

'Measured Mile' Theory OK In \$144M Lockheed-Air Force Fight

By **Rae Ann Varona**

Law360 (August 25, 2022, 6:57 PM EDT) -- The Armed Services Board of Contract Appeals, in granting Lockheed Martin Aeronautics Co.'s motion for summary judgment, has allowed it to use a "measured mile" approach to prove its \$143.5 million claim for extra "over and above" work for the Air Force.

In granting Lockheed Martin's motion, ASBCA Administrative Judge Reba Page simultaneously denied summary judgment to the Air Force, which had opposed the aerospace company's use of the approach on the ground that the theory was not suitable for proving liability, causation and injury to establish its claim.

"Although the government's criticism of appellant's alleged inability to match the impact of claimed disruption to particular [over and above] work is a refrain that runs through the government's litigation approach, the government has not made its case that Lockheed Martin errs in relying upon the measured mile to do so," Judge Page said in the opinion made public Wednesday.

Lockheed Martin had submitted its claim for \$143,529,290 against the Air Force in October 2018 to cover costs it incurred for allegedly excessive over and above work it did under a 2007 contract to upgrade 49 government-owned C-5 Galaxy aircraft. The aerospace company was previously compensated for direct costs of the work, according to Judge Page's opinion.

The company appealed to the ASBCA in 2019 after the Air Force denied its request for additional funds.

In April, the ASBCA granted Lockheed Martin's second and third cross-motions and found that the company's claim was timely made.

Judge Page explained in the recently released opinion addressing the parties' second set of cross-motions for summary judgment that a clause in the contract gave Lockheed Martin the right to an equitable adjustment in the contract prices and delivery schedule when over and above work caused the cost or time required to complete the work to increase or decrease.

The "measured mile" approach, which Lockheed Martin relies on to prove its claim, compares the productivity of an impacted period in a project with the productivity of an unaffected period, the opinion states.

The Air Force asserts that Lockheed Martin should instead be required to present actual costs of the

disruption to prove it was harmed, according to the opinion.

Judge Page said that in challenging the approach, the government cited previous decisions in which contractors who did not provide actual costs and relied on alternative legal theories to prove their claims were denied recovery.

But in addressing what she said was the Air Force's "recurring thesis" of Lockheed Martin's unjustified reliance on the approach, Judge Page said the board — in ordering the Air Force to handover withheld evidence — had before reminded the government that that approach was "not a disfavored approach before the Board" and that Lockheed Martin would still need to provide proof of its claim.

Citing previous ASBCA decisions, Judge Page said that the board had in the past accepted the approach as an appropriate method of determining productivity impacts.

As recently as 2019, she said Judges Richard Shackelford and J. Reid Prouty had applied the measured mile approach, explained its proper use and refused an argument that a contractor was instead required to track each and every cost.

"Although the decision was a concurrence, and thus not binding precedent under the Board's internal rules, its explanation of the measured mile methodology and its proper place is, nevertheless, instructive here and supports our consideration of that methodology, rather than its outright rejection as demanded by the government," she said.

Counsel for Lockheed Martin did not immediately respond to requests for comment Thursday, nor did a representative of the Air Force.

Lockheed Martin is represented by Stephen J. McBrady, J. Chris Haile, Sky Mathieson, Michelle D. Coleman and John Nakoneczny of Crowell & Morning LLP.

The Air Force is represented by in-house counsel Jeffrey P. Hildebrant, Caryl A. Potter III and Lawrence M. Anderson.

The case is Appeal of Lockheed Martin Aeronautics Co. Under Contract No. FA8625-07-C-6471, ASBCA No. 62209, before the Armed Services Board of Contract Appeals.

--Editing by Andrew Cohen.