

<b>MILLER AERO SERVICE, INC.,</b>	)	<b>AGBCA No. 2001-115-1</b>
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Appellant	)	
	)	
<b>Representing the Appellant:</b>	)	
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**RULING ON MOTIONS FOR PARTIAL SUMMARY JUDGMENT**

August 29, 2001

**Before HOURY, VERGILIO, and WESTBROOK, Administrative Judges.**

**Opinion for the Board by Administrative Judge VERGILIO.**

On December 21, 2000, the Board received this appeal filed by Miller Aero Service, Inc. (contractor) of Boise City, Oklahoma. The respondent is the U. S. Department of Agriculture, Animal and Plant Health Inspection Service (APHIS) (Government). The dispute involves a contract, No. 53-6395-4-62, issued by APHIS, Animal Damage Control Program, in support of predator control activities within Texas. The modified contract required the contractor to provide a helicopter with or without a pilot, along with specified support. The helicopter crashed, when operated by a Government-furnished pilot.

The contractor maintains that the contractual requirements for pilot qualifications are applicable, such that when the Government utilized a pilot not satisfying the contractual requirements, it breached the contract, entitling the contractor to the relief sought. The Government maintains that when signed, the contract provisions dealt solely with contractor-furnished pilots. With the

modification, says the Government, there is no indication that the original intent should be changed or that pilot qualifications would or should apply to a Government-furnished pilot.

The Board has jurisdiction over this timely-filed appeal pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, as amended. The contractor has moved for partial summary judgment, asking the Board to resolve a contract interpretation question, namely, that the pilot requirements dictated in the contract apply to Government-furnished pilots. Cross-moving for partial summary judgment the Government maintains that the requirements do not apply to Government-furnished pilots, and asks the Board to conclude that the Government-furnished pilot was licensed and qualified to fly the helicopter.

The contract specifies: “Pilots working on this contract must meet the following requirements[.]” The plain meaning of the contract makes the pilot requirements applicable to a Government-furnished pilot; the pilot works on the contract. The fact that as originally entered into the contract envisioned only contractor-furnished pilots, and permitted Government-furnished pilots only through a contract modification, does not alter the plain meaning and applicability of the clause.

Accordingly, regarding the contract interpretation question, the Board concludes that the contract demands that a Government-furnished pilot satisfy the pilot requirements dictated in the contract. Therefore, the Board grants the contractor’s motion for partial summary judgment and denies the Government’s cross-motion. Resolving these motions, however, does not resolve the question of whether a Government breach of the contract requirements was a factor in whole or in part regarding the crash of the helicopter, and what, if any, relief is appropriate.

### **FINDINGS OF FACT**

1. With an effective date of April 15, 1994, the Government awarded to the contractor a requirements contract, No. 53-6395-4-62, with an estimated quantity of 400 flight hours, and a base period of 1 year from the date of award (Exhibit 1 at 1 (¶¶ 2, 3, 5, 7, 15C), 9 (¶ B.1, items 13-16), 43 (¶ I.5, Requirements, 48 CFR 52.216-21 (APR 1984))) (all exhibits are in the appeal file). As awarded, the contractor was to furnish one helicopter with pilot, fuel, maintenance, equipment and crew for use in support of predator control activities (Exhibit 1 at 8 (¶ B.1)). Similarly, the statement of work dictates that the contractor “shall furnish, operate and maintain one helicopter with pilot in accordance with all the specifications herein” (Exhibit 1 at 11 (¶ C.1)).

2. Section H of the contract details “special contract requirements” (Exhibit 1 at 27-37). Of relevance here, the Pilot Qualifications clause specifies: “Pilots working on this contract must meet the following requirements” that are detailed in seven numbered subparagraphs. One of the itemized requirements dictates that pilots shall have logged flying time as pilot-in-command of at least 1500 hours in a helicopter. (Exhibit 1 at 30-31 (¶ H.7.6).) The subsequent paragraph details “special pilot qualifications” in addition to those dictated in paragraph H.7 (Exhibit 1 at 31-32 (¶ H.8)).

3. With an effective date of May 25, 1994, the parties jointly modified the contract, as follows:

Contractor to provide up to 100 hour's use of helicopter 7404F without pilot to Texas ADC at a price of \$205 per hour. Contractor to provide insurance, maintenance, gas and oil; and, contractor is responsible to transport helicopter to home base. Texas ADC to provide trailering to any other locations. If it is necessary for contractor to provide trailering (without pilot), trailer charge per mile is \$.60 per mile. Hours without pilot will be applied to the 400 hour base with pilot.

(Exhibit 3 at 102 (modification two).) The standard form of the modification also states: "Except as provided herein, all terms and conditions of the [contract], as heretofore changed, remains unchanged and in full force and effect" (Exhibit 3 at 102).

4. With a Government-furnished pilot operating the contractor's helicopter on June 20, 1994, the helicopter crashed, incurring damage (Exhibit 9 at 109). As indicated on a National Transportation Safety Board (NTSB) "Factual Report Aviation" the pilot of the helicopter had a total flight time of 1516 hours in the make and model of helicopter and a total (on all aircraft) of 1406 hours as pilot-in-command; there is no entry in the spaces for pilot-in-command of the make and model helicopter or for rotorcraft (Exhibit 9 at 112). An NTSB Pilot/Operator Aircraft Accident Report similarly identifies 1515.6 hours as total flight time in the make and model helicopter, and 1406.4 hours as pilot-in-command of all aircraft, with no entries for pilot-in-command of rotorcraft or the particular make and model of helicopter (Exhibit 9 at 118). Both documents identify the pilot as holding a certificate for commercial flying with ratings in single engine land and helicopter (Exhibit 9 at 112, 118).

5. By letter dated June 16, 2000, the contractor submitted a claim to the contracting officer to recover \$61,206.65 for the loss of the helicopter and equipment, and the loss of income. The contractor maintains that the Government breached the contract by allowing a pilot-in-command to operate the helicopter when the individual lacked the minimum hours required under the contract in paragraph H.7, and by interfering with (by damaging the helicopter) the contractor's ability to perform the contract. (Exhibit 19 at 159-83.) In a letter to the contractor dated September 22, 2000, the contracting officer denied the claim, stating in part:

I have attached a copy of the NTS[B] Report and the letter from our legal department supporting the decision.

Both agencies have determined that the crash was not due to pilot error rather wear and tear of the helicopter. The [Office of General Counsel] also advised of your right to file suit in the appropriate court if you are dissatisfied with the decision.

(Exhibit 22 at 190.)

6. The Board received the appeal from the contractor on December 21, 2000.

### DISCUSSION

In its motion for partial summary judgment, the contractor asserts that the contract requires Government-furnished pilots to satisfy the “pilot qualifications” detailed in the contract. The Government opposes the motion; it cross-moves for relief, maintaining that the pilot qualifications apply only to contractor-furnished pilots and that the Government-furnished pilot was licensed and qualified to fly the helicopter. In response, the contractor opposes the cross-motion.

As awarded, the contract required the contractor to furnish, operate, and maintain one helicopter with pilot in accordance with the specifications of the contract (Findings of Fact (FF) 1). Thereafter, by contract modification, the contractor could be called upon to provide use of the helicopter without pilot (FF 3).

The contract specifies pilot qualifications with the following introduction: “Pilots working on this contract must meet the following requirements” (FF 2). A Government-furnished pilot operating the contractor’s helicopter is working on the contract. The plain language of the clause dictates that any pilot (whether furnished by the contractor or Government) must satisfy the contractual requirements. The contractor is entitled to partial summary judgment on its question of contract interpretation.

The Government’s analysis and conclusion that the contract-stated pilot qualifications apply only to contractor-furnished pilots are ill-founded. When signed, the contract addressed only contractor-furnished pilots. The pilot requirements, therefore, applied only to contractor-furnished pilots. With modification two, says the Government, there is no indication that pilot qualifications were intended to apply to Government-furnished pilots. But one must consider the modified contract as a whole. The broad wording or applicability of paragraph H.7, encompassing “pilots working on this contract,” has meaning with the modification. Moreover, otherwise, despite the Government’s suggestions to the contrary, the modified contract contains no standards for a Government-furnished pilot, despite the explicit, detailed minimums established in the contract. The Government does not suggest that such requirements are merely incidental to an owner who may insure the helicopter, and must obtain some insurance (Exhibit 1 at 37 (¶ H.21, Insurance Requirements (liability insurance for bodily injury to or death of person and for loss or damage to property)).) Even if the Government intended that the pilot requirements clauses not apply to Government-furnished pilots, its unstated intent does not alter the interpretation of the contract.

The Government attempts to support its interpretation by citing other contract provisions referencing pilots, and contending that the term “pilot” can consistently only mean a contractor-furnished pilot. As detailed below, a review of the clauses cited belies the interpretation proffered by the Government. The Government’s interpretation is not reasonable.

Paragraph E.3, Inspection of Personnel, directs that (a) upon request, the contractor shall promptly submit completed pilot information forms for personnel that may be utilized under the contract, (b) when determined necessary by the contracting officer, a pilot performance evaluation will be conducted, and (c) the determination as to the ability of the pilot, through an evaluation flight, to successfully meet the requirements of the contract rests with the Government (Exhibit 1 at 22). The

Government would not request the contractor to submit information about a Government-furnished pilot, and the Government could pre-qualify a potential pilot it may wish to utilize without regard to this clause.

Paragraph E.4, Reinspection Expenses, provides that the contractor shall be liable for any Government costs incidental or due to the substitution of personnel not previously inspected (Exhibit 1 at 22). The clause, which uses the term “personnel,” not “pilot,” cannot reasonably be read to make the contractor liable for Government expenses incurred regarding Government-furnished personnel. This clause does not alter the interpretation or applicability of the pilot requirements clauses.

Paragraph F.3, Reporting Date, states that the contractor shall report with all required personnel within 15 days after notification of contract award for inspection and approval of personnel and required documentation, among other items (Exhibit 1 at 23). It is not reasonable to read this paragraph, which uses the term “personnel” not “pilot,” as requiring the contractor to make available Government-furnished pilots. Also, modification two has an effective date after the referenced 15-day period. This clause does not alter the interpretation or applicability of the pilot requirements clauses.

Paragraph H.9, Pilot Authority and Responsibility, dictates, for example, that the pilot is responsible for the safe operation of the aircraft and the safety of its occupants and cargo, and that the pilot shall refuse any flight or landing which the pilot considers hazardous or unsafe (Exhibit 1 at 32-33). Nothing in the clause or contract suggests that a Government-furnished pilot would possess different authority or responsibility.

Paragraph H.13, Availability of Service, specifies that the schedule of operations will be planned by the Government with the cooperation of the pilot, and that the contractor agrees to designate the pilot to represent the contractor on the job for the purpose of planning operations with the Government (Exhibit 1 at 35). This clause, which requires the contractor to designate a pilot to represent the contract for planning purposes, does not alter the interpretation or applicability of the pilot requirements clauses.

Paragraph H.14, Substitution of Aircraft or Personnel, specifies that the contractor may substitute personnel, and notes that any pilot substitutions will be subject to training and familiarization, as deemed necessary by the Government (Exhibit 1 at 35). This clause, which addresses contractor actions, does not affect the interpretation or applicability of the pilot requirements clauses.

In its cross-motion, the Government also asks the Board to conclude that the Government-furnished pilot was licensed and qualified to fly the helicopter. While the contractor does not appear to question the assertion that the Government-furnished pilot possessed a license and certification to operate the helicopter, it remains to be determined if the pilot satisfied the requirements of the contract. The Government raises what is presently a moot question.

### **RULING**

The Board grants the contractor's motion for partial summary judgment, and denies the cross-motion of the Government. The resolution of the motion and cross-motion interpreting the contract, does not serve to resolve the true issues of this appeal. Even if the Government breached the contract by providing a pilot not satisfying the requirements, it does not follow that such was a cause or factor in the crash, or that such a breach would make the Government liable in full or in part for resulting damages.

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**JOSEPH A. VERGILIO**

Administrative Judge

Concurring:

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**EDWARD HOURY**

Administrative Judge

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**ANNE W. WESTBROOK**

Administrative Judge

**Issued in Washington, D.C.**

**August 29, 2001**