ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --	)	
	)	
Lockheed Martin Aircraft Center	)	ASBCA No. 55164
	)	
Under Contract No. N00019-00-D-0279	)	

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OPINION BY ADMINISTRATIVE JUDGE SCOTT
ON MOTIONS FOR SUMMARY JUDGMENT

Appellant Lockheed Martin Aircraft Center (LMAC) has appealed from the contracting officer's (CO's) deemed denial of its $17,763,627 claim under the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613, for costs incurred under the subject requirements contract due to the government's alleged diversion and elimination of maintenance requirements for the U.S. Air Force's C-9A series aircraft. The government moved to dismiss the appeal for lack of jurisdiction and moved for summary judgment on Counts II and III of the complaint. Appellant opposed the motions; moved to amend its complaint; and moved for summary judgment on Count I of its amended complaint. We denied the government's motion to dismiss and granted appellant's motion to amend. *Lockheed Martin Aircraft Center*, ASBCA No. 55164, 07-1 BCA ¶ 33,472 (*Lockheed I*). For the reasons that follow, we deny their summary judgment motions.

STATEMENT OF FACTS FOR PURPOSES OF THE MOTIONS

Based upon the parties' submissions and the record to date, the following facts and contract provisions are undisputed or have not been controverted.[1]

The Contract and Performance

On 4 May 2000, effective 1 August 2000, the Naval Air Systems Command (NAVAIR) and LMAC entered into the subject negotiated requirements contract under which LMAC was to provide, *inter alia*, standard depot level maintenance (SDLM) including periodic depot maintenance (PDM), mid-term inspection (MTI), over and above work (O&A), and modification work on U.S. Navy, U.S. Marine Corps and U.S. Air Force C-9 series aircraft. The contract included a two-month base period from 1 August 2000 through 30 September 2000 and six options, covering fiscal years (FYs) 2001 through 2006, which the Navy exercised. (R4, tab 1 at GOV9, 53-55, 58, 78, tabs 1E, 2A, 2B, 2E, 2K, 2N, 2S) This appeal concerns only the Air Force C-9A aircraft.

The contract incorporates the following clauses by reference: FAR 52.215-8, ORDER OF PRECEDENCE—UNIFORM CONTRACT FORMAT (OCT 1997); FAR 52.216-18, ORDERING (OCT 1995); FAR 52.216-21, REQUIREMENTS (OCT 1995); FAR 52.233-1, DISPUTES (DEC 1998)—ALTERNATE I (DEC 1991); FAR 52.243-1, CHANGES-FIXED PRICE (AUG 1987); FAR 52.243-3, CHANGES-TIME-AND-MATERIALS OR LABOR-HOURS (AUG 1987) (applicable to certain contract line items (CLINs)); FAR 52.249-2, TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (FIXED-PRICE) (SEP 1996); and FAR 52.249-6, TERMINATION (COST-REIMBURSEMENT) (SEP 1996) ALTERNATE IV (applicable to certain CLINs) (R4, tab 1 at GOV115-16, 118-19).

[1] The government represented that, for purposes of its summary judgment motion on Counts II and III, there are no genuine issues of material fact and the Board may take appellant's proposed findings in its opposition as established (gov't rebut. mem. at 6). However, in its "reply" to appellant's summary judgment motion on Count I, the government raised issues concerning some of the same or similar proposed findings (gov't reply at 5-7, 9). In resolving the motions, we have adopted only those of appellant's proposed findings, or portions thereof, that do not contain legal argument, are backed by citation to evidence, and that the government did not ultimately dispute or controvert.

The Order of Precedence clause provides in part:

> Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order:
>
> (a) The Schedule (excluding the specifications).
>
> (b) Representations and other instructions.
>
> (c) Contract clauses.
>
> (d) Other documents, exhibits, and attachments.
>
> (e) The specifications.

The Requirements clause provides in part:

> (a) This is a requirements contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies or services specified in the Schedule are estimates only and are not purchased by this contract. Except as this contract may otherwise provide, if the Government's requirements do not result in orders in the quantities described as "estimated" or "maximum" in the Schedule, that fact shall not constitute the basis for an equitable price adjustment.
>
> (b) Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering clause. . . .
>
> (c) Except as this contract otherwise provides, the Government shall order from the Contractor all the supplies or services specified in the Schedule that are required to be purchased by the Government activity or activities specified in the Schedule.

The contract does not contain ALTERNATE I (APR 1984) to the Requirements clause, which provides the following substitute for paragraph (c), above:

> (c) The estimated quantities are not the total requirements of the Government activity specified in the Schedule, but are estimates of requirements in excess of the quantities that the activity may itself furnish within its own capabilities. Except as this contract otherwise provides, the Government shall order from the Contractor all of that activity's requirements for supplies and services specified in the Schedule that exceed the quantities that the activity may furnish within its own capabilities.

The Fixed-Price Termination for Convenience clause provides in part:

> (a) The Government may terminate performance of work under this contract in whole or, from time to time, in part if the [CO] determines that a termination is in the Government's interest. The [CO] shall terminate by delivering to the Contractor a Notice of Termination specifying the extent of termination and the effective date.

Section B of the contract Schedule, "SUPPLIES OR SERVICES AND PRICES/COSTS," provides that "[t]he quantity set forth for each line item is the Government's Best Estimated Quantity (BEQ) it estimates to order during the period of this contract" (R4, tab 1 at GOV10). The CLINs for PDM and MTI for Air Force C-9A series aircraft were at fixed prices. The estimated quantity of PDM for those aircraft for the base period (CLIN 0003) was one, at a unit price of $636,047. The estimated quantities for the six option years were four per year at unit prices of $701,846, $715,676, $733,000, $752,225, $772,817, and $794,842, respectively. The estimated quantity of MTI for those aircraft for the base period (CLIN 0005) was one, at a unit price of $193,211. The estimated quantities of MTI for the option years were two per year at unit prices of $249,759, $255,318, $262,196, $269,731, $277,925, and $286,773, respectively. (*Id.* at GOV10, 17, 23, 29, 35, 41, 47)

Schedule section C, "DESCRIPTION/SPECIFICATIONS/PWS [Performance Work Statement]," provides in part at section C-1, "AIRCRAFT DEPOT MAINTENANCE [ADM] REQUIREMENTS:"

> a. SUPPLIES OR SERVICES TO BE PROVIDED.
>
> The Contractor shall accomplish the work identified below upon receipt of a written order from the Government. The Government shall not be liable for any expense incurred by

> the Contractor under any item identified below until an order has been issued. The Contractor shall be responsible for initiating written O&A work requests to the ACO immediately as the need for such work becomes known.

(R4, tab 1 at GOV53)

Section C-1 also provides, at Part A, "FIXED PRICE ITEMS," that, for the base period and option CLINs, the contractor was to perform the PDM and MTI requirements on Air Force C-9A series aircraft as required in sections 2 and 5, and 2 and 6, respectively, of attachment 1 and in certain contract data requirements lists (R4, tab 1 at GOV53-54). Section J of the contract Schedule describes attachment 1 as "C-9 AIRFRAME DEPOT MAINTENANCE AND MODIFICATION PERFORMANCE WORK STATEMENT," dated 16 July 1999[2] (*id*. at GOV141, 187).

The PWS notes that the Air Force C-9 aircraft are a military version of the commercial DC-9-32F series aircraft and the 20 Air Force C-9A aircraft provide medical evacuation and passenger transportation. (R4, tab 1E, § 1.0 at GOV194)

PWS section 1.5, "Critical Performance Objectives," at subsection 1.5.1, identifies five elements of contractor performance "considered critical to this program," including:

> a.) Perform all C-9 aircraft depot maintenance services required to meet world-class aviation industry, quality, safety and environmental standards.
>
> . . . .
>
> c.) Provide sufficient manpower, equipment and facilities to accomplish all scheduled SDLM, PDM, MTI and Modification requirements, as well as all unscheduled C-9 Drop-In and Field Team requirements.

(*Id*. at GOV195)

PWS section 2 contains general requirements (R4, tab 1E at GOV198, *et seq*.). PWS section 5 describes Air Force C-9 PDM as follows:

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[2] One of two cover sheets to the attachment uses the phrase "Performance Work Specification," but the other cover sheet, and each page of the attachment, uses the phrase "Performance Work Statement," like Section J.

> 5.0.1 The Air Force C-9 PDM process includes visual, NDI and functional checks of the airframe, engines, and systems, and stripping and repainting of the aircraft. PDM consists of a thorough and comprehensive disassembly and inspection of the aircraft structure and flight critical components. The Contractor shall repair defects discovered during PDM to ensure serviceability of the aircraft structure and components until the next scheduled depot visit. The Contractor shall accomplish all PDM inspection and maintenance requirements as defined in the USAF C-9 PDM Specification, Basic dated 01 October 1989, Change 15, dated 31 December 1998, Attachment (3).

(*Id*. § 5.0.1 at GOV212, *see also* R4, tab 1 at GOV141) PDM was to occur at five year (60 month) intervals (*see, e.g.*, R4, tab 4AI at GOV581).

PWS section 6 describes Air Force C-9 MTI as follows:

> The USAF C-9 MTI process is a Visual Inspection of the airframe. The MTI consists of inspections identified by Douglas to preclude the spread of corrosion to primary structural members per the Corrosion Prevention and Control Plan. The Contractor shall repair defects discovered to ensure serviceability of the aircraft structure and components until the next scheduled depot visit. The Contractor shall accomplish all MTI inspection and maintenance requirements as defined in the [Technical Order (TO)] 1C-9A-6, Basic dated 01 October 1989, Change 15 dated 31 December 1998.

(R4, tab 1E, § 6.0 at GOV219) TO 1C-9A-6 (the 1998 TO) is contract attachment 11 (*see* R4, tab 1, GOV142). MTI was to occur every 30 months, which was the midpoint between PDM inspections (R4, tab 6C (Reinhart e-mail "RE: C-9 Aircraft Depot Level Maintenance/Solicitation #N00019-9 9-R-1169/Request Clarification") ("The MTI is an inspection required every 30 months"), *see also* R4, tab 4AI at GOV582).

The Introduction to the 1998 TO states in part:

> 1. THIS MANUAL CONTAINS COMPLETE REQUIREMENTS FOR ACCOMPLISHING SCHEDULED

> MAINTENANCE ON THIS AIRCRAFT DURING ITS ENTIRE SERVICE LIFE. . . .
>
> 2. THE INTERVAL BETWEEN THE ACCOMPLISHMENT OF A REQUIREMENT IS INTENDED TO BE THE LONGEST PERIOD OF TIME THAT AN ITEM OR COMPONENT CAN SAFELY OPERATE WITHOUT AN INSPECTION OR OBSERVATION. . . .
>
> . . . .
>
> 4. THE INSPECTIONS PRESCRIBED BY THIS MANUAL WILL BE ACCOMPLISHED AT SPECIFIED PERIODS BY AIR FORCE ORGANIZATIONAL ACTIVITIES WITH ASSISTANCE PROVIDED BY AIR FORCE FIELD MAINTENANCE ACTIVITIES AND SPECIALIZED REPAIR ACTIVITIES WHEN REQUIRED. . . .

(Gov't reply to app. mot., ex. A at 9)

Section F-3 of the contract Schedule, "AIRCRAFT DEPOT MAINTENANCE INDUCTION SCHEDULING," provides in part:

> The projected, aircraft depot maintenance, induction schedule is contained in Attachment 10. The projected aircraft induction schedule and the estimated quantities for the services in Section B of this contract, represent the Government's best estimate for the required services at the time of contract award. **The estimates provided in Section B shall not to [sic] be construed by the contractor as contractual commitments or guaranteed minimums.**
>
> Upon award of the Base Year contract and at the award of each subsequent Option Year, the Government will provide the Contractor's [sic] a revised projected depot maintenance induction schedule. Based on this projected schedule, the Contractor shall submit a depot maintenance Plan of Actions and Milestones . . . that outlines the Contractor's overall plan for production, facilities and manpower for the coming contract or option year. . . .

> In the event ACO and the Contractor fail to reach a schedule agreement for the upcoming contract or option year, the Government may unilaterally issue the aircraft depot maintenance induction schedule. **If the Contractor is unable to accommodate and comply with the Government's aircraft depot maintenance induction schedule, the Government may, at its option, seek other contractual sources for any or all of the aircraft depot maintenance requirements contained in Section B.**

(R4, tab 1 at GOV80-81) The referenced Attachment 10, dated 6 July 1999, contains an induction schedule for the base and option periods for SDLM, PDM and MTI for the Navy, Air Force and Marine aircraft (R4, tab 1N at GOV290).

Contract Attachment 4, Air Force TO 1C-9A-6WC-7, "WORKCARDS, MID-TERM INSPECTION, USAF SERIES, C-9A AIRCRAFT," dated 1 October 1998 (R4, tab 1H at GOV278-79), provides in part:

> 1. THESE INSPECTION WORKCARDS . . . . DO NOT REPLACE, BUT DO AUGMENT THE REQUIREMENTS ESTABLISHED FOR OTHER SCHEDULED INSPECTIONS, SUCH AS PREFLIGHT/THRUFLIGHT, HOME STATION, ETC. MID-TERM REQUIREMENTS ARE TO BE ACCOMPLISHED ON ALL AIRCRAFT DURING THE MID-PDM MID-TERM.
>
> 2. THE "MIDPOINT BETWEEN PDM" IS THE MINIMUM INTERVAL IN ORDER TO MAINTAIN THE AIRCRAFT IN AN ACCEPTABLE CONDITION. THE PRIMARY PURPOSE OF THE C-9A MID-TERM IS TO RETURN THE AIRCRAFT APPEARANCE TO A "LIKE NEW" CONDITION AND TO ACCOMPLISH SPECIFIC CORROSION INSPECTIONS IN ORDER TO MAINTAIN AIRCRAFT STRUCTURAL INTEGRITY. WORKCARDS 1-001 THROUGH 1-021 ARE MANDATORY CORROSION INSPECTION REQUIREMENTS AND MUST BE ACCOMPLISHED.

(Amend. compl., ex. 5)

In August 2000, when the contract became effective, the following C-9A aircraft were in the Air Force's inventory: (1) 67-22583; (2) 67-22584; (3) 67-22585; (4) 68-08932; (5) 68-08933; (6) 68-08934; (7) 68-08935; (8) 68-10958; (9) 68-10959; (10) 68-10960; (11) 68-10961; (12) 71-00874; (13) 71-00875; (14) 71-00880; (15) 71-00881; (16) 71-00882; (17) 71-00879; (18) 71-00877; (19) 71-00876; and (20) 71-00878 (gov't mot., attach. C (3/3/06 declaration of Margaret Smith, then C-9 depot/engine program manager (as of September 2004) (Smith decl.) ¶¶ 1, 2; app. opp'n at 3, proposed finding No. 2).

By e-mail dated 24 July 2002, Ray Bolt, identified as "C-9 Mod Manager," wrote to various government personnel on the subject of "MTI for 960,"[3] as follows:

> This is SPO [Systems Program Office] direction for accomplishment of MTI on C-9A 68-0960. Scott AFB [Air Force Base] will perform MTI using T.O. 1C-9A-6WC-7 dated 1 Oct 1998 Change 1 dated 15 Feb 1999[4] in lieu of accomplishment at [LMAC]. This direction has been coordinated with C-9 engineering . . . .

(R4, tab 4AF at GOV575) A later government e-mail also dated 24 July 2002 on the subject of "MTI for 960" stated:

> Request you return UNOBLIGATED funds via DD Form . . . sent to you on DD FORM . . . dated 23 May 02 in the amount of $1,833,924.00. These funds were committed and sent to you for MTI on AMC [Air Mobility Command] Medevac aircraft 68-0960.
>
> It has been determined that the MTI will be performed by Scott AFB instead of being accomplished at Lockheed.

[3] We infer that this is the above-listed aircraft 68-10960.

[4] The referenced TO seems to be contract attachment 4, noted above, but the record to date does not appear to contain a copy of the 15 February 1999 change.

> Request these funds be returned ASAP so they can be used on other requirements.

(*Id*.) Even later on 24 July 2002, Antonio M. Aponte, identified as administrative contracting officer (ACO), Defense Contract Management Agency, sent an e-mail on the subject of "MTI for 960" to LMAC personnel and others stating:

> This is to notify LMAC that the Air Force has determined to perform the MTI for A/C [aircraft] 960 at Scott AFB instead of being accomplished at LMAC. MTI schedule for Yokota [Japan] A/C 874 remains unchanged.

(App. supp. R4, tab 8 at APP56)

By memorandum dated 2 October 2002 on the subject of "C-9 PDM Cycle," Maj Lawrence J. Stetz, identified as chief of the Commercial Derivative Aircraft Branch, Aircraft Maintenance Division, Air Force Headquarters, AMC, informed Air Force personnel that:

> 1. Due to the likely retirement of the C-9 fleet, you are instructed to keep the C-9A and C-9C aircraft on their current 5 yr cycle for the A models and the 3 phase cycle for the C models. We have coordinated this action with . . . C-9 weapons system managers.

(R4, tab 3M)

An Air Force "BULLET BACKGROUND PAPER ON C-9A RETIREMENT," dated 11 October 2002, refers to "20 C-9As retiring in FY 04" It states, *inter alia*, that the "C-9As are over 30 years old and require full re-engining ($638M to upgrade fleet);" "[t]he Air Force position to retire the C-9As is based on decreased requirements for patient movement and the range limitations of the aircraft;" "[t]he AF bill will decrease overall because of the aircraft retirement and divestiture of assets;" and "estimated annual savings $100M subject to patient count, organic aircraft availability, and commercial provider costs" (gov't mot., attach. B (4/4/06 declaration of Lt Col Stanley Skavdal, then Deputy Chief, Operational Programming Division, Directorate of Plans and Programs at Headquarters, AMC, Scott AFB, based upon his review of records pertaining to retirement of Air Force's C-9A fleet (Skavdal decl.) ¶ 1, attach. A).

By e-mail dated 16 October 2002, on the subject of the C-9 induction schedule for the first quarter of FY 2003, a government employee advised ACO Aponte and other

government personnel that AMC had directed that no Air Force C-9 aircraft were to be inducted into depot maintenance for that quarter. Three aircraft scheduled for maintenance were affected: 932 (PDM scheduled for mid-October 2002; Air Force granted waiver until April 2003); 874 (MTI scheduled for 1 November 2003) and 881 (PDM scheduled for 3 December 2003). (R4, tab 4Y; app. opp'n at 12-13, proposed finding No. 30)

In a letter to a Congressman dated 10 December 2002 concerning the potential retirement of the C-9A, an Air Force officer advised, among other things, that "[b]ased on decreased wartime requirements for patient movement and the limitations of this aging aircraft, the Air Force is evaluating the most cost-effective way to conduct AE [Aeromedical Evacuation]" (Skavdal decl., attach. B).

The parties negotiated an updated schedule in December 2002 reflecting that five, instead of the estimated four, PDMs were to occur in FY 2003 on Air Force C-9A aircraft, including 583 (scheduled for induction in March 2003); 932 (scheduled for induction in April 2003); and 881 (scheduled for induction in June 2003) (amend. compl., ex. 3; app. opp'n at 12, proposed finding No. 29).[5] The government operated those three aircraft under PDM waivers allowing overflight for designated periods of time. (Smith decl. ¶¶ 3b., 3d., 3n.; app. opp'n at 13, proposed finding No. 31)

By e-mail dated 20 February 2003, Lt Marc Albritton, then C-9 depot program manager, inquired of Maj Stetz whether AMC would be inputting aircraft 932 into Depot, noting it was scheduled for induction on 1 April and that, if AMC did not plan to induct it, Lt Albritton needed "to let LMAC know as soon as possible to allow them to properly manage their personnel" (R4, tab 4V at GOV557). Maj Stetz responded:

> Tell LMAC we won't be inputting that aircraft. We'll park it here at Scott until we get the go-ahead to excess the fleet. By the way, we don't have any funds to cover a PDM, and the command as a whole is short on money due to the on-going world events.

[5] Appellant's propsed findings and its amended complaint refer to an April 2002 scheduling conference between the parties involving PDM inductions and to a Schedule 18-02, dated 24 April 2002, upon which appellant is said to have relied (app. opp'n at 11-12, proposed finding No. 28; amended compl. ¶ 47). The government acknowledges a Schedule 18-02 but denies that it reflects C-9A requirements (answer to amended compl. ¶ 47). Appellant did not direct the Board to the record and the Board has not located such a schedule therein.

(*Id*.) By e-mail of 21 February 2003, Lt Albritton asked the ACO to inform LMC, per AMC's direction, that aircraft 932 would not be inducted on 1 April 2003 for its scheduled PDM inspection. Lt Albritton advised that there was no additional direction at that time. (R4, tab 4V at GOV556) On 21 February 2003 Lt Albritton sent a copy of this e-mail chain to CO Anthony J. DeVico and others, and CO DeVico sent it to Marcus H. Hatcher, LMAC's contract manager (*id*.; *see also* app. supp. R4, tab 7 at APP01).

By separate e-mail dated 21 February 2003, copied to the CO and others, Lt Albritton asked the ACO to advise LMAC that, per Air Force direction, aircraft 583 would not be inducted on 13 March 2003 for its scheduled PDM inspection and that there was no additional direction at the time. The ACO so notified Mr. Hatcher and others by e-mail the same day. Prior related internal government e-mail of 19 and 21 February 2003 indicated that the aircraft would not be inducted for PDM but most likely retired; there was no funding for FY 2004 and beyond; and, until a disposition decision was received, PDM would be placed on hold. (R4, tab 4W)

By e-mail of 24 February 2003 Mr. Hatcher inquired of the ACO whether aircraft 932, like aircraft 583, was slated for retirement. Lt Albritton responded to the ACO by e-mail of 25 February 2003 that:

> The only guidance we have received from AMC was their intentions not to induct aircraft 932 at this time. Whether or not the aircraft will be retired or inducted at a later date is yet to be determined. This also applies to aircraft 583.

(R4, tab 4T at GOV547) By e-mail of 25 February 2003 the ACO forwarded the response to Mr. Hatcher (app. supp. R4, tab 8 at APP62).

In a 24 March 2003 letter to LMAC, the CO sought information about potential cost and other impacts should the C-9A aircraft be retired in FY 2003. He noted that AMC was considering the retirement but stated that the inquiry "is for estimation purposes only, and <u>is not</u> an official notice regarding the disposition of the C-9A aircraft." (R4, tab 3L) Among other things, he sought the potential impact of the Air Force's retention of only one C-9A, 876; and the impact if C-9A sites and certain services remained operating for part of FY 2004. In a 2 April 2003 letter to LMAC, the CO inquired further about possible retention of 876 in FY 2004. He again stressed that "this . . . <u>is not</u> an official notice regarding the disposition of the C-9A aircraft." (R4, tab 3K)

LMAC responded, including estimated cost and other impacts, by letters to the CO of 22 April 2003 and 18 August 2003 (R4, tab 3J at GOV478, tab 3G at GOV470). In a 4 September 2003 letter to LMAC, the CO stated that C-9A flying operations at Scott AFB and Yokota, Japan, would cease by 30 September 2003; the government intended to continue C-9A flying operations at Ramstein AFB, but that a de-scoping of activities there would occur; total C-9 aircraft there would be reduced from six to one; aircraft 876 would remain; and C-9A flying operations, excepting 876, would cease by 30 September 2003 (R4, tab 3F at GOV469).

An internal government memorandum dated 4 June 2003 notes that Air Force-wide divestiture of the C-9A was included in the President's FY 2004 budget submission to Congress (Skavdal decl., attach. F).

In a letter to the CO dated 15 September 2003, LMAC stated that in FY 2003, to date, no Air Force C-9A aircraft had been inducted to LMAC for either MTI or PDM requirements. It alleged that the failure to induct and the fleet retirement amounted to, at the least, a constructive contract change. It asserted that a reasonable variance to the BEQs could be expected, but that the progressive disclosure of the cancellations of Air Force C-9A model inductions; the great variance between the BEQs and negotiated induction schedules and what occurred; the dramatic decrease in the contract base by the retirement of the Air Force's C-9As; and the requirement that LMAC maintain a state of industrial readiness to perform based upon the scheduled inductions, entitled LMAC to an equitable adjustment. (R4, tab 3E) In a 20 October 2003 letter to LMAC, the CO denied government responsibility for LMAC's costs and confirmed that the Air Force was divesting its C-9A aircraft, with the exception of one to be retained at Ramstein AFB, Germany, and possibly three to be retained at Scott AFB by the Air Force Reserve (R4, tab 3D; *see also* Skavdal decl. ¶¶ 3c., 4, attachs. G-I)). The parties continued to dispute LMAC's entitlement to compensation (R4, tabs 3B, 3C; app. supp. R4, tab 8 at APP77).

The parties agree that appellant did not perform MTI for any Air Force C-9A aircraft under the contract's base or option periods (amended compl. ¶ 45; ans. to amended compl. ¶ 45; gov't mot. at 11, ¶ 22).

Both the government and appellant rely upon Ms. Smith's sworn declaration. She reports the following, based upon her review of official records concerning the 20 Air Force C-9A aircraft identified above. (Smith decl. ¶¶ 1-3, attachs. A-Z, AB-AJ)

(1) 67-22583. MTI was not accomplished under the contract. Although it appeared that MTI was due in March 2003, a waiver was said to have been issued until the aircraft was inducted into PDM. The last PDM was on 17 October 1997, prior to the

contract. The next PDM was due on 17 October 2002. However, the aircraft was operating under a PDM waiver to overfly the aircraft, which the government extended. The waiver was still in effect when the aircraft was divested on 12 August 2003 and reassigned to the Aerospace Maintenance and Regeneration Center (AMARC), Tucson, Arizona. (*Id*. ¶¶ 3a., 3b., attachs. A, B, C)

(2) 67-22584. MTI was due on 26 March 2003. Pursuant to an extension, MTI was accomplished by the 375 MXS Squadron at Scott AFB (375 MXS) as of 29 April 2003. The aircraft was in for a PDM at LMAC and delivered on 26 September 2000. The next PDM was due in September 2005 but did not occur because the aircraft was divested and reassigned to the U.S. Air Force Museum (USAF Museum) on 30 August 2005. (*Id*. ¶¶ 3a., 3r., attachs. AF, AG)

(3) 67-22585. MTI was due on 10 July 2003. A waiver was granted until the aircraft could be placed into storage at AMARC. The aircraft was in for a PDM at LMAC and was delivered on 17 November 2000. The next PDM was due in November 2005. No further PDMs were performed because the aircraft was divested and relocated to AMARC on 22 September 2003. (*Id*. ¶¶ 3a., 3c., attachs. D, E)

(4) 68-08932. MTI was accomplished by the 375 MXS as of 5 April 2002. The last PDM was on 18 October 1997, prior to the contract. The next PDM was due on 18 October 2002 but the aircraft operated under a waiver to overfly until 18 April 2003. The aircraft was removed from service after the waiver was exceeded, with the exception of a one-time flight waiver for its flight from Scott AFB to AMARC for induction into storage, which occurred on 21 August 2003. (*Id*. ¶¶ 3a., 3d., attachs. F, G, H, I)

(5) 68-08933. MTI was accomplished by the 375 MXS on or about 26 January 2001. The last PDM the aircraft received was on 2 March 1998, prior to the contract. The next PDM was due on 2 March 2003 but the aircraft was operating under a PDM waiver to overfly until 3 September 2003. The aircraft was divested and reassigned to AMARC on 20 August 2003. (*Id*. ¶¶ 3a., 3e., attachs. I, J, K)

(6) 68-08934. MTI was accomplished by the 375 MXS on 18 May 2001. PDM was due in October 2003. No PDM was performed; the aircraft was divested and reassigned to AMARC on 28 August 2003. (*Id*. ¶¶ 3a., 3f., attachs. L, M)

(7) 68-08935. MTI was accomplished by the 375 MXS on 9 March 2001. PDM was due in November 2003. No PDM was performed; the aircraft was divested and reassigned to AMARC on 25 August 2003. (*Id*. ¶¶ 3a., 3g., attachs. I, N)

(8) 68-10958. MTI was accomplished by the 375 MXS on 22 March 2002. PDM was due in July 2004. No PDM was performed; the aircraft was divested and reassigned to AMARC on 25 August 2003. (*Id*. ¶¶ 3a., 3h., attachs. I, O)

(9) 68-10959. MTI was accomplished by the 375 MXS on 5 October 2001. PDM was due in May 2004. No PDM was performed; the aircraft was divested and reassigned to AMARC on 27 August 2003. (*Id*. ¶¶ 3a., 3i., attachs. P, Q)

(10) 68-10960. MTI was accomplished by the 375 MXS on 7 August 2002. PDM was due in October 2004. No PDM was performed; the aircraft was divested and reassigned to AMARC on 26 August 2003. (*Id*. ¶¶ 3a., 3j., attachs. M, R)

(11) 68-10961. MTI was accomplished by the 375 MXS on 19 November 2002. PDM was due in May 2005. No PDM was performed; the aircraft was divested and reassigned to AMARC on 4 September 2003. (*Id*. ¶¶ 3a., 3k., attachs. S, T)

(12) 71-00874. MTI was accomplished at Scott AFB on 9-10 January 2003. PDM was due in July 2005. No PDM was performed; the aircraft was divested and reassigned to AMARC on 16 September 2003. (*Id*. ¶¶ 3a., 3l., attachs. T, U)

(13) 71-00875. MTI was due on 18 October 2003. No MTI was performed; the aircraft was divested and reassigned to AMARC on 4 September 2003. The aircraft was in for a PDM at LMAC and was delivered on 6 April 2001. The next PDM was due in April 2006. No further PDM was performed due to the reassignment to AMARC. (*Id*. ¶¶ 3a., 3m., attachs. T, V)

(14) 71-00880. Ms. Smith could not ascertain whether an MTI was accomplished on this aircraft. It was in for a PDM at LMAC and was delivered on 9 November 2002. The next PDM was due in November 2007, but the aircraft was divested and reassigned to AMARC on 29 September 2003. (*Id*. ¶¶ 3a., 3u., attach. E)

(15) 71-00881. Ms. Smith's declaration and the record are not clear concerning this aircraft. She reports that the last PDM was on 13 January 1998, prior to the contract. This would mean that, in due course, the next PDM was due five years later, on 13 January 2003. She reports, though, that MTI was due on 13 January 2003 and PDM was due on 6 January 2003. The apparent discrepancy in the PDM due date and the proximity of the PDM and MTI due dates are not explained. Citing to a December 2002 Air Force memorandum (attachment W to her declaration), Ms. Smith states that no additional PDM was performed and the aircraft operated under a waiver issued in December 2002 to overfly for a period of 6 months, not to exceed 500 flight hours. She also states that MTI was waived for 6 months, citing the same memorandum. Although

its caption refers to "C-9A PDM INSPECTION AND MTI WAIVER," the memorandum discusses a 6-month overflight of the scheduled PDM input date only. However, it does appear to be clear that the aircraft was divested and reassigned to AMARC on 2 September 2003, and that an additional PDM waiver was granted for a onetime flight from Ramstein AFB, where the aircraft was stationed, to AMARC. (*Id*. ¶¶ 3a., 3n., attachs. E, W, X)

(16) 71-00882. MTI was due on 24 March 2003 but an overflight waiver was granted until PDM. The last PDM had been on 30 April 1998, prior to the contract. The next PDM was due on 30 April 2003, but an overflight waiver was granted, not to exceed 500 flight hours. The waiver was in effect when the aircraft was divested and reassigned to AMARC on 15 September 2003. (*Id*. ¶¶ 3a., 3o., attachs. E, Y, Z)

(17) 71-00879. MTI was due on 28 October 2004 but an MTI overflight waiver was granted until the aircraft could be inducted into storage at AMARC. The aircraft was in for a PDM at LMAC and delivered on 28 April 2002. The next PDM was due in April 2007. No further PDM was performed. The aircraft was scheduled in September 2003 for reassignment to AMARC on 29 September 2003, but in October 2003 the reassignment was revoked and the aircraft remained in service. On 20 September 2005 it was divested and reassigned to AMARC. (*Id*. ¶¶ 3a., 3p., attachs. E, AA, AB, AC)

(18) 71-00877. No MTIs were performed on the aircraft between 2000 and its retirement from active service in October 2003 due to a cracked spar. The aircraft was in for a PDM at LMAC and delivered on 22 February 2002. It was reassigned to AMARC on 15 September 2003 and reassigned to the USAF Museum on 6 December 2004. (*Id*. ¶¶ 3a., 3q., attachs. T, AD, AE)

(19) 71-00876. MTI was accomplished at Ramstein AFB in 2004. The aircraft was in for a PDM at LMAC and was delivered on 9 January 2002. The next PDM was due in January 2007 but the aircraft was reassigned to the USAF Museum on or about 20 September 2005. (*Id*. ¶¶ 3a., 3s., attachs. AH, AI)

(20) 71-00878. MTI was due on 13 March 2005 but a waiver to overfly the scheduled MTI date until the aircraft could be placed into storage at AMARC was requested and granted in January 2005. The aircraft was in for a PDM at LMAC and was delivered on 15 September 2002. The next PDM was due in September 2007 but the aircraft was reassigned to the USAF Museum on or about 7 September 2005. (*Id*. ¶¶ 3a., 3t., attachs. AG, AJ)

Claim, Complaints, Motions

On 30 November 2004 LMAC submitted a request for equitable adjustment to the CO in the amount of $17,763,627 for costs incurred through FY 2004 due to the combined impact of the government's alleged diversion of all MTI requirements for the Air Force C-9A aircraft and its decision to retire its fleet of C-9As. LMAC claimed that the government's diversion of MTI to a source other than LMAC was a contract breach; its retirement of the Air Force's C-9A fleet was a deductive change; and, alternatively, the retirement was a constructive partial termination of the contract for convenience. (App. supp. R4, tab 8) On 15 June 2005 LMAC certified its request, without change, as a CDA claim, pursuant to 41 U.S.C. § 605(c)(1) (app. supp. R4, tab 7). The CO did not issue a decision on LMAC's claim and, on 19 September 2005, it appealed to the Board.

As noted, in *Lockheed I*, we denied the government's motion to dismiss and granted appellant's motion to amend its complaint. The amended complaint alleges, among other things, that:

(1) The contract did not allow waiver of the 60-month mandatory minimum requirement for PDM; (2) the government diverted 12 aircraft by performing MTI itself or through another contractor; (3) when the parties were establishing PDM schedules, the government did not inform LMAC that it was operating aircraft scheduled for induction under PDM waivers and that, prior to the government's summary judgment motion, it had not informed LMAC of the PDM and MTI waivers; (4) the government misled LMAC into concluding that one aircraft would be parked until divestment and another would most likely be retired, when both actually flew for several months under overfly waivers of both PDM and MTI; (5) the government was encouraging and requiring LMAC to continue to be ready to perform the contract's C-9A PDM and MTI requirements while, at the same time, the government was issuing overfly waivers that guaranteed it would not meet its contractual obligation to induct the C-9A aircraft for maintenance in accordance with the parties' negotiated schedules; and (6) on 15 May 2003, after the government had already issued multiple waivers of MTI and PDM, it issued a new version of TO 1C-9A-6 (the 2003 TO) to permit it to overfly the aircraft, in order to avoid the contract's PDM maintenance requirements and not due to changes in operational requirements and aircraft use; the waivers were not properly approved and granted; and the government flew aircraft beyond the authorized waiver periods. (Amended compl. ¶¶ 39, 46, 50, 52-54, 57, 58, 63-66, 77, ex. 4 (TO 1C-9A-6 (5/15/03, Change 1, 1/15/04))

Count I of the amended complaint alleges that the government breached the contract by failing to order all of its C-9A MTI requirements from appellant and diverting requirements to another source (¶¶ 79-83). Count II alleges that the government

constructively changed the contract by violating its duty of good faith and fair dealing and acting in bad faith; changing the contract performance method; and deleting the underlying aircraft maintenance requirements by retiring the Air Force's C-9A fleet (¶ 90). Count III alleges, alternatively, that retirement of the Air Force's fleet eliminated 20 aircraft, or 42 percent of the work to be performed by appellant, resulting in a constructive partial termination of the contract for convenience (¶¶ 94, 95). After it filed its amended complaint, appellant filed its motion for summary judgment on Count I.

The government answered the amended complaint by denials or challenges to the above allegations and opposed LMAC's motion for summary judgment on Count I. Among other things, the government asserted that the 1998 TO, attached to its reply to LMAC's motion, contained the same language quoted by LMAC from the 2003 TO concerning authorization to overfly. (Answer to amended compl., ¶ 64; gov't reply to app. mot., ex. A at 93)

The amendments to the complaint do not vitiate the government's previously filed motion for summary judgment on Counts II and III. Thus, the motions for summary judgment on all three counts of the complaint are opposed and ripe for decision.

DISCUSSION

Summary Judgment Standards

Summary judgment is an appropriate method to resolve an appeal or portions of it when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. A disputed fact is only material if it might make a difference in the appeal's outcome. We evaluate each party's motion on its own merits and draw all reasonable inferences against the movant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562-63 (Fed. Cir. 1987); *Mingus Constructors, Inc. v. United States*, 812 F.2d 1387, 1391 (Fed. Cir. 1987). There is a genuine issue of material fact if the evidence is such that a reasonable fact finder could find in favor of the non-movant. *Anderson, supra*, 477 U.S. at 248. In deciding a summary judgment motion, we do not resolve factual disputes but ascertain whether there is a genuine issue of material fact. The movant must show the absence of one. The nonmovant must respond with facts demonstrating that there is one. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25 (1986); *Adickes v. Kress & Co.*, 398 U.S. 144, 157 (1970); *Basic Marine, Inc.*, ASBCA No. 53256, 02-1 BCA ¶ 31,677 at 156,542.

We have considered all of the parties' arguments. Those that we do not mention, or do not discuss, are not necessary to our determination of whether there are genuine issues of material fact that preclude partial summary judgment for either party.

Appellant's Motion for Summary Judgment on Count I of Amended Complaint

Appellant contends that there is no genuine dispute that, under its requirements contract for Aircraft Depot Maintenance, which included MTI on the Air Force's 20 C-9A aircraft, the government was required to purchase all of those MTI requirements from appellant but instead, the Air Force never ordered MTI from appellant and diverted those requirements by performing the work itself. Appellant relies upon the pleadings, the Rule 4 file and supplement, and Ms. Smith's declaration.

The government responds that discovery is incomplete, and that there are genuine issues of material fact relevant to the alleged diversion, including, among other things: the contract's contents and the Air Force's authority to perform MTI, in particular with respect to the 1998 TO; uncertainty in the fall of 2002 over new maintenance requirements known as the "Strand" requirements (gov't reply to app. mot. at 6), and related negotiations with appellant, that delayed MTI implementation; whether employees of appellant protested verbally to the government about the lack of MTI inductions; and whether there has been the proof of some damage that is a prerequisite to proving liability.

Appellant replies that the contract's contents and its interpretation are matters of law. It accepts for purposes of its motion that the government's proffered copy of the 1998 TO is the correct Attachment 11 to the contract and that it includes paragraph 4, quoted above, but it asserts that the TO is merely technical guidance, which the government has not interpreted correctly and which does not alter the requirements nature of the contract or supersede its FAR 52.216-21 Requirements clause. Appellant notes that, under the contract's FAR 52.215-8 Order of Precedence clause, contract clauses take precedence over contract attachments. Appellant acknowledges that the government has raised material fact issues regarding quantum but contends that it has alleged sufficient damages to warrant summary judgment on entitlement.

Government's Summary Judgment Motion on Amended Complaint Counts II and III

In seeking summary judgment on the issues raised in Counts II and III of the amended complaint, the government urges that, under a requirements contract, absent a showing of government bad faith or lack of due care in estimating its requirements, the contractor bears the risk of loss if the estimated quantity does not materialize or the ordered amount varies considerably from the estimate. The government asserts that maintenance services under the contract were reduced due to a FY 2003 Air Force mission change and decisions by the Secretary of the Air Force and the Department of Defense (DoD) to divest the Air Force's C-9A inventory, approved by the President and

Congress in September 2003. It alleges that appellant is not entitled to recover under the Changes or Termination for Convenience clauses because the government's requirements changed due to its good faith, legitimate business decision to divest itself of the Air Force's C-9A inventory. The government also contends that those clauses, read literally, do not apply to the circumstances at issue. It alleges that the Termination for Convenience clause, in particular, cannot apply because the disputed PDM and MTI work was never incorporated into the contract through orders issued under the Ordering clause. It relies upon the pleadings, the Rule 4 file, and the Skavdal and Smith declarations.

Appellant responds that the government must act in good faith in determining its actual requirements during contract performance. It asserts that it is entitled to recover under the Changes clause because the government breached its duty of good faith and fair dealing when it flew its aircraft under improper maintenance waivers rather than order contractually-required maintenance, and when it directed appellant to stand ready to perform even after it had granted maintenance waivers. Appellant contends specifically that: (1) when the government realized it might retire the C-9A aircraft, but before it actually divested them, it determined that it would be to its advantage to avoid its contractual obligation to purchase all of its ADM requirements from appellant; (2) the government's decision to avoid its obligation was not due to any change in the aircraft's technical needs; (3) the government failed to induct the aircraft that needed ADM, even though the aircraft remained flying and required ADM for a period after the government ceased to order it; (4) rather than have appellant perform scheduled ADM, the government flew the aircraft without the required maintenance; (5) the government's operation of the aircraft under improper maintenance waivers was not for any reason other than to avoid its contractual obligations and costs; (6) the government did not inform appellant about the waivers; (7) the government had determined that it would not order ADM for the C-9A aircraft but still instructed appellant to be ready to perform, knowing that appellant would incur significant costs to do so; and (8) the government has not identified who made the final decisions to issue the waivers and to retire the aircraft, or precisely when the decisions were made, which are material facts to be determined through discovery.

Appellant also contends that it is entitled to recover under the Changes clause, even if the government did not act in bad faith, because the government changed its method of fulfilling its requirements by granting maintenance waivers. Appellant alleges that the record does not reflect that the waivers were properly authorized and that it appears that the government violated their terms by overflying aircraft beyond the dates set therein. Appellant adds that, even if the contract as awarded had allowed for waivers, the government changed the contract's nature and frustrated its purpose by using waivers to eliminate required PDM and MTI. Appellant further alleges that an equitable adjustment is appropriate under the Changes clause when the government effectively deletes work under a particular CLIN, thereby unilaterally eliminating the objective

underlying contract requirements, and that, here, the government eliminated C-9A maintenance requirements first by issuing waivers in violation of the contract and then by divesting the aircraft.

Appellant also asserts that the Termination for Convenience clause applies when required contract work is eliminated and will never be ordered. It alleges that the true nature of the parties' underlying actions, including the government's motivation in issuing waivers, and the key role of the C-9A work in the performance and pricing of the entire contract, are fact issues to be resolved by the Board and should govern whether there was a breach, a constructive deductive change, or a constructive partial termination for convenience.

Requirements Contract Standards

It is established that "it is the very essence of a requirements contract . . . that the buyer agree to turn to the supplier for *all* of its needs." *Torncello v. United States*, 681 F.2d 756, 768 (Ct. Cl. 1982); *see also Coyle's Pest Control, Inc. v. Cuomo*, 154 F.3d 1302, 1305 (Fed. Cir. 1998). "A requirements contract calls for the government to fill all its actual requirements for specified supplies or services during the contract period by purchasing from the awardee, who agrees to provide them at the agreed price." *Medart, Inc. v. Austin*, 967 F.2d 579, 581 (Fed. Cir. 1992). When the government's actual, continuing, requirements subject to a requirements contract do not change, it does not have the arbitrary right to reduce the amount of those requirements that it purchases from the contractor, or to change its method of fulfilling those requirements, such as by developing and using its own capabilities at the contractor's expense, and the contractor need not prove that the government acted in bad faith in order to recover. *Johnstown Coal & Coke Co. v. United States*, 66 Ct. Cl. 616, 621 (1929) (when government did not prove its actual coal requirements were less than contract contemplated, contractor entitled to market price benefit it would have realized based upon difference between contract estimate and coal ordered and delivered); *Henry Angelo & Sons, Inc.*, ASBCA No. 15082, 72-1 BCA ¶ 9356 at 43,429 (when requirements contract, containing predecessor to Alternate I to the Requirements clause quoted above, called for contractor to paint and repair buildings in excess of those Army would service with its own capabilities, Board interpreted clause to refer to Army's capabilities at time of award and found convenience termination when, after alleged funding and price issues, Army began to perform certain work itself and to attempt to remove other work from contract's ambit); *Alamo Automotive Services, Inc.*, ASBCA No. 9713, 1964 BCA ¶ 4354 (when Air Force requirements contract called for contractor to repair and maintain motor vehicles in excess of government's capabilities of doing so, Board treated later Air Force directive that bases increase their own capabilities as compensable contract change).

More recently, the court of appeals has confirmed that:

> [T]he government breaches a requirements contract when it has requirements for contract items or services, but diverts business from the contractor and does not use the contractor to satisfy those requirements. In that case, the contractor is entitled to recover damages in the form of lost profits, provided it is able to meet the requirements for lost profits recovery . . . .

Rumsfeld v. Applied Companies, Inc., 325 F.3d 1328, 1339 (Fed. Cir.), *cert. denied*, 540 U.S. 981 (2003) (citations omitted). *See also T&M Distributors, Inc*., ASBCA No. 51279, 01-2 BCA ¶ 31,442 at 155,276, 155,281 (noting government not liable for breach if its requirements actually differ from those anticipated when requirements contract made, but, when Army did not order all of its actual requirements for repair parts from contractor, it breached contract; not necessary for contractor to show government bad faith, abuse of discretion, or arbitrary or capricious action).

However, the government is entitled to reduce or otherwise change its requirements for legitimate business reasons. When a contractor alleges that the government breached its contract by reducing its requirements, the contractor bears the burden to prove that the government acted in bad faith, for example, by reducing its requirements solely to avoid its contractual obligations. In the absence of a showing that the government acted in bad faith, it will be presumed to have reduced its requirements for valid business reasons. *Technical Assistance Int'l, Inc. v. United States*, 150 F.3d 1369, 1373 (Fed. Cir. 1998) (government did not breach or constructively change requirements contract for vehicle maintenance and repairs when it increased rate of vehicle replacement, thereby decreasing its repair and maintenance requirements). *See also East Bay Auto Supply, Inc.*, ASBCA No. 25542, 81-2 BCA ¶ 15,204 (government did not breach requirements contract to supply parts to maintain vehicle fleet at Air Force base, and no cardinal change, when government relocated almost half the fleet per high level DoD decision based upon cost considerations).

Government officials are presumed to act in good faith. To overcome that presumption, a contractor must supply clear and convincing evidence. Bald assertions of bad faith are insufficient to create a genuine factual issue that precludes summary judgment. *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234 (Fed. Cir. 2002); *T&M Distributors, Inc. v. United States*, 185 F.3d 1279 (Fed. Cir. 1999). On the other hand, "crucial elements of alleged Government bad faith tend to be very fact-intensive, revolving around the Government's subjective intentions and motives, and do not lend themselves readily to disposition by summary judgment." *J.A. Jones Construction Co.*, ASBCA No. 43344, 96-2 BCA ¶ 28,517 at 142,422.

Genuine Issues of Material Fact

Preliminarily, the contract's precise contents, including the contents and status of the Technical Orders, have not yet been established to the Board's satisfaction. Nevertheless, it is undisputed, or uncontroverted, that during the contract's performance period the government did not induct any Air Force C-9A aircraft for MTI by appellant. The government's own evidence establishes that, instead, it performed certain MTI itself, evidencing actual, continuing, MTI requirements during the contract performance period that should have been appellant's to perform. However, the government contends that the Air Force reserved the right under the contract to perform MTI itself. Appellant counters that the Air Force had no such right; the Air Force misled appellant; and appellant was unaware that the Air Force was performing MTI.

Similarly, it is unclear whether the contract permitted MTI or PDM waivers, or whether the Air Force's use of waivers was, rather, an impermissible diversion, or disregard, of the Air Force's actual continuing need for aircraft maintenance. Appellant alleges that the Air Force did not have the claimed PDM or MTI waiver rights under the 1998 TO or otherwise; its issuance of the 2003 TO was an invalid attempt to allow the waivers it issued; the Air Force misled appellant; and appellant was unaware that the Air Force was overflying aircraft under maintenance waivers. This invokes the related question of whether, even if PDM and MTI waivers were permissible under some circumstances, the Air force could legitimately, in good faith, waive and defer contractually-required maintenance to the point that maintenance was no longer necessary due to an aircraft's divestiture, foreseen by the Air Force. Moreover, facts concerning the Air Force's alleged encouragement or requirement that appellant remain ready to perform while, at the same time, the Air Force was performing MTI itself and/or issuing PDM and MTI waivers, remain to be resolved.

Finally, the government suggests that negotiations over new "Strand" maintenance requirements caused uncertainty about MTI at the end of FY 2002. However, it has not established any facts, let alone undisputed facts, in this regard. The current record is sparse concerning the "Strand" requirements and is inadequate to ascertain what they were; whether they were implemented; and the extent, if any, to which they were relevant to the parties' rights and obligations under their requirements contract. In turn, appellant alleges that the Air Force did not comply with negotiated PDM induction schedules upon which appellant had relied, but at least one such schedule does not yet appear to be part of the record.

When we draw reasonable inferences in the government's favor, as we are required to do, in the case of appellant's summary judgment motion on Count I of the complaint, we conclude that resolution of disputed facts, and establishing facts that are

not yet clear, are essential before the Board can determine whether the government breached its requirements contract by diverting its actual, continuing, MTI requirements and performing them itself, and/or through others. When we draw reasonable inferences in appellant's favor with respect to the government's motion on Counts II and III, we conclude that appellant has raised genuine issues of material fact concerning alleged waivers and elimination of requirements, and the government's motives and manner of doing so, that call for further development in order for us to decide whether the government acted in bad faith, or, even if there were no bad faith, whether the government's actions resulted in a constructive contract change, or were tantamount to a partial termination of the contract for convenience.

Thus, genuine issues of material fact preclude summary judgment for either party.

DECISION

The parties' motions for summary judgment are denied.

Dated: 21 March 2008

CHERYL L. SCOTT
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

MARK N. STEMPLER
Administrative Judge
Acting Chairman
Armed Services Board
of Contract Appeals

I concur

CAROL N. PARK-CONROY
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 55164, Appeal of Lockheed Martin Aircraft Center, rendered in conformance with the Board's Charter.

Dated:

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