Credits	(6,697)
Total Termination Settlement	6,954
Less Amount Paid by CO	(1,697)
Recovery	5,257

Appellant is entitled to $5,257. No interest on the claim shall be added, since this appeal is not subject to the CDA.

Dated: 25 October 2010

JACK DELMAN
Administrative Judge
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. 57133, Appeal of David J. Needham, rendered in conformance with the Board's Charter.

Dated:

CATHERINE A. STANTON
Recorder, Armed Services
Board of Contract Appeals