Board of Contract Appeals
General Services Administration
Washington, D.C. 20405

DENIED: September 22, 2000

GSBCA 14165

WESTERN AVIATION MAINTENANCE, INC.,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Otto S. Shill, III, Bradley D. Weech, and Kelly G. Black of Jackson White Gardner Weech & Walker, P.C., Mesa, AZ, counsel for Appellant.

Michael J. Noble, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **BORWICK, DeGRAFF,** and **GOODMAN.**

DeGRAFF, Board Judge.

The General Services Administration (GSA) entered into five contracts to sell five airplanes to Western Aviation Maintenance, Inc. (Western Aviation). GSA did not deliver the airplanes and Western Aviation sued for breach of contract. In an earlier opinion, Western Aviation Maintenance, Inc. v. General Services Administration, GSBCA 14165, 98-2 BCA ¶ 29,816, we held that Western Aviation is not entitled to specific performance of its contracts. We now hold that, even though GSA breached its contracts with Western Aviation, Western Aviation has not established that it is entitled to recover any damages for those breaches.

Findings of Fact

GSA Issues an Invitation for Bids

In early 1996, GSA issued an invitation for bids for ten surplus airplanes. The airplanes had been declared surplus property by the Department of State and were in the custody of the United States Air Force. Exhibits 1, 11, 24. The task of selling these

airplanes was among the duties of a warranted GSA contracting officer whose responsibilities included disposing of property that had been screened to determine that no other Government agency had a use for it and that there was no qualified party to whom the Government could donate the property. Transcript at 5-8, 28-29. The airplanes listed in the invitation for bids had cleared that utilization and donation screening process. Exhibit 24; Transcript at 5-8.

The invitation listed the airplanes' serial numbers and said that they were C-123s manufactured by Fairchild in 1954 or 1955. The title page of the invitation contained the heading, "Scrap and Salvage Aircraft," and the invitation stated that the airplanes had been cannibalized to varying degrees and had been exposed to the elements. Exhibit 1. GSA's regulations explained that "scrap" property had no value other than its basic material content, and that "salvage" property had some value greater than its basic material content, although its condition was such that its repair or rehabilitation would cost in excess of 65% of its acquisition cost. 41 CFR 101-43.001-28, -29 (1995). Generally, salvage airplanes contain some usable components, scrap airplanes are useful only for their material content, and neither is suitable for flying. Transcript at 230. Whether a scrap or salvage airplane can be retrofitted or upgraded so that it is flyable is a function of the amount of work that someone is willing to do in order to obtain the necessary Federal Aviation Administration (FAA) approvals. Although some airplanes have been sold for scrap or salvage and then been modified to become airworthy, GSA had no expectation that a purchaser would make these airplanes flyable. Transcript at 233, 237. The invitation stated that GSA did not represent that the airplanes could be modified to meet FAA standards for airworthiness, and told prospective purchasers who contemplated operating the airplanes in the United States to consult the FAA before making a commitment to purchase the airplanes. Exhibit 1.

The Defense Logistics Agency (DLA) determines property disposal policy for the Department of Defense (DoD). When GSA advertised the C-123s for sale, DLA had issued the Defense Reutilization and Marketing Manual, which contained a list of types of airplanes that were available for sale for commercial use. The manual was an internal DoD document that applied to DoD activities. Exhibits 12, 26, 136. Before GSA advertised the C-123s for sale, the director of the property management division for GSA Region 9 consulted the person at DLA who was responsible for maintaining and issuing the list of commercially salable airplanes. Transcript at 87-88. That individual said that although the C-123 was not yet listed as an item available for sale for commercial use, a decision had been made to classify it as commercially salable and it would be listed as such the next time that the manual was revised. Subsequently, GSA issued the invitation for bids. Exhibit 12; Transcript at 14, 88. After the sale at issue in this appeal occurred, the Defense Reutilization and Marketing Manual was revised and listed the C-123 as an item available for sale for commercial use. Transcript at 68-69; Exhibits 26, 136.

The invitation for bids incorporated Standard Form 114C, General Sale Terms and Conditions, which provided that the purchaser was “entitled to obtain the property upon full payment therefor,” unless the invitation stated otherwise. Exhibits 1, 2. The invitation did not place any limitations upon a purchaser’s ability to obtain the property, except to say that the purchaser had to arrange for a removal date and time to load or tow the airplanes from the base, and to coordinate the removal with the Government’s property custodian. Exhibit 1. The purchaser could either move the airplanes or make arrangements with a nearby

contractor to move them. Exhibit 1; Transcript at 101, 248-49. Form 114C explained that if a purchaser failed to remove its property, the Government could send a notice of default and give the purchaser the option to cure the default by removing the property within a specified time. Exhibit 2.

In the invitation for bids, GSA warranted that the property listed in the invitation would conform to its description. The invitation then stated:

> DESCRIPTION WARRANTY: . . . If a misdescription is determined before removal of the property, the Government will keep the property and refund any money paid. If a misdescription is determined after removal, the government will refund any money paid if the purchaser takes the property at his or her expense to a location specified by the contracting officer. . . . The amount of recovery under this provision is limited to the purchase price of the misdescribed property. The purchaser is not entitled to any payment for loss of profit or any other money damages, special, direct, indirect, or consequential.

Exhibit 1.

Form 114C contained the following clauses:

> 15. LIMITATION ON GOVERNMENT'S LIABILITY
>
> Except for reasonable packing, loading, and transportation costs (such packing, loading, and transportation costs being recoverable only when a return of property at Government cost is specifically authorized in writing by the Contracting Officer) 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.
>
> 22. WITHDRAWAL OF PROPERTY AFTER AWARD
>
> The Government reserves 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 condition, 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.

Exhibit 2.

The invitation for bids also incorporated Standard Form 114-C-1, Special Sealed Bid Conditions, which provided:

> D. AWARD OF CONTRACT
>
> The contract will be awarded to that responsible Bidder whose bid conforming to the Invitation will be most advantageous to the Government, price and other factors considered. A written award mailed (or otherwise furnished) to the successful Bidder within the time for acceptance provided in the Invitation shall be deemed to result in a binding contract without any further action by either party.

Exhibits 1, 3.

The invitation stated that potential bidders could inspect the airplanes at Davis-Monthan Air Force Base, which is in Tucson, Arizona, in early February 1996, and submit sealed bids later that month. Bidders were required to submit a deposit of twenty percent of their bids, and the successful bidder would be required to pay the remaining balance within ten calendar days after award of a contract. Exhibits 1, 11, 24.

GSA Awards Five Contracts to Western Aviation

Western Aviation, which is owned in part by Floyd Stilwell, owns and operates aircraft primarily for use in fire fighting. Mr. Stilwell also owns part of Marsh Aviation, which is a manufacturing company that repairs, overhauls, rebuilds, and modifies aircraft.

Transcript at 110, 157. Western Aviation and Marsh Aviation are located in the same facility in Mesa, Arizona, but they are separate companies with different corporate charters. Exhibits 4, 109; Transcript at 114-15. Mr. Stilwell is the president of Western Aviation and the chief executive officer of Marsh Aviation. Transcript at 175. The two companies vigorously maintain separate books and records, and have separate business operations as a mechanism for limiting each company's potential liability. Transcript at 114, 175-76.

When Mr. Stilwell saw the invitation for bids for the C-123s, he immediately made arrangements to see the airplanes. Mr. Stilwell was interested in the airplanes because he and the person who holds the design rights to the C-123 had been discussing ways to upgrade the engines on the C-123 and equip the airplane so that it could be used for fighting forest fires. In Mr. Stilwell's opinion, there was an opportunity to use C-123s to produce a 3000 gallon tanker aircraft that would compete successfully for fire fighting contracts. Transcript at 116-17. Mr. Stilwell went to see the C-123s twice before Western Aviation made a bid for them. Transcript at 117-18. He went inside seven airplanes, including five airplanes that Western Aviation subsequently purchased. Transcript at 249. Western Aviation submitted its bid, signed by Mr. Stilwell, for ten airplanes and its accompanying deposit on February 26, 1996. The bid stated that Western Aviation would pay for the airplanes and remove them within thirty days after the bid opening date. Exhibit 4.

On February 29, 1996, GSA opened the bids for the airplanes and determined that Western Aviation was the high bidder for five of the airplanes. Exhibits 4, 5. Mr. Stilwell recalled that, before he received written notice of Western Aviation's high bids, he telephoned the contracting officer and learned that Western Aviation was the successful bidder for five airplanes. Transcript at 121-22. On March 7, 1996, GSA sent Western Aviation five notices of award signed by GSA's contracting officer. Each notice stated that after Western Aviation paid the balance due for each airplane, GSA would issue a receipt that would authorize Western Aviation to remove the airplane from the base. The notices also stated that Western Aviation had to pay the balances due and remove the airplanes by March 21, 1996. Exhibit 6. Western Aviation paid the balances due by the March 21 deadline. The total price paid by Western Aviation for the five airplanes was $87,500. The receipt that GSA provided to Western Aviation stated that the airplanes would be released at the request of Western Aviation. Exhibit 8.

The evidence does not establish that, at the time of contracting, GSA had any reason to anticipate that Western Aviation intended to refurbish the C-123s and equip them so that they could be used for fighting fires. The GSA employees did not know either Western Aviation's intentions regarding the airplanes or its general line of business. This was the contracting officer's first involvement with a sale of airplanes and he did not know what Western Aviation's business was. He did not remember having any contact with Mr. Stilwell before the sale at issue here was completed.[1] Transcript at 23-24, 30-31, 246. The director of the property management division for GSA Region 9 had a conversation with Mr. Stilwell

[1]Mr. Stilwell thought that the contracting officer visited his facility in 1993 or 1994, and saw work that Marsh Aviation was performing. Transcript at 250-51. Even if Mr. Stilwell's recollection is correct, this does not establish that the contracting officer knew anything about Western Aviation.

in approximately 1995, concerning a problem that arose when GSA transferred some C-130 airplanes to another Government agency. Mr. Stilwell told her that he was in the business of providing either equipment or services to be used in fire suppression. They did not discuss the source of the airplanes that he used. She had no other contacts with Mr. Stilwell before the sale at issue in this appeal, and before the contracts were awarded she had no idea what Western Aviation's operations were. In fact, she associated the name "Western" with an entirely different company. Transcript at 89-92, 231, 233-34. GSA's property disposal and aircraft utilization specialist had some contact with Mr. Stilwell before the sale at issue. Transcript at 98. She knew that Marsh Aviation was re-engining some airplanes for the State of California, but she had never heard of Western Aviation. Transcript at 240-41. According to Mr. Stilwell, before the sale at issue in this appeal, he did not tell the contracting officer what Western Aviation's business was. Transcript at 162-63. In addition, when he spoke with the director of the property management division for GSA Region 9, Mr. Stilwell represented himself as working for Marsh Aviation. Transcript at 163-64. Also according to Mr. Stilwell, prior to the sale, GSA's property disposal and aircraft utilization specialist probably did not know what Western Aviation did. Transcript at 164. Mr. Stilwell testified that, before this sale, he had dealt with GSA probably six to ten times. He did not say that he dealt with GSA on behalf of Western Aviation. Transcript at 110-11.

After the contracts were awarded, Mr. Stilwell and one or two of his technicians came to see the airplanes. Transcript at 98-99; 122. On their first trip, they determined what they would need to do in order to make the airplanes ready to be flown to Mesa. Transcript at 122. On a subsequent trip, they measured the interior of the airplanes so that they could determine where to place the tanks that would hold 3,000 gallons of fire retardant material, and how they could install the door system that would be used to deliver the fire retardant material from the airplanes. Transcript at 122-25. They went inside the airplanes several times. Transcript at 100, 103-04. In order to fly the airplanes after he made his planned modifications, Mr. Stilwell would have needed to comply with all of the FAA's requirements for making structural changes and would have needed to obtain a supplemental type certificate from the FAA, which would have allowed the airplanes to be flown as modified. Transcript at 124, 140-42.

Mr. Stilwell explained that contracts to lease airplanes for fire fighting are awarded every three years. Because contracts were to be awarded early the following year, Mr. Stilwell had a short time within which to modify the airplanes, obtain the FAA's approval for modifying the airplanes, and bid to supply airplanes for fire fighting contracts. As soon as Western Aviation received award of the contracts for the five airplanes, he began designing a door system and a tank system that would fit in the airplanes and operate satisfactorily. Transcript at 133-39. A month or so after the designs were developed, Marsh Aviation began building the tank and door system. Transcript at 134, 159. Mr. Stilwell testified that Western Aviation signed a work order for Marsh Aviation to design and retrofit the airplanes, that Marsh Aviation billed Western Aviation for amounts due, and that Western Aviation's obligation to Marsh Aviation was shown in those bills. The record does not contain a copy of the work order, but it does contain invoices from Marsh Aviation to Western Aviation. Exhibits 112, 113, 123; Transcript at 158-60.

GSA's property disposal and aircraft utilization specialist accompanied Mr. Stilwell and his technicians when they came to see the airplanes after award. She testified that she

was sure that she and Mr. Stilwell discussed what he was planning to do with the airplanes, but she did not recall exactly what Mr. Stilwell told her. Transcript at 99-100. Mr. Stilwell testified that they did not discuss the "specific details" of his plans, but that they did discuss that he was taking measurements and proceeding to manufacture hardware. Transcript at 128. In the experience of the director of the property management division for GSA Region 9, it was not the norm for a purchaser to expend large amounts of money before taking delivery of airplanes. Transcript at 234-35.

A Possible Contamination Problem Arises

In April 1996, GSA notified the Air Force of the sale of nineteen C-123 airplanes. These included the ten airplanes that GSA advertised for sale in early 1996, five of which were sold to Western Aviation, plus nine additional C-123s that the Air Force transferred to GSA in February 1996. Exhibits 9, 39; Transcript at 34. On June 6, 1996, the Air Force wrote a letter to GSA concerning the nineteen C-123s. The letter explained that the Air Force had to "demilitarize" the airplanes before they could be released. During that process, its employees smelled chemical odors and experienced a burning sensation when working in two of the airplanes, neither one of which had been purchased by Western Aviation. The June 6 letter explained that the airplanes possibly contained hazardous chemicals and that the Air Force could not release the airplanes until they were tested for such materials. The estimated cost of the tests was between $12,500 and $37,500 per airplane. Exhibit 9.

According to the Air Force official in charge of disposing of the airplanes, the two airplanes in which employees smelled chemical odors and experienced a burning sensation were equipped with spray equipment. Transcript at 40. In order to determine whether an airplane has been used for spraying, the Air Force can inspect either the airplane itself or the records of the airplane. Transcript at 213. The Air Force official in charge of disposing of the nineteen C-123s did not recall precisely how many of them had spray equipment, and he did not recall whether those with spray equipment were among the airplanes purchased by Western Aviation. Transcript at 37, 215-16. Mr. Stilwell's recollection was that only two of the five Western Aviation airplanes were equipped with spray tanks. Transcript at 118. The records of the nineteen C-123s do not show what use was made of the spray equipment, but the Air Force was concerned that it might have been used to spray defoliants or insecticides containing harmful chemicals. Exhibit 42; Transcript at 64. As a result of the odors and burning sensation, the Air Force required personnel to wear protective gear when working in the airplanes that had spray equipment. Exhibit 29; Transcript at 39.

In early June 1996, the director of the property management division for GSA's Region 9 telephoned Mr. Stilwell and told him that there was going to be a delay in completing the sale of the airplanes to Western Aviation. She explained that the delay was due to suspected dioxin[2] contamination, and she offered Mr. Stilwell the option of canceling

[2]Dioxins are a family of related chemicals and are a common contaminant in Agent Orange. Transcript at 81, 189, 193, 198; Exhibit 46. Agent Orange is a herbicide that is largely made up of two herbicides commonly known as 2,4-D and 2,4,5-T. Transcript at 196; Exhibit 46. Although dioxin toxicity is documented in laboratory animals, there is disagreement in the scientific community concerning the toxicity of dioxin in humans.

the contracts and receiving a refund from GSA. Mr. Stilwell said that he was willing to wait and see whether the situation could be resolved.[3] Transcript at 91-92, 235. At that time, the director of the property management division for GSA Region 9 hoped that GSA would be able to deliver the airplanes to Western Aviation. Transcript at 235. She spoke with Mr. Stilwell once or twice more, in order to keep in touch and to continue to let him know that GSA was willing to refund Western Aviation's money. Transcript at 93.

At some point, probably in June, GSA's property disposal and aircraft utilization specialist notified Mr. Stilwell that Western Aviation could come and pick up two of the five airplanes that it had purchased. She told Mr. Stilwell that he could retrieve two of the airplanes because the Air Force had determined that they had not been used for spraying. Mr. Stilwell responded that he did not want to come and pick up only two of the airplanes, and that he would rather come and pick up all five at once. Transcript at 100-01, 241. Mr. Stilwell explained that it is expensive to set up an operation to prepare airplanes to be moved, and that he wanted to do this only one time. Transcript at 129, 252-53. When this conversation occurred, GSA's property disposal and aircraft utilization specialist's understanding was that the delivery of the remaining three airplanes was on hold, and not that they would never be released. Transcript at 244.

The Air Force took swipe samples from some of the nineteen C-123 airplanes and had those samples analyzed to determine whether the planes were contaminated with hazardous materials. Exhibits 30, 31. Two swipe samples were taken in May and sent to a laboratory to be analyzed for dioxins in August. Traces of dioxins were found in the samples. The record of the analysis does not say which airplanes were the subject of the swipe samples. Exhibits 31, 46; Transcript at 194. Also in August, swipe samples from seventeen C-123s, including three of the airplanes purchased by Western Aviation, were taken and were sent to a laboratory to be analyzed for 2,4-D and 2,4,5-T. Exhibit 30. The Air Force official in charge of disposing of the airplanes believed that samples were taken from all of the airplanes equipped with spray apparatus. Transcript at 46. On each of the seventeen airplanes tested, samples were taken from two locations where the presence of 2,4-D and 2,4,5-T would have been most likely. Transcript at 78-80. The amount, if any, of the two herbicides in the samples taken from one of the three Western Aviation airplanes was less than could be detected by the analysis to which they were subjected. For each of the other two airplanes, one sample showed detectable levels of herbicides and the other sample did not. Exhibit 30; Transcript at 198-99, 203-05. The laboratory that analyzed the August swipe samples explained that the presence of 2,4-D or 2,4,5-T suggested, but did not prove, the presence of dioxin. Exhibit 30 at 22. The Air Force toxicologist who studied the results of the laboratory's analysis concluded that there was some dioxin in the airplanes that were tested. Transcript at 198. He also concluded that the level of contamination of individual airplanes was unknown, and he recommended that a minimum of ten samples per airplane

---

Transcript at 190-91; Exhibit 46.

[3]Mr. Stilwell's recollection was that GSA initially told him that the Air Force would have to demilitarize the airplanes, and later told him about the possible contamination problem. Transcript at 164-65. To the extent that this conflicts with the testimony of the director of the property management division, it is irrelevant to our disposition of this appeal.

be taken and analyzed in order to determine the level of dioxin contamination of the airplanes. He estimated that it would cost approximately $15,000 to evaluate each airplane. He also recommended that airplanes with detectable levels of dioxin be fully decontaminated before being transferred, and he explained that the cost of decontamination was unknown. Exhibit 46.

Mr. Stilwell spoke with GSA's contracting officer and GSA's property disposal and aircraft utilization specialist several times in the fall and asked what was happening with the release of the airplanes. The contracting officer said that the Air Force had not yet released the airplanes, but Mr. Stilwell did not get the impression that Western Aviation would never receive the airplanes. Transcript at 146. During the fall months, the Air Force was trying to decide whether it should release the airplanes, test them further, attempt to decontaminate them, destroy them, or seal them and leave them in place. Exhibits 32-39.

On December 18, 1996, the Air Force wrote a letter to GSA concerning ten C-123s, including the five airplanes purchased by Western Aviation. The letter stated that the airplanes were "possibly contaminated with dioxin" and asked GSA to terminate the sale due to "public health concerns." The Air Force explained that one of the ten C-123s had tested positive for dioxin, and that it was "prohibitively expensive" to test all of the airplanes properly. The letter stated that two of the airplanes sold to Western Aviation had been used in Southeast Asia and that no records were available to show how the other airplanes had been used. In addition, the letter stated that the C-123s should have never been advertised for sale because they did not appear on the list of commercially salable airplanes appended to the Defense Reutilization and Marketing Manual. Exhibit 10. After sending this letter to GSA, the Air Force continued to consider whether it would be possible to release the airplanes. Exhibits 40-43.

GSA Terminates the Contracts

On January 8, 1997, GSA terminated its contracts with Western Aviation because the Air Force would not release the airplanes due to concerns about possible dioxin contamination and, therefore, GSA could not deliver the airplanes. GSA explained that it would refund Western Aviation's purchase price. Exhibit 13; Transcript at 18, 22. The contracting officer understood that the Air Force did not have any need for the airplanes, and that it intended to seal up the airplanes and store them. Transcript at 29.

Until Mr. Stilwell received GSA's January 8 letter, he believed that he was going to be able to take at least two of the airplanes. Transcript at 146-47. On January 13, 1997, Western Aviation objected to the termination of its contracts. Western Aviation explained that it had spent a great deal of money and time to design a fire retardant system for the airplanes. Western Aviation also said that it would be willing to sign a release to protect the Air Force from any damage that it might incur. Exhibit 14.

The Air Force wrote to Western Aviation on March 12, 1997, and stated that it could not release the airplanes. According to the Air Force's letter, three of the airplanes sold to Western Aviation were used in Southeast Asia and all of the airplanes contained spray apparatus, which led the Air Force to conclude that all of the airplanes might possibly be contaminated with dioxin. The Air Force explained that it would be prohibitively expensive

to test the airplanes in order to confirm any contamination, and also explained that there were no established remediation goals or acceptable clean-up levels for dioxin contamination. Exhibit 17. The Air Force sealed the airplanes and stored them at Davis-Monthan Air Force Base. Transcript at 218. GSA refunded Western Aviation's purchase price. Exhibit 19.

Western Aviation Claims Damages

In letters to GSA dated March 7 and 19, 1997, Western Aviation again objected to the termination of the contracts. In the March 19 letter, Western Aviation explained that it had spent over $110,000 in order to develop and to market a fire retardant system to be used in the C-123s for aerial forest fire fighting. The letter did not say what costs were included in the $110,000. Western Aviation also said that it had paid interest in excess of $8000 during the time that GSA held Western Aviation's payment for the airplanes. Western Aviation stated that it wanted to be made whole if GSA could not perform the contracts. Exhibits 16, 21. GSA responded that its liability was limited to refunding Western Aviation's purchase price and denied Western Aviation's request for any additional money. Exhibit 22. Western Aviation later certified a claim for damages of $500,000, but did not say what costs were included in that figure. Exhibit 84.

In the complaint filed in this case, Western Aviation stated that it had invested over $500,000 in its C-123 project. It said that its damages consisted of the cost of arranging for a work facility near Davis-Monthan Air Force Base, purchasing special equipment to work on the airplanes, designing and building a tank with a micro-processor controlled door system, developing an FAA certification plan, researching the availability of and obtaining spare parts, creating a marketing and financing plan, and the cost of financing $87,500 for one year. The complaint did not set out the costs that made up any of these individual elements of damage. Exhibit 74.

In its responses to GSA's interrogatories, Western Aviation stated that its damages included the cost of inspecting the airplanes and preparing them to be removed from Davis-Monthan Air Force Base; purchasing an aircraft tug and a tow bar; travel to move the tow bar from Davis-Monthan Air Force Base and to store it in Tucson, and travel to move the tow bar to Mesa; developing a sales program for the engines and propellers, and defaulting on the sale of the engines and propellers; research and travel to locate and to bid on replacement engines and equipment for upgrading the C-123s; purchasing a prototype C-123; studying the design of an engine upgrade; designing and developing a tank; developing an FAA certification plan; multiple trips to Tucson to inspect and evaluate the five C-123s; interim storage of the airplanes for preparation for flight to Mesa; and developing a marketing program. The interrogatory responses did not set out the cost of any of these individual elements of damage. Exhibit 114.

In a September 4, 1998 letter to counsel for GSA, Western Aviation stated that its damages consisted of the following elements and amounts:

Marsh Aviation invoice dated March 8, 1997

Parts	$ 28,468.63
Mileage	705.00
Labor	179,600.00

Total	$208,068.63
Floyd Stilwell services 2/5/96 - 3/8/97	$100,000.00
Tim Austin services 3/1/96 - 3/8/97	120,000.00
Move Tim Austin from Florida to Arizona	8,000.00
Move Tim Austin from Arizona to Florida	8,000.00
Ghislain Boivin, travel and expenses	2,400.00
Bob Gibson, deferred legal	20,000.00
Bill Walker, 1,000 hours 2/5/96 - 3/8/97	60,000.00
Total	$318,400.00

Exhibit 123.

The March 8, 1997 Marsh Aviation invoice for $208,068.63 appended to Western Aviation's September 4, 1998 letter contains a list of dollar amounts paid for supplies ordered by Marsh Aviation between March 5, 1996, and March 7, 1997, for a total of $28,468.63. Exhibit 123. Mr. Stilwell testified that these supplies were used to build the tank and the door system. Transcript at 137-38. Nearly all of the $28,468.63 is supported by invoices from Marsh Aviation's suppliers.[4] Exhibit 134; Transcript at 168. The invoices show that Marsh Aviation spent $4289.70 for supplies that were ordered after GSA terminated Western Aviation's contracts. Exhibits 123, 134. The record does not contain any explanation of the $705 charge for mileage set out in the Marsh Aviation invoice. The invoice says that the $179,600 charge for labor represents 3592 labor hours at $50 per hour. Exhibit 123. Attached to the invoice are time sheets which Mr. Stilwell testified represented the hours spent by the people who designed and fabricated the tank and the door system. Transcript at 150-51. The labor hours listed on the time sheets are for time worked between December 1995 and March 1997, and total nearly 6000 hours instead of the 3592 labor hours shown on Marsh Aviation's March 8, 1997 invoice. Exhibit 123. There is no explanation in the record of how Marsh Aviation decided which of the hours listed on its time sheets were devoted to work on Western Aviation's C-123 tank and door system.

Looking next at the $318,400 referred to in Western Aviation's September 4, 1998 letter, we find no invoices, time sheets, payroll records, bills, or any other documentary support for the expenses included within this amount. The September 4 letter says that between February 29, 1996, and March 8, 1997, Mr. Stilwell spent the majority of his time trying to locate engines and propellers that could be installed in place of the existing engines and propellers on the C-123s, trying to obtain financing for the FAA certification program, and working with Tim Austin to develop a marketing plan. Mr. Austin moved from Florida to Arizona to devote all of his time to developing a marketing and financing program for converted and upgraded airplanes. Bill Walker is a test pilot who devoted his time to FAA certification requirements. Bob Gibson is an attorney who was hired to assist in obtaining financing and drafting contracts for a C-123 program. Ghislain Boivin is the president of a

[4]The items not supported by invoices are $55.60 listed as paid to DiEugenio; $87.30 listed as paid to Arizona Air Tool; and $255.85 listed as paid to Jorgensen Steel. Exhibits 112, 134.

company that intended to act as an agent to negotiate operating leases for the airplanes. Exhibits 109 at 10-11; 123.

Other than the September 4, 1998 letter, there is nothing in the record to support the claimed costs of $318,400. During re-direct examination, Mr. Stilwell's counsel asked him if the damages reflected in the exhibits he had testified about were those of Western Aviation. Mr. Stilwell answered that they are obligations that Western Aviation has. Transcript at 179. Although Mr. Stilwell testified about some of the attachments to the September 4, 1998 letter, he did not testify about the $318,400 or any of the expenses included within that figure. Transcript at 137-38, 150-51, 169.

In its post-hearing brief, Western Aviation claims damages of between $4.2 and $18.7 million. This includes the $318,400 discussed in the preceding paragraph, the $28,468.63 for parts as set out in the Marsh Aviation invoice discussed above dated March 8, 1997, plus the following amounts:

Labor costs	$ 369,825.00
Computer costs	20,686.94
Equipment to move airplanes	7,620.00
Sale of parts from airplanes	298,550.00
Sale or lease of airplanes	
Sale	3.5 to 18 million
Lease	4.9 million

Appellant's Post-Hearing Brief at 23-26.

In support of its post-hearing claim of $369,825 for labor costs, Western Aviation relies upon a version of the March 8, 1997 Marsh Aviation invoice discussed above in connection with the damages calculation that Western Aviation submitted to GSA counsel on September 4, 1998. The March 8 invoice that Western Aviation sent to GSA counsel shows labor costs of $179,600, representing 3592 hours of work. Exhibit 123. The version of the March 8 invoice relied upon by Western Aviation in its post-hearing brief shows labor costs of $369,825, representing 7396.5 hours of work. Exhibit 112. The record does not explain why two copies of the same invoice contain different figures for labor costs and labor hours. In addition, the documents that Western Aviation relies upon in its post-hearing brief to support the invoiced 7396.5 hours of labor contain duplicative entries, do not support that number of hours, and are different from the documents relied upon to support the number of hours set out in the copy of the invoice that Western Aviation submitted to GSA counsel on September 4, 1998. Exhibits 123, 133.

In support of its post-hearing claim of $20,686.94 for computer costs, Western Aviation relies upon a copy of a Marsh Aviation invoice that lists amounts paid to Transource Computer ($10,382.50), to A.R.P. Inc. ($13,810), and to Courtaulds Aerospace ($111.66). Exhibit 113. The only evidence in the transcript concerning computer-related purchases is Mr. Stilwell's testimony:

> [W]e had to upgrade our computers so that we could get the work done in the time frame we had allocated for this program. All our work was done on

> computers with the auto-CAD software which allows you to do two dimensional plotting and planning and drawings.

Transcript at 137. The record contains two invoices from Transource Computer showing that Marsh Aviation purchased two personal computers in January 1996, for a total of $6765.28. Exhibit 134 at 64, 65. There are two invoices from A.R.P. Inc., totaling $13,810, for consulting work for "water bomber door control" engineering work done for Marsh Aviation in July 1996, and August 1997. Exhibit 134 at 66, 68. There is also an invoice showing that Marsh Aviation purchased something from Courtaulds Aerospace for $111.66 in June 1997. Exhibit 134 at 67.

In support of its post-hearing claim of $7620 for equipment to move airplanes, Western Aviation relies upon Exhibits 130 and 131, which show that Marsh Aviation purchased a tow bar for $310 on March 12, 1996, and a tow truck for $5750 in August 1996, and spent $1600 in October 1996, to have the tow truck shipped to its facility in Mesa, Arizona. Exhibits 130, 131. Tow bars are sometimes designed to be used with one specific type of airplane, and Marsh Aviation purchased its tow bar in order to move the C-123s. Transcript at 102, 242. Mr. Stilwell testified that he purchased a "tug" to tow the C-123s. Transcript at 248. Mr. Stilwell testified that Marsh Aviation billed Western Aviation for amounts due and that Western Aviation's obligation to Marsh Aviation is reflected in those bills, but the record does not establish that Marsh Aviation ever submitted a bill to Western Aviation for the tow truck or the tow bar. Transcript at 159. As mentioned above, Mr. Stilwell testified on re-direct examination that Western Aviation's obligations were reflected in the exhibits about which he testified. Transcript at 179. Mr. Stilwell never testified about Exhibits 130 and 131, which show that Marsh Aviation paid for the tow truck and the tow bar.

In support of its post-hearing claim of $298,550 from the sale of parts from airplanes, Western Aviation relies upon a booklet titled, "Marsh Aviation Company, Falcon Field Airport, Mesa, Arizona, Proposed Purchase of Fairchild C-123 and C-123T Aircraft." The booklet is dated February 15, 1996, and contains Marsh Aviation's cash flow projections, based upon the assumption that it acquired the C-123s that GSA advertised for sale. Western Aviation is not mentioned in the booklet. The booklet contains a cash flow projection showing sales prices and cost of sales of the engines and propellers from the airplanes. The amount claimed by Western Aviation in its post-hearing brief is the difference between the projected sales prices of engines and propellers, and the projected cost of sales, without taking into account the projected acquisition cost of $72,500. The amount claimed is overstated by $3150 because it includes projected profits from an airplane that Western Aviation did not purchase instead of projected profits from an airplane that it did purchase.[5] Of the amount claimed by Western Aviation, Marsh Aviation projected receiving $200,000 from the sales of propellers. Marsh Aviation explained in the booklet that the propellers would sell for this amount only if they were modified to be installed on a different type of airplane. An FAA supplemental type certificate would be needed to permit this modification

[5]The two airplanes are identified on page 6 of Exhibit 109 as Item 10 (the airplane that Western Aviation purchased) and Item 11 (the airplane that Western Aviation did not purchase).

and installation. Without such a modification, Marsh Aviation said that the value of the propellers was low. The booklet contains a general disclaimer, stating that the projected sales and cost of sales, though believed to be accurate, were not guaranteed. Exhibit 109. Mr. Stilwell testified that Marsh Aviation had a buyer for the engines, and that if Marsh Aviation instead of Western Aviation had sold these items, the companies' books would have been straightened out later. Transcript at 173-74. There is no evidence to show what the buyer for the engines was willing to pay, or to show that an FAA supplemental type certificate was ever obtained to permit the propellers to be installed on a different type of airplane.

In support of its post-hearing claim of a profit of either $3.5 to $18 million for sale of the airplanes or $4.9 for leasing the airplanes, Western Aviation relies upon a booklet that was jointly prepared by Marsh Aviation and Firestar Aircraft Company in August 1996, for the purpose of attracting investors to the project described in the booklet, which was to convert four types of airplanes, including C-123s, into fire fighting aircraft. Exhibit 110; Transcript at 131. The booklet explains that Marsh Aviation had achieved substantial industry recognition, as well as operational and financial success, in designing and producing aerial fire fighting aircraft and components, and that Marsh Aviation had a proven track record of obtaining FAA certification for its products and selling converted airplanes for use in fire fighting. The booklet says that Marsh Aviation and Firestar Aircraft Company owned the airplane conversion program. It never mentions Western Aviation, and speaks only of the manner in which Marsh Aviation and Firestar Aircraft would utilize C-123s. Exhibit 110.

The August 1996 booklet estimates that the C-123 project would cost $6.5 million to complete, that converted C-123s could each be sold for between $5 and $9 million depending upon the components ordered by the customer, and that an operating profit of 40% would be realized on each sale. Exhibit 110 at 86, 90-91. The record contains no evidence of Western Aviation's profitability. Western Aviation's post-hearing claim for between $3.5 and $18 million for sales is calculated as follows. If five airplanes each sold for between $5 and $9 million, total sales would be between $25 and $45 million. Multiplying these sales figures by an operating profit of 40% would result in profits of between $10 and $18 million. If the entire $6.5 million project completion cost is attributed to sales of airplanes and subtracted from these figures, the profits realized from sales would range from $3.5 million to $11.5 million. So, in its post-hearing brief, Western Aviation claims that the least it could have expected to profit from the sale of five airplanes was $3.5 million, and the most it could have expected to profit from the sale was $18 million. The booklet does not, however, say that five airplanes would be sold. To the contrary, the booklet states that four of the five airplanes owned by Marsh Aviation would be leased for fire fighting. Exhibit 110 at 87. The booklet estimates that the net operating profit of a C-123 leased for ninety days would be $432,250 in the United States and $571,900 in other countries. Assuming that all five airplanes could be leased for one year (four ninety-day periods), the expected annual operating profit of all five airplanes would be between $8,645,000 and $11,438,000. Exhibit 110 at 92. Mr. Stilwell explained that airplanes are usually used from June through mid-September in the northern hemisphere. Transcript at 135. If the entire $6.5 million project

completion cost is attributed to leases of airplanes and subtracted from these figures, the profits realized from leasing would range from $2.1 million to $4.9 million.[6]

Discussion

The contracting officer had the authority to enter into contracts with Western Aviation, and GSA breached those contracts when it failed to turn over the five airplanes that Western Aviation purchased. If Western Aviation is entitled to recover monetary damages, the amount of those damages is not limited by the exculpatory clauses contained in the contracts. The amount recoverable is limited, however, to damages that were the foreseeable result of a breach at the time the parties entered into their contracts and that can be proved with reasonably certainty.

[6]In its post-hearing brief, Western Aviation's estimated profits from leases are based upon figures found at pages 93 and 94 of Exhibit 110. These figures, however, represent the estimated profits from sales plus the estimated profits from leases.

The Contracting Officer's Authority

According to statute and regulation, contracting officers have the authority to enter into contracts. 41 U.S.C. § 601(3) (1994); 48 CFR 2.101 (1995). The contracting officer who awarded the contracts to Western Aviation held a contracting officer's warrant of appointment and his duties included disposing of property that had been screened, as had the C-123s at issue here, to determine that it was not needed by another Government agency and that there was no qualified party to whom the Government could donate the property. There is no evidence that the contracting officer's warrant itself contained any language that limited his authority to enter into the contracts with Western Aviation. According to GSA, however, the contracting officer lacked the authority to enter into these contracts.

GSA argues that the contracting officer's authority was limited by the Defense Reutilization and Marketing Manual because the manual did not list C-123s as items available for sale for commercial use at the time of the sale to Western Aviation, and was also limited by GSA regulations that prohibit selling items that are contaminated with hazardous materials. Respondent's Post-Hearing Brief at 21-27. We do not accept GSA's arguments, as explained below.

The Defense Reutilization and Marketing Manual

We find no language in the Defense Reutilization and Marketing Manual that limited the GSA contracting officer's authority to enter into contracts with Western Aviation.[7] The manual contained a list of airplanes that could be sold for commercial use and, at the time of the sale to Western Aviation, the C-123 was not among the airplanes listed. The manual, however, was an internal DoD document and said that it applied to DoD activities. The manual did not say that it applied to anyone employed by an agency other than DoD, and did not mention the authority of a GSA contracting officer to sell surplus property.

In addition to the manual's lack of an express limitation upon a GSA contracting officer's authority, there is no evidence to show that DLA, the agency that determines DoD's property disposal policy and that issued the Defense Reutilization and Marketing Manual, read the manual as limiting a GSA contracting officer’s authority to sell C-123s for commercial use. Before the sale at issue here, GSA consulted with the DLA employee who was responsible for maintaining and issuing the list of commercially salable airplanes, about the salability of the C-123s. He told GSA that a decision had been made to classify the C-123 as commercially salable and that this decision would be shown in the manual the next time it was revised. There is no evidence that this DLA employee believed that the manual restricted the authority of GSA's contracting officer to sell the C-123s. Neither is there any evidence that the GSA contracting officer or any of his supervisors believed that the manual imposed a limitation upon his authority.

[7] Although our record does not contain a complete copy of the manual, the parties placed portions of the manual in the record, and those portions are presumably the ones that are relevant to this case.

GSA points out that the Air Force read the manual to say that the sale of the C-123s by GSA for commercial use was not authorized. The Air Force's interpretation of the manual is not persuasive, however, because the Air Force was not the agency responsible for either determining the property disposal policy of DoD or maintaining the manual. In addition, the Air Force first provided GSA with its view of the manual nine months after the sale, when it was attempting to persuade GSA to terminate Western Aviation's contracts. Also, after expressing this opinion, the Air Force continued to consider whether the airplanes could be released to Western Aviation, which is inconsistent with reading the manual to say that it eliminated the GSA contracting officer's authority to sell the C-123s.

In summary, we find no facts to support the argument that the Defense Reutilization and Marketing Manual limited the GSA contracting officer's authority. Although the manual did not list C-123s as items available for sale for commercial use at the time of the sale to Western Aviation, the manual applied to DoD activities and did not impose any express limitation upon the GSA contracting officer's authority. In addition, there is no evidence that either DLA or GSA read the manual as containing such a limitation. For these reasons, we conclude that the contracting officer's authority was not limited by the Defense Reutilization and Marketing Manual.

The Hazardous Materials Regulations

Although published regulations provide that agencies cannot dispose of items that are contaminated with hazardous materials without following certain procedures,[8] the evidence does not establish that the five airplanes sold to Western Aviation were contaminated. The airplanes in which Air Force employees smelled chemical odors and experienced a burning sensation were not among those sold to Western Aviation. The record does not establish whether any of the Western Aviation airplanes were tested for dioxin. Two of the Western Aviation airplanes were not tested to determine whether they were contaminated with 2,4-D or 2,4,5-T. Even though swipe samples were taken from the remaining three Western Aviation airplanes in the areas most likely to be contaminated with the two herbicides, if there was any amount of 2,4-D and 2,4,5-T present in the samples from one airplane, it was below detectable levels. For each of the other two Western Aviation airplanes, one sample showed detectable levels of herbicides and the other sample did not. The laboratory that analyzed the samples for the presence of 2,4-D and 2,4,5-T noted that the presence of these two herbicides did not establish that dioxin was present. The Air Force toxicologist who studied the results of the tests believed that there was some dioxin in the airplanes, but concluded that the level of contamination of individual airplanes was unknown. Although he recommended that a minimum of ten samples per airplane be taken and analyzed in order to determine the level of contamination of the airplanes, no further samples were taken. The record contains conflicting evidence as to how many of the airplanes sold to Western Aviation were used in Southeast Asia, and does not establish whether any of the airplanes were used to spray Agent Orange. Similarly, the evidence is conflicting as to whether the five Western Aviation airplanes contained spray equipment at the time of the sale or at any prior time.

[8] 41 CFR pts. 101-42, -45 (1995).

GSA contends that even though some tests showed no detectable levels of herbicides, this does not establish that no dioxin was present because there is no "minimum level of contamination for dioxin." Respondent's Post-Hearing Brief at 25. In other words, even though testing showed no detectable levels of herbicides, this did not establish the absence of dioxin and so the airplanes were contaminated and should not have been sold. We reject GSA's contention. If we were to follow GSA's logic, all surplus property would have to be considered to be contaminated with dioxin because even if it showed no detectable levels of 2,4-D and 2,4,5-T, this would not establish the absence of dioxin.

In summary, the evidence does not establish that the five airplanes sold to Western Aviation were contaminated with hazardous materials, so we cannot conclude that the contracting officer's authority to enter into contracts to sell the airplanes was limited by regulations concerning the disposal of hazardous materials.

Breach of Contract

Unless some contract provision authorized GSA to refuse to turn over the five airplanes to Western Aviation, GSA's action constitutes a breach of contract. Binding contracts existed when GSA sent Western Aviation notices of award. The contracts provided that Western Aviation was entitled to obtain the airplanes when it paid for them in full, and Western Aviation satisfied this requirement. The only restriction placed upon Western Aviation's right to obtain the airplanes after it paid for them was set out in the invitation for bids, which provided that Western Aviation had to arrange for a removal date and time. Although Western Aviation did not remove the airplanes, this was due to the actions of GSA and not due to any fault of Western Aviation. GSA told Western Aviation that it could not remove three of the five airplanes. Although GSA gave Western Aviation permission to remove the remaining two airplanes, GSA effectively rescinded that permission when it terminated the contracts for those airplanes.[9]

The Description Warranty clause contained in the invitation for bids authorized GSA to retain the airplanes if they were misdescribed in the invitation. The invitation described the airplanes as C-123s, which is correct, and accurately listed the serial numbers of the airplanes. Because the airplanes were not misdescribed in the invitation for bids, the Description Warranty clause did not authorize GSA to withhold the airplanes from Western Aviation.

GSA argues that it was authorized to refuse to turn over the airplanes by the Withdrawal of Property After Award clause, which permitted the Government to retain the airplanes "for its use . . . if a bona fide requirement for the property develops or exists prior to actual removal of the property from Government control." Exhibit 2. GSA contends that it was permitted to withhold the airplanes from Western Aviation because the clause permits

[9]If GSA had wanted to terminate these two contracts based upon Western Aviation's failure to remove the airplanes, it would have needed to send Western Aviation a notice of default, as provided in Standard Form 114C, General Sales Terms and Conditions. GSA did not terminate these two contracts based upon Western Aviation's failure to remove the two airplanes.

the Government to withdraw property in order to save money and permits the Government to withdraw property after award unless it does so with the intent to resell it. Respondent's Post-Hearing Brief at 31-33.

In support of its reading of the clause, GSA relies upon Peck Iron & Metal Co. v. United States, 496 F.2d 543 (Ct. Cl. 1974), and Convery v. United States, 597 F.2d 727 (Ct. Cl. 1979).[10] In Peck, the Court held that the clause did not permit the Government to withdraw an entire aircraft carrier when it needed only a small part of the carrier's equipment and intended to resell the remainder. The Court stated that the clause was meant to apply when the Government actually needed the property to use for its own purposes, and not when it intended to resell the property. In Convery, the Court decided that an agency had a bona fide requirement for a machine that it used as a trade-in when it purchased a new machine that was badly needed. The Court decided that the agency did not have to establish that it had a physical use for the withdrawn property, and it found support for its decision in a statute that permitted agencies to acquire new property by using old property for a trade-in allowance. The Court also noted that using the old machine for a trade-in resulted in a substantial savings to the Government.

Consistent with the language of the Withdrawal of Property After Award clause, Peck and Convery establish that although the clause does not require the Government to have a physical use for withdrawn property, it does require that the Government have some use for property that it withdraws from award, due to a bona fide requirement for the property. The cases do not hold that the clause permits the Government to withdraw property from award unless it does so with the intent to resell it, or that the Government may withdraw property simply to save money. According to Peck, when the Government intends to resell property that it withdraws after award, it is not withdrawing the property for its use due to the existence of a bona fide requirement. According to Convery, when the Government intends to use withdrawn property as a valuable trade-in for badly needed new property, it is withdrawing the property for its use due to the existence of a bona fide requirement.

In addition to Peck and Convery, other decisions explain the circumstances in which the Government will be found to have withdrawn property for its use due to the existence of a bona fide requirement. For example, the Government had a bona fide requirement to use five scrap armored personnel carrier hulls that the Marine Corps planned to convert to heavy duty tank hull trailers (Coast Iron & Metal Co., ASBCA 14082, 70-2 BCA ¶ 8392); a refueling tank from a truck when half of the refueling tanks at one Air Force base were inoperable (Garry E. Pugh, ASBCA 25819, 82-2 BCA ¶ 15,834); a machine that the Navy intended to incorporate into its anchor chain testing program (Coordinated Equipment Co., ASBCA 27164, 83-2 BCA ¶ 16,555); and antenna controls that the Defense Nuclear Agency needed to use to fulfill a treaty commitment (Eric Bjorgum, ASBCA 49988, 00-1 BCA ¶ 30,695 (1999)). The Government did not have a bona fide requirement to use a brake press machine that it withdrew from a sale because the machine should never have been included

[10]GSA also cites to Chesapeake Salvage Corp., ASBCA 24861, 81-1 BCA ¶ 15,020. Although the board there discussed the Withdrawal of Property After Award clause, it explained that the clause was not involved in that case because the agency did not withdraw any property from the award.

in the sale in the first place (Merchants and Traders Group, Inc., ASBCA 15993, 71-2 BCA ¶ 8960), or a gun turret that it withdrew from a sale because the invitation for bids inaccurately stated the demilitarization requirements and the weight of the turret (Clyde Kirby, ASBCA 20558, 76-2 BCA ¶ 12,059).

GSA has not established that it withdrew the airplanes after award for the Government's use due to the existence of a bona fide requirement for the airplanes. GSA contends that the Air Force had a bona fide need for the airplanes because it would have been costly to test them thoroughly and because it needed to protect the public by preventing the release of dioxin-contaminated airplanes. Respondent's Post-Hearing Brief at 31-33. As explained earlier in our discussion of the contracting officer's authority, GSA has not established that the airplanes purchased by Western Aviation were contaminated. The Air Force's concerns about the cost of testing do not establish that the Government actually made any use of the airplanes because a requirement existed for them, and so these concerns do not provide a basis for applying the Withdrawal of Property After Award clause. The contracting officer correctly understood that the Air Force did not have any need for the airplanes and that it intended to seal them and store them. None of the precedent concerning the Withdrawal of Property After Award clause would support a conclusion that sealing and storing an airplane amounts to using an airplane. So far as our record shows, no agency developed any bona fide requirement for the airplanes and no one is making any use of them. In such circumstances, the Withdrawal of Property After Award clause did not authorize GSA to refuse to turn over the airplanes to Western Aviation.

GSA's refusal to permit Western Aviation to take possession of the airplanes constitutes a breach of contract because the contract entitled Western Aviation to the airplanes when it paid for them in full, which it did, and when it made arrangements to pick them up, which it was prevented from doing by GSA. Although the Description Warranty clause contained in the invitation for bids and the Withdrawal of Property After Award clause contained in the General Sale Terms and Conditions authorized GSA to withdraw the airplanes from the sale in some circumstances, those circumstances were not present in this case.

Availability of Monetary Damages and Applicability of Exculpatory Clauses

A Government agency can have the best possible motive for deciding not to fulfill the terms of a contract, but a good motive does not eliminate the agency's responsibility for compensating the contractor for a breach. In Everett Plywood Corp. v. United States, 651 F.2d 723 (Ct. Cl. 1981), the Government terminated a contract due to concerns about environmental damage. In considering whether the Government's desire to protect the environment meant that it could cancel the contract without being liable for breach damages, the Court explained:

> There can therefore be no doubt that high reasons of public policy do not endow public officials with authority to repudiate contracts, though they may influence courts to refrain from interference by way of specific performance, etc., and from awarding damages that exceed a reasonable compensation for the lost contract rights.

. . . .

> Clearly, the government ought not to have stood idly by and continued with the contract if unacceptable damage to the environment were foreseen. On the other hand, whether the government can terminate the contract and escape making compensation is another issue, the issue we are concerned with.

651 F.2d at 728, 729. Accord Sun Oil Co. v. United States, 572 F.2d 786 (Ct. Cl. 1978). The issue that concerned the Court in Everett Plywood is also the issue that concerns us in this appeal.

Even though the Air Force suspected that some of the airplanes sold to Western Aviation might have been contaminated with a hazardous substance, GSA's actions constituted a breach. Although Western Aviation is not entitled to obtain specific performance of its contract, Western Aviation Maintenance, Inc. v. General Services Administration, GSBCA 14165, 98-2 BCA ¶ 29,816, Western Aviation might be able to collect monetary damages. Before we examine Western Aviation's request for damages, however, we first determine whether any contract clause limits the amount of Western Aviation's recovery.

In certain circumstances, the Description Warranty clause and the Withdrawal of Property After Award clause limit the amount of money damages that a contractor can recover to a refund of whatever amount the contractor paid to GSA. When a contract contains clauses such as these, the Government's ability to use them to limit its liability is curtailed by the strict and narrow construction of the clauses. If the facts of a case do not bring it within the confines of the clauses, however, the limitations on liability contained in the clauses do not apply. Peck Iron and Metal Co. v. United States, 496 F.2d 543 (Ct. Cl. 1974); Benjamin v. United States, 348 F.2d 502 (Ct. Cl. 1965); Deep Run Salvage, ASBCA 45152, 94-1 BCA ¶ 26,371 (1993) (denying motion for summary relief); Clyde Kirby, ASBCA 20558, 76-2 BCA ¶ 12,059; Merchants and Traders Group, Inc., ASBCA 15993, 71-2 BCA ¶ 8960. As explained in the previous section of this opinion, GSA did not misdescribe the C-123s and did not withdraw them from the sale for the Government's use due to the existence of a bona fide requirement for the airplanes, so neither the Description Warranty clause nor the Withdrawal of Property After Award clause operates to limit the amount of Western Aviation's recovery to a refund of its purchase price.

The Limitation on Government's Liability clause can, in some circumstances, limit recovery to a refund of the amount paid by a successful bidder. The Government cannot, however, always use a limitation on liability clause to limit its liability for breach damages to a refund, because the use of the clause is restricted by public policy considerations and fundamental principles of contract law that require contracts to be supported by mutuality of obligation and consideration that is not illusory. The clause was designed to be used to limit the Government's liability to a refund when "(1) a need for the property develops after it has been declared surplus and offered for sale, 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." Freedman v. United States, 320 F.2d 359, 362 (Ct. Cl. 1963). The clause should not be construed as "absolving the Government from all damages where it breaches the contract," without having one of the two good reasons enumerated above, because to read the clause as completely

relieving the Government for liability for breach damages "would come close to (if not reach) the pit of voidness." Id. at 366. Accord Thuresson v. United States, 453 F.2d 1278 (Ct. Cl. 1972); Stoner-Caroga Corp. v. United States, 3 Cl. Ct. 92 (1983).

The Limitation on Government's Liability clause does not limit Western Aviation's recovery to a refund of the amount that it paid to GSA. As discussed in the previous section of this opinion, no Government need for the C-123s developed after the airplanes were declared surplus and offered for sale. GSA contends that it made a serious mistake when it sold the C-123s, because the Defense Reutilization and Marketing Manual did not list that type of airplane as commercially salable at the time the sale to Western Aviation occurred. Respondent's Post-Hearing Brief at 33-34. The evidence does not show that the provisions of the manual applied to sales made by GSA, and so does not establish that the GSA contracting officer made a mistake when he sold the C-123s. DLA authored the manual and the DLA employee who maintains and issues the list of commercially salable airplanes told GSA before the sale that a decision had been made to classify the C-123 as commercially salable and that it would be listed as such the next time the manual was revised, which it was. There is no evidence that any DLA or GSA employee believes that it was a mistake to sell the C-123s. We are not convinced that GSA made a mistake, much less a serious mistake, when it advertised and sold the C-123s. In addition, given the public policy considerations that caution against a broad application of the clause, it is not surprising that no precedent supports invoking the Limitation on Government's Liability clause based upon a mistake such as the one that GSA contends occurred here concerning a limitation upon the contracting officer's authority.[11]

Western's Damages

As explained in our findings of fact, Western Aviation's damages claims have been revised several times. We accept the version of the claim set out in Western Aviation's opening post-hearing brief as the final revision of its claim. In that brief, Western Aviation argues that it is entitled to recover either its expectation interest damages or its reliance interest damages. The expectation interest damages claimed by Western Aviation consist of its potential profits from sales of airplanes ($3.5 to $18 million), sales of parts ($298,550), and leases of airplanes ($4.9 million). The reliance interest damages claimed by Western Aviation amount to $745,000.57, which consists of $318,400 for salaries, moving expenses, travel expenses, and legal expenses, and $28,468.63 for parts as set out in Western Aviation's September 4, 1998 letter to GSA counsel; plus $369,825 for labor, $20,686.94 for computer

[11]When a contracting officer's authority is limited by either a statute or a regulation published in the Code of Federal Regulations, disregard of that limitation is a mistake serious enough to void the terms of a contract. Total Medical Management, Inc. v. United States, 104 F.3d 1314 (Fed. Cir.), cert. denied, 522 U.S. 857 (1997); Urban Data Systems v. United States, 699 F.2d 1147 (Fed. Cir. 1983). Absent unusual circumstances, however, disregard of a limitation imposed by an unpublished, internal agency directive is not so eventful. Texas Instruments Inc. v. United States, 922 F.2d 810 (Fed. Cir. 1990); Howard Nettleton, PSBCA 3454, 94-3 BCA ¶ 27,038; A-1 Garbage Disposal & Trash Service, ASBCA 30623, 89-1 BCA ¶ 21,323; Kurz & Root Co., ASBCA 17146, 74-1 BCA ¶ 10,543.

costs, and $7620 for equipment to move airplanes as set out in Western Aviation's opening post-hearing brief. Appellant's Post-Hearing Brief at 44-45.[12]

Expectation interest damages and reliance interest damages are available as alternative forms of recovery. Expectation interest damages give a non-breaching party the benefit of the bargain by placing it in as good a position as it would have occupied if the breaching party had performed the contract. Expectation interest damages can include profits. Reliance damages include expenditures the non-breaching party made in performance or in anticipation of performance of the contract that was breached. Reliance interest damages reimburse the non-breaching party for the loss caused by its reliance upon the contract by placing the party in as good a position as it would have occupied if the contract had never been made. Reliance interest damages do not include profits. Laka Tool and Stamping Co. v. United States, 650 F.2d 270 (Ct. Cl.), cert. denied, 454 U.S. 1086 (1981); ATACS Corp. v. Trans World Communications, Inc., 155 F.3d 659, 669 (3rd Cir. 1998); Landmark Land Co. v. United States, 46 Fed. Cl. 261 (2000); California Federal Bank v. United States, 43 Fed. Cl. 445 (1999); Dolmatch Group, Ltd. v. United States, 40 Fed. Cl. 431 (1998); Restatement (Second) of Contracts §§ 344, 349 (1981).

In order to recover for 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 a 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. Exxon Co., U.S.A. v. Sofec, Inc., 517 U.S. 830, 839-40 (1996); Wells Fargo Bank v. United States, 88 F.3d 1012 (Fed. Cir. 1996), cert. denied, 520 U.S. 1116 (1997); Landmark Land Co. v. United States, 46 Fed. Cl. 261 (2000); California Federal Bank v. United States, 43 Fed. Cl. 445 (1999); S.N. Nielsen Co., GSBCA 4916, 81-1 BCA ¶ 14,921; Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. 1854); Restatement (Second) of Contracts §§ 344, 351 (1981). Lost profits that the non-breaching party claims it would have realized from "other independent and collateral" contracts, if not for the Government's breach, are not recoverable because such profits are not directly caused by the breach and are not the natural and ordinary consequence of the breach. Myerle v. United States, 33 Ct. Cl. 1, 26 (1897); Wells Fargo Bank v. United States, 88 F.3d 1012 (Fed. Cir. 1996), cert. denied, 520 U.S. 1116 (1997); Morris v. United States, 39 Fed. Cl. 7 (1997), aff'd, 178 F.3d 1307 (Fed. Cir. 1998) (table).

[12]Western Aviation does not claim the difference between the fair market value of the airplanes at the time of the breach and the contract price, which would be the traditional measure of damages for a breach such as occurred here. Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540 (1903); Miller v. United States, 140 F. Supp. 789 (Ct. Cl. 1956). This is just as well, however, because there is no evidence to establish that there was any difference between the fair market value at the time of the breach and the contract price, and GSA refunded the contract price after it terminated the contracts.

In addition to being recoverable only if they are the foreseeable result of a breach, breach damages are recoverable only in the amount that can be established with reasonable certainty. Reasonable certainty does not mean mathematical certainty. However, in order for the Board to make an award of damages, the appellant must present sufficient evidence to permit us to make a "fair and reasonable approximation" of the amount of damages. Locke v. United States, 283 F.2d 521, 524 (Ct. Cl. 1960); Restatement (Second) of Contracts § 352 (1981).

Western Aviation argues that GSA should be estopped from denying that the damages sought by Western Aviation were the foreseeable result of a breach. Equitable estoppel is used "to bar a party from raising a defense or objection that it otherwise would have, or from instituting an action which it is entitled to institute." American Maritime Transport, Inc. v. United States, 18 Cl. Ct. 283, 292 (1989) (quoting Jablon v. United States, 657 F.2d 1064, 1068 (9th Cir. 1981)). In order to establish an estoppel, four elements must be present:

> (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must have relied on the former's conduct to his injury.

Emeco Industries, Inc. v. United States, 485 F.2d 652, 657 (Ct. Cl. 1973) (quoting United States v. Georgia-Pacific Co., 421 F.2d 92, 96 (9th Cir. 1970)).

Western Aviation argues that estoppel should be applied because (1) GSA knew in June 1996, of the expenditures being made by Western Aviation and also knew at that time that two of the airplanes could be released; (2) GSA told Western Aviation that two of the airplanes could be released and intended for Western Aviation to act upon that information; (3) Western Aviation did not know that the Air Force might not release the two airplanes; and (4) Western Aviation spent money in reliance upon GSA's representation that two airplanes would be released. Appellant's Post-Hearing Brief at 47. After considering Western Aviation's argument, we conclude that there is no basis for applying the doctrine of estoppel in this case.

We are not convinced that Western Aviation seeks to utilize the doctrine of estoppel in the correct manner. In order to recover any damages, Western Aviation must establish that, when it entered into its contracts with GSA, its claimed damages were the foreseeable result of a breach of those contracts. This is part of Western Aviation's burden of proving its case. Robert J. DiDomenico, GSBCA 5539, 82-2 BCA ¶ 16,093 at 79,901; G P Construction & Development Corp., ASBCA 33121, 91-3 BCA ¶ 24,302 at 121,440. Instead of using estoppel to bar GSA from raising a defense or objection that it otherwise would have, Western Aviation wants to use estoppel in order to avoid carrying its burden of proof. In essence, Western Aviation's estoppel argument is that its damages should be recoverable even if GSA, at the time of contracting, had no reason to foresee that the damages claimed by Western Aviation would occur in the event of a breach. This is not the law and we know of no precedent to support the proposition that estoppel can work to make this the law.

Even if Western Aviation is seeking to utilize the doctrine appropriately, it has not established the first, second, and third elements of estoppel. As for the second element,

Western Aviation has not shown that GSA intended for Western Aviation to take any action as the result of GSA's statement that the airplanes were available to be retrieved, other than pick up the airplanes. Looking at the first and third elements, we see that Western Aviation has not shown that it was ignorant of any facts known to GSA. Western Aviation correctly states that in June 1996, GSA knew that two of the five C-123s could be released to Western Aviation. Western Aviation, however, also knew in June that the airplanes could be released because GSA told Western Aviation that it could come and get them. Western Aviation says that in June 1996, GSA also knew of the expenditures being made by Western Aviation. The evidence shows that GSA and Western Aviation did not discuss the specific details of Mr. Stilwell's plans for the airplanes, although they did discuss that he was taking measurements and proceeding to manufacture hardware. GSA could have inferred that Western Aviation was spending some money, but the evidence does not establish that GSA had any idea of the extent of the expenditures being made by Western Aviation. Western Aviation, of course, knew precisely what it was spending. Finally, Western Aviation says that it did not know that the Air Force might not release the two airplanes. Likewise, GSA did not know that the Air Force might not release the two airplanes. Western Aviation has not established that any grounds exist for estopping GSA from denying that Western Aviation's damages were foreseeable.

Expectation interest damages

Western Aviation's claimed expectation interest damages consist entirely of lost profits. It claims that it would have profited from sales of airplanes, leases of airplanes, and sales of parts, if not for GSA's breach. Damages consisting of lost profits from sales and leases of airplanes were not the foreseeable result of a breach, and the amounts claimed have not been proved with any degree of certainty. Although some damages for lost profits from sales of parts were the foreseeable result of a breach, the amount claimed is just as uncertain as are the amounts requested for lost profits from sales and leases of airplanes.

Lost profits from sales and leases of airplanes

Western Aviation claims that it could have sold or leased the C-123s after it converted them to air tankers, and that GSA's breach caused either $3.5 to $18 million of lost profits from sales or $4.9 million of lost profits from leases. The lost profits were not the foreseeable result of a breach because they would have only been realized if Western Aviation had entered into independent, collateral contracts for the sale or lease of the airplanes. Western Aviation cannot establish that any of these contracts would have materialized, so it cannot prove that these losses resulted from GSA's breach. In addition, when GSA entered into the contracts to sell the C-123s, it had no reason to anticipate that a breach would cause such damages. GSA advertised the airplanes as scrap or salvage airplanes, neither of which is suitable for flying. Scrap property has no value other than its basic material content. Although salvage property has some value greater than its basic material content, its condition is such that its repair cost will be more than 65% of its acquisition cost. It may well be possible to retrofit or upgrade any scrap or salvage airplane so that it is airworthy. However, there was no reason for GSA to anticipate that whoever purchased these five airplanes would spend money, especially before taking delivery of the airplanes, to prepare to convert them so that they could be used for fighting fires and to develop a marketing program for the airplanes. In the great multitude of cases in which

airplanes are sold as scrap or salvage under ordinary circumstances, the consequences that occurred here would not, in all probability, have occurred. Damages resulting from Western Aviation's inability to sell or lease converted C-123s were not the foreseeable result of a breach of the contracts with GSA because they were not the natural consequence of a breach of a contract to sell scrap or salvage airplanes, so they are not recoverable.

These claimed lost profit damages flow entirely from the fact that Western Aviation intended to do something not generally done with scrap or salvage airplanes. Not only did it intend to refurbish them for flying, it also intended to convert them so that they could be used to fight fires and to develop a program for selling and leasing the airplanes for that purpose. At the time of contracting, however, GSA was not aware of Western Aviation's plans. The contracting officer did not know the nature of Western Aviation's business. The director of the property management division for GSA Region 9 spoke with Mr. Stilwell a year or so before GSA issued the invitation for bids for the C-123s, but Mr. Stilwell represented that he worked for Marsh Aviation and the director had no idea what Western Aviation's operations were. GSA's property disposal and aircraft utilization specialist had never heard of Western Aviation, although she knew of Mr. Stilwell and Marsh Aviation. No evidence establishes that anyone from GSA knew that Western Aviation had a unique plan for utilizing these scrap or salvage airplanes, which included refurbishing the airplanes, converting them into air tankers, and then leasing or selling them. Western Aviation asserts that GSA's familiarity with Mr. Stilwell establishes that it knew what Western Aviation intended to do with the C-123s. Mr. Stilwell had dealt with GSA perhaps six to ten times before the sale at issue here and some GSA employees knew him as a representative of Marsh Aviation. Even if they had been quite familiar with Marsh Aviation's business, and we are not convinced that they were, they did not know anything about Western Aviation's business. The damages that Western Aviation claims it incurred due to its inability to sell and lease airplanes were not the foreseeable result of a breach because they were due to special circumstances of which GSA was not aware at the time of contracting. Thus, those damages are not recoverable.

Even if lost profits from sales and leases of air tankers had been the foreseeable result of a breach at the time of contracting, they would not be recoverable because it is uncertain whether any of these profits would have ever been realized or, if they had, that they would have accrued to Western Aviation. In order to determine that Western Aviation would have realized any profits from sales or leases, we have to make one rather important initial assumption. That is, we have to assume that Western Aviation would have been able to obtain the necessary FAA approval for its conversion of the C-123s to air tankers. Unless the FAA approved Western Aviation's modifications to the C-123s and issued a supplemental type certificate, no projected profits from either sales or leases would have ever materialized. We do not know whether Western Aviation had received such approvals in the past, and we have no basis upon which to conclude that the FAA's approval was likely. The estimate for lease profits includes an additional assumption, which is that all of the airplanes could be leased for 360 days per year. The usual season for fire fighting in the northern hemisphere is only three and one-half months, and there is no evidence to show that it was reasonable to assume that the five converted C-123s could have been leased for 360 days each year.

The only evidence we have of projected profits from sales or leases is the August 1996 booklet that was prepared by Marsh Aviation and Firestar Aircraft for the purpose of

attracting investors to a project that involved converting four different types of airplanes to be used for fire fighting. The booklet's estimated profits from sales of converted C-123s range from a low of $3.5 million to a high of $18 million. The uncertainty of the estimate is evident, given its wide range, and the estimate is not supported by any evidence concerning actual sales or expense data or experience. In addition, there was no established market for leasing or selling converted C-123s for fire fighting tankers, so we do not know whether they could have been leased or sold as projected by Marsh Aviation and Firestar Aircraft. Also, the booklet upon which Western Aviation relies in support of its claim for lost profits never mentions Western Aviation. According to the booklet, it was Marsh Aviation and Firestar Aircraft that would reap the benefits of any sales or leases of the airplanes. Finally, the record contains no evidence of Western Aviation's past profits and so, even in the absence of the other uncertainties mentioned here, we would have no basis upon which to conclude how profitable a venture the conversion of the C-123s might have been for Western Aviation.

Lost profits from sales of parts

Western Aviation's expectation interest damages also include $298,550 from the sale of engines and propellers from the airplanes. Although it was foreseeable that GSA's breach would lead to the loss of any profits to be made from the sale of parts from the airplanes, Western Aviation has not established either that the damages it claims were entirely the foreseeable result of a breach or that those damages would have amounted to $298,550, so these damages are not recoverable.

It was foreseeable that if GSA breached its contracts, Western Aviation would be damaged if it could not sell parts from the scrap or salvage airplanes that it purchased. Scrap and salvage items are expected to be worth at least their basic material content, so in the normal course of events, it is probable that a purchaser would sell the material that made up the scrap or salvage airplanes and whatever parts could be reclaimed from the airplanes. As discussed in the following paragraph, however, the bulk of Western Aviation's claimed damages consist of lost profits from sales of modified propellers. Marsh Aviation intended to modify the propellers, obtain the FAA's approval to install them on an airplane other than a C-123, and then sell them. These damages were not the natural and ordinary consequence of a breach of a contract to sell scrap or salvage airplanes, and there is no evidence to suggest that GSA was aware of Western Aviation's special plans for the propellers. Thus, damages consisting of lost profits from the sale of modified propellers were not the foreseeable result of a breach of contract.

In addition to not being entirely the foreseeable result of a breach, the claimed damages are uncertain in amount. The support for Western Aviation's claim for lost profits from the sale of parts is a February 1996 booklet that contains Marsh Aviation's cash flow projections, based upon the assumption that it purchased the C-123s from GSA. Western Aviation's claim is overstated by $3150 because it includes projected profits from an airplane that Western Aviation did not purchase instead of projected profits from an airplane that it did purchase. In addition, in arriving at its claimed amount, Western Aviation did not subtract the projected cost of acquiring the engines and propellers, which was $72,500. Marsh Aviation projected that $200,000 of its projected profit would come from the sale of propellers, but only if the FAA would issue a supplemental type certificate to permit the modification of the propellers so that they could be installed on an airplane other than a

C-123. Without such a modification, the booklet said, the value of the propellers was low. We do not know whether the FAA would have approved the propeller modification that Marsh Aviation proposed and we have no evidence of the value of the propellers without the modification. Although Mr. Stilwell testified that Marsh Aviation had a buyer for the engines, there is nothing in the record to show whether the price that the buyer was willing to pay was anywhere near Marsh Aviation's projection, or to show how much Marsh Aviation would have remitted to Western Aviation. We do not know whether Western Aviation had a history of profits or, if it did, how profitable selling the engines and propellers would have been. Neither the testimony nor the Marsh Aviation booklet establishes with any degree of certainty what profits would have been realized by Western Aviation from the sales of engines and propellers.

Reliance interest damages

Western Aviation's claimed reliance interest damages consist of $318,400 for salaries, moving expenses, travel expenses, and legal expenses; $28,468.63 for parts; $369,825 for labor; $20,686.94 for computer costs; and $7620 for equipment to move airplanes. These damages are not recoverable, either because they were not the foreseeable result of a breach or because the amount of damages was not proven with any degree of certainty.

Western Aviation claims that it spent $318,400 for salaries, moving expenses, travel expenses, and legal expenses in order to further the program to market refurbished C-123s as air tankers; $28,468.63 for parts used to build a tank and door system for a modified C-123; and $369,825 for labor to fabricate the tank and door system. These damages were not the foreseeable result of a breach because they resulted from Western Aviation's efforts to convert C-123s to air tankers that could be used for fighting fires and to develop a marketing program for the converted airplanes. As explained above in our discussion of expectation interest damages, such damages are not recoverable because they were not the natural and ordinary consequence of a breach of a contract to sell scrap or salvage airplanes, and were due instead to special circumstances of which GSA was not aware at the time of contracting. In addition, to the extent that some of these costs were incurred before the parties entered into their contracts and others were incurred after GSA terminated the contracts, they are not damages caused by the breach.

In addition to not being the foreseeable result of a breach, the claimed amount of $318,400 is uncertain. The figure is not supported by any invoices, time sheets, payroll records, bills, or any other documentary evidence which should have been readily available to support these claimed damages. There is no testimony concerning either the $318,400 figure or the expenses that are included within that amount. Even if GSA had been able to foresee that such damages would flow from a breach, there is no evidence to establish the amount of these damages with any degree of certainty.

The claimed amount of $369,825 for labor is also uncertain, in addition to not being the foreseeable result of a breach of contract. This amount is supported by a March 8, 1997 invoice from Marsh Aviation to Western Aviation. The record, however, contains two versions of this invoice. One shows a charge of $179,600 representing 3592 hours of work and the other shows a charge of $369,825 representing 7396.5 hours of work. The record does not explain why two copies of the same invoice contain different figures. In addition, the labor records that are in evidence contain duplicative entries and do not support the number of hours on either invoice, and different records are offered to support the different versions of the invoice. Neither version of the March 8 invoice is certain enough to serve as a basis for an award of damages, even if the damages had been foreseeable.

The $20,686.94 claimed for computer costs is supported by an invoice for computers purchased months before GSA awarded the contracts to Western Aviation; by invoices for consulting work, some of which was done after GSA terminated the contracts; and by an invoice for some unidentified item that was purchased after GSA terminated the contracts. Western Aviation has not explained how the consulting work is related to a claim for computer costs, or how costs incurred before the contracts were awarded and after they were terminated were the probable result of a breach. In addition, to the extent that the computers

were purchased and the consultants were hired in order to pursue a program to convert the C-123s to air tankers, these damages were not the foreseeable result of a breach, as explained earlier in this opinion.

Finally, Western Aviation claims $7620 for a tow truck and a tow bar. The contracts between the parties required Western Aviation to move the airplanes from Davis-Monthan Air Force Base or to hire someone to move them, so it was a natural and ordinary result of a breach that Western Aviation would be damaged if it spent any money in anticipation of moving the airplanes. GSA questions whether Western Aviation is entitled to be reimbursed for the $7620, however, because this money was spent by Marsh Aviation. Respondent's Post-Hearing Brief at 28.

Western Aviation asserts that it is liable for the money that Marsh Aviation spent because the "undisputed evidence establishes the formation of a contract between Western and Marsh Aviation." Appellant's Reply at 46. The evidence upon which Western Aviation relies, however, does not establish the existence of a contract between the two companies that would obligate Western Aviation to pay Marsh Aviation for the tow truck and tow bar. Mr. Stilwell testified that Western Aviation hires Marsh Aviation to perform work for it, but that testimony was a general description of the relationship between the two companies and did not relate either to the five airplanes at issue here or to the tow truck and tow bar. Transcript at 114-15. He testified that Western Aviation hired Marsh Aviation to prepare a manual specifying how to install a particular engine on the C-123, but this does not evidence any contract other than perhaps one to prepare the manual. Transcript at 130. He testified that Western Aviation hired Marsh Aviation to design and build the tank system, and explained that Western Aviation's obligation to Marsh Aviation was reflected in the bills that Marsh Aviation sent to Western Aviation. A contract to design and build a tank system is not a contract to purchase a tow truck and a tow bar, and Marsh Aviation never billed Western Aviation for either the tow truck or the tow bar. Transcript at 158-59. Mr. Stilwell said that there was a signed work order between the two companies, but he did not know whether there was a contract between them. The work order is not in our record, and we do not know its terms. Transcript at 158-59. He testified that the work of stripping the paint from the airplanes would have been done by Marsh Aviation, under a subcontract, and that Marsh Aviation would have probably been the sales agent for selling parts from the airplanes. Nothing shows that either a contract to strip paint or to sell parts would include purchasing a tow truck or a tow bar for Western Aviation. Transcript at 171, 174. Finally, in response to a question posed by his counsel during his re-direct examination, Mr. Stilwell testified that Western Aviation's obligations were reflected in the exhibits about which he testified. This testimony is not evidence of a contract with Marsh Aviation, and Mr. Stilwell never testified about the exhibits related to the tow truck and the tow bar. Transcript at 179. The evidence relied upon by Western Aviation falls short of establishing that it entered into a contract with Marsh Aviation that required Marsh Aviation to purchase a tow truck and a tow bar and also required Western Aviation to reimburse Marsh Aviation for such a purchase.

As Mr. Stilwell explained, Western Aviation and Marsh Aviation are two separate companies with different corporate charters. They conduct separate business operations and use their separate corporate structures as the mechanism for limiting liability in case of a loss. They vigorously maintain separate books and records, and Marsh Aviation billed Western Aviation for amounts due to Marsh Aviation. The only invoices from Marsh Aviation to

Western Aviation are dated March 8, 1997, one year after Marsh Aviation purchased the tow bar, six months after it purchased the tow truck, two months after GSA terminated the contracts, and six weeks before this appeal was filed. If Marsh Aviation intended to invoice Western Aviation for the tow truck and tow bar, it had ample time to do so. Yet Marsh Aviation never billed Western Aviation for either purchase. The obligations of Marsh Aviation do not automatically become the obligations of Western Aviation, even though the two companies have some common ownership. The evidence does not establish that Western Aviation was obligated to reimburse Marsh Aviation for the purchase of the tow truck and the tow bar, so the evidence is not sufficient to establish that Western Aviation sustained $7620 of reliance interest damages due to GSA's breach.

Summary

The result in this case might seem discordant. Even though GSA breached its contracts with Western Aviation, Western Aviation is not entitled to recover any damages. However, not every breach results in an award of damages. San Carlos Irrigation and Drainage District v. United States, 111 F.3d 1557, 1563 (Fed. Cir. 1997); Wells Fargo Bank v. United States, 88 F.3d 1012, 1022 (Fed. Cir. 1996), cert. denied, 520 U.S. 1116 (1997). The legal rules that we apply in order to reach our result are not new.[13] Applying those rules, we conclude that the evidence of record in this appeal does not establish that Western Aviation is entitled to recover any of the amounts that it claims are due as a result of GSA's breach.

Decision

The appeal is **DENIED**.

MARTHA H. DeGRAFF
Board Judge

We concur:

ANTHONY S. BORWICK
Board Judge

ALLAN H. GOODMAN
Board Judge

[13] "While the inquiry we are about to make is important, it is by no means a novel one, and does not open up any new field of legal investigation. It involves, not the discussion of any new principle but merely the application of one of some antiquity to the actual facts of this case." Winston Cigarette Machine Co. v. Wells-Whitehead Tobacco Co., 53 S.E. 885, 887 (N.C. 1906).