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U.S. GENERAL SERVICES ADMINISTRATION
Office of General Counsel

April 24, 2000

Martha H. DeGraff
Board Judge
Board of Contract Appeals
General Services Administration
1800 F. Street, NW
Washington, DC 20405

Subject: Western Aviation Maintenance, Inc. v. General Services Administration, GSBCA No. 14165

Dear Judge DeGraff:

Pursuant to the Board's Order, this is the **GENERAL SERVICES ADMINISTRATION'S POSTHEARING BRIEF**.

Sincerely,

Michael J. Noble
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BOARD OF CONTRACT APPEALS
GENERAL SERVICES ADMINISTRATION
WASHINGTON, DC

WESTERN AVIATION MAINTENANCE, INC. Appellant, v. GENERAL SERVICES ADMINISTRATION, Respondent.	)	GSBCA No. 14165

GENERAL SERVICES ADMINISTRATION'S POSTHEARING BRIEF

Respondent, the General Services Administration (GSA or agency) opposes Appellant, Western Aviation Maintenance, Inc.'s (Western Aviation) April 22, 1997 appeal of the contracting officer's January 8, 1997 decision canceling a purported sale of five C-123 Fairchild aircraft. Western Aviation is not entitled to recovery for the following reasons: 1) the Department of Defense (DoD) had not identified C-123 aircraft as being commercially saleable at the time of contract formation, therefore the sale was unauthorized; 2) the C-123s evidenced the existence of hazardous chemical contamination and under applicable regulations, the aircraft could not be sold until they were decontaminated; 3) the damages claimed by Western Aviation were damages actually incurred by Marsh Aviation Co. (Marsh Aviation), a contractor not in privity with GSA; 4) the U.S. Air Force had a bona fide need for the aircraft, protection of the public from exposure to hazardous dioxin; and 5) the damages

claimed by Western Aviation are consequential damages not foreseeable at the time of contract formation. Accordingly, GSA respectfully requests that Western Aviation's appeal be denied.

PROPOSED FINDINGS OF FACT

1. On or about December 23, 1995, the U.S. Department of State (State Dept.) declared 12 Fairchild C-123 aircraft excess, having identified them as surplus personal property. Among the aircraft declared excess were five C-123s (Serial Numbers (SN) 54-0635; 54-0628; 54-0711; 55-4517; and 54-0607) which would subsequently be sold to Western Aviation. Appeal File, Exh. 24.

2. Most of the aircraft declared excess by the State Dept., including those which would be purportedly sold to Western Aviation, were owned by the U.S. Air Force. Appeal File, Exhs. 25, 42. Those aircraft owned by the U.S. Air Force had been used by the State Dept. as parts donors. Appeal File, Exh. 42.

3. Under DoD's demilitarization procedures, C-123 aircraft were not commercially saleable. Appeal File, Exhs. 26, 35; Hearing Transcript (Tr.) at 69-70. Unless identified in DoD 4160.21-M, Defense Reutilization and Marketing Manual, aircraft not commercially saleable had to be destroyed and could only be sold as scrap. Appeal File, Exh. 36. When contacted by GSA, the Defense Logistics Agency did state that C-123 aircraft would be listed as commercially saleable in the next revision of DoD 4160.21-M. Tr. at 14, 87-88; Appeal File, Exh. 20. However, that did not occur until August of 1997. Appeal File, Exh. 136.

4. Nonetheless, on February 26, 1996, the U.S. Air Force

mistakenly transferred to GSA for resale, the C-123 aircraft previously declared excess by the State Dept. Appeal File, Exh. 25.

5. In accordance with Invitation for Bids No. 91FBOS-96-023 (the solicitation), GSA offered for sale eleven scrap and salvage aircraft, ten of which were Fairchild C-123 aircraft. Appeal File, Exh. 1 at 8, 11.

6. The Federal Property Management Regulations (FPMR) define scrap as "personal property that has no value except for its basic material content." 41 C.F.R. § 101-43.001-30. The FPMR defines salvage as "personal property having value greater than its basic material content but which is in such condition that it has no reasonable prospect of use for any purpose as a unit ... and its repair or rehabilitation for use as a unit is clearly impracticable." 41 C.F.R. § 101-43.001-28; see also Tr. at 230.

7. The aircraft offered for sale were described as follows:

> All aircraft offered on this sales solicitation have been cannibalized to varying degrees and stripped of avionics, engines, blades, and instrumentation as (sic) a minimum. These airframes have been exposed to the elements and have sustained varying degrees of corrosion. The airframes may contain quantities of serviceable or repairable parts.

Appeal File, Exh. 1 at 9.

8. The solicitation incorporated the terms and conditions of Standard Form (SF) 114C ("Sale of Government Property General Terms and Conditions") and the sealed bid conditions of SF 114C-1. Appeal File, Exh. 1 at 3, 11.

9. Under ¶ 7 of SF 114C, title to property sold would "vest

in the Purchaser as and when removal is effected." Appeal File, Exh. 2 at 1.

10. Under ¶ 14 of SF 114C ("Risk of Loss"), the government would be:

> responsible for the care and protection of the property subsequent to it being available for inspection and prior to its removal. Any loss, damage, or destruction occurring during such period will be adjusted by the Contracting Officer to the extent it was not caused directly or indirectly by the Purchaser, its agents, or employees. At the discretion of the Contracting Officer, the adjustment may consist of recision.

Appeal File, Exh. 2 at 2.

11. Under ¶ 15 of SF 114C ("Limitation of Government's Liability"),

> Except for reasonable packing, loading, and transportation costs ... the measure of the Government's liability in any case where liability of the Government to the Purchaser has been established shall not exceed refund of such portion of the purchase price as the Government may have received.

Id.

12. Finally, under ¶ 22 ("Withdrawal of Property After Award"), the government reserved,

> the right to withdraw for its use any or all of the property covered by this contract, if a bona fide requirement for the property develops or exists prior to actual removal of the property from government control. In the event of a withdrawal under this recision, the Government shall be liable only for the refund of the contract price of the withdrawn property or such portion of the contract price as it may have received.

Id. at 3.

13. The bona fide need requirement was consistent with regulatory guidance provided by the FPMR. There, it stated,

> Any need for personal property expressed by any Federal agency shall be paramount to any disposal, if such need is

made known to the holding or selling agency prior to actual removal of the property from Government control in the case of sale.

41 C.F.R. § 101-45.102.

14. On February 26, 1996, Western Aviation submitted bids on all ten C-123 aircraft. Appeal File, Exh. 4.

15. On March 7, 1996, GSA purportedly awarded Western Aviation the following contracts for five of the ten aircraft:

GS09F96FBE2005 (Serial Number 54-0635)
GS09F96FBE2008 (Serial Number 54-0628)
GS09F96FBE2010 (Serial Number 54-0711)
GS09F96FBE2012 (Serial Number 55-4517)
GS09F96FBE2013 (Serial Number 54-0607)

Tr. at 12; Appeal File, Exh. 8.

16. Contemporaneous with the sale of the preceding five aircraft, National Aircraft purportedly was awarded contracts for five other C-123 aircraft. Appeal File, Exhs. 10, 38.

17. According to Western Aviation's President, Floyd Stilwell, Western Aviation is a corporation that owns and operates aircraft to provide fire-fighting capability. Tr. at 110, 114, 158-159. Marsh Aviation is a separate corporation also owned by Mr. Stilwell which builds, overhauls, designs and retrofits aircraft. Id. With respect to the contracts at issue, Mr. Stilwell claimed that Marsh Aviation acted as a contractor for Western Aviation. Tr. at 115, 158-159. However, Western Aviation introduced no documents indicative of a legal contractual relationship.

18. There were three individuals from GSA involved in the aircraft's sale to Western Aviation, Doug Boylan, Peggy Lowndes,

and Shirley Beene. Tr. at 8, 87, 91, 98-99, 239-240, 248.

19. Mr. Boylan was the contracting officer for the solicitations and made the purported awards to Western Aviation. Appeal File, Exh. 5; Tr. at 5, 8. At the time of the purported awards, Mr. Boylan had no knowledge of Floyd Stilwell, nor did he have any knowledge of Western Aviation's line of business. Tr. at 24, 30-31, 162-163, 246.

20. Ms. Beene was the property custodian for the aircraft and the individual whom Western Aviation contacted to inspect the aircraft. Tr. at 98-99, 239-240. At the time of the purported awards, Ms. Beene had no knowledge of Western Aviation, its line of business or any connection between the firm and Mr. Stilwell. Tr. at 98, 163-164, 240-241. Ms. Beene was aware that Marsh Aviation refurbished aircraft, but not in connection with any fire-fighting business. Id.

21. Ms. Lowndes was the Director of GSA Region 9's Property Management Division and Mr. Boylan's second-line supervisor. Tr. at 87-88. At the time of the purported awards, Ms. Lowndes had no knowledge regarding Western Aviation's line of business. Tr. at 163-164, 230-231. Ms. Lowndes did have prior contact with Mr. Stilwell. Based on that contact, she was aware that Mr. Stilwell had provided equipment and/or services to be used in fire suppression. Tr. at 90-91.

22. Mr. Stilwell confirmed that all knowledge of Western Aviation's business lines with respect to Mr. Boylan, Ms. Beene, and Ms. Lowndes occurred after the contracts were awarded. Tr.

at 164.

23. In April of 1996, the U.S. Air Force's Aerospace Maintenance and Regeneration Center (AMARC), Davis-Monthan Air Force Base (AFB), was notified of the C-123 sale. Appeal File, Exh. 9; Tr. at 34.

24. AMARC subsequently began its demilitarization of the C-123 aircraft. Tr. 34, 39. Demilitarization involved the removal of any items that were classified or had military value. It also involved checking for radioactivity and the removal of any items that might be hazardous to the public. Tr. at 35.

25. During the initial phase of demilitarization, AMARC personnel noticed that two of the C-123 aircraft (Serial numbers 54-0585 and 55-4571) contained chemical odors. AMARC personnel also experienced a burning sensation on their hands and arms when conducting their demilitarization efforts. Based on a preliminary investigation conducted by AMARC's safety office and the Davis-Monthan AFB's bioenvironmental office, it was determined that the aircraft might be contaminated with hazardous chemicals. Tr. at 37-38, 65, 210-211; Appeal File, Exh. 9.

26. Additional evidence of the potential risk of chemical contamination existed by virtue of the fact that all but two of the C-123 aircraft had some form of spray apparatus attached, including tanks, pump apparatus and/or pipelines leading to the wings. Tr. at 36-37, 213; Appeal File, Exh. 10. These spray systems had previously been used to spray a variety of insecticides and defoliants including Agent Orange. Appeal File,

Exh. 32.

27. AMARC was justifiably concerned about the fact that C-123 aircraft might be contaminated with hazardous dioxins. In 1994, a C-123 aircraft had been designated for display at Wright-Patterson AFB. During the restoration process and after concerns were raised by museum staff because of its reported useage in defoliation efforts in Southeast Asia (including use of Agent Orange), the aircraft was tested for chemical contamination. Swipe samples taken showed that all samples tested positive for dioxin. Appeal File, Exh. 27; Tr. at 188-189.

28. According to the accompanying report, prepared by Air Force Toxicologist Dr. Ronald C. Porter, PhD, exposure to dioxins could have the following harmful effects:

> humans can exhibit chloracne from short-term espoused to high concentrations of PCDDs. Other, less established effects in humans include: altered heme synthesis, changes in liver function tests, peripheral neuropathy and changes in serum lipid concentrations. Cancer study results are inconsistent, with some showing an increase in soft tissue sarcoma and no increase in others.

Appeal File, Exh. 27; see also Tr. at 78, 190-192.

29. Among Dr. Porter's recommendations, were that during restoration, protective equipment (i.e., the wearing of Tyvek coveralls and full-face air filters) should be used by restorative personnel; contaminated ambient air should be contained by painting the insides of the aircraft; and tourists should be limited to the outside of the aircraft. Id.

30. In an April 17, 1996 memorandum, AMARC personnel were specifically instructed to wear rubber gloves, a face shield, at

least a half face respirator, and Tyvek coveralls when conducting demilitarization of the C-123s. Appeal File, Exh. 29.

31. AMARC initially determined that two of the five aircraft could be released for delivery. According to GSA's Property Custodian, Shirley Beene, the purported release occurred within a couple of months of contract award. Tr. at 128, 241. However, Western Aviation declined to accept partial delivery, informing GSA that Western Aviation wanted all five of the aircraft. Tr. at 129, 242-244. At no time did Western Aviation represent to GSA that it would take a partial delivery of two aircraft. Tr. at 166-167.

32. Ultimately, the Air Force elected to take a conservative approach with respect to the released C-123s. According to the Wright-Patterson AFB's Security Assistance Center, unless records research affirmatively established that the aircraft had not performed a spraying mission in Southeast Asia, the aircraft was assumed to be contaminated. Appeal File, Exh. 51.

33. On May 20, 1996, the Davis-Monthan AFB's bioenvironmental office took five swipe samples from C-123 aircraft for testing. Tr. at 41; Appeal File, Exh. 31 at 2, 15-16. On July 3, 1996, a purchase order was issued by AMARC allowing Alta Analytical Laboratory, Inc. (Alta) to evaluate two of the five samples for tetra to octa chlorinated dioxins. Appeal File, Exh. 31 at 17. The samples were received by Alta on August 16, 1996 and when tested, turned up positive for dioxin. Tr. at 42-43, 194; Appeal File, Exh. 31 at 2.

34. On June 6, 1996, AMARC notified GSA that pending complete testing for chemical contamination, AMARC could not release any of the C-123 aircraft for delivery, including the aircraft sold to Western Aviation. GSA was informed that each aircraft would require 10 test samples at a cost of $3,750.00 per test sample for tests taking 72 hours and $1,250.00 per test sample for tests taking 21 days. Appeal File, Exh. 9. AMARC's Executive Director obtained these figures from the bioenvironmental office at Davis-Monthan AFB. Tr. at 211.

35. AMARC's caution in not releasing the aircraft had support in regulatory guidance. Relevant provisions included the following:

a) "Hazardous wastes shall not be reported to GSA for disposal, and shall be disposed of by the holding agency or the reporting activity only under the Environmental Protection Agency (EPA) and State and local regulations." (41 C.F.R. § 101-42.204(c)).

b) The FPMR defines hazardous material to include material which in "the course of normal operations produce fibers dusts, gases, fumes, vapors, mists, or smoke which have one or more of the following characteristics ... causes occupational chemical dermatitis, which is any abnormality of the skin induced or aggravated by the work environment ...." (41 C.F.R. § 101-42-001).

c) "Unless authorized by the appropriate GSA regional office, a holding agency shall not sell extremely hazardous property unless the property is rendered innocuous or adequate safeguards are provided." (41 C.F.R. § 101-42.403(e)).

d) The FPMR defines extremely hazardous material as "materials which are hazardous to the extent they require special handling such as licensing and training of handlers, protective clothing, and special containers and storage." (41 C.F.R. § 101-42-001).

e) "Dangerous material shall not be disposed of pursuant to this part 101-45 without first being demilitarized or

> decontaminated when a duly authorized official of the executive agency concerned determines this action to be in the interest of public health, safety, or security." (41 C.F.R. § 101-45.309-3(a)).

36. GSA's Property Management Division director, Peggy Lowndes, in turn, contacted Western Aviation's President to inform him that because of the possibility of dioxin contamination, AMARC was not yet willing to release the C-123 aircraft. Because of the delay in delivery, Ms. Lowndes asked Mr. Stilwell whether he wanted to cancel the sale and have Western Aviation's cash deposit returned. Mr. Stilwell responded that he was willing to wait while AMARC determined if the aircraft could be released. Tr. at 92, 146. Ms. Lowndes testified that she made the same offer at least one more time to Mr. Stilwell prior to the contracts' cancellation. Tr. at 93.

37. On June 20, 1997, the Air Force Material Command (AFMC) at Wright-Patterson AFB issued an e-mail for the benefit of the Assistant Staff Judge Advocate, Directorate of Environmental Law. Appeal File, Exh. 28. There, it was noted that dioxins are produced inadvertently during the manufacture of herbicides and germicides. The e-mail also relied on scientific source material (Toxicologist Profile for Dioxin June 1989, Agency for Toxic Substances and Disease Registry, and United States Public Health Service) to articulate the health risks posed by dioxin contamination, including the following:

a) dioxin causes chloracne, disfiguring skin lesions that often persist for years;

b) suggestive evidence that dioxin causes liver damage;

c) suggestive evidence that dioxin causes loss of appetite, weight loss, and digestive disorders;

d) dioxin produces toxicity to the immune system and a greater susceptibility to infection;

e) dioxin creates adverse reproductive effects including spontaneous abortions;

f) dioxin can result in malformations in offspring;

g) dioxin is probably a carcinogen to humans.

Appeal File, Exh. 28.

38. On August 16, 1996, an additional report was issued regarding the toxicity of the C-123 aircraft. In an Industrial Hygiene Survey, testing for the presence of 2, 4 - Dichlorophenoxy Acetic Acid and 2, 4, 5 - Tricholorophenoxy Acetic Acid, DO Consulting LTD examined 17 C-123 aircraft. Appeal File, Exhs. 30, 46. These chemicals are commonly referred to as Agent Orange. Tr. at 76-77, 196; Appeal File, Exh. 46. Dioxins are invariably present in Agent Orange. Tr. at 81, 198. The conclusion was that 24 samples taken tested positive for Agent Orange. Twelve samples produced readings below the level of detection.[1] Appeal File, Exh. 30; Tr. at 81-82, 198.

39. The swipe samples were taken from areas in the aircraft that were most likely to be contaminated by Agent Orange. Tr. at 51-52, 194, 197.

40. After reviewing this scientific study, Air Force toxicologist Dr. Ron Porter issued a series of recommendations in

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[1]Because there is no standard for minimum level of contamination, it is impossible to ascertain whether these samples evidenced dioxin contamination. Tr. at 190-191.

draft and in final version. His recommendations were: a) fully evaluate the level of dioxin contamination taking a minimum of 10 samples per aircraft; b) for aircraft having detectible levels of dioxin, proceed with full decontamination of the aircraft prior to any transfer; and c) coordinate with the Judge Advocate General's Office regarding any legal liabilities. Appeal File, Exhs. 46-47; Tr. at 199-200.

41. Dr. Porter also observed that the total cost of testing would be $15,000 per aircraft, excluding labor and contract costs. Clean-up would require wiping down the entire inside of the plane with hexane and then disposing of the rags and waste at a certifiable hazardous waste facility. Dr. Porter suggested that an alternative might be to bond the contamination to the interiors of the planes via painting. Appeal File, Exh. 41; Tr. at 192, 200-201. However, even after clean-up, a new round of testing would be needed to evaluate the efficacy of the clean-up. Tr. at 208.

42. During the hearing, AMARC's Executive Director testified that AMARC did not have the funding to sample aircraft at the level recommended by Dr. Porter. Tr. at 66.

43. On October 11, 1996, AMARC requested assistance from AFMC at Wright-Patterson AFB, vis-a-vis whether the C-123 aircraft could be released as sold or had to be decontaminated and/or destroyed. AMARC Executive Director Schoneman observed that although dioxins had been identified as carcinogens, there were no threshold limits, no standard decontamination procedures,

and no standard disposal methods. Appeal File, Exh. 32; Tr. at 58.

44. Indeed, various commands in the Air Force were given an opportunity to comment on the proposed release of C-123s to the general public. All were in agreement on one or more of the following points: a) release of the C-123s would carry with it the risk of dioxin contamination to the general public; b) the cost of decontamination was prohibitive; and c) the aircraft were not eligible for sale to the public. Appeal File, Exhs. 33-43; Tr. at 212, 216-217.

45. Examples of the U.S. Air Force's reservations included the following:

a) In an October 30, 1996 memorandum, the Assistant Staff Judge Advocate, Directorate of Environmental Law, opined that it was the Judge Advocate's position "that these aircraft should not be sold to the public if there is any dioxin contamination at an unsafe level, whatever that may be. Our potential liability is just too great, particularly when so few facts are known." (Appeal File, Exh. 33).

b) Headquarters AFMC opined that C-123 aircraft were not commercially salable aircraft. Demilitarization would be required before the scrapped aircraft could be allowed to leave Davis-Monthan AFB. (Appeal File, Exh. 34).

c) In a December 5, 1996 response to a November 15, 1996 AFMC request for information, the Executive Director of AMARC observed that the release of the C-123s to GSA did not correspond to applicable DoD guidance, knowledgeable military personnel had not been in the loop regarding the C-123s release to GSA, and that aircraft records showed that at least 11 of 18 aircraft had operated in Southeast Asia. (Appeal File, Exhs. 35, 39).

d) On December 30, 1996, AFMC's Bioenvironmental Engineering Services Division, Office of the Command Surgeon noted that the "Air Force cannot guarantee the aircraft are free of contamination nor can we verify that any decontamination procedure has been successful (limited by

analytical detection limits)." Proposed alternatives were either to have the aircraft cut up and disposed of (demilitarization) or have them stored at Davis-Monthan AFB. (Appeal File, Exh. 40 at 1).

46. Consideration was also given to offering Western Aviation the opportunity of entering into a hold harmless agreement. Concerns that such a disclaimer would not be effective in relieving the Air Force of liability caused AMARC to reject such an approach. Tr. at 213-214; Appeal File, Exh. 32.

47. On December 18, 1996, the AFMC's Law Office requested that GSA cancel the sale of the five C-123s to Western Aviation. The primary articulated reason was concern that release of dioxin contaminated aircraft would pose a health hazard to the American public. The Law Office observed that all the aircraft sold to Western Aviation contained spray apparatus indicating they may have been used to spray herbicides. A second articulated reason was the prohibitive costs necessary for comprehensive testing. Appeal File, Exh. 10. A third articulated reason was that the DoD's disposition manual did not list C-123s as eligible for sale to the public. Appeal File, Exh. 10

48. On January 8, 1997, GSA notified Western Aviation that it was canceling the sale of the five aircraft. Exh. 13. As the contracting officer testified, since the Air Force refused to release the aircraft, GSA had nothing to deliver. Tr. at 245-247.

49. In accordance with the terms and conditions of the contracts, Western Aviation's cash deposits were returned. Appeal File, Exhs. 22, 114 (Western Aviation's Response to GSA's

Request for Admission #14).

50. The aircraft were subsequently relocated within a fenced-in area at Davis-Monthan AFB and sealed to prevent further risk of exposure to dioxins. Tr. at 217-218; Appeal File, Exhs. 50-51.

51. On April 22, 1997, Western Aviation appealed the contracting officer's decision to cancel the purported contracts, alleging that the cancellation amount to a breach of the contracts. Appeal File, Exh. 23.

52. During the period leading up to the contracting officer's decision to cancel, there were other C-123 aircraft available for sale. According to Mr. Stilwell, there was one C-123 for sale in Tucson, one in Los Angeles, and two to three in Alaska. Tr. at 170. Mr. Stilwell, in fact, acquired a C-123 as a prototype. Id. Indeed, there were C-123s in foreign countries that were potentially for sale. Tr. at 149; Appeal File, Exhs. 95, 102 at 10.

53. In Appellant's Response to Respondent's Interrogatories, Western Aviation identified the type of expenses incurred as a consequence of GSA's purported breach. These included:

a) Multiple trips to Davis-Monthan AFB to inspect and evaluate the C-123s for their removal, interim storage, and preparation for flight to Mesa, AZ.

b) Purchase and storage of a tow bar necessary for removal of the aircraft.

c) Purchase of an aircraft tug to move the C-123s.

d) Costs associated with removal of the C-123s and aircraft inspections.

e) Costs incurred in marketing and selling the surplus engines and propellers to other entities.

f) Costs associated with acquiring a prototype C-123 aircraft.

g) Study of the feasibility of upgrading the C-123 engines with an Allison turbo prop engine.

h) Research and travel costs to acquire C-130 engines and equipment to upgrade the C-123 engine.

i) Design and develop a fire retardant tank for the C-123.

j) Costs incurred in studies, drawings, and structural evaluations of the aircraft and an FAA certification plan.

k) Costs incurred in developing a marketing program and in calling on potential customers to facilitate the sale and/or leasing of the upgraded C-123s.

Appeal File, Exh. 114 at 1-2.

54. In a separate discovery response to GSA, Western listed its expenses for the period 2/5/96 to 3/8/87 to include the following:

a) labor supplied by Marsh Aviation employees	$179,600.00
b) Mileage	$705.00
c) Parts supplied by Marsh Aviation	$28,468.63
d) Services by Floyd Stilwell	$100,000.00
e) Services/travel by Tim Austin	$136,000.00
f) Deferred Legal by Bob Gibson	$20,000.00
g) Services by Bill Walker	$60,000.00
h) Services by Ghislain Boivan	$2,400.00
TOTAL CLAIM	$526,468.00

Appeal File, Exh. 123 at 7-8, 11.

55. At hearing, Mr. Stilwell testified that the parts,

mileage and labor supplied by Marsh Aviation, were for the conversion of the C-123 into an aircraft which could spray fire retardant. They were utilized for the development of a tank to hold fire retardant chemicals and a door system to allow for the release of the chemicals. Tr. at 123-126, 133-134, 138; see also Exh. 123 at 5-6. Western Aviation's records show that all parts and materials were billed to Marsh Aviation. Appeal File, Exhs. 116, 134; Tr at 167-170. With respect to labor, Western Aviation's records show that they were Marsh Aviation employees. Tr. at 150-152, 169; Appeal File, Exhs. 123 at 7-15, 133. According to Mr. Stilwell, their labor was not billed to Western Aviation but to Marsh Aviation. Tr. at 169.

56. As noted above, Western Aviation claims it is entitled to recover for a tow truck, acquired to move the aircraft. Western Aviation's records show that the tow truck was acquired by Marsh Aviation at a cost of $1600.00. Appeal File, Exh. 131.

57. As noted above, Western Aviation claims it is entitled to recover for a tow bar, acquired to move the aircraft. Western Aviation's records show that the tow bar was acquired by Marsh Aviation at a cost of $310.00. Appeal File, Exh. 130.

58. As noted above, Western Aviation claims it is entitled to recover for costs connected with the intended sale of the C-123s' excess component parts, i.e. the engines and the propellers. Mr. Stilwell testified that although the planes were owned by Western Aviation, the intended sale was to be made by Marsh Aviation. Tr. at 172-174.

59. As noted above, Western Aviation claims that it is entitled to recover for the services provided by Tim Austin. Mr. Stilwell testified that Mr. Austin's role was to develop a marketing plan for the refurbished C-123s for sale and/or lease as well as a plan to obtain investors. Tr. at 131, 160. Western Aviation's records show that Mr. Austin was developing this plan on behalf of Marsh Aviation. Appeal File, Exhs. 92 at 4-30, 99, 110; Tr. at 160.

60. As noted above, Western Aviation claims that it is entitled to recover for the services provided by Bill Walker. Mr. Walker was a test pilot who devoted his time to FAA certification requirements and aircraft performance. Appeal File, Exh. 122 at 6. Since these expenses were necessary for the retrofitting and use of the C-123, they would have been born by Marsh Aviation. Tr. at 158. Going further, while Mr. Walker was on the Board of Directors of Marsh Aviation, he was not on the Board of Directors of Western Aviation. Tr. at 178.

61. As noted above, Western Aviation claims that it is entitled to recover for the services provided by Ghislain Boivan. According to Western Aviation's records as well as Western Aviation's responses to GSA's discovery, these services were marketing efforts for the C-123 to assist Marsh Aviation. Appeal File, Exhs. 97-98, 109 at 10-11; 122 at 3.

62. As noted above, Western Aviation claims deferred legal expenses vis-a-vis Bob Gibson. According to Western Aviation's records as well as Western Aviation's responses to GSA discovery,

these were costs incurred by Marsh Aviation regarding the acquisition of financing. Appeal File, Exhs. 97, 105-106.

63. As noted above, Western Aviation claims expenses for Floyd Stilwell, acting as President of Western Aviation. According to Western Aviation's responses to GSA discovery, Mr. Stilwell's time was primarily spent: a) developing an engine to be used in the converted C-123; b) locating engines, propellers, and nacelles; c) obtaining financing for the retrofitting of the aircraft and for FAA certification; and d) developing a comprehensive marketing plan. Appeal File, Exh. 122 at 6. Yet, all correspondence in the evidentiary record regarding these functions present Mr. Stilwell as representing Marsh Aviation, not Western Aviation. Appeal File, Exhs. 95-101, 104, 109-111.

64. During the hearing, Mr. Stilwell claimed that the expenses sought were obligations incurred by Western Aviation. Tr. at 159, 179. According to Mr. Stilwell, Marsh Aviation acted either as Western Aviation's contractor or as Western Aviation's sales agent. Tr. at 115, 174. As Mr. Stilwell also testified, there was never a written contract for Western Aviation to reimburse Marsh Aviation for the services or goods Marsh Aviation provided. Tr. at 159. Indeed, the only evidence of a contractual relationship was Mr. Stilwell's testimony at hearing that such a legal relationship existed. Tr. at 159-160.

DISCUSSION

Having identified those facts which lead inescapably to a denial of Western Appeal, GSA turns to the legal analysis which

support such a finding.

I. BECAUSE THE CONTRACTING OFFICER DID NOT HAVE AUTHORITY TO CONVEY THE CONTAMINATED C-123s TO WESTERN AVIATION, THE BOARD HAS NO JURISDICTION OVER THE SUBJECT APPEAL.

Pursuant to the Contract Disputes Act of 1978, the Board has jurisdiction to provide relief regarding issues relating to contracts. 41 U.S.C. §§ 602(a), 607(d) (1982). Nonetheless, a government official must be acting within the scope of his/her authority for the government to be contractually bound. Thanet Corp. v. United States, 591 F.2d 629, 635 (Ct.Cl. 1979). Absent the requisite authority, the government is not bound regardless of the actions of the official purportedly making the commitment. Mil-Spec Contractors, Inc. v. United States, 835 F.2d 865, 867 (Fed. Cir. 1987); State Street Management Corp. v. General Services Administration, GSBCA No. 12374, 94-1 BCA ¶ 26,500, at 118,951. In this regard, the contractor bears the burden of accurately ascertaining the scope of the official's authority. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 384 (1947); Prestex, Inc. v. United States, 3 Cl.Ct. 373, 377 (1983).

In the instant appeal, the contracting officer did not have authority to enter into the sales contract with Western Aviation for the sale of the C-123s. As such, no contract was created that required GSA to convey the aircraft.

a) DoD regulations applicable at the time of award did not authorize the sale for commercial use of the C-123.

The first bar is that C-123s were not eligible for commercial sale to the general public. DoD 4160.21-M, the Defense Reutilization Manual, listed those military aircraft

which could be sold to the general public for commercial use. Appeal File, Exh. 26. The list was revised as of May 22, 1995, was directive in nature, and effective for one year. Id. As of March 7, 1996, the date of the contract awards, the C-123 Fairchild was not on the list of planes which could be sold for commercial use. Appeal File, Exhs. 8, 26.

At hearing, the Executive Director of AMARC, the organization responsible for demilitarizing the aircraft for release to Western Aviation, testified that if a brand of aircraft was not listed in the Defense Utilization Manual, it could not be released for commercial sale. Tr. at 69-70. According to the Executive Director, the C-123s were mistakenly declared excess because the transfer process did not follow normal channels and thus, those individuals knowledgeable about the sales restriction on C-123s were not in the loop. Appeal File, Exh. 39.

Once alerted to the regulatory restriction, the Air Force's position, as reflected by the Air Force Materials Command at Wright-Patterson AFB, was that the purported sale to Western Aviation could not be consummated. Tr. at 70-71; Appeal File, Exhs. 35-36, 41. The C-123 aircraft had to be destroyed and could only legally be sold to a private concern as scrap. Tr. at 73-74; Appeal File, Exh. 36. AFMC's Command Law Office relied in part on this restriction when it requested that GSA cancel the sales to Western Aviation. Appeal File, Exh. 10. However, because the contracting officer did not have authority to sell

the aircraft in the first place, there was no need to cancel the sales, no contracts had, in fact, been created.

Western Aviation will no doubt point to conversation between the Defense Logistics Agency and GSA official Peggy Lowndes that DoD intended to revise the list of aircraft eligible for commercial use to include the Fairchild C-123 aircraft. Tr. at 14, 87-88. However, the revision did not occur until August 1997 at which point Western Aviation's contracts had been cancelled. Appeal File, Exh. 136. Until the revision took place, though, GSA's contracting officer could not enter into a binding contract with any private party to sell C-123s.

b) The FPMR precluded the sale of aircraft contaminated with dioxin.

A second regulatory bar to the sale of the C-123s existed because of the discovery that the aircraft might be contaminated by dioxin. 41 C.F.R. § 101-45.309-3(a), applicable to the demilitarization process, precluded disposal of dangerous materials without their first being decontaminated. 41 C.F.R. § 101-42.204(c) precluded holding agencies (i.e., the State Department or the U.S. Air Force), from conveying to GSA hazardous wastes for disposal. Finally, 41 C.F.R. 101-43.403(e) precluded a holding agency from selling extremely hazardous property unless the property was rendered innocuous. Thus, DoD could not legally release, and GSA could not legally sell, aircraft contaminated with hazardous and/or dangerous materials.

There is no question, that dioxin contaminated aircraft constituted extremely hazardous and/or dangerous personal

property.

The FPMR defines hazardous material to include material which produces gases or fumes which cause an abnormality of the skin to occur. 41 C.F.R. § 101-42-001. Dioxin has been found to cause chloracne as well as soft tissue sarcoma. Appeal File, Exhs. 27-28. When Davis-Monthan employees began demilitarizing the excess C-123s, they experienced a burning sensation on their hands and arms. Tr. at 37-38, 65; Appeal File, Exh. 9.

The FPMR defines extremely hazardous material as materials which are so hazardous that they require special handling such as protective clothing. 41 C.F.R. § 101-42-001. After, AMARC was notified of the symptoms being experienced by Davis-Monthan employees involved in the C-123 demilitarization, the base safety chief issued instructions on safety equipment to be worn and disposal processes to follow. Tr. at 67-68; Appeal File, Exh. 29; see also Appeal File, Exh. 27 (safety and health recommendations for personnel to follow who were restoring a C-123 contaminated with dioxin).

In the instant appeal, one C-123 aircraft was found to be contaminated by dioxin. Appeal File, Exh. 31. In a second test, 24 swipe samples taken from 17 other C-123s tested positive for Agent Orange, including samples taken from two aircraft purportedly conveyed to Western Aviation (SN 54-0635 and SN 54-06070). Appeal File, Exh. 30. Dioxins are inherently present in Agent Orange. Tr. at 81, 198. Although 12 other swipe samples, including two samples from a third aircraft conveyed to Western

Aviation (SN 54-0628), were below the level of detection, these findings did not negate the presence of dioxin contamination. That's because there is no minimum level of contamination for dioxin. Tr. at 190-191, 198, 207-208.

At hearing, however, Western Aviation argued that there was affirmative evidence that 2 to 3 of Western Aviation's aircraft were devoid of dioxin. Floyd Stilwell affirmatively stated that he recalled only two of the aircraft he attempted to purchase had spray tanks attached. Tr. at 118. When inside each of the five aircraft, Mr. Stilwell observed that none contained chemical odors. Tr. at 249. Finally, Mr. Stilwell testified that the U.S. Air Force had released two of the aircraft for removal and it was his understanding that he could remove them whenever he wished. Tr. at 145-147.

Mr. Stilwell's testimony at hearing, however, is not dispositive of whether the five aircraft were contaminated with dioxin. With respect to the spray tanks, Mr. Stilwell's hearing testimony was inconsistent with his responses to GSA's discovery. There, Mr. Stilwell stated under oath that he had no knowledge of spray apparatus attached to any of the five aircraft sold to him and that he believed none of the five aircraft contained spray tanks. Appeal File, Exh. 114 at 3. The only explanation for this inconsistency is that Mr. Stilwell does not actually recall whether spray apparatus were attached to the five aircraft.

Going further, the Executive Director testified that in some of the aircraft, the spray tanks and apparatus had been removed.

Tr. at 63-64. Nonetheless, pipelines leading to the wings were sufficient to show that the C-123 had been used to spray insecticides and defoliants, including Agent Orange. Tr. at 37, 215-216; Appeal File, Exh. 32. Indeed, according to the Executive Director, only 2 of the C-123s at Davis-Monthan did not show physical evidence of prior involvement in spraying operations. Tr. at 37.

As for Mr. Stilwell's testimony that he did not detect chemical odors in any of the C-123 he attempted to buy, dioxin is a colorless solid with no known odor. Appeal File, Exh. 28.

Finally, with respect to the evidence indicating that the U.S. Air Force had released 2 of the 5 C-123s for delivery to Western Aviation, the GSA property custodian, Shirley Beene stated that this release occurred within a couple of months of the purported award. Tr. at 128, 241. At that point, no testing of the aircraft for dioxin contamination had occurred. AMARC was waiting for funding. Tr. at 165. Consequently, it is not clear that the U.S. Air Force had made an affirmative decision that the 2 aircraft were free of dioxin contamination. Instead, the evidence shows that the U.S. Air Force ultimately adopted a conservative approach with the C-123s at Davis-Monthan.[2] All C-123s would be presumed to be contaminated unless records research revealed that a C-123 had not performed a spraying mission.

[2]The FPMR favors a conservative approach where the level of contamination cannot be determined. With respect to Polychlorinated Biphenyls (PCB), items with unknown levels of PCBs may not be transferred, donated, or sold. 41 C.F.R. § 101-42.1102-2(a)(5).

Appeal File, Exh. 51. As AMARC's Executive Director testified, though, the U.S. Air Force's records were incomplete. Tr. at 68.

In summation, the contracting official was not empowered to convey the C-123s to Western Aviation. First, DoD regulations did not authorize their commercial sale. Second, the FPMR precluded the sale of hazardous or dangerous property. Because the contracting officer did not have authority to enter into the sales contracts with Western Aviation, the Board does not have jurisdiction over Western Aviation's appeal under the Contract Disputes Act.

II. WESTERN AVIATION IS NOT ENTITLED TO RECOVER FROM THE GOVERNMENT COSTS AND EXPENSES INCURRED BY MARSH AVIATION.

In the instant appeal, Western Aviation erroneously attempts to recover costs incurred by Marsh Aviation in order to retrofit the C-123s and render them flyable so that they could be used in fire suppression activities. It is black-letter law, that a contractor not in privity with the Government may not recover costs from the Government under the Contract Disputes Act. Erikson Air Crane Co. of Washington Inc. v. United States, 731 F.2d 810, 813 (1984); Appeal of Albert Grinsberg, GSBCA No. 9911, 91-2 BCA ¶ 23,784 at 122,605. Here, Marsh Aviation is a stranger to the contracts forming the basis for the instant appeal; the award of the five C-123s was made to Western Aviation. Appeal File, Exh. 8. Yet, the evidentiary record shows that after award, Western Aviation assumed no financial obligations, all obligations belonged to Marsh Aviation. See Severin v. United States, 99 Ct. Cl. 435 (1944); J.L. Simmons Co. v. United States,

304 F.2d 886, 888 (1962) (prime contractor may not sue for breach of contract on behalf of a subcontractor unless it has reimbursed the subcontractor or the subcontractor remains liable for such reimbursement in the future).

In his response to GSA's discovery, Western Aviation identified the various types of expenses that it was seeking recovery for. They include the following: a) materials used to retrofit the C-123; b) labor incurred to retrofit the C-123s; c) development costs for upgrading the C-123 engines; d) the cost of a tow truck and a tow bar to move the C-123 from Davis-Monthan Air Base; e) costs incurred in obtaining financing for retrofitting the C-123s; f) marketing costs to sell or lease the retrofitted C-123 for fire suppression; g) costs incurred to obtain FCC certification; h) efforts to sell the surplus engines and propellers; i) legal expenses; j) travel to examine the C-123s while at Davis-Monthan. Appeal File, Exhs. 114 at 1-2; 123 at 7-8, 11. Yet, the documentary and testimonial evidence establishes that all these costs were incurred by Marsh Aviation.

Invoices for the materials used to retrofit the C-123s, were billed to Marsh Aviation. Tr. at 167-179; Appeal File, Exhs. 116, 134. Labor for the retrofitting came from Marsh Aviation employees. Tr. at 150-152, 169; Appeal File, Exh. 123 at 1-15; Exh. 133. The tow truck and tow bar were invoiced to Marsh Aviation. Exhs. 130, 131. The sale of the surplus engines and propellers was to be performed by Marsh Aviation. Tr. at 172-173. Obtaining financing was conducted under Marsh Aviation

authority. Appeal File, Exhs. 92 at 4-10, 99, 110; Tr. at 131. Marketing efforts were performed under Marsh Aviation authority. Tr. at 160; Appeal File, Exhs. 92, 95-101, 104, 109-111, 122 at 3. Legal activities were performed on behalf of Marsh Aviation. Appeal File, Exhs. 97, 105, 106. FAA certification was performed by a member of the Marsh Aviation Board of Directors. Tr. at 178; Appeal File, Exh. 122 at 6. Finally, even Mr. Stilwell's visits to Davis-Monthan were for the purpose of retrofitting the C-123s for fire-fighting, a function of Marsh Aviation. Tr. at 110, 114, 122, 158-159.

At hearing, Mr. Stilwell asserted the existence of a contractual relationship between Marsh Aviation and Western Aviation. Tr. at 159, 179. He referred to Marsh at a contractor of Western. Tr. at 115, 158-159. At another point he referred to Marsh as a sales agent of Western. Tr. at 174. Yet, Mr. Stilwell could identify no documents establishing a contractual relationship between the two corporations. Tr. at 159-160. He introduced no such documents. Marsh Aviation may have expected to be reimbursed by Western Aviation, but Western was under no legal obligation to do so. Moreover, there was no requirement that Western Aviation bring suit on behalf of Marsh Aviation. See Keydata Corp. v. United States, 504 F.2d 1115, 1120-21 (1974); Castagna & Son, Inc., GSBCA No. 6906, 84-3 BCA ¶ 17,612, at 131,269 (Severin doctrine inapplicable where a subcontract obligates the prime contractor to sue of behalf of its subcontractors). As a consequence, Western Aviation is not

empowered to recover on behalf of Marsh Aviation.

Going further, Western Aviation cannot recover on behalf of Marsh Aviation on a theory of tortious conduct. In S.N. Nielson Co., Inc., GSBCA No. 4916, 81-1 BCA ¶ 14,921, at 133,610, the Board considered a scenario "under which A, having contracted to do an act for B, may find himself liable to C, a stranger to the contract, for either doing the act badly or not doing it at all." The Board concluded that if A had performed the act badly, C might recover. If A had not performed at all, C could not recover. Id.

In the instant appeal, the government contracted with Western Aviation for the sale of aircraft. The Government did not perform the contract (as opposed to performing the contract badly). As a consequence of nonperformance, Marsh Aviation was harmed. Nonetheless, under Nielson there is no liability on the part of the government.

Thus, whether the issue is approached as contractual conduct or tortious conduct, Western Aviation has no legal claim for damages against GSA.

III. THE CONTRACTS EXPLICITLY LIMITS WESTERN AVIATION'S RECOVERY TO A RETURN OF THE PURCHASE PRICE.

Pursuant to ¶ 22 of SF 114c, GSA reserved the right to withdraw the C-123s from sale if the Government developed a bona fide requirement for the aircraft after award but prior to delivery. In the event of such a withdrawal, Western Aviation's remedy was contractually limited to a return of the purchase price. Appeal File, Exh. 2 at 3. Additionally, under the FPMR,

any need for the property expressed by a government agency would be paramount to any public disposal, provided the need was expressed prior to delivery of the property. 41 C.F.R. § 101-45-2.

The Withdrawal Clause has been found to be a valid contractual provision to limit the Government's liability. Gary E. Pugh, ASBCA No. 25819, 82-2 BCA ¶ 15,834, at 42,078. It applies where: (1) a need for the property develops after it has been declared excess; or (2) a serious mistake has been made, such as a grave price discrepancy between the true value of the item and the amount bid. Chesapeake Salvage Corp., ASBCA No. 24861, 81-1 BCA ¶ 15,020, at 74,325-74,326. According to the U.S. Court of Claims,

> We think Clause 23 [Withdrawal of Property Award] should not be interpreted as a restriction to a particular mode of use. Rather, it is expressive of a broader right reserved to the Government, so that application of the clause is not limited to situations where the withdrawing agency can show a necessity for its physical use of the property.

Convery v. United States, 597 F.2d 727, 731 (Ct.Cl. 1979). The sole limitation on the application of the Withdrawal Clause is that it does not apply where the Government intends to resell the property. Id.; Peck Iron & Metal Co. v. United States, 496 F.2d 543 (Ct.Cl. 1974). This limitation is not applicable here; the U.S. Air Force has retained the withdrawn C-123 at Davis-Monthan AFB to this day, sealed in a fenced-in area. Tr. at 217-218; Appeal File, Exhs. 50-51.

In the instant appeal, the U.S. Air Force's articulated bona fide need was to prevent the release of dioxin contaminated

aircraft to the general public so as to protect the public health. Testing had established that one C-123 was contaminated with dioxin. Tr. at 42-43; Appeal File, Exh. 31. A second round of tests showed that 24 samples tested positive for Agent Orange, a defoliant which invariable contains dioxins. Tr. at 76-77, 81-82, 198; Appeal File, Exh. 30. Of the C-123s at Davis-Monthan, all but 2 showed evidence of spray apparatus which suggested they had been used to spray insecticides and herbicides, including Agent Orange. Tr. at 36-37; Appeal File, Exhs. 10, 32.

The record evidence establishes the health hazards posed by dioxin. Its been linked to chloracne, alerted heme synthesis, changes in liver function, peripheral neuropathy and changes in serum lipid concentrations. Tr. at 78, 190-192; Appeal File, Exh. 27. Dioxin is probably a carcinogen and has been linked to adverse reproductive effects and malformations in offspring. Appeal File, Exh. 28. However, there are no threshold limits for dioxin contamination, no standard decontamination procedures, and no approved disposal methods. Tr. at 190-191; Appeal File, Exh. 32.

Thus, because the risk of harm to individuals was too great, AFMC's Command Law Office requested that GSA cancel the sale of the C-123s to Western Aviation. Appeal File, Exh. 10. GSA complied. Appeal File, Exh. 13.

A second articulated bona fide reason for the C-123s withdrawal, was the cost of sampling the aircraft to determine the exact level of contamination. AFMC's Command Law Office

termed the cost "prohibitively expensive." Appeal File, Exh. 10. AFMC agreed. Appeal File, Exh. 40 at 2. The U.S. Air Force's toxicologist estimated that the cost of testing would run $15,000.00 per plane excluding labor and contract costs. Tr. at 192, 199-200; Appeal File, Exh. 46. As such, the estimated testing costs approximated the sale price of 4 of the 5 C-123s sold to Western Aviation. Appeal File, Exhs. 6-7. The total cost of decontamination was unknown. Appeal File, Exh. 46. AMARC did not have the funds to sample the C-123s at the level recommended. Tr. at 66. Once decontamination was completed, a second round of testing would still be necessary. Tr. at 208.

By electing to cancel the sale, GSA was able to save the U.S. Air Force considerable monies. Cancellation of a sales contract to obtain a monetary savings has been held to be a bona fide need under the Withdrawal Clause. Convery, 597 F.2d at 730-731 (Government had a bona fide need for property where it would serve as a trade-in).

In the alternative, the Withdrawal Clause of the contracts was appropriate given the fact that C-123s were not eligible for sale. As the AFMC Command Law Office's December 18, 1996 letter to GSA correctly pointed out, the C-123s should not have been offered for sale. Appeal File, Exh. 10. DoD Manual 4160.21-M identified those aircraft eligible for commercial sale. Tr. at 69-70; Appeal File, Exhs. 35-35, 41. The C-123 was not on the list. Appeal File, Exh. 26. Consequently, selling these aircraft to Western Aviation was a serious mistake. GSA was

within its contractual rights to withdraw the property from sale once notified of the mistake. See Clyde Kirby, ASBCA No. 20558, 76-2 BCA ¶ 12,059 at 51,867 (Government made a serious mistake in listing the weight of a turret and specifying the extent of demilitarization required; the Government appropriately cancelled the sale).

Thus, because GSA properly invoked the Withdrawal Clause contained in ¶ 22 of SF-114C, Western Aviation's relief is limited to the damages specified in the contracts, a return of the purchase prices. Appeal File, Exh. 2 at 3. That has been accomplished. Appeal File, Exhs. 22, 114 (Western Aviation's Response to GSA's Request for Admission #14).

IV. WESTERN AVIATION IS NOT ENTITLED TO COSTS OR EXPENSES INCURRED IN FINANCING, RETROFITTING, OR MARKETING THE C-123s AS FIRE SUPPRESSION AIRCRAFT; THESE DAMAGES ARE CONSEQUENTIAL DAMAGES NOT FORESEEABLE BY GSA AT CONTRACT AWARD.

Western Aviation is not entitled to recover those costs attributable to developing an air-worthy C-123 capable of engaging in fire-fighting or fire suppression. These damages were not foreseeable by GSA at the time of contract award and thus, are not allowed.

The general rule is that damages for breach of contract are limited to the natural and probable consequences of the breach. Ramsey v. United States, 121 Ct. Cl. 426, 433 (1951). Damages which are remote or consequential are not recoverable. Id. The objective is to place the injured party in as good a position as it would have been in by full performance without charging the

breaching party for harms not foreseeable at the time of contract award. Northern Helex Co. v. United States, 524 F,2d 707, 713 (Ct.Cl. 1975). According to the Armed Services Board of Appeals (ASBCA), the objective is to ascertain "'what liability the defendant fairly may be supposed to have consciously assumed' with the Government responsible only for such 'consequences as may reasonably supposed to be in the contemplation of the parties at the time of the making of the contract.'" A-1 Garbage Disposal and Trash Services, Inc., ASBCA No. 43006, 93-1 BCA ¶ 25,465, citing Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540, 544 (1903).

Anticipated profits can constitute breach damages if they are not too remote to be considered a natural result of the breach. Id. If, however, lost profits are merely speculative and not supported by the record, a contractor may not recover. Anthony J. Butterhof, GSBCA No. 5485, 81-1 BCA ¶ 15,085, at 133,469.

With respect to the instant appeal, Western Aviation seeks recovery for: a) materials used to retrofit the C-123; b) labor incurred to retrofit the C-123s; c) development costs for upgrading the C-123 engines; d) the cost of a tow truck and a tow bar to move the C-123 from Davis-Monthan Air Base; e) costs incurred in obtaining financing for retrofitting the C-123s; f) marketing costs to sell or lease the retrofitted C-123 for fire suppression; g) costs incurred to obtain FCC certification; h) efforts to sell the surplus engines and propellers; i) legal

expenses; j) travel expenses to examine the C-123s while at Davis-Monthan. Appeal File, Exh. 114 at 1-2; Exh. 123 at 7-8, 11.

With the exception of monies paid to acquire a tow truck, a tow bar, and to lease space to store the C-123s, the remaining costs are costs not foreseeable at the time of contract award and thus, not allowable. These are costs attributable to rendering the aircraft capable of performing fire-fighting, a purpose not reasonably anticipated by GSA at the time of contract award and thus not recoverable.

During the hearing, the three GSA individuals involved in the sale of the C-123s all testified that they had no knowledge of the purpose for which Western Aviation was acquiring the aircraft at the time of award. Tr. at 24, 30-31, 162-163 (Doug Boylan), 240-241 (Shirley Beene), 163-164 (Peggy Lowndes). According to Mr. Stilwell, any knowledge of Western Aviation's intended use for the aircraft occurred after contract award. Tr, at 164.

Additionally, the solicitation gave no indication that GSA was intending to convey an aircraft that could be rendered flyable. The first page of the solicitation explicitly stated that the proposed sale was for scrap and salvage aircraft. Appeal File, Exh. 1 at 1. "Scrap" is defined by the FPMR as personal property without any value except for its basic material content. 41 C.F.R. § 101-43.001-30. "Salvage" is personal property whose intrinsic value is in the parts; there is no

reasonable prospect for usage as a unit. 41 C.F.R. 101-43.001-28; Tr. at 230.

Continuing in this same vein, the solicitation characterized the condition of the aircraft as:

> cannibalized to varying degrees and stripped of avionics, engines, blades, and instrumentation as (sic) a minimum. These airframes have been exposed to the elements and have sustained varying degrees of corrosion. The airframes may contain quantities of serviceable or repairable parts.

Appeal File, Exh. 1 at 9.

Consequently, there was no intention from the language of the solicitation that these aircraft could be rendered flyable for any purpose, let alone for fire-fighting, or were being sold for that purpose.

Going further, Western Aviation's expenditure of hundreds of thousands of dollars prior to delivery of the aircraft was clearly unanticipated and unreasonable in light of the liability clauses of the contracts. For example, as noted above, Western Aviation would be limited to a recovery of its purchases price in the event any governmental agency expressed a need for the aircraft. Appeal File, Exh. 2 at 3. Title to the aircraft would not pass until the removal of the aircraft occurred. Appeal File, Exh. 2 at 2. Finally in the event of loss, damage, or destruction of the property prior to its removal, the contracting officer was authorized to rescind the contract and return the purchase price. Appeal File, Exh. 2 at 2.

Consequently, with the exception of costs incurred with respect to anticipated storage and transportation of the C-123s,

Western Aviation is not entitled to any further damages vis-a-vis the recovery of expenses.

As noted infra, Western Aviation is entitled to recover for lost profits provided they are not speculative and are supported by the record. A fair reading of Floyd Stilwell's hearing testimony indicates Western Aviation is seeking lost profits: a) from not being able to sell or lease the aircraft for fire-fighting; b) lost revenue from being unable to sell approved engine conversions and tank systems to other customers and c) lost revenue from not being able to sell the surplus C-123 engines and propellers. Tr. at 147, 151-152. Recovery of lost revenue from being unable to sell or lease the C-123s, or market an approved engine conversion and tank system, are clearly speculative since, other than self-serving testimony from Mr. Stilwell, there is no independent evidence establish the value of such uses. With respect to lost profits connected with the sale of the surplus engines and propellers, although Mr. Stilwell claimed he had a buyer for the propellers, there is no documentary evidence of who the buyer was, what the buyer was willing to pay, or what the terms of the sale were. Tr. at 147.

Accordingly, with the noted exceptions, Western Aviation is not entitled to breach damages.

CONCLUSION

In summation, Western has not established that GSA breached the contract or is liable for the damages Western Aviation seeks. First, the contracting officer did not have regulatory to sell

dioxin contaminated C-123s to Western Aviation. Second, Western Aviation is not entitled to damages since all damages were incurred by Marsh Aviation, a contractor not in privity with GSA. Third, the U.S. Air Force had a bona fide need for the property, protecting the public health by not allowing the people to be exposed to dioxin contaminated aircraft. Fourth, Western Aviation is seeking to recover consequential damages not foreseeable at the time the contracts were awarded to Western Aviation.

Accordingly, GSA respectfully requests the Western Aviation's appeal be denied and no damages awarded.

Respectfully submitted,

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April 24, 2000

CERTIFICATE OF SERVICE

This certifies that on April 24, 2000, the **GENERAL SERVICES ADMINISTRATION'S POSTHEARING BRIEF** was sent via facsimile transmission to the following individuals at the specified address:

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