



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

GRANTED: May 13, 2008

CBCA 52

TAS GROUP, INC.,

Appellant,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Carolyn Callaway, Albuquerque, NM, counsel for Appellant.

Timothy P. McIlmail, Commercial Litigation Branch, Civil Division, Department of Justice, Washington, DC, counsel for Respondent.

Before Board Judges **STERN**, **FENNESSY**, and **SOMERS**.

SOMERS, Board Judge.

TAS Group, Inc. (TAS), on behalf of its subcontractor, CSI Aviation Services, Inc. (CSI or subcontractor), has appealed the decision of the contracting officer of the United States Marshals Service (USMS), an agency of the Department of Justice, denying its claim for \$827,743.79 for recovery of damages allegedly caused to an aircraft CSI had leased to the USMS.

We grant the appeal because we find that appellant has proved by a preponderance of the evidence that the Government should be held responsible under the "Government Liability" clause for negligent conduct resulting in damage to the engine and other consequential damages. In addition, appellant has established its entitlement to damages in the amount of \$827,743.79.

Statement of Facts

The Justice Prisoner and Alien Transportation Service (JPATS), an entity managed by the USMS, transports prisoners and aliens in federal custody throughout the United States and overseas. On June 1, 1999, TAS and the USMS entered into a contract requiring TAS to provide passenger aircraft for use by the USMS. Pursuant to this contract, the USMS issued a delivery order for the lease of two MD-82 aircraft for the period May 3, 2004, through May 2, 2005. Appeal File, Exhibit 9.¹ TAS subcontracted with CSI, who provided the two aircraft. CSI leased the aircraft from Jetran International, Ltd. Exhibit 36.

Pursuant to the contract, the contractor remained responsible for all costs of aircraft maintenance and repairs, except if the damage arose from the Government's negligence. As stated in the "Government Liability" clause:

The Government shall not be held liable for any injury to the Contractor's property unless such injury or damage is due to negligence on the part of the Government and is recoverable under the Federal Tort Claims Act, or pursuant to other Federal Statutory Authority.

Id. at 181.

The contract required that the USMS pilots meet certain training and testing requirements in order to fly the MD-82. Exhibit 9. Two USMS pilots make up the cockpit crew for the MD-82 aircraft. The two pilots involved in the incident giving rise to this appeal, John Bordelon and Jason Maurer, had both received refresher training on the MD-82 in August 2003. Exhibits 12, 15.

The refresher training included a review of the start procedures of aircraft engines for the MD-82. One abnormality that can happen during start is called a "hot start." A hot start occurs when exhaust gas temperature (EGT) exceeds the limits for a start. Transcript at 87.² Both pilots are required to anticipate, watch for, and interrupt hot starts throughout the start sequence until the engine has stabilized. Transcript at 308. An impending hot start occurs

¹ All exhibits are found in the appeal file, unless otherwise noted.

² At a hearing held in this matter on October 3 and 4, 2007, in Washington, D.C., both parties presented fact and expert witnesses. Citations to the transcript refer to testimony elicited at that hearing.

when the pilots recognize that the exhaust gas temperature will likely exceed the maximum EGT for that engine, and the pilots are trained to instinctively terminate the start to prevent the engine from exceeding the maximum EGT. *Id.* Anyone authorized to start a jet engine is trained in procedures to prevent hot starts. Transcript at 90. A hot start can occur at any time during the start sequence. Transcript at 152. At the hearing in this matter, expert witnesses for appellant and the Government testified that the procedures reviewed in this refresher training are illustrative of the standard of care a type-rated pilot in good standing should exercise during a ground start. Transcript at 49, 89, 92, 162, 152, 243, 266-267, 287.

In the MD-82, a two-engine aircraft, there are two EGT gauges, one for each engine. The maximum allowable EGT during a ground start is 475° Celsius (C).³ In addition, the initial fuel flow should be about 800 pounds per hour (PPH). A starting fuel flow of 1100 PPH or more, and/or an EGT reading above 475°C, is an indication of an impending hot start, requiring the pilot to turn off the fuel control lever immediately. Thus, the operations manual for the MD-82 instructs the pilot to “keep hand on Fuel control lever until all engine indications are stabilized” and directs the pilot to “continue to monitor EGT until N2⁴ is stabilized at or about 50%.” Exhibit 11. The engine is stabilized when it indicates “N2 RPM [revolutions per minute] at 50-61%, EGT at 300-400° Celsius, fuel flow at 800 -1100 PPH, oil pressure at 40-55 PSI [pounds per square inch].” *Id.*

The EGT gauge is marked so that the normal temperatures are located at the bottom area of the circular gauge. Looking at the EGT gauge as a clock, the normal temperatures, from 0° to 400°C, can be found between 4 o’clock and 7 o’clock. In contrast, temperatures from 400° to 800° C (the maximum temperature) are shown from about 7 o’clock to about 1 o’clock. Exhibit 35.

On May 13, 2004, Mr. Bordelon and Mr. Maurer flew one of the MD-82 aircraft, identified as N822US, from the United States to Tegucigalpa, Honduras. Exhibit 21. Upon landing, the passengers disembarked. The plane taxied to the refueling point. Transcript at 232. After about forty-five minutes, the passengers returned to the plane, and the pilots prepared for takeoff. Exhibit 4.

In accordance with standard procedure, Mr. Bordelon reached up with his left hand and engaged the starter for the right engine (identified as JT8D-217). Transcript at 235.

³ Engine limitations, such as the 475°C on ground start for the JT8D-217 engine, are determined by the manufacturer. Transcript at 88; Exhibit 25.

⁴ The N2 gauge shows speed of high pressure compressor. Transcript at 84.

According to Mr. Bordelon, he observed normal start indications, which he set forth in an e-mail message to his supervisor at JPATS on May 14, 2004:

The EGT was less than 100C not requiring cooling. Starter was engaged and at 24 N2 the fuel lever was opened. Fuel flow was normal and engine lite off was normal with a normal rise in [EGT] which I observed to 300C. At that time I transition[ed] to N2 now at about 30% and monitored to 40% where I disengaged the starter. All start indications appeared normal . . . especially fuel flow at about 1000.

Exhibit 4.⁵

When Mr. Bordelon released the starter, he verified starter disengagement by looking up at the annunciation panel. Transcript at 303. Next, Mr. Bordelon returned his attention to the EGT gauge and realized that it read 800°C, the maximum level on the gauge. *Id.* Upon seeing that the EGT read 800°C, Mr. Bordelon “asked Jason [Maurer] if he saw this and he also studied the engine for one second telling me to shut it down which is what I was doing.” *Id.* Mr. Bordelon testified that “[a]s soon as I saw 800 degrees – that was the first indication I had of an over-temp – I shut it down.” Transcript at 244.

The pilots called the mechanic, Dan Hatfield, a employee of the maintenance subcontractor,⁶ into the cockpit to discuss the temperature reading. Exhibit 4 at 19; Exhibit 2 at 3. After the mechanic visually inspected the engine, the pilots and the mechanic concluded that the EGT gauge might be malfunctioning. Exhibit 2 at 3. The mechanic switched the EGT gauges. *Id.* The pilots started the other engine to see whether the gauge removed from the right engine would work with the left engine. The left engine experienced no problems with the swapped EGT gauge. Exhibit 6; Transcript at 98, 260. Using the EGT gauge that had been removed from the left engine, the pilots again attempted to start the right engine. Exhibit 4. This time, the fuel flow went immediately out of range to 2000 PPH and the EGT began climbing rapidly. The pilots quickly shut down the right engine and grounded the aircraft. The crew remained overnight in Honduras and returned to Louisiana, the home base, the next day on a different JPATS aircraft. Transcript at 239.

⁵ At the hearing, the Government elicited testimony from Mr. Bordelon that his e-mail message did not accurately reflect the initial fuel flow and that the initial fuel flow was actually 600 PPH. Transcript at 241, 242.

⁶ Under the contract, the USMS provided the aircraft crew, but the contractor provided maintenance and insurance on the aircraft. Exhibit 9 at 122-41.

CSI received notice of the hot start on the date it occurred, May 13, 2004. Transcript at 38. CSI sent technicians to Honduras, removed the right engine, replaced it with another engine, provided a substitute aircraft for USMS's use, and returned the aircraft and the engine to the United States, incurring a cost of approximately \$228,000. Exhibit 4. A boroscope examination of the engine revealed extensive damage to the engine. Later, at trial, both appellant's and respondent's engine experts testified that the damage to the engine shown by the boroscope was consistent with a severe hot start. Transcript at 98, 101-04, 370-71. CSI received a preliminary estimate to repair the engine of \$749,450. *Id.* Appellant's expert witness estimated that the cost to repair or replace the engine could exceed \$1 million. Transcript at 108. Respondent's expert agreed. Transcript at 377.

Once CSI received the preliminary estimate, it concluded that the cost of repairing the engine and, in addition, renting a replacement engine until the repairs were completed, would increase the costs significantly. Accordingly, CSI negotiated a settlement with Jetran. Transcript at 44-46. Pursuant to the terms of the settlement, Jetran agreed to provide a substitute engine for the damaged one and to release CSI from all liability for repairing the damaged engine for CSI's payment of \$600,000 to Jetran. Exhibit 4. CSI did not know whether Jetran later repaired the engine, and, if so, at what cost. Nor did CSI learn whether Jetran had made any determination as to the cause of the hot start. Transcript at 46.

CSI had the flight data recorder removed and evaluated, but no useful data could be retrieved from the tapes. Transcript at 39, 67-68. In addition, no information from N822US's cockpit voice recorder regarding the incident remained. Exhibits 4, 20; Transcript at 40, 68. On June 28, 2004, CSI requested that the USMS investigate the hot start incident. Exhibit 29. Nonetheless, the USMS did not investigate the incident nor did it interview the pilots. Transcript at 258.

Apparently, however, CSI's insurance company did conduct an investigation in order to resolve an insurance claim. Exhibit 35. Mr. Maurer, one of the pilots, made his only statement regarding this incident in an e-mail message to his supervisor, Jerry Hurd, sent on July 19, 2004, in response to questions raised by CSI's insurance company. Mr. Maurer stated, in part:

This appears to be a big fishing expedition. I do not understand the logic or reasoning of these questions by CSI's insurance company. . . . I have read and agree with Mr. Bordelon's synopsis, however, I must add that I saw the increase in EGT after verifying the starter disengagement on the annunciation panel. The increase was at a rate that I have never seen before (even in the simulator) approximately 400°C/sec. There is no pilot that could have shutdown the engine fast enough to prevent an overtemp condition that late in

the start sequence. There was something that obviously failed during the final stages of the start sequence. Prior to the starter disengagement, all indications were a normal start.

Appeal File, Exhibit 35. There is no evidence concerning what Mr. Maurer observed prior to verifying the starter disengagement, but it appears from Mr. Bordelon's testimony that Mr. Maurer did not alert Mr. Bordelon to the rising EGT temperature. Neither Mr. Maurer nor Mr. Hurd testified at the hearing.

Discussion

Applicable Law

At issue in this appeal is whether the Government should be held responsible under the "Government Liability" clause for negligent conduct resulting in damage to the engine and other consequential damages. Appellant asserts that the Government's negligent actions caused the damages claimed. The Government disagrees, contending that its pilots followed proper procedures and used ordinary care in starting the engine, that no pilot could have prevented the "hot start," and that it cannot be held responsible for the damages.

In a previous opinion in this appeal, we determined that appellant's purported tort claim arose from a breach of contract obligation over which this Board possesses jurisdiction pursuant to the Contract Disputes Act of 1978, 41 U.S.C.A §§ 601-613 (West Supp. 2007) (CDA). *TAS Group, Inc. v. Department of Justice*, CBCA 52, 07-2 BCA ¶ 33,630; *see also Awad v. United States*, 301 F.3d 1367, 1372 (Fed. Cir. 2002) (where a tort claim stems from a breach of contract, the cause of action is ultimately one arising in contract); *Wood v. United States*, 961 F.2d 195, 198 (Fed. Cir. 1992) (CDA jurisdiction exists "regardless of the fact that the loss resulted from the negligent manner in which defendant performed its contract"). Thus, even though the damages sought by appellant may have resulted from the alleged negligent (tortious) manner in which the Government performed its contract, the claim retains its status as a breach of contract claim. *See Ultra Construction Co.*, VABC 1873, 85-2 BCA ¶ 18,007, at 90,289 (citing *Simpson Transfer and Storage Co.*, ASBCA 24750, 82-2 BCA ¶ 15,949, at 79,066).

In order to resolve the dispute, we must turn to the federal common law of negligence. *Ultra Construction Co.*, 85-2 BCA at 90,289 (the rights and obligations of the parties to the contract present questions controlled by federal law and not by the law of the state) (citing *Simpson Transfer and Storage Co.*, 82-2 BCA at 79,066); *see also Dureiko v. United States*, 209 F.3d 1345, 1356 (Fed. Cir. 2000) (holding that release would be interpreted according to federal law where the Federal Government was a party to the release). Due to the scarcity

of federal common law on the issues of causation and negligence, however, we follow the approach detailed in *Prudential Insurance Co. of America v. United States*, 801 F.2d 1295, 1298 (Fed. Cir. 1986), which stated that “[t]o the extent that existing federal law is not determinative of the issue and permits an area of choice between the merits of competing principles, the best of modern decision and discussion, including the general principles of contract . . . law, should be taken into account.”; *see also Ginsberg v. Austin*, 968 F.2d 1198, 1200 (Fed. Cir. 1992) (“Since federal law does not answer the issue, we look to general property and contract law principles as they are embodied in state law pronouncements.”).

Even though the damage occurred outside the United States, we apply the law of the United States. *See, e.g., Boyle v. United States Technologies Corp.*, 487 U.S. 500, 504 (1988) (“obligations to and rights of the United States under its contracts are governed exclusively by federal law”)⁷. This rule is premised on the need to protect the uniquely federal interest underlying the statutory and regulatory framework for federal procurements, in which the desirability for a uniform rule is plain. *Sam Gray Enterprises, Inc. v. United States*, 43 Fed. Cl. 596, 600 (1990), citing *Clearfield Trust Co. v. United States*, 318 U.S. 363, 367 (1943). This rationale is equally compelling when the alternative to applying federal law is not state law, but rather foreign law. *Id.*

To recover for a breach of contract, a party “must allege and establish (1) a valid contract between the parties, (2) an obligation or duty arising out of the contract, (3) a breach of that duty, and (4) damages caused by the breach.” *San Carlos Irrigation and Drainage District v. United States*, 877 F.2d 957, 959 (Fed. Cir. 1989). We shall, therefore, address the existence and scope of any duty owed by the Government, and, if we find that one exists, whether the Government breached that duty.

Government’s Duty

The first issue to be addressed is whether the “Government Liability” clause, which makes the Government liable for “injury or damage” due to its negligence, creates a duty of care requiring the pilots “to exercise the skill and knowledge normally possessed by members

⁷ An amendment to the Federal Acquisition Regulation (FAR) Disputes clause, 48 CFR 233.4, makes plain that “United States law will apply to resolve any claim to this contract.” The FAR directs that the clause shall be included “in all solicitations and contracts.” Although the amendment occurred six months after the issuance of the delivery order here, it appears consistent with the holding in *Boyle*.

of that profession in good standing in similar communities.” *See Restatement (Second) of Torts, § 299A (1965).*⁸

The contract states that USMS pilots will fly the aircraft, and that these pilots must have the appropriate rating to fly the aircraft. By requiring type-rated pilots, the contract clearly contemplated that the pilots would be competent and capable of operating the leased aircraft, which would include the ability to follow correct procedures. The duty of care required that the pilots exercise the skill and knowledge normally possessed by other pilots with equivalent training in accomplishing this task. *Restatement (Second) of Torts § 299A; Norair Engineering Corp.*, ENG BCA 5244-Q, 98-2 BCA ¶ 29,967, at 148,269 (“a professional must exercise the necessary degree of skill and specialized care that is expected of a member of the profession acting under similar conditions This standard of care must be proved through expert testimony.”). As noted previously, expert witnesses for appellant and the Government both testified as to the standard of care a type-rated pilot in good standing should exercise during a ground start.

The Government’s Breach

We move to the next step of the analysis, i.e., whether the Government breached its duty to exercise reasonable care, resulting in damage to the engine. In analyzing the pilots’ actions to determine whether they met the standard of care required, we note that the evidence concerning what actually happened in the cockpit of the aircraft on May 13, 2004, is sparse. The pilots did not file any reports, no one interviewed the pilots after the incident, and the Government apparently did not investigate the incident.

Neither party disputes the fact that the two pilots possessed the experience and training to follow proper procedures in operating this airplane. Mr. Bordelon and the expert witnesses presented by both parties testified that standard training procedures require the pilots to monitor the EGT and the fuel flow in order to anticipate hot starts based on initial

⁸ Although the Government does not dispute that a valid contract exists, it contends that the “Government Liability” clause does not provide a remedy to appellant because appellant leased the engine from a third company. We reject that argument outright. Not only does the Government fail to provide a scintilla of support for its contention that only property “owned” by the prime contractor is covered by the clause, the Government also ignores our prior ruling that the term “contractor’s property” includes the property not owned by the prime contractor. *TAS Group, Inc.*, 07-2 BCA at 166,566. Thus, whether or not the contractor “owns” the property outright or leases the equipment it provides under the contract is of no legal consequence here.

readings of the gauges, e.g., if fuel flow exceeds 1100 PPH or if EGT rises rapidly. When the crew consists of two pilots, such as in this case, one pilot manipulates the controls and monitors the gauges, while the second pilot is responsible for observing the start and alerting the pilot flying the aircraft to any problems. The pilots are required to immediately shut down the engine at the first indication of a hot start. Failure to monitor these gauges throughout the start sequence and act immediately to abort the start if the EGT approaches or exceeds engine limitations would evidence a failure to exercise the standard of care required.

To establish that the pilots failed to follow proper procedures, appellant presented evidence to show that the pilots did not recognize that the rate of the initial fuel flow potentially indicated an impending hot start. In particular, the MD-82 operations manual states that initial fuel flow should be approximately 800 PPH, with a starting fuel flow of 1100 PPH or more indicating an impending hot start. Mr. Bordelon's May 14, 2004, e-mail message reveals that both pilots observed all normal start indications, to include fuel flow at about 1000 PPH. As noted previously, the Government elicited testimony from Mr. Bordelon that his e-mail did not accurately reflect the initial fuel start, that the initial fuel flow was 600 PPH, and that when he wrote that the fuel flow was 1000 PPH, he meant the fuel flow after the hot start.

If Mr. Bordelon's e-mail message correctly noted the fuel flow at 1000 PPH, this reading indicates an initial fuel flow at the upper limits of normal. The evidence presented at trial included a photograph of the N822US gauges, which shows that the distance between 1000 PPH and 1100 PPH is very small, making it difficult to distinguish between the two readings, increasing the possibility of error. However, if, as Mr. Bordelon testified, the starting fuel flow was 600 PPH, that reading falls below normal limits, contrary to his statement that all indications were normal. In any event, whether the fuel flow read at 1000 PPH or 600 PPH, the evidence suggests a discrepancy between a "normal" initial fuel flow and the reading reported.

To further support its claim, appellant notes that Mr. Bordelon's testimony establishes that the pilots failed to monitor the EGT during the start procedure. Specifically, Mr. Bordelon acknowledged that he observed the EGT at 300°C and did not see it again until it reached 800°C. Mr. Bordelon testified that "[a]s soon as I saw 800 degrees -- that was the first indication I had of an over-temp -- I shut it down." There is no evidence that Mr. Maurer alerted Mr. Bordelon to the over-temp condition.

The Government asserts that the exhaust gas temperature increased so fast that a competent and attentive two-pilot crew could not have interrupted the start before it reached 800°C, relying upon Mr. Maurer's statement contained within a July 19, 2004, e-mail

message. As noted previously, this e-mail message represents the only statement from Mr. Maurer concerning the hot start incident, was prepared after the dispute arose, and is unsworn. Mr. Maurer stated that “[t]he increase was at a rate that I have never seen before (even in the simulator) approximately 400 degree C/sec.” Respondent presents no other evidence to support its contention that the EGT increased at a rate of 400°C per second.

The experts for both parties disagreed with Mr. Maurer’s statement and opined that the EGT could not increase at 400°C per second. One Government expert witness testified that “an actual 400-degree-a-second rise is not possible.” Transcript at 357. The witness stated that it would take an EGT between four to six seconds to go from 400° to 800°C. Transcript at 357. Another Government expert witness confirmed that it is unlikely that the EGT would increase 400°C per second:

[I]t’s a very rare event, but [Bordelon] says he saw it Simply because perhaps the exhaust gas temperature in the engine couldn’t physically generate that much heat doesn’t indicate that he didn’t see that on the gauge.

Transcript at 291. James David Lynch, Jr., the expert witness for appellant, agreed that the pilots had a duty to monitor the EGT throughout the start sequence, because “the engine could get hot anytime from introducing fuel and engine stabilization. That’s the reason why the manufacturer has stated in its checklist you will maintain your hand on that fuel control lever the entire period of time until the engine reaches stabilization.” Transcript at 152.

We find that the preponderance of the evidence supports appellant’s contention that the pilots breached their duty of care by failing to anticipate and stop the hot start. The pilots knew that they were required to shut down the engine before it could exceed 475°C, the temperature beyond which extensive damage to the engine occurs. If the pilots had been monitoring the EGT as required, the pilots should have observed the rapid increase in the EGT temperature. In addition, whether or not Mr. Maurer observed the EGT increase, there is no evidence that Mr. Maurer tried to warn Mr. Bordelon about the impending hot start, nor did he take action to shut down the engine himself, as he was required to do. Evidence also suggests that the pilots misread the fuel flow on starting and may have failed to anticipate and interrupt the hot start which may have been evident from the beginning. We conclude that the pilots failed to take the actions necessary to prevent the engine from reaching an “over-temp” condition, resulting in damage to the engine.

Damages

In *Western Aviation Maintenance, Inc. v. General Services Administration*, GSBCA 14165, 00-2 BCA ¶ 31,123, the board stated:

In order to recover for a breach of contract, the non-breaching party must establish that its damages were caused by the breach. The principle of legal causation employed in contract cases is foreseeability, much the same as proximate cause is the principle used in most tort cases. Breach damages are recoverable only if, at the time the contract was made, the breaching party had reason to foresee that such damages were the probable result of the breach. Damages are foreseeable either if they are the natural and ordinary consequence of a breach, or, if they are due to special circumstances of which the breaching party was aware at the time of contracting.

Id. at 153,740; *see also Data Enterprises of the Northwest v. General Services Administration*, GSBCA 15607, 04-1 BCA ¶ 32,539, at 160,962. With regard to quantum, the general rule is that for breach of contract damages, the non-breaching party is entitled to be restored to an economic position in which it would have been had the breach of contract not occurred. In order for the Board to make an award of damages, appellant must present sufficient evidence to permit us to make a “fair and reasonable approximation” of the amount of damages. *Western Aviation*, 00-2 BCA at 153,740.

Here, the contractor presented extensive evidence showing that the damages claimed resulted from the hot start and that the actual costs claimed were reasonable. Appellant presented evidence to show that it paid \$26,451.61 to rent a substitute engine for installation on N822US, \$13,730.16 to transport the substitute engine to Honduras, \$13,182 to transport the damaged engine back to the United States, \$7056 for the cost of the crew to change the engines on the ground in Honduras, \$8071.42 for a crew for ferry the N822US back to its home base, and \$2172.60 for fuel. In addition, during the period of time that the N822US was on the ground in Honduras, CSI provided a substitute aircraft to JPATS at the cost of \$124,200. Insurance for the substitute aircraft cost CSI \$32,880. The total amount of these damages adds up to \$227,743.79.

The Government did not dispute that appellant incurred costs of \$227,743.79. Respondent’s Posthearing Brief at 29. However, the Government disagrees that appellant has met its burden to prove entitlement to the remaining claim of \$600,000 for the damage to the engine. *Id.* In response to appellant’s claim, the Government asserts that appellant did not prove that the engine suffered \$600,000 in damage because appellant incurred no actual “costs” in repairing the engine. *Id.*

Appellant does not contend that it would cost \$600,000 to repair the engine. Appellant established through expert testimony that the boroscope examination performed in June 2004 revealed extensive damage to the engine. Based upon that condition, the expert opined that the entire turbine section would have to be disassembled. Transcript at 382.

Appellant presented evidence that it would cost approximately \$749,450 to repair the engine. This estimate did not include the other costs that would be incurred during the time it would take to repair the engine, including the lease of the substitute engine. Experts retained by both parties testified that the cost of replacing the engine would exceed \$1 million. *Id.* at 108, 377. Rather than repair or replace the engine, the contractor negotiated a fixed price to replace the engine of \$600,000, which it paid to Jetran on August 6, 2004.

We conclude that based upon the evidence presented, the contractor exercised its good business judgment when it decided to enter into a settlement for a fixed amount rather than incur expenses that would almost certainly exceed the settlement amount. *See, e.g., Stanley Aviation Corp.*, ASBCA 12292, 68-2 BCA ¶ 7081. The final settlement amount fell below the potential costs that would have been incurred had the contractor elected to have the engine repaired or replaced. The Government failed to rebut the contractor's evidence showing that its settlement for a fixed amount was reasonable in light of the fact that the future costs would almost certainly exceed the settlement amount. Accordingly, we find that appellant has established its entitlement to damages in the amount of \$827,743.79.

Decision

The appeal is **GRANTED**.

JERI KAYLENE SOMERS
Board Judge

We concur:

JAMES L. STERN
Board Judge

EILEEN P. FENNESSY
Board Judge