

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of --)
)
The Minesen Company) ASBCA Nos. 52488, 52811
)
Under Contract No. NAFBA3-93-C-0001 and)
Lease No. DACA84-1-91-114)

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OPINION BY ADMINISTRATIVE JUDGE PAUL

These are timely appeals of a contracting officer's (CO) decisions denying The Minesen Company's (Minesen) claims for breach of contract. Respondent, the U.S. Army Morale, Welfare and Recreation Fund (Fund) is a non-appropriated fund instrumentality (NAFI); and the contract is not subject to the Contract Disputes Act (CDA), 41 U.S.C. §§ 601-613. Pursuant to the contract, the Board's decision is "final and [is] not subject to further appeal." A five-week hearing was held in Honolulu and San Francisco, and the resulting transcript encompasses 4,305 pages. The documentary record and the parties' briefs are voluminous. Only issues of entitlement are before us for decision.

FINDINGS OF FACT

1. On 30 November 1988, the Fund issued Request for Proposals (RFP) NAFBA1-89-R-0008 "soliciting a contractor to design, build, and finance an economy/limited service transient lodging facility on Schofield Barracks, Oahu, Hawaii." The primary objective of the solicitation was to "serve soldiers and their families travelling in conjunction with permanent change of station (PCS) moves." The successful contractor had to "design, and construct the facility to include furnishing, landscaping, access roadway, and parking facilities." More specifically, it had to provide, at a

minimum, "guest rooms, food and beverage service, vending areas, guest laundry, children's play area and supporting back of house areas." In addition, the successful contractor might "be required to enter into a land lease, in addition to any other contractual document required, with the United States as a condition to constructing, operating, and maintaining a transient lodging facility." Regarding utilities, the RFP stated, in pertinent part:

The successful offeror will be required to purchase and install appropriate utility lines and meters for necessary utility services from the site boundaries. Utilities will be provided through contract with the Installation Energy Office and shall be considered an operating cost of the facility.

With respect to room requirements, the RFP provided:

Offeror shall be responsible for determination of the number of guest units appropriate for this site. In support of the offerors [sic] efforts the results of an economic feasibility study for this project are provided at Attachment C. While this information is correct to the best of our knowledge this information will not be warranted by the Fund or the author of the study. The fund desires that the emphasis placed on retiree usage be reevaluated by the offeror based upon a planned 400 unit addition to the Hale Koa Hotel at Fort DeRussy Hawaii which may negatively impact on the propensity of retirees to patronize this proposed facility.

(R4, tab 4 at 1-4)¹

2. The feasibility study identified in the RFP was prepared by Hospitality Valuation Services, Inc. (HVSI) and was dated 31 December 1987. The study identified sufficient demand in the "Schofield Barracks area" to "support a 216-unit, economy/limited, transient lodging facility." It also stated that the "subject property [was] intended primarily for the transient housing of [PCS] active-duty military personnel but will also be available to other market segments described herein." The study

¹ In addition to the basic R4 file which we shall cite as "R4, tab _," the parties submitted six supplemental R4 files, which shall be referred to, for example, as "R4, 1st Supp., tab _." Also Minesen and the Fund submitted exhibits, which will be identified as "ex. A-," and "ex. G-," respectively.

described these other four “market segments” as “TDY” or temporary duty, “[o]ther AD or active duty,” “On Leave” and “retirees and others.” It anticipated that the vast majority of guests at the proposed facility would be PCS personnel with substantially smaller percentages of guests in the “TDY” and “other AD” categories. The study contrasted the proposed facility at Schofield Barracks with the Hale Koa hotel which was referenced in the RFP. It noted that the Hale Koa was “luxury-class hotel situated on Waikiki Beach” which “is far more tourist oriented than PCS oriented (as will be the proposed subject property)” Unlike the projected guest mix of the proposed facility at Schofield, only 8 percent of the Hale Koa’s guests were PCS personnel, whereas the vast majority were “active-duty military on leave” “retirees” and other tourists (R4, tab 3, summary of findings at 1-6).

3. The study also noted: “Demand for transient military accommodations for the U.S. Army in the Schofield Barracks area is generated primarily by the following entities: Schofield Barracks, Fort Shafter, and Tripler Army Medical Center.” The study stated that, additionally, “demand for transient military accommodations for the other armed services (Navy, Air Force, Marine Corps, and Coast Guard) is generated by the installations located along the southern south central portion of the island, such as Pearl Harbor Naval Base and Hickam Air Force Base.” (R4, tab 3, summary of findings at 5-6). With respect to the locations of these various facilities, the economic portion of the study noted that “the two army posts, Shafter and TAMC (Tripler Army Medical Center), are located roughly 18 miles from Schofield Barracks while Pearl Harbor and Hickham are located 15 and 20 miles from Schofield, respectively.” (R4, tab 3, economic study at 4). The study described as a “disadvantage” the “[s]omewhat disparate location of Schofield Barracks relative to several other military installations as well as Waikiki Beach.” (R4, tab 3, economic study at 10). One aspect of this “disadvantage” was described by LTG James Hill, former commander of the 25th Infantry Division (Light) (25th ID). LTG Hill testified that typically, PCS soldiers and their families “don’t have a car.” This, of course, made it difficult for them to travel among the various military facilities referenced in the feasibility study (tr. 1/45-46).²

4. The study described in detail the manner in which PCS soldiers and their families qualified for the temporary lodging allowance (TLA):

During the time that the military personnel is considered PCS,
the soldier is allowed to request the payment of a temporary

² The page numbers of the transcript run from 1 to 4,305 without reference to volumes; however, we are including the volume numbers in our citations for ease of reference.

lodging allowance (TLA). The amount of TLA varies with the individual soldier's family size and chosen temporary living arrangements. TLA is paid in ten-day intervals, and is available up to an aggregate of 60 days while the individual seeks permanent housing. Although TLA is available for the full 60 days, the PCS soldier must be demonstrating an attempt to find military or private housing in order to qualify for the payments. Due to the availability of barracks space, bachelors' quarters and single-person housing, both on the base and in the area, unmarried personnel typically do not require extended TLA payments or transient lodging facilities. Conversely, a significant shortage of family housing generates an abundance of PCS requirements for transient lodging facilities. PCS's requiring TLA average roughly two to three dependents, in addition to themselves, on the Island of Oahu.

(R4, tab 3, economic study at 39)

5. The study also described the procedures whereby transient Army personnel could qualify for reimbursement for their lodging expense even if they did not stay at the guest house on their assigned installation:

The majority of personnel on duty for the Army requiring transient lodging facilities utilize the guest houses situated on their assigned installation. Upon arrival, this personnel [sic] must report to the guest house located on the installation. If lodging is available, the soldier will stay at the guest house. In the event that lodging is not available, the soldier is issued a Statement of Non-Availability (SNA) and is permitted to seek transient accommodations on the economy. The number of SNA's issued is used to quantify unaccommodated demand on a monthly basis. U.S. Army guest houses on Oahu are situated on Tripler Army Medical Center (TAMC), Fort Shafter and Schofield Barracks.

(R4, tab 3, economic study at 50)

6. Finally, with respect to a minimum occupancy rate to achieve a "break even" point, the study stated:

The proposed subject property will require a 65.1% occupancy to cover all operating expenses and break even. Although the required breakeven occupancy point of the proposed subject property is high relative to commercial hotels, the reduced average rate programmed for the military transient lodging facility reduces the overall profitability of the property relative to that of commercial hotels. However, with a projected stabilized occupancy level of 88%, we believe that a sufficient cushion exists to cover operating expenses during the normal cyclical occupancy trends experienced by transient lodging facilities.

(R4, tab 3, economic study at 104)

7. Amendment No. 0001 to the RFP, dated 23 February 1989, extended the closing date for receipt of technical proposals from 28 February 1989 to 14 April 1989 (R4, tab 5).

8. Amendment No. 0002 to the RFP, dated 30 March 1989, provided:

Additional information requested for Schofield Barracks has been received and will be made available to offerors within the next two (2) weeks via Amendment 0003.

Closing date of April 14, 1989, is deleted. A new closing date will be established at the time Amendment 0003 is released.

(R4, tab 6)

9. Amendment No. 0003 to the RFP, which was promulgated on 21 April 1989, extended the date for receipt of proposals to 25 May 1989. It also required offerors "to acknowledge receipt of Amendment 0001, Amendment 0002 and this amendment at the time proposals are submitted." The amendment also provided a series of blueprints as an attachment. Finally, it contained a series of clarifications, the most significant of which were:

6. CLARIFICATION: Subparagraph C under Objectives, page 2 is deleted and replaced with the following:

"Subparagraph C. The offeror will provide as a minimum two scenarios for the financing and operation of this

facility. The offeror shall present a leaseback or other arrangement whereby the completed facility is transferred to the Fund for a long-term period to operate and maintain. The transfer of maintenance responsibility in conjunction with operation may be proposed or maintenance may remain the responsibility of the contractor. This concept will include the option for purchase by the Fund at an unspecified [sic] at an unspecified future date. The offeror shall also propose a scenario whereby proposer finances, operates and maintains the facility for a long-term target period of 31 ½ years. Proposals, whereby the Fund acts as a guarantor of the construction financing and becomes the owner of the facility responsible for payments on permanent financing, may also be proposed by offerors for evaluation.

7. CLARIFICATION: Is the size of the facility being determined by market demand or size of the site?

The total number of guest rooms and size of facility [sic] to be determined by market demand and not by size of site. Installation has made additional land available for proposed facility as stated in paragraph 4a.

8. CLARIFICATION: Specify whether anything has changed since the market study was conducted.

Following completion of the market study for this facility, Congress authorized the construction of a 400 room addition to the Hale Koa Hotel Armed Forces Recreation Center on Waikiki Beach. Based on the geographic separation of the two facilities patronage information for the active duty segment of this population is correct to the best of our knowledge. The projections for retiree usage as reflected in the study should be reexamined by potential offerors based upon the proposed addition to the Hale Koa Hotel.

9. CLARIFICATION: That the public sector is not a potential patron of this facility and that a patron must somehow be related to a military member.

Patronage: As stated in the RFP the proposed facility is for the use of authorized transient personnel and is not open to the general public. The completed transient lodging facility will fall within the Joint Federal Travel Regulation definition of government quarters if its use is directed in accordance with the regulation of the service concerned. Travelers receiving government per diem will be required to patronize lodging facilities owned and operated by a private entity as long as confirmed reservation priorities are in accordance with those provided in Attachment 3. Confirmed reservations for permanent change of station personnel should be available six months in advance of arrival date and confirmed reservations for Temporary Duty and other authorized patrons should be available 45 days in advance of arrival date.

....

14. CLARIFICATION: The site identified in the economic feasibility study is no longer valid. the [sic] new site is as set forth in the RFP and paragraph 4 of this amendment.³

10. Minesen, the ultimately successful offeror, forwarded its technical proposal to the Fund's CO, Ms. Mary M. Keeney, on 19 July 1989 in accordance with further amendments to the RFP.⁴ The proposal was designed to comply with "step one" of the solicitation process. In addition to an "executive summary," the proposal was divided into three parts, identified as follows:

- A. Design and Construction
- B. Functional and Aesthetic Design
- C. Financial Proposal

(Rule 4, tab 8, cover letter)

11. The executive summary described Minesen and its principals in these terms:

³ Paragraph 4.a. contained a blueprint of the new site.

⁴ The 'step one' RFP was amended a total of six times (R4, tab 8).

The Minesen Company is a new organization, established specifically for the purpose of developing, financing and supporting the Army Morale, Welfare and Recreation Fund transient lodging facility program. The principals bring to the project records of successful accomplishment in development, design, construction management, and finance in both private and public sector work with strong concentration in the hotel and hospital industries. All have had hands-on management responsibility for large planning and building projects. Their experience will ensure a well managed, efficient and timely construction project, as well as a functional and aesthetic design compatible with Schofield guidelines and the Hawaiian setting. Their operations management experience underlies many details of the proposal leading to a facility which will be efficient and will serve Army personnel well.

Offeror's Experience

A. P. Jensen, President of the Minesen Company, has nineteen years of construction management experience, with the last seven in the hotel industry. He has overseen the building of fourteen new hotels and maintenance and renovation projects in many more. His complete resume is in the Technical Proposal.

Conrad Miller, A.I.A., Vice President for Design, adds thirteen years of architectural experience to the resources of the Minesen Company. His most recent projects were the \$4 million renovation of Kona village Resort, Kaupulehu, Hawaii, , [sic] and the \$4.8 million renovation of the Sheraton Lakeside Hotel, Orlando, Florida. His experience has ranged from program development and schematic design through construction budgeting and on site troubleshooting for hotel, hospital, medical, retail and housing projects. His resume also is in the Technical Proposal.

Joyce J. Neville, D.B.A., C.P.A., vice President for Finance, brings extensive and diverse experience in finance and administration to the Minesen Company. She has had executive responsibility for master and strategic planning and a number of large building projects as a chief executive, and

experience in banking, financial management, and capital financing as a chief financial officer. Her complete resume appears in the Technical Proposal.

(R4, tab 8, executive summary at 2-3)

12. The executive summary also set forth the method by which Minesen determined the number of rooms to be constructed:

The room quantification methodology used in this study is basically the same model used in a consulting study for this project by Hospitality Valuation Services, Inc. for the Department of the Army. However, we changed some underlying assumptions concerning future demand because of the 400-room expansion of the Hale Koa and because data on unaccommodated demand at the Hale Koa appears to be significantly understated. Also, in contrast to the consultant's recommendation, our design presents slightly larger room sizes, more comparable to standards in the private sector. These factors as well as site size were constraints in our quantification of rooms.

We propose to build 184 rooms in contiguous buildings enclosing a landscaped open courtyard. The facility has a total 87,949 square feet. The rooms have many attractive design features and amenities.

Our proposal reflects a conservative approach for maintaining high occupancy year-round, affording comfortable rooms, and a site plan compatible with the selected site. We believe this design will minimize unaccommodated demand on a year-round basis while developing an efficient, self-sustaining facility.

(R4, tab 8, executive summary at 3)

13. As part of its room quantification method contained in the functional and aesthetic design portion of its proposal, Minesen included Table 1:

Estimated Annual Room Nights
at New Schofield Barracks Facility
Generated from Three Army Installations

Market Segment	Historical Accommodated Room Nights	Estimated percent Captured by New Facility	Historical Unaccommodated Room Nights	Estimated Percent Captured by New Facility	Total Estimated Room Nights at New Facility
Schofield Barracks					
PCS	15,244	100%	10,085	90%	24,321
TDY	3,198	100%	2,121	90%	5,107
<u>Other</u>	<u>2,785</u>	100%	<u>1,840</u>	80%	<u>4,257</u>
Total	21,227		14,046		33,684
Fort Shafter					
PCS	3,146	30%	4,022	50%	2,955
TDY	457	20%	584	45%	354
<u>Other</u>	<u>587</u>	20%	<u>750</u>	20%	<u>267</u>
Total	4,190		5,356		3,576
TAMC					
PCS	3,769	30%	228	75%	1,302
TDY	9,310	20%	563	70%	2,256
<u>Other</u>	<u>15,213</u>	20%	<u>921</u>	40%	<u>3,411</u>
Total	28,292		1,712		6,969
				TOTAL	44,229

Minesen did not include in Table 1 any estimated, unaccommodated room nights which it might capture from the Hale Koa hotel (R4, tab 8, functional and aesthetic design at 5). Ms. Joan Newhart, the Fund's contracting officer for much of the contract's term, testified credibly that the significantly lower percentages for the capture of travelers to Tripler and Shafter—as opposed to Schofield—demonstrated Minesen's understanding that the feasibility study did not state a requirement that travelers to Tripler and Shafter were required to stay at the Inn (tr. 16/3353-55).

14. With respect to financial submissions, the proposal contained three scenarios:

The Minesen Company offers herein three alternative methods of financing the Schofield Barracks transient lodging facility. Each is based on the Minesen Company providing a complete turnkey development, including first class furnishings, landscaping, access roadway, and parking facilities. The facility is to be located on the 3.8 acre site designated in Request for Proposal NAFBA1-89-R-0008 as amended, this land to be leased to The Minesen Company for a period of 32-1/2 years at a nominal rate.

Scenario 1

The Minesen Company will retain ownership of the facility and lease it to the Fund for 31-1/2 years. The Fund will operate the facility and will pay a monthly lease rental. The Minesen Company will be responsible for major repairs and replacements and for periodic renovation and refurbishing if desired. At the end of the lease period, title to the facility will pass unencumbered to the Fund with no further payment. The Fund will have the right to buy out the remainder of the lease at any time during the term of the lease under a formula set out in the Technical Proposal.

Scenario 2

The Minesen Company will own and operate the facility for 31-1/2 years with unencumbered title to the facility passing to the Fund at the end of the term of the operating agreement. The Fund will have the right to purchase the facility at any time. No guarantees of levels of occupancy will be required as long as the present Joint Federal Travel Regulations govern travel of Army and other government personnel. Cooperation of the Hale Koa in coordinated marketing and reservation programs will be assured by the Fund and will be reciprocated by The Minesen Company.

Scenario 3

The Minesen Company will sell the facility to the Fund at the completion of construction when a Certificate of Occupancy is obtained or when the facility opens for operation, whichever is earlier. If the Fund desires to exercise this option, the Minesen Company will arrange the permanent financing, if desired. All warranties of labor, materials, equipment and furnishings will be transferred to the Fund at the time of sale. If desired, The Minesen Company will contract to manage major repairs and replacements and to plan and manage periodic renovation and refurbishment. The Minesen Company will also contract to manage the facility if the Fund seeks such an arrangement.

Under each of these scenarios the Fund will be asked to guarantee the construction and permanent financing if the agreement between the Fund and offeror is not sufficient to obtain the lowest possible financing costs.

It is our goal in setting out these options to present to the Fund an array of options from which Fund management may select the one which allows optimal use of financial resources for the Fund's total construction program.

(R4, tab 8, executive summary at 5)

15. On 16 March 1990, Ms. Keeney forwarded Step II of the RFP to potential offerors. This portion of the RFP contained numerous contractual clauses, several of which were subsequently modified. Of particular significance to these appeals is Clause 6., "TLF DEFINED AS GOVERNMENT QUARTERS," which provided:

The completed transient lodging facility will fall within the then current Joint Federal Travel Regulation definition of government quarters if its use is directed in accordance with the regulation of the military service concerned. The Joint Federal Travel Regulation and any definition contained therein is subject to change at any time. Travelers receiving government per diem payment, in order not to forfeit their per diem entitlement, will be required to patronize the TLF on a mandatory basis as long as confirmed reservation priorities are in accordance with those provided at Attachment E to Step

I. Confirmed reservations for permanent change of station personnel should be available six months in advance of arrival date and confirmed reservations for temporary duty and other authorized patrons should be available 45 days in advance of arrival date.

(R4, tab 9 at 3)

16. The cover letter to Part II of the RFP stated, in pertinent part:

In [sic] Section IV of the RFP sets forth the submittal requirements for Step II. There are specific formatting requirements set forth for submittal of Step II. Please note the project budget format at Attachment IV must be completed and the clarifications on Step I at Attachment VI must be answered.

(R4, tab 9, cover letter)

17. Documentary evidence from this time period demonstrates Minesen's understanding of the "[t]ravellers" requirement set forth in Clause 6 of Step II of the RFP. For example, a Minesen "Loan Proposal," which was recovered from Dr. Neville's computer files and which was created on 22 April 1990, stated, in part:

The TLF is an economy lodging facility for Army personnel and their families who have been transferred to Schofield Barracks. They are required to stay at the Schofield TLF if space is available. Only if the TLF is full and cannot accommodate them will they receive travel allowance payment for lodging in the private sector. Government personnel on special assignment to Schofield are also required to stay at the TLF. Eligible to stay at the TLF, though not required to do so, are Army personnel and families vacationing or being transferred to other Army installations in the area or coming to nearby Tripler Army Medical Center for medical care, military personnel from other services, and Army retirees who may benefit from the low cost of the facility in one of the world's highest cost resort areas. The TLF is not available to the general public.

(R4, 3rd Supp., tab 123)

18. Around this time period, Minesen began to explore means of obtaining financing for the project. On 2 May 1990, Dr. Neville, one of Minesen's principals, forwarded a letter to her partners in which she stated, in pertinent part:

Newman & Assoc. is the only mortgage banker I've talked to so far. They might take both the construction and permanent loans if we can work it out at all. Their representative, Roger Hein, is the one knowledgeable about these kinds of projects...this one in particular...and with the consultant in DC who knows all of the people at MWR Fund, status of most of their projects, their goals, past patterns, etc. Both Roger and the consultant feel that we must have a partner who has "bonding capacity" **before** we can get a letter of commitment from any lender. Why won't the Fund guarantee be adequate? Because the Fund is dependent (like any ordinary business) on profits it earns and if it should encounter serious financial problems it might not have the liquid assets to make good on its guarantee to the lender. If this seems farfetched to you, I agree and so does Roger...but he makes his living talking long-term lenders into putting millions on the line and he is absolutely convinced we need the bonding capacity in order to get a loan commitment. Further, he thinks that without such participation or its imminence, we won't be able to get a serious big lender to give us even a letter of interest. Talking to a friend about this, I was advised that it was in negotiating the terms of the participation that we would have to guard against the risks of a non-competitive GC bid. If we can find a management company who wants to come in, then we can skirt the GC bid problem but will have to give the management company what it wants. In other words, we need a large amount of resources and we have to be prepared to give something to get them.

(R4, 3rd Supp., tab 113)

19. On 3 May 1990, Dr. Neville forwarded a copy of Minesen's Step I proposal to Mr. Hein of Newman & Associates. In addition, she asked for Mr. Hein's aid in finalizing its Step II proposal. Finally, Dr. Neville stated:

It seems very fortuitous that a random encounter would refer me to Newman & Associates with its familiarity with Federal/private building ventures and, even more serendipitous that you would already have the Schofield Barracks RFP on your desk long before I called you about it.

(R4, 3rd Supp., tab 114)

20. Further, in a draft of "Guarantees and Commitments" which was created on 15 May 1990 as a basis for later negotiations with the Fund, Minesen stated, in pertinent part:

Because of the nature of the proposed agreement, in which a privately owned building is located on government owned land, these assurances also represent actions supportive to Fund and Department of the Army programs.

1. While the location of the facility on government owned land, supported further by Federal Travel regulations requiring that Schofield-assigned in transit stay at the facility seems to assure a steady and stable demand for the facility, we have been counseled that the Fund's guarantee of the financing will make this project attractive at quite competitive interest rates. This has been reflected in our financial projections. In fact, when terms of the guarantee can be made explicit, we anticipate that financing costs may be somewhat below the levels we have used at this point. Guarantee of both construction and permanent loans is requested.
2. Should the Department of the Army or the Fund decide for any reason to close the Schofield Barracks transient lodging facility during the term of the lease, the Minesen Company should be compensated under the buyout plan for the remainder of the lease period.
3. The proposed new facility has been planned, designed and located to serve the needs of a very specific population. Design and financing have reflected the existence of fairly stable, ongoing demand for such service based upon existing Federal Travel Regulations. As enclosed financial

forecasts demonstrate, with such demand we anticipate a high level of efficiency in operating this facility, which will be of direct benefit to the Army in reduced TLA expenditures and to the Fund in a stable, self-sustaining operation. So long as the existing travel regulation is in effect and as long as the proposed facility is the only transient lodging facility operating at Schofield Barracks, no commitment is requested of the Fund. However, if the Fund or the Army should establish a competing facility or if the requirement for Schofield-based personnel to utilize the facility is eliminated,, [sic] then a guaranteed minimum level of occupancy shall be agreed to be underwritten by the Fund to the extent operating results fall short of the amount to pay the debt service after meeting operating expenses falling within hotel industry standard efficiency parameters.

(R4, 3rd Supp., tab 135)

21. On 29 March 1990, Minesen responded to Ms. Keeney's cover letter of 16 March with a detailed list of clarification requests. It also asked that the CO extend the response time for its Step II submittal (R4, tab 11). On 2 April 1990, Minesen forwarded a second set of clarification requests and reiterated its need for an extension of the Step II submittal period (R4, tab 11).

22. On 27 April 1990, Ms. Keeney forwarded Amendment 0002 to the Step II RFP. The amendment contained several pages of changes to the RFP. In addition, it extended the date for receipt of proposals to 18 May 1990 "at 12 Noon EDT." (R4, tab 12)

23. On 18 May 1990, Minesen forwarded to the CO its proposal in response to Step II of the RFP. In its cover letter, it stated, in pertinent part:

Our proposal meets the specifications and requirements set out in the RFP of March 16, 1990 and demonstrates the strength our firm brings to design, construction, financial planning, and operations management of the Schofield Barracks transient lodging facility. As we did in Step I, we have fully set forth our financial options so that the Fund may assess its own constraints and goals and arrive at its optimal position. Many financial details remain to be negotiated, but

extensive exploration with a variety of financial organizations supports our belief that our company can achieve a reasonable rate of return while executing a profitable project for the Fund.

(R4, 3rd Supp., tab 158)⁵

24. On 15 August 1990, Ms. Keeney forwarded the following letter to Minesen:

The purpose of this letter is to provide you with an opportunity to provide clarifications to your proposal submitted under Request for Proposal, NAFBA1-89-C-0008, Step II for the development of a transient lodge facility at Schofield Barracks, Hawaii. The clarifications you provide will be used to further evaluate your proposal. Failure to submit clarifications by the date and time specified will result in your initial proposal standing on its own merit.

At Attachment 1 to this letter is a list of questions. You are request [sic] to provide responses to each of the questions. If any of your responses cause change [sic] to the previously proposed proforma operating statements, construction cost, or room rates then it is requested that these items be resubmitted as total documents.

Responses to this request for clarification are due not later than 12:00 Noon 11 September 1990. Responses shall be submitted in a [sic] sealed envelopes and shall be delivered to the community [sic] and Family Support Center, NAF Contracting Division, 2461 Eisenhower Ave, Room 1214, Alexandria, Virginia 22331-0517.

⁵ In July 1990, several years before the underlying contract was executed, the General Accounting Office (GAO) issued a draft report in which it tentatively concluded *inter alia*, "that the Army was granting transient personnel the off base per diem when lodgings set aside for their use had vacancies" (R4, 4th Supp., tab 48 at GOV2004076). DoD agreed with GAO that transient lodging facilities could be used more effectively and that the TDY reservations could be handled more efficiently (*id.* at GOV2004080).

Any questions concerning this request for clarification may be directed to the undersigned at (202) 325-0757.

Attached to the letter were two pages containing 19 questions to be answered by Minesen's principals (R4, tab 13).

25. On 29 August 1990, Ms. Keeney forwarded another letter to Minesen in which she stated, in part:

Thank you for your proposal submitted for the Schofield Barracks Transient Lodge Facility project. We have completed preliminary evaluation, have requested clarifications and at this time would like to invite you to make a presentation of your proposal.

Your presentation will take place in Hawaii from 09:00 to 11:30 AM on Tuesday, 25 September 1990. The exact location of the presentation will [sic] furnished to you at a later date. Your formal presentation will last no longer than 50 minutes with the remainder of the session being available for questions/discussions.

It is requested that your presentation take the following order and form.

- a. Design and Construction
 - Site Plan
 - Type of construction/building materials/finishes
 - Milestones
 - Compatibility with surrounding structures
 - Construction budget (total and per guest unit)

- b. Functionality and aesthetics of the facility design
 - Space plan/functional layout
 - Guest room types
 - Food Service area(s)
 - Common use areas
 - Amenities

- c. Overview of management plan under contractor owned/operated scenario.

- Staffing levels
- Managerial Qualifications
- Function of Management Company, if applicable

d. Financing program (items to be addressed under both contractor owned/operated and contractor owned/fund operated scenarios)

- Capitalization plan
- Operating Projections
- Rooms Rates
- Guarantees and commitments

Request that you contact the undersigned at (202)-325-0757 with the names of the individuals that will be representing your firm during this presentation.

(R4, 3rd Supp., tab 159)

26. On 10 September 1990, Minesen forwarded to the CO its responses to over 19 questions. Minesen also wrote: "We look forward to presenting our proposal in Hawaii from 9:00 to 11:30 AM Tuesday, 25 September 1990" (R4, 2nd Supp., tab 2).⁶

27. On 1 March 1991, the Fund's evaluation team for Step Two of the RFP forwarded its written analysis of the various proposals to Ms. Keeney. The evaluation team made a detailed set of "comments, recommendations and negotiation points"

⁶ In September 1990, the GAO issued its final audit report on transient lodging. On page 4 of the "Executive Summary," it stated, in part:

In an effort to reduce training costs, DOD requires the services to lodge transient personnel on base whenever possible. Only when base facilities are not available should transients be granted off-base per diem for lodging. However, transient personnel were sometimes granted the higher off-base per diem when lodgings set aside for their use were available.

On page 52 of its comments, DoD wrote: "The Secretary of the Army will establish controls to ensure that installations fully use on-base facilities before authorizing off-base per diem" (R4, 4th Supp., tab 55).

regarding each of the offerors' proposals. With respect to Minesen, the team stated, in general terms:

(1) Mineson [sic] Company has provided a financial scenario for a proposed 184 unit facility inclusive of 100 seat restaurant and optional convenience store. The offeror has provided a financial scenario which provides for development, construction, financing, and operation of the proposed facility. Additionally, lease scenario is provided for a contractor owned government operated facility as required by the request for proposal. An alternative is also proposed whereby the facility may be leased to the Fund who may then contract management through Mineson [sic].

(2) The offeror has projected operational stabilization in year four of operation which is well within the range of industry and acceptable. The average daily rate projected in the first year of stabilization is \$72.36. This rate provides for net income before depreciation sufficient to cover interest and principle [sic] payments from year one of operation. Room demand builds from an initial projection of 75% occupancy in year one to a stabilization occupancy level of 90% in year 4. This stabilized level of occupancy is possibly a little aggressive but not inappropriate given the total construction of 184 units and the market demand analysis provided by the offeror in step 1 which recognizes the seasonalities of demand.

b. Consolidated/Departmental Pro Formas. The offeror has provided consolidated income and expense projections through the first ten years of operation. A rooms Department pro forma provides rooms expense as 26.62% of the average daily room rate proposed in the first year of stabilized occupancy or \$17.30 per occupied room night. The offeror has (inclusive of clarifications), in the majority, provided for appropriate expense items and projected amounts by appropriate departments. The following points of exception/negotiation are provided the Contracting Officer as regard departmental projections:

The team then provided the CO with an evaluation of Minesen's Step Two proposal which encompassed eight single-spaced pages (R4, 2nd Supp., tab 64).⁷

28. On 13 May 1992, Mr. Hein forwarded a letter to Dr. Neville in which he stated, in part:

Enclosed please find the updated form of draft financing letter you requested for your Schofield Barracks proposal. Please review this letter and call me with any suggested changes so we can put our letter in final form and have a copy delivered to you prior to your meetings tomorrow.

(R4, 3rd Supp., tab 115)

29. On 16 June 1992, Mr. Hein forwarded the following letter to Dr. Neville:

We have sent loan packages on your proposed TLF project to two banks with headquarters in Honolulu, a major Japanese banks [sic] Los Angeles agency office, and a large insurance company that has been very active in the area of Department

⁷ In September 1991, the U.S. Army Audit Agency (AAA) issued a report to evaluate the "viability of the concept of third-party financed lodging facilities." Addressing difficulties faced by such facilities at Fort Bliss, Georgia, and Fort Drum, New York, the AAA concluded, in part:

Conclusion: The risks and disadvantages of the contractor-owned, contractor-operated facilities are that they may not be profitable for contractors to operate unless:

- The Family Support Center requests that Army regulations be changed to direct the use of the facilities as government quarters. Official travelers at Fort Bliss and Fort Drum weren't directed to use the facilities. The room occupancy levels at Fort Drum weren't high enough for the contractor to make a profit.

(R4, 4th Supp., tab 71 at GOV000766)

of Defense lease financings. We have been in contact with these lenders about the package, however, I think it is unrealistic that any of them will be able to thoroughly review this package, do their required due diligence, and provide us with a letter of interest by this Friday.

Therefore, I would suggest you request an extension from the contracting officer of at least two weeks to provide the required letters of interest from a lender. If you or the contracting officer have [sic] any questions about this recommendation, please feel free to give me a call.

(R4, 3rd Supp., tab 115)

30. Newman's loan package contained an "EXECUTIVE SUMMARY" which stated, in part:

The TLF is an economy lodging facility for Army personnel and their families who have been transferred to Schofield Barracks. They are required to stay at the Schofield TLF if space is available. Only if the TLF is full and cannot accommodate them will they receive travel allowance payment for lodging in the private sector. Government personnel on special assignment to Schofield are also required to stay at the TLF. Eligible to stay at the TLF, though not required to do so, are Army personnel and families vacationing or being transferred to other Army installations in the area or coming to nearby Tripler Army Medical Center for medical care, military personnel from other services, and Army retirees who may benefit from the low cost of the facility in one of the world's highest cost resort areas. The TLF is not available to the general public.

The economic feasibility study by Hospitality Valuation Services, Inc. reports that the present old TLF at Schofield has 60 rooms (World War II vintage) and about 15,000 room nights a year are turned away. Furthermore, all other TLFs on Oahu are old and full, and all are turning away personnel who would find a new, modern Schofield TLF with air conditioning, private bathrooms, a recreation and swimming area, and a restaurant an attractive alternative where their

travel allowance will more nearly cover the cost than at a private sector hotel or motel room. The Hale Koa, a resort hotel the Army operates on Waikiki Beach, has 99% occupancy and a 2-year waiting list. A significant number of those personnel and families would be interested in a new modern TLF at Schofield in lieu of waiting 2 years or not taking a Hawaii vacation. Marketing will focus on these presently under-served segments of the military and retired military population.

Because of the strategic importance of Hawaii to the U.S. Government, it is unlikely that Schofield Barracks, the largest Army base in Hawaii, would be closed. Nonetheless, guarantees in such event have been included in the TMC proposal. The military budget reductions currently being planned by the U.S. Government do not include cutbacks in the Pacific area. Even if some personnel reductions should occur, the size of the TMC proposed facility will continue to assure a profitable level of occupancy.

(R4, 3rd Supp., tab 116) Identical language was contained in an "EXECUTIVE SUMMARY" presented to banks in Hawaii on 1 and 2 March 1993 by Newman in its capacity as Minesen's placement agent (R4, 3rd Supp., tab 122).

31. On 29 June 1992, Dr. Neville forwarded to Newman and Associates some corrections and suggested editing changes to the "EXECUTIVE SUMMARY" which had been transmitted to her earlier in the month. Although she made eight sets of changes, Dr. Neville did not alter the language contained in the first two paragraphs of the section entitled "Demand and Market for the Project." (R4, 3rd Supp., tab 117; tr. 1/218)

32. On 22 June 1992, Dr. Neville wrote a letter to Mrs. Margaret S. Hannson of Golden, Colorado who had conferred with her "on how to proceed with obtaining a banking letter of reference to be sent to a Hawaiian bank with reference to the deal I have been working on there for so long."⁸ Included in Dr. Neville's letter was the following language relating to the requirements for DoD personnel to stay at the Inn: "The TLF (which also exists at every military installation, every branch of the service) is the required source of lodging for soldiers and their families who are being transferred to

⁸ Dr. Neville testified at the hearing that Ms. Hannson was on the board of a major Denver bank (tr. 2/231).

Schofield and need temporary, affordable housing until they find permanent housing in the private housing market.” She added: “The TLF is also required lodging for civilian and military personnel sent to Schofield on temporary duty.” (R4, 3rd Supp., tab 125)

33. On 9 June 1992, Ms. Wanda L. Shukay, the Fund’s new CO, issued amendment 0005 to Step II of the RFP. The principal purpose of this amendment was the solicitation of best and final offers (BAFO’s). The due date for BAFO’s was “June 19, 1992 at 4:00 PM EDT” (R4, tab 19).⁹

34. On 9 July 1992, Minesen submitted its BAFO to the CO. Attached to the offer was a letter of commitment from the Sumitomo Bank, Ltd., of Los Angeles, California. Minesen also noted in its cover letter that it had detailed discussions with several Hawaiian banks regarding construction financing. Also contained in Minesen’s BAFO was a Consolidated Budget and Cash Flow Statement which projected occupancy rates for the first 10 years of the contract. The rates for years one through three were 75%, 80%, 85% respectively; the rates for years five through ten were all projected at 90% (R4, tab 20 at Bates p. GOV000000908).

35. After representatives of the Fund reviewed Minesen’s BAFO, the parties met at the offices of Newman and Associates to negotiate contractual terms. The Fund’s negotiators were Ms. Shukay, Mr. Anderson, Mr. Cavezza, Mr. Nelson, Mr. Ontko, Mr. Parzych and Mr. Sands, with Ms. Shukay as the CO taking the lead (R4, 4th Supp., tab 403; tr. 9/1887, 1928-29; tr. 13/3016). Minesen was principally represented by Mr. Jensen and Dr. Neville, and, occasionally by Mr. Miller (tr. 9/1887, 1889, 1892; 12/2562). According to Mr. Cavezza, the negotiations encompassed four full days (tr. 9/1891).

36. The negotiations were ultimately completed; and, on 14 January 1993, the parties entered into Contract No. NAFBA3-93-C-0001 to “develop, construct, operate and maintain a transient lodging facility (TLF) on Schofield Barracks,” Hawaii. The contract’s term was 32 years. (R4, tab 1 at 1)

37. Attached to the contract were five exhibits, including “METES AND BOUNDS”; “ENVIRONMENTAL ASSESSMENT”; and “FINANCIAL EXHIBIT FOR TERMINATION FOR CONVENIENCE CLAUSE” (R4, tab 1, attachments).

38. The contract contained several pertinent clauses, including Clause 7, “TLF DEFINED AS GOVERNMENT QUARTERS,” which had been slightly modified from

⁹ The due date set forth in amendment 0005 was apparently later extended.

the version contained in Clause 6 of Step II of the RFP (finding 15). That clause now provided:

The completed TLF will fall within the current Joint Federal Travel Regulation definition of government quarters, if its use is directed in accordance with the regulation of the military service concerned. The Joint Federal Travel Regulation and any definition contained therein is subject to change at any time. Travelers receiving government per diem payment, in order not to forfeit their per diem entitlement, will be required to patronize the TLF on a mandatory basis as long as confirmed reservation priorities are in accordance with those provided at Section III, Operation Requirements.

(R4, tab 1 at 3)

39. Also pertinent to this litigation are clauses 13 through 20, which stated:

13. **REVIEWS.** The Contractor and the Fund agree to hold in-process review meetings every six months during the first three years of operation. Areas of discussion and decision at these meetings will include room rate reviews, the facility operation and capital expenditure funds. Planning for the upgrades and/or renovations of the TLF will occur at a minimum of every three years. The Contracting Officer or the duly appointed Contracting Officer's Representative will jointly with the Contractor approve all capital expense plans.

14. **ROOM RATE STRUCTURE.** The table below sets forth the Contractor's offer for the beginning room rate structure that will apply for the TLF during the first six months of operation and serves as a basis for any increase or decrease in room rates negotiated in accordance with the terms of contract.

ROOM PRICING POLICY & RATES

<u>NO.</u> <u>OCCUPANTS</u>	<u>STANDARD</u>	<u>DOUBLE/DOUBLE</u>	<u>SUITE</u>
1 ADULT	\$52	\$52	\$84
2 ADULTS	\$66	\$66	\$84
3 ADULTS	\$76	\$76	\$94
4 ADULTS	N/A	\$86	\$104

15. ROOM RATE ADJUSTMENT. The room rates shall not exceed the maximum lodging portion of the transient lodging allowance (TLA). The first scheduled room rate review, agreed upon by both parties, shall take place six (6) months after beneficial occupancy. Any agreed upon rate changes shall be made effective the first day of the second month after approval by written modification to this contract and signed by both parties. Increases or decreases in room rates shall be a function of historical inflation, actual facility expenses for the prior period and projected facility expenses for the next fiscal year of operation.

16. REQUIRED REPORTS. The contractor will provide the Contracting Officer the following reports –

a. The annual operating, capital expenditure and cash flow budget projections, not later than 30 days prior to the beginning of the fiscal year. These projections shall form the basis for room rate adjustments. A direct correlation between expenses and room rate escalation must be evident for approval of the Contractor’s proposed room rate increase.

b. Monthly financial statements of the TLF within 20 days following the reporting period.

17. GUARANTEE OF DEBT SERVICE. The Fund agrees to guarantee and pay monthly, the contractor’s debt service that occurs monthly during a two (2) year period beginning on the date of beneficial occupancy of the TLF, to the extent that the total amount of any monthly debt service exceeds the difference between the total amount of the same month’s

gross sales of the TLF minus the total of the same month's normal operating expenses of the TLF. In no event, will the Fund expend more than the aggregate sum of payment of the principle [sic] and interest on the outstanding loan indebtedness during this two (2) year period. Provided monthly the Contractor will review and repay the Fund, any sums paid by the fund during the preceding month(s), to the extent of the Contractor's net profit for the subsequent month(s). If the contract is terminated, any amounts not repaid to the Fund pursuant to this paragraph shall reduce any subsequent price that would otherwise be payable by the Fund to the Contractor under this contract. After the first two years of operation, Contractor requests for extension of guarantee of debt service shall be in writing and shall not be unreasonably withheld by the Fund.

18. **OUTSTANDING DEBT.** The mortgage loan shall not exceed the total project cost without the written approval of the Contracting Officer. At any time this contract is terminated for any reason, the Fund will either pay or assume the total indebtedness and prepayment penalties, if any.

19. **MORTGAGE.** The Fund recognizes that if the Contractor obtains financing for the TLF, the financial institution may require a lien to be placed on the lease and the leasehold estate created thereby in accordance with provisions of the lease in order to secure the loan. The Fund agrees to such a lien, but in the event of foreclosure, the financial institution shall have the right to operate the TLF only after obtaining the Contracting Officer's prior written consent, which consent will not be unreasonably withheld. Any further assignment by the secured party will be subject to the same conditions stated in this paragraph.

a. If the Fund shall become entitled to terminate this contract upon the occurrence of a default by Contractor, the Fund shall, before terminating this lease, give to each lender who has made the request referred to in subparagraph b. below notice that such specified default remains unremedied and that the Fund is entitled to terminate the Contract. In

such case within 60 days following said notice such lender shall:

(1) Notify the Fund of its election to propose a takeover of the Contract; and

(2) If such takeover is on substantially the same terms and conditions as this Contract and if the proposed substitute party is acceptable to the Fund; then the Fund shall accept such lender's proposal for takeover of contract performance, and, if such lender shall be unable to foreclose or acquire the Contractor's interest in this Contract, the Fund shall not unreasonably withhold approval for an extension of time to effect such takeover by foreclosure or acquisition. Nothing herein contained shall be deemed to require a lender to continue with any foreclosure or other proceedings or, in the event such lender or its designee shall acquire possession of the leased premises, to continue such possession, if the default in respect of which the Fund shall have given a notice shall be remedied. If prior to any sale pursuant to any proceeding brought to foreclose any mortgage, or if prior to the date on which Contractor's interest in this Contract shall otherwise be foreclosed or acquired, the default in respect of which the Fund shall have given a notice shall have been remedied and possession of the leased premises shall have been restored to Contractor, then the obligations of the substitute party referred to in paragraph (2) of this condition shall be of no further effect. Nothing herein contained shall affect the right of the Fund, upon the subsequent occurrence of any default, to exercise any right or remedy herein reserved to the Fund.

b. If requested in writing by the holder of any mortgage (which request shall specify an address to which notices shall be given) any notice, demand, request, approval or other communication (a "notice") which under the terms of this Contract, the lease, or under any statute, must or may be given to the parties hereto shall also be given contemporaneously to such holder. Any such notice to the holder of any mortgage must be given by personal delivery or mailing the same by registered or certified mail, return receipt requested,

addressed to such holder at the address specified by such holder, in the request made by such holder, pursuant to this subparagraph.

20. APPROVAL OF FINANCING.

a. The Fund reserves the right to approve any initial and future financing of the TLF, including the refinancing of any loans, however, approval will not be unreasonably withheld. Prior to entering into any binding financial commitment for financing or refinancing of the TLF, the contractor shall submit all information relative thereto to the Contracting Officer for review and approval prior to obtaining a commitment letter from the lending institution. Such information shall include any pertinent information concerning the terms and conditions of the loan.

b. The Contractor will use its best effort to obtain financing that may be assumed by the Fund on the same conditions and terms in the event the contract is terminated.

(R4, tab 1 at 6-9)

40. Also of significance is Clause 33, which provided, in part:

33. TITLE TO AND AMORTIZATION OF THE TLF.

a. It is understood and agreed by the parties that the TLF constructed by the Contractor on the leasehold premises described in the lease shall be and remain the property of the Contractor for as long as this contract and the lease remain in full force and effect, and that upon termination of this contract or the lease, whichever the case may be, the TLF shall become the property of the Fund, and all interests therein by the Contractor shall cease upon such termination.

(R4, tab 1 at 13)

41. In addition to the general terms and conditions which we have reviewed, the contract contained several pertinent special provisions (SPs). Among them is SP1., which stated: "SUPPLEMENTAL AGREEMENT: All modifications, additions or deletions to

this contract must be prepared in writing as formal modifications to this contract and signed by both parties, in the same manner as this contract, in order to be effective." Also of interest was SP2., "ORDER OF PRECEDENCE," which provided:

In the event of any conflict or inconsistency between the provisions of this contract and the lease, these contract provisions shall take precedence. Appended to this contract at Exhibit 3 is the Contractor's formal offer to Solicitation NAFBA1-89-R-0008 listed as follows:

- a. Offer dated July 20, 1989, Step I
- b. Offer dated May 18, 1990, Step II
- c. Offer dated February 12, 1992, Amendment 0003 to Step II, updated offer, including electrical work at Schofield Barracks
- d. Best and Final Offers, July 9, 10 and August 21, 1992, Contractor Owned and Operated.

The Contractor's offer, as reflected in the above documents is a part of this Contract. If there is any conflict between the Offer and the Contract, the Contract shall take precedence.

(R4, tab 1 at 21)

42. Also pertinent to this litigation is SP4., "CONTRACTOR'S RIGHT OF FIRST REFUSAL AND ADDITIONAL DEVELOPEMENT." It provided:

a. The fund recognizes that the development of any similar facilities on Schofield Barracks may have a detrimental effect upon the occupancy and financial success of the TLF. Accordingly, the Fund agrees that the Fund will construct no facilities for the purposes for which the Schofield Barracks TLF will be constructed without offering the Contractor the right of first refusal to construct said facility or the opportunity to construct additional rooms on the TLF to accommodate the requirement for additional rooms.

b. This clause does not in any way bind the US Government in its use of funds appropriated by Congress to construct, operate, or lease similar lodging facilities. The Government would support patrons in the TDY category only.

c. The Schofield Barracks TLF eligibility requirements are listed in Section III of this Contract. Even so, in the event the Government constructs a lodging facility on the Schofield Barracks, and the resulting percentage of occupancy at the TLF is less than 80% for a three (3) month consecutive period, and the Contractor requests the contract be terminated for nonfeasibility, then the Fund, after review of the contractors [sic] request and if such request provides sufficient information that operation of the TLF is projected to be nonfeasible, the Fund will not unreasonably withhold purchasing the TLF in accordance with the Termination for Nonfeasibility clause.

(R4, tab 1 at 21-22)

43. SP6. is a "DISPUTES CLAUSE (APRIL 1987)" specifically designed for NAFI contracts. It stated:

a. This contract is not subject to the Contract Disputes Act of 1978 (41 U.S.C. 601-613) [emphasis in original].

b. This contract is subject to the rules and regulations promulgated by the Secretary of Defense and Secretary of the Army for nonappropriated fund contracting as listed below.

c. All disputes arising under or relating to this contract shall be resolved under this clause.

....

g. The Contracting Officer's decision shall be final unless the Contractor appeals as provided in paragraph h. of this clause.

h. The Contracting Officer's final decision may be appealed by submitting a written appeal to the Armed Services Board of Contract Appeals within 90 days of receipt of the Contracting Officer's final decision. Decisions of the Armed Services Board of Contract Appeals are final and are not subject to further appeal.

i. The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.

(R4, tab 1 at 22-24)

44. The contract contained a large number of special provisions relating to termination procedures which were later amended through a series of contractual modifications. For the sake of clarity, we shall cite the final versions of these termination provisions below (finding 59).

45. The contract also contained a set of "OPERATION REQUIREMENTS," which provided:

1. OPERATING PROCEDURES. The Contractor will provide the Contracting Officer a copy of the standard operating procedures to be used for operation of the TLF.

2. AUTHORITY FOR OCCUPANCY AND RESERVATIONS.

a. ELIGIBILITY REQUIREMENTS. The following categories of personnel are authorized to occupy rooms at the TLF. The installation commander may establish priorities within Priority I and priority II to meet special needs.

(1) Priority I.

(a) Active duty military personnel of all grades, accompanied or unaccompanied, departing or arriving incident to a permanent change of station, hereinafter referred to as "PCS."

(b) Visiting relatives and guests of patients in a military treatment facility or military patients in local hospitals.

(c) Active and retired military personnel and other personnel undergoing outpatient medical treatment who must stay overnight near a military medical treatment facility.

(2) Priority II.

(a) Military and civilian personnel on temporary duty, hereinafter referred to as "TDY".

(b) Ready and Selected Reserve (in good standing as determined by the Secretary concerned) [sic] Component personnel who possess the red/pink identification card (DD Form 2 Reserve), their family members and those retired without pay (grey area retirees) and their family members. Reserve and National Guard members who are retired with pay and possess DD Form 2A, N, AF, MC, or CG (retired gray/blue) identification card. Senior ROTC cadets while on extended active duty.

(c) Military personnel in a leave, pass, or transient status.

(d) Retired military personnel in a transient status.

(e) Relatives visiting military personnel stationed in Hawaii.

(f) Other authorized patrons in accordance with Army Regulation AR 215-2.

b. The Contractor is advised that individuals in Priority I making reservations in conjunction with a PCS move may make reservations up to one year in advance of arrival date. Persons in all other categories may make reservations up to 45 days in advance of their arrival date. Priority on a waiting list for reservations is established by the ranking in paragraph 2.a. above then on the date and time the request is received at the reservation office. Requests must include the name of party, arrival date, confirmation of authorized use, arrival time (late

arrival), number and type of room(s) required, length of stay, and special needs (i.e., cribs, cots, handicapped).

c. Military Personnel on PCS will provide a copy of PCS orders or the special order number, date, and issuing headquarters with the reservation request. When orders are not with the request, they must be presented upon arrival.

d. Confirmation when sent to a military member or sponsor should contain the following information:

- (1) Effective dates of the reservation.
- (2) Check-in/out time.
- (3) Cancellation policy.
- (4) Conditions of occupancy and rates for requested room(s).
- (5) Telephone number of the registration desk.
- (6) Location of the facility.
- (7) Number of room(s) reserved.
- (8) Guarantee method if applicable.
- (9) Special request, i.e., cribs, etc.

3. PAYMENT FOR SERVICES. The Contractor will be responsible for securing payment directly from the individuals using the facility.

4. OPERATING AGREEMENT. The Contractor and the Installation Commander or his designee will sign an operating agreement. The contents of this agreement will deal with the day to day operation of the TLF as it relates to the total environment of Schofield Barracks. In the event of a conflict between the operating agreement and this contract, this contract shall take precedence. The topics that may be covered in the operating agreement will include but are not limited to:

- a. Fire protection/equipment/fire hydrant
- b. Military Policy [sic] protection and assistance
- c. Utilities (availability/use)
- d. Road access
- e. Permits
- f. Alcoholic beverages
- g. Bad credit
- h. Eviction of tenants
- i. Military on-post help
- j. Installation Security Alert
- k. Security
- l. Tenant Referral

(R4, tab 1 at 61-63)

46. On 1 February 1993, the parties executed Lease No. DACA84-1-91-14 which became an attachment to the contract. Under the lease's terms, Minesen rented the land occupied by the Inn (the TLF) for a period of 32 years. Of particular interest is clause 24., "Cost of Utilities and Other Services," which provided:

That the Lessee shall pay the cost, as determined by the said Officer of producing and/or supplying any utilities and other services furnished by the Government or through Government-owned facilities for the use of the Lessee, including the Lessee's proportionate share of the cost of operation and maintenance of the Government-owned facilities by which such utilities or services are provided or supplied. Payment shall be made in the method prescribed by the said Officer, upon bills rendered monthly.

(R4, tab 23 at 7)¹⁰

47. Effective on 1 February 1993, the parties executed Modification No. P00001 to the contract, which stated: "The Minesen Company is hereby notified to proceed to final design of the Schofield Barracks TLF in accordance with the terms and conditions of the contract" (R4, tab 24).

¹⁰ The "said Officer" referred to in the clause was the Commander, U.S. Army Engineer Division, Pacific Ocean (R4, tab 23 at 2).

48. In June 1993, the Bank of Hawaii (BoH) approved Minesen for a construction loan in the amount of \$12,500,000 for a 10-year term. As part of the agreement, the Fund obligated itself

. . . to pay monthly Borrower's debt service during the two year period beginning on the date of occupancy of the project to the extent that actual monthly debt service exceeds project [net operating income]. Borrower may request an extension of the guarantee of debt service which shall not be unreasonably withheld by the Fund.

The agreement also stated the following condition:

AMWR [the Fund] will execute a separate agreement with BoH agreeing that in the event of TMC's [Minesen's] default under the BoH loan or the AMWR contract, AMWR will promptly assume the BoH loan or promptly pay to BoH all amounts due under the BoH loan.

Should the AMWR exercise its right to purchase the TLF under the provisions of the contract, BoH shall release the lien of its mortgage upon receipt of all amounts due under its loan.

(R4, 3rd Supp., tab 196 at 4-5)

49. Effective on 14 July 1993, the parties executed Modification No. P00002 to the contract, which stated:

a. Subject contract is hereby modified at Section II, paragraph 12 due to THE MINESEN COMPANY's diligent effort to secure financing as follows:

12. TERMINATION FOR FAILURE TO SECURE FINANCING. In the event the Contractor fails to secure the written commitment for financing on or before July 31, 1993, the Fund reserves the right to terminate this contract, at no cost to either party; except, however, for those costs incurred by the Contractor in proceeding at Modification P0001, for the design portion of this contract. The Contractor shall notify the Contracting Officer within 48 hours after failure to

receive written commitment for financing. The Contractor shall submit those costs associated with the design portion to the Contracting Officer for a final determination of payment for those reasonable costs incurred.

(R4, tab 25)

50. Minesen complied with this modification and obtained a written commitment for financing (R4, 3rd Supp., tab 196). As a result, the parties entered into Modification No. P00003, with an effective date of 13 October 1993, which altered several of the contract's terms and conditions, as well as a number of special provisions. The pertinent, modified terms and conditions provided, as follows:

17. GUARANTEE OF DEBT SERVICE.

a. The Fund agrees to guarantee and pay on a monthly basis, as applicable, the monthly debt service, plus late payment penalties, if any, during the two (2) year period beginning on the date of beneficial occupancy of the TLF, to the extent that the total amount of any monthly debt service exceeds the difference between the total amount of the preceding month's gross sales of the TLF minus the total of the preceding month's normal operating expenses of the TLF. Except as provided in this paragraph, in no event, will the fund expend more than the aggregate monthly debt service, plus late payment penalties, if any, during this two (2) year period. On a monthly basis, the Contractor will review and repay the Fund any sums paid by the Fund during the preceding month(s) to the extent of the Contractor's net cash flow after debt service for the subsequent month(s). The calculation of gross sales and normal operating expenses shall include and be consistent with those types of revenue and expense items set out in the Consolidated Budget and Cash Flow Statement submitted by the Contractor to the Fund as part of the contract and as prescribed in the Uniform System of Accounts and Expense Dictionary, 4th Edition, published by the American Hotel and Motel Association. If the contract is terminated, any amounts not repaid to the Fund pursuant to the preceding sentence shall reduce the amount that would otherwise be payable by the Fund to the Contractor under this contract in excess of the outstanding indebtedness. After the

first two (2) years of operation beginning with beneficial occupancy, Contractor requests for extension of the guarantee of debt service provided for in this paragraph shall be in writing and any such extension shall not be unreasonably withheld by the Fund.

b. The Contractor agrees to establish at the time of commencing operation of the TLF an account at its principal bank, to be designated the "Debt Service Revolving Account", in an amount equal to one month's debt service. At the beginning of the second year of operation, the amount shall be increased to be equal to two months' debt service if net cash flow after debt service is available for such increased deposit. At any time the total amount of any monthly debt service exceeds the difference between the total amount of the preceding month's gross sales of the TLF minus the total of the preceding month's normal operating expenses of the TLF, [t]he amount needed to make the debt service payment shall be withdrawn by Contractor from the Debt Service Revolving Account. The amount withdrawn shall be fully reimbursed from net cash flow after debt service in the immediately succeeding month(s) so as to restore the account to the beginning balance as set forth in this paragraph. The amount to be paid by the Fund toward any month's debt service, as described [in] the preceding paragraph, shall be determined after all funds in the Debt Service Revolving Account have been applied. Upon expiration of the Fund's Debt Service Guaranty, this account may be liquidated by the Contractor.

18. OUTSTANDING DEBT. The mortgage loan shall not exceed the total project cost without the written approval of the Contracting Officer. At any time this contract is terminated for any reason, the Fund will pay the then outstanding indebtedness. Should the Fund pay the then outstanding indebtedness, the payment shall be made to the Contractor or its assignee. If the payment of the then outstanding indebtedness is made by the Fund to the Contractor, the Contractor shall be responsible for liquidating the outstanding indebtedness and providing the Fund with title to the TLF, free and clear of all liens.

19. MORTGAGE AND ASSIGNMENT.

a. The Fund recognizes that if the Contractor obtains financing for the TLF, the financial institution providing the financing, may require a lien to be placed on the lease and the leasehold estate created thereby in accordance with provisions of the lease in order to secure the loan. The Fund hereby agrees to such a lien. Any event giving rise to a right to foreclose the lien shall be deemed to constitute an event for which the Fund may terminate this Contract for default. Upon receipt of notice of the accrual of such right to foreclose from the holder of the lien that shall have made the request referred to in subparagraph b, the Fund shall forthwith deliver to the Contractor a Notice of Termination for Default. If the Contractor fails to correct this cause of termination and continues and persists therein for forty-five (45) days after such Notice of Termination is given, then the termination shall become final effective on the date specified in the Notice, and the Fund shall assume responsibility for the operation and maintenance of the TLF on the effective date of termination. The contractor shall not be deemed to have corrected the cause of termination for such a Notice of Termination for Default until the event giving rise to the right to foreclose the lien shall have been corrected to the satisfaction of the Fund and the holder of the lien.

b. If requested in writing by the holder of any lien (which request shall specify an address to which notices shall be given) any notice, demand, request, approval or other communication (a "notice") which under the terms of this Contract, the lease, or under any statute, must or may be given to the parties hereto shall also be given contemporaneously to such holder. Any such notice to the holder of any lien must be given by personal delivery or mailing the same by registered or certified mail, return receipt requested, addressed to such holder at the address specified by such holder, in the request made by such holder, pursuant to this subparagraph.

c. Nothing herein contained shall affect the right of the Fund, upon the subsequent occurrence of any default, to exercise any right or remedy herein reserved to the Fund.

d. The Contractor may assign its rights to be paid amounts due or to become due as a result of the performance of this contract to a bank, trust company, or other financing institution, including any Federal lending agency. The assignee under such an assignment may thereafter further assign or reassign its right under the original assignment to any type of financing institution described in the preceding sentence. Unless otherwise stated in this contract, payment to an assignee of any amounts due or to become due under this contract shall not be subject to reduction or setoff. Any assignment or reassignment authorized under this clause shall cover all unpaid amounts payable under this contract, and shall not be made to more than one party, except that an assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in the financing of this contract.

(R4, tab 26 at 6-9)

51. The construction finance phase having been completed, the parties executed Modification No. P00004, effective on 14 October 1993, which provided:

- a. The final plans and specifications have been reviewed by the Fund and are hereby accepted. Effective this date you are hereby given notice to proceed with construction of the Transient Lodging Facility at Schofield Barracks.
- b. The job site shall be secured in a manner to control access by unauthorized personnel during the period of construction.
- c. The effective date of this Notice to Proceed shall start the contract performance period for construction as specified in the construction milestone schedule of the subject contract.

(R4, tab 27)

52. On 17 March 1994, a Memorandum of Agreement (MoA) was executed among the 25th Infantry Division (Light)/U.S. Army Garrison Hawaii; the U.S. Army Community and Family Support Center (USACFSC); and Minesen. Its purpose was “to establish general operating practices, required support, responsibilities, general relationships, and procedures under which the parties above will function in regard to the management and operation of the Inn at Schofield Barracks, also referred to as ‘the Inn.’” Among the responsibilities undertaken by the U.S. Army Garrison Hawaii, Minesen’s landlord, was the following:

Refer all Schofield Barracks official travellers to the Inn at Schofield Barracks for assignment of quarters. The Inn is considered Government quarters in accordance with the Joint Federal Travel Regulation, Appendix A, definition of Government quarters, subparagraph 6. Personnel on official travel who are authorized use of the Inn will not be issued statements of nonavailability unless the Inn is at maximum capacity.

Among Minesen’s responsibilities was to “[p]romptly settle utility charges upon verification of accuracy.” (R4, 1st Supp., tab 6) There is no record evidence demonstrating that similar MoAs were executed with respect to either Tripler Army Medical Center or Fort Shafter.

53. The Inn was constructed “in 8 months at a cost of \$14.25 million.” It opened for business on 1 June 1994. Although the occupancy rate for June was only 60%, the rates for July through December 1994 were 94.9%, 97.6%, 99.1%, 99.9%, 98%, and 95.3%, respectively (R4, tab 31).

54. On 2 December 1994, Minesen undertook permanent financing of the project through a note purchase agreement executed with John Hancock Mutual Life Insurance Company (Hancock). Through this agreement, Minesen authorized the issuance and sale of senior secured notes in the amount of \$14,250,000. The notes were first to be applied to “the payment in full of all amounts owed or to become owing . . . in connection with that certain loan . . . in the stated principal amount of \$12,500,000.00, made by the Bank of Hawaii” to Minesen. Any “funds remaining” were to be released to Minesen (R4, 1st Supp., tab 10 at 1-2).

55. Regarding Minesen’s contract with the Fund, the note purchase agreement provided:

9.15 Compliance with MWR Contract and Other Contracts. The Company shall perform and comply with every material term, covenant and provision of the MWR Contract and each of the Other Contracts, shall be in compliance with such terms, and shall not be in default under the MWR Contract or any of the Other Contracts. Except as provided in Section 8 of the Assignment of MWR Contract, the Company shall not, without the prior written consent of a Super-Majority of the Note Holders, enter into any modification or amendment of the MWR Contract.

(R4, 1st Supp., tab 10 at 29)

56. In addition, included among the various “Events of Default and Acceleration” in clause 12 of the note purchase agreement was subparagraph (d), which provided that:

a [sic] default in the performance of or compliance with any material provision of the MWR Contract, the Other Contracts, or the Ground Lease, and such default shall have continued beyond the cure period therefor, if any, specified in such respective documents, or the termination of the MWR Contract;

would result, *inter alia*, in the unpaid principal and accrued interest on the notes becoming automatically due and payable (R4, 1st Supp., tab 10 at 31, 34).

57. The same penalty applied under the following subparagraphs contained in clause 12. of the note purchase agreement:

(m) the Fund shall deliver (or the Trustee or any Note Holder shall otherwise receive) notice that the Company has failed to deposit and maintain all monies required under the MWR Contract to be deposited and maintained in the (i) Debt Service Revolving Account and (ii) the Replacement Reserve Account, as such terms are defined in the MWR Contract, or that the Company has failed to remit the full amount of the Contract Administration Fee, as defined in the MWR Contract, or otherwise failed to pay any amount or fund any account or escrow established under the MWR Contract or the Ground Lease; or

(n) if the Fund defaults in its obligations under the MWR Contract, or if the Fund is reconstituted, abolished, merged, or consolidated, or assigns its rights and obligations under the MWR Contract, or is otherwise modified, or its financial condition changes, in a manner that materially and adversely affects the ability of the Fund (or its successor or assign) to perform under the MWR Contract, including without limitation, its ability to pay off or assume the indebtedness evidenced by the Notes upon termination of the MWR Contract; or

(o) if the Fund's right and ability to borrow funds from the Army Banking and Investment Fund ("ABIF") is terminated or impaired and in either event the Fund does not have the right and ability to borrow monies from the ABIF and/or alternate sources reasonably acceptable to Purchaser in an amount at least equal to that required to perform all of its obligations under the MWR Contract and all of its other obligations as they exist from time to time; or

(p) if, at any time, (i) Schofield Barracks is closed and transferred or conveyed to a non-Department of Defense entity; or (ii) Schofield Barracks is closed and transferred or conveyed to a Department of Defense entity which fails to fully acknowledge the rights of the Fund and the Company to perform pursuant to the terms of the MWR Contract and to operate the TLF; or (iii) Schofield Barracks is "substantially deactivated" [for purposes of this subsection (p), the term "substantially deactivated" shall mean a permanent reduction in force of the military presence at Schofield Barracks which results in a reduction of the average daily occupancy rate at the TLF over a period of three (3) consecutive calendar months to less than eighty percent (80%)]; . . .

(R4, 1st Supp., tab 10 at 33-34)

58. On 2 December 1994, Ms. Shukay, the Fund's CO, acknowledged and consented to a notice of assignment forwarded to her as a part of Hancock's note purchase agreement with Minesen. To accommodate Minesen's permanent financing, Ms. Shukay also agreed, in part, as follows:

1. Consent to Loan. The Fund has approved and consented to the Loan. The Loan does not exceed the "total project cost," as defined in the Contract.

2. Payment of Outstanding Indebtedness. Except as expressly provided in Paragraphs [sic] 3 below, the Fund shall pay in full the "outstanding indebtedness" (as such term is defined in the Contract) upon termination of the Contract for any reason and in accordance with the terms and conditions set forth in the Contract. The Fund shall make such payment directly to the Trustee/Mortgagee in accordance with any valid assignment by the Debtor to the Trustee/Mortgagee. The Fund acknowledges and agrees that the "outstanding indebtedness" of the Loan shall include, for all purposes under the Contract or this Agreement, all unpaid amounts of the \$14,250,000 original stated principal amount of the Loan, accrued interest, late payment penalties, and prepayment penalties which are specifically referred to as the "Make-Whole Premium" in the Note Agreement. Upon payment by the Fund of the "Outstanding Indebtedness", the Trustee/Mortgagee and the Noteholder agree to provide to the Fund, duly recorded releases of all of the Loan Documents and a full release of any and all obligations of the Fund set forth in the Lease or Contract.

3. Assumption of the Loan by the Fund. Upon satisfaction of the conditions set forth in this Paragraph, the Fund may elect to reinstate and assume the Loan upon termination of the Contract for any reason, in lieu of paying the "outstanding indebtedness" pursuant to Paragraph 2 above. Within thirty (30) days following said termination of the Contract for any reason, the Fund must notify the Trustee/Mortgagee in writing that it wishes to qualify for assuming the Loan (the "Assumption Notice"): If the Fund fails to deliver the Assumption Notice prior to the expiration of said 30-day period, the Fund shall be conclusively deemed to have waived said option to qualify to assume the Loan and the Fund shall pay in full the outstanding indebtedness in accordance with Paragraph 2. Promptly following the

delivery of the Assumption Notice, the Fund shall deliver all financial, corporate, authority, and other information reasonably requested by the Trustee/Mortgagee. The Trustee/Mortgagee, acting for the benefit of the Noteholders, shall approve the reinstatement and assumption of the Loan by the Fund upon satisfaction of the following conditions:

- a. Execution by the Fund of instruments acceptable to the Trustee/Mortgagee and the Noteholders by which the Fund, notwithstanding any limitations on liability originally contained in the Loan documents, expressly and unconditionally assumes (i) payment of the Loan, and (ii) performance of the other obligations of the Debtor under the Loan Documents;
- b. Evidence acceptable to the Trustee/Mortgagee and the Noteholders (i) of the authority of the Fund to assume the Loan and (ii) that the terms of the Loan Documents, as modified, will be fully binding and enforceable in accordance with their terms against the Fund and its assets and that the Noteholders shall have the benefit of, and be secured by, all mortgages, pledges, assignments, grants and other rights after the assumption of the Loan as before said assumptions;
- c. Evidence acceptable to the Trustee/Mortgagee and the Noteholders that the financial condition of the Fund has not deteriorated from its condition as of the date of this Agreement and, without limiting the foregoing, that the Fund maintains the right and ability to borrow funds from the Army Banking and Investment Fund or from other nonappropriated funds or from another source reasonably acceptable to the trustee/Mortgagee in an amount at least equal to that required to perform all of its obligations under the Contract and all of its other obligations as they exist from time to time;
- d. Evidence satisfactory to the Trustee/Mortgagee and the Noteholders that (i) Schofield Barracks has not been closed, placed on any "base closing list," or substantially deactivated, (ii) the Fund has not been

reconstituted, abolished, merged, consolidated or otherwise modified in a manner materially adverse to its ability to perform under the Loan documents, as modified, and (iii) no such events described in clauses (i) and (ii) above are expressly under consideration by the United States Congress or other governmental body exercising jurisdiction in such matters:

- e. Evidence that the Fund has fully performed all of its obligations under (i) the Contract, and (ii) under this Agreement; and
- f. The Fund shall secure from the Secretary of the Army or his designee a Supplemental Agreement to the Lease assigning the leasehold interest to the Fund;
- g. Payment to the Trustee/Mortgagee of all fees and costs, including reasonable attorneys' fees, incurred by the Trustee/Mortgagee or the Noteholders in connection with said assumption, including any fees resulting from the issuance of legal opinions reasonably required by the Trustee/Mortgagee in connection therewith.

4. Debt Service. The Fund shall (as set forth in the Contract) guarantee and pay monthly the monthly debt service of the Debtor to the Trustee/Mortgagee for the benefit of the Noteholders, plus late payment penalties, if any (provided that the Debtor has executed and delivered to the Fund a valid assignment of its rights to the payment of the debt service to the Trustee/Mortgagee), during the two-year period beginning on the "date of beneficial occupancy" (as such term is defined in the Contract) of the transient lodging facility ("TLF"), to the extent that the total amount of any monthly debt service exceeds the difference between the total amount of the preceding month's gross sales (as such term is defined in the Contract) of the TLF minus the total of the preceding month's normal operating expenses (as such term is defined in the Contract) of the TLF. Except as provided in this Paragraph, in no event will the Fund expend more than the aggregate

monthly debt service, plus late payment penalties, if any, during this two-year period.

(R4, 1st Supp., tab 14, tab 15 at 3-5)

59. In order contractually to implement Minesen's note purchase agreement with Hancock, on 2 December 1994, the Fund and Minesen executed contract Modification No. P00005, which altered certain, pertinent special provisions of the contract. Specifically, the termination provisions were modified to state as follows:

7. TERMINATION FOR DEFAULT.

a. The Fund has the unilateral right to terminate this contract for default in the event the Contractor violates any of the terms or conditions of this contract or the lease at any time during the life of this Contract. The occurrence of any event which is an Event of Default pursuant to the terms, conditions and provisions of any loan documents executed by the Contractor to secure the financing, including, without limitation, the mortgage, the note purchase agreement, the note, and the pledge agreement referred to in subparagraph 19a of Section I shall be deemed to constitute an event for which the Fund may terminate this Contract for default. Notwithstanding the foregoing, in the event the Event of Default is an Event of Default pursuant to paragraph 9.1 of the Note Purchase Agreement executed by the Contractor, the Contract shall be terminated pursuant to Section II, paragraph 11 of the Contract; or in the event the Event of Default is an Event of Default pursuant to paragraphs 12(n), 12(o) or 12(p) of the Note Purchase Agreement executed by the Contractor, the Contract shall be terminated pursuant to Section II, paragraph 10 of the Contract.

b. The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination for Default. If the Contractor fails to correct the cause of termination under the Notice of Termination for Default and continues and persists therein and (1) upon receipt of a notice of an Event of Default from the holder of the lien, the Contractor fails to cure the Event of Default within the timeframes established by the holder of the lien, and established in the Notice of

Termination for Default given to the Contractor by the Fund, referred to in Section I, subparagraph 19a, or (2) if the Contractor fails to cure within sixty-days (60) in respect of any other event giving rise to a right to terminate this contract for default, then the termination for default shall become effective. With respect to those defaults under the loan documents executed by the Contractor for which Contractor is not entitled to any notice or opportunity to cure and in the event the Fund shall not be able to cure the Event of Default pursuant to the terms of the Agreement between the Fund, the Trustee/Mortgagee and the Noteholders, and the loan shall be [sic] not be reinstated in the name of the Contractor, then the termination of this contract for default shall be deemed to be effective as of the date of the occurrence of the Event of Default of the loan documents executed by the Contractor.

c. In the event the Fund terminates this contract for default, the Fund will purchase the TLF for an amount equal to the then outstanding indebtedness. Within thirty (30) days after the effective date of termination specified in the Notice of Termination for Default, the Fund will pay an amount equal to the then outstanding indebtedness to the holder of the lien or will assume the outstanding indebtedness and will assume responsibility for operation and maintenance of the TLF.

10. TERMINATION FOR CONVENIENCE BY THE FUND AFTER BENEFICIAL OCCUPANCY.

a. After beneficial occupancy, the Fund may terminate performance under this contract if the Contracting Officer determines that a termination is in the Fund's interest. The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying the effective date.

b. In the event that the Contractor is declared in default of the loan documents and the Event of Default of the loan documents is pursuant to the terms, conditions and provisions of paragraphs 12(n), 12(o) or 12(p) of the Note Purchase Agreement executed by the Contractor to secure the

financing, then the Fund shall terminate the Contract pursuant to the provisions of this paragraph 10 of the Contract. Said terms, conditions and provisions of paragraphs 12(n), 12(o) or 12(p) of the Note Purchase Agreement being as follows:

12(n) if the Fund defaults in its obligations under the MWR Contract, or if the Fund is reconstituted, abolished, merged, or consolidated, or assigns its rights and obligations under the MWR Contract, or is otherwise modified, or its financial condition changes, in a manner that materially and adversely affects the ability of the Fund (or its successor or assign) to perform under the MWR Contract, including, without limitation, its ability to pay off or assume the indebtedness evidenced by the notes upon termination of the MWR Contract; or

12(o) if the Fund's right and ability to borrow funds from the Army Banking and Investment Fund ("ABIF") is terminated or impaired and in either event the Fund does not have the right and ability to borrow monies from the ABIF and/or alternate sources reasonably acceptable to Purchaser in an amount at least equal to that required to perform all of its obligations under the MWR Contract and all of its other obligations as they exist from time to time; or

12(p) if, at any time, (i) Schofield Barracks is closed and transferred or conveyed to a non-Department of Defense entity; or (ii) Schofield Barracks is closed and transferred or conveyed to a Department of Defense entity which fails to fully acknowledge the rights of the Fund and the Company to perform pursuant to the terms of the MWR Contract and to operate the TLF; or (iii) Schofield Barracks is "substantially deactivated" [for purposes of this subsection (p), the term "substantially deactivated" shall mean a permanent reduction in force of the military presence at Schofield Barracks which results in a reduction of the average daily occupancy rate at the TLF over a period of three (3) consecutive calendar months to less than eighty percent (80%)].

c. The Fund shall pay the Contractor the amounts determined by the Contracting Officer as follows, subject to the condition that the amount so paid shall not be less than the then outstanding indebtedness:

(1) A sum equal to the discounted present value of projected future net cash flows before debt service. The projected future net cash flows will be considered an annuity, i.e., equal cash flows, throughout the remaining term of the contract. The annuity figure is the previous year's net cash flow before debt service, or in year one the amounts shown on the net cash flow before debt service of the Contractor's Consolidated Budget and Cash Flow Statement submitted to and approved by the Fund at contract execution, adjusted to ninety (90) percent occupancy as provided in subparagraph c(2). Exhibit 5, provides a discussion of present value analysis and discounted cash flows and the formula used to compute the net present value of an annuity.

(2) Prior to stabilized operations, net cash flows before debt service will be recomputed on a prorated basis to reflect ninety percent occupancy rather than using net cash flows reflecting actual occupancy. After stabilized operations, but no later than beginning year 5 of operations, actual net cash flows before debt service for the preceding twelve (12) months will be applied.

(3) The discount rate to be used to calculate net present value shall be the lower of :

-- the average rate for the preceding six (6) months of a ten (10) year U.S. Treasury note plus two hundred basis points, or

-- the average rate for the preceding six (6) months of a thirty (30) year U.S. Treasury note plus one hundred fifty basis points.

(4) Notwithstanding the computed rate, the discount rate shall not be less than nine and one half percent (9.5%) or greater than twelve and one half percent (12.5%).

d. Within thirty (30) days after the effective date of termination specified in this paragraph, the Fund will either (1) pay the then outstanding indebtedness and assume responsibility for the operation and maintenance of the TLF; or (2) agree to assume the then outstanding indebtedness and assume responsibility for the operation and maintenance of the TLF. The assumption of the then outstanding indebtedness by the Fund shall commence on the effective date of termination as specified in the Notice of Termination. The Fund shall then pay to the Contractor the difference between the payment that would otherwise be made under this paragraph and the amount of the then outstanding indebtedness.

e. In the event the Fund pays the then outstanding indebtedness, the Contractor shall be responsible for providing the Fund a free and clear title to the TLF.

11. TERMINATION FOR NON-FEASIBILITY.

a. In the event at any time after the first two operating years, and due to no fault of the Contractor, the Contractor forecasts that the project will be financially non-feasible, to the extent that the operating expenses, debt service, taxes, capital reserve replacement, and insurance are anticipated to exceed gross operating revenues for the next twelve month [sic] period, the Contracting Officer will agree, subject to its review and approval of the Contractor's forecast by the Fund, which review and approval shall not be unreasonably delayed or withheld, to terminate the contract.

b. In the event the Event of Default of the loan documents is an Event of Default pursuant to paragraph 9.1 of the Note Purchase Agreement executed by the Contractor, the Contract shall be terminated pursuant to this paragraph 11 of the Contract.

c. The Contracting Officer shall then pay to the Contractor any amounts remaining in the Reserve Replacement Account and a management fee of five (5) percent of the original total project cost and a profit of seven (7) percent of the original total project cost, after deduction of the debt service amounts owed the Fund and any costs for renovations, replacements and major repairs required to the TLF.

d. Within thirty (30) days after the effective date of termination specified in this paragraph, the Fund will either (1) pay the then outstanding indebtedness to the holder of the lien and assume responsibility for operation and maintenance of the TLF, or (2) agree to assume the then outstanding indebtedness and assume responsibility for the operation and maintenance of the TLF. The assumption of the then outstanding indebtedness by the Fund shall commence on the effective date of termination as specified in the Notice of Termination. The Fund shall then pay to the Contractor the difference between the payment that would otherwise be made under this paragraph and the amount of the then outstanding indebtedness.

d. In the event the Fund pays the then outstanding indebtedness, the Contractor shall be responsible for providing the Fund a free and clear title to the TLF.

(R4, tab 29 at 1, 6-10)

60. Also in December 1994, a draft message from Headquarters, Department of the Army (HQDA) notified the Army's major commands of various "inactivations, realignments, reorganizations and relocations" as part of a general downsizing. As an element of this realignment, HQDA determined that the 1st Brigade of the 25th Infantry Division (Light) would be transferred from Schofield Barracks to Fort Lewis, Washington (R4, 3rd Supp., tab 220 at 3-5). There is no record evidence demonstrating that any of the Fund's personnel had any prior knowledge of this realignment (tr. 17/3510-11).¹¹ Mr. Peter Isaacs, the Fund's chief operating officer, testified credibly

¹¹ The 25th Infantry Division (Light) encompassed three brigades prior to the realignment (R4, 3rd Supp., tab 234 at 1).

that the 1st Brigade was not a full brigade, that other units moved into Schofield Barracks to replace the 1st Brigade, and that the net decrease in active duty soldiers stationed on Oahu as a result of the realignment was approximately 500 personnel (tr. 7/1495-96). Mr. Isaacs' testimony is supported by record evidence (R4, 3rd Supp, tab 225 at 1, tab 229 at 1, tab 231 at 1, tab 241 at 8-11). Pursuant to several official documents, the actual realignment was to be completed by August 1995 (R4, 3rd Supp., tab 231 at 6, tab 234 at 2, tab 235 at 3, tab 242 at 8, tab 245 at 3). The Inn's occupancy rates for 1995 were as follows: January – 99.4%; February – 99.3%; March – 97.0%; April – 83.3%; May – 82.4%; June – 98.9%; July – 98.3%; August – 96.3%; September – 68.7%; October 77.6%; November – 89.3%; December – 71.8% (ex. G-33). Accordingly, there was not at the time of the realignment “a reduction of the average daily occupancy rate at the [Inn] over a period of three (3) consecutive calendar months to less than eighty percent (80%)” (see finding 59).

61. During the last two weeks of September and the first two weeks of October 1995, the Army experienced a “troop freeze” which prevented PCS soldiers and their families from relocating. The impact on the Inn's occupancy rates was predictable. As we have seen, the rate for September was 68.7% and that for October was 77.6% (finding 60).

62. The occupancy rate improved during January and February 1996 to 91.2% and 88.4%, respectively, but in March through May 1996, the rate dropped to 70.4%, 72.9%, and 72.6%, respectively. On 31 January 1996, a memorandum for record was promulgated which recapped a semi-annual operational review meeting attended by representatives of the Fund and Minesen. The group noted that recent “erratic occupancy levels had an adverse impact on the Inn's cash flow” (R4, tab 32 at 1).

63. On 14 March 1996, Mr. Jensen, Minesen's president, forwarded the following letter to Mr. Peter Anderson, the Fund's Contracting Officer Representative (COR):

As a follow up to your conversation on this date with Ms. Pauline Barney, our Director of Operations, this letter is a request to modify the current restrictions on our ability to accept reservations from TDY personnel. Specifically, this request pertains to Section III, Item 2.b. on page 61 of our contract, wherein we are limited to accepting reservations for TDY parties no more than 45 days in advance of their arrival date.

This request is based on our recent occupancy levels, which have been significantly lower than projected. We have been

frustrated in our pursuit of TDY travelers, discovering these persons have quite often made reservations at other facilities four to six months prior to their arrival date, long before they become available to us as a marketable group under the current contract conditions. As you know, this group is otherwise fully qualified to stay at the Inn, and it is our feeling that some of our occupancy shortfall may be remedied if we can simply make ourselves available to this group in [sic] timely manner.

Your immediate written response to this matter is appreciated. As always, thank you for your efforts in our behalf.

(R4, tab 34) On 15 March 1996, Mr. Anderson endorsed Minesen's request in a memorandum to the CO, Ms. Shukay (R4, tab 35). Ms. Shukay responded positively to Mr. Jensen's request in a letter of 18 March 1996. She stated, in pertinent part:

This is in response to your letter to Mr. Peter Anderson dated 14 March 1996. To permanently change the contract would require additional documentation and discussions with the installation. Until this is accomplished, we propose the following interim solution:

The Inn at Schofield Barracks may take reservations for individuals or groups in a TDY Status up to six months in advance. The number of room reservations that may be used for these six month [sic] advance reservations shall not exceed 25% of total room inventory (48 rooms). Any deviation from this number shall be approved, in writing by the Contracting Officer's Representative. For the months of June, July and August advance reservations of more than 45 days but less than six months for TDY shall not exceed 10% of the room inventory. This policy will remain in effect until 31 December 1996.

(R4, tab 36)

64. In a memorandum dated 2 May 1996, Mr. Anderson stated that Minesen had requested a room rate increase of approximately 10%. Noting that Minesen had experienced "an unexpected drop in occupancy for the last six months," he recommended

that the requested rate increase be granted. On 14 May 1996, Ms. Shukay approved the room rate increase (R4, 3rd Supp., tab 261).

65. Around this time period, the Fund also aided Minesen by honoring "its debt service commitment with a \$68,000 payment, with prospects of continued monthly payments" (R4, tab 39). Furthering the Fund's efforts in this regard, on 12 August 1996, Ms. Shukay forwarded to Minesen an executed copy of contract modification No. P00006 which extended the debt service agreement for another year (R4, tab 42).

66. In an extracontractual attempt to boost the Inn's occupancy rate, on 15 August 1996, BG Evan R. Gaddis, Assistant Division Commander (Support) for the 25th Infantry Division (Light), issued the following memorandum:

1. For the past two years, the Inn at Schofield Barracks (INS) has been the official temporary lodging facility for personnel assigned to, or on official travel to, the Schofield Barracks area. This facility is operated by contract under the jurisdiction of the Department of the Army. The local Morale and Welfare Fund receives money for each occupied room, which enhances the quality of life for our soldiers.
2. In the past, it was not necessary to look beyond the Schofield area to keep the INS occupancy rate at a level which would keep the operation solvent. With the loss of a brigade, that situation has changed and occupancy rates have fallen drastically, putting the INS at financial risk. Therefore, effective upon receipt of this memorandum, all Army personnel in a PCS and temporary duty status (in the Central Oahu region) will be required to use the INS as a billeting facility. The INS will be the only facility on Oahu authorized to issue a Room Status Certificate. For personnel located in the Fort Shafter area or other areas in the Southern Oahu region the Tripler Billeting Facility should be your first choice of transient lodging. If space is not available there, they will telephonically check with the INS for availability. If space is available, the soldier is required to occupy the INS. If space is not available at the INS, a Room Status Certificate will be sent via facsimile to the Tripler Billeting Facility.

3. This policy will be incorporated into our existing Policy Memorandum GW-1-95, dated 5 October 1995.

(R4, tab 43) In furtherance of this directive, also on 15 August 1996, COL Owen D. Ryan, Commander, U.S. Army Garrison, Hawaii, issued a memorandum in which he stated, in pertinent part, the following guidance for soldiers in a PCS status to and from central Oahu:

4. Issuance of Statements of Nonavailability (SNA).

a. Schofield Barracks. The Inn at Schofield Barracks is the designated transient quarters for personnel arriving for duty at Schofield Barracks. Incoming service members may request space in the Inn at any time prior to their arrival date. If quarters are not available, the Inn will issue a room status certificate (RSC). Unaccompanied service members must present RSCs to the Schofield Unaccompanied Personnel Housing Office, Building 692, to obtain statements of nonavailability (SNA) to substantiate payment of temporary lodging allowance. Accompanied service members must present their RSC to the Schofield Family Housing Office, Building 690, to obtain a SNA.

b. If an arriving member prefers to spend his/her day(s) in a civilian hotel, a request for priority SNA may be made. The Inn uses a "red dot" system to track these requests. As the Inn reservations fill up, those on the priority list are "bumped" into the RSC in order of request. It is obviously beneficial for anyone who desires civilian accommodation to make reservations early to increase the probability of getting an RSC.

c. Fort Shafter. Arriving service members assigned for duty at Fort Shafter and Tripler Army Medical Center (TAMC) must contact the Tripler Billeting for space availability. If space is not available, the billeting office will contact the Inn at Schofield for space availability. If space is available, the service member is required to check in at the Inn. If space is not available, the Inn will forward a RSC to the billeting office. If an arriving member prefers occupancy

in a civilian hotel, he/she may request priority for a RSC. The procedures in paragraph 4b apply.

(R4, 3rd Supp., tab 268)

67. Ms. Betty Uyema, the housing manager for the Tripler billeting facility, acted swiftly to implement BG Gaddis' policy directive. On 16 August 1996, she promulgated the following memorandum:

SUBJECT: TEMPORARY LODGING FOR ARMY
PERSONNEL

1. EFFECTIVE IMMEDIATELY FOR PERSONEL [sic]
LOCATED IN THE FORT SHAFTER AREA OR OTHER
AREAS IN THE SOUTHERN OAHU REGION, THE
TRIPLER BILLETING FACILITY SHOULD BE YOUR
FIRST CHOICE OF TRANSIENT LODGING.

IF SPACE IS NOT AVAILABLE THE SOLDIER IS
REQUIRED TO OCCUPY THE INN AT SCHOFIELD
BARRACKS.

IS [sic] SPACE IS NOT AVAILABLE AT THE INN AT
SCHOFIELD BARRACKS A STATEMENT OF
NON-AVAILABILITY WILL BE ISSUED BY THE INN
AT SCHOFIELD.

2. THIS APPLIES TO ALL ARMY IN A PCS AND
TEMPORARY DUTY STATUS.

3. THIS POLICY WILL BE INCORPORATED INTO OUR
EXISTING POLICY MEMORANDUM GS-1-95, DATED
5 OCT 95.

(R4, 3rd Supp., tab 269). Ms. Uyema also informed service members who were unaccommodated at Tripler billeting that they had to contact the Inn before obtaining an SNA and receiving the lodging portion of their TLA (tr. 4/1058-60). In addition, she co-ordinated with the Inn's personnel to insure that the Gaddis directive was being implemented (tr. 4/1065-66).

68. The various efforts of the parties to increase the Inn's occupancy rate met fruition in the summer of 1996. In June, the occupancy rate was 98.6%; in July, it was 84.3%; in August, it was 91.2%; and in September, it was 91.9% (ex. G-33).

69. However, for a three-month period in the autumn of 1996, the occupancy rate once again declined. In October, the rate was 78.3%; in November, it was 79.7%; and in December, it was 62.5% (ex. G-33). Apparently recognizing that this decrease had occurred, Mr. Isaacs forwarded the following e-mail to several of the Fund's personnel on 19 December 1996:

1. BG Gaddis just talked to BG Mitchell (his replacement at 25th ID) [sic] BG Mitchell believes that they are ensuring that all TDY travelers are staying at ISB but we need to check the system and make sure there are no loopholes. They want to be helpful!
2. Also there is a large INSCOM organization on Schofield Barracks called KUNIA (sp?) which apparently has a lot of TDY visitors, check with INSCOM DCSPER and see if we are getting them, if not they should [sic] the requirement to stay at ISB on their orders.
3. We need to get the Finance community to republish to the field that all Army personnel going TDY to Central OAHU are required to stay at ISB. Let me know how, who and, when this will be done.
4. HKH [Hale Koa Hotel] needs to maximize not only TDY but other referrals to ISB as much as possible.
5. Don Nelson is available to go to Hawaii in early Jan with whoever else is necessary.

Let me see game plan for all actions NLT 27 Dec.

THIS NEEDS FULL COURT PRESS AND EVERYONE'S ATTENTION.

FAILURE IS NOT AN OPTION [sic]

(R4, tab 44)

70. Also in December 1996, Minesen sought a meeting with the CO to discuss various issues. Ms. Shukay responded positively; and, on 13 January through 17 January 1997, representatives of the parties met in an attempt to resolve these issues. At the meeting, Minesen aired various complaints relating to the occupancy rate, including reduced troop strength and the Army's perceived failure to refer all travellers to Schofield Barracks to the Inn. As a result of the meeting, the parties reached a number of agreements which were implemented in the ensuing months (R4, tab 47).

71. One of these agreements related to a letter to be forwarded to Hancock outlining intermittent problems with occupancy rates. Dr. Neville forwarded "a revised draft of our cover letter to John Hancock," along with a cover letter, to Ms. Shukay on 24 January 1997. Dr. Neville stated, in pertinent part, in the cover letter: "Our position is clear and consistent: The contract requires that all Army travellers to Oahu be referred to the Inn." She added: "Because of the difficulty you anticipate in obtaining compliance with the contract despite your best efforts, as we stated, we therefore reserve the right to reopen this issue of referral of travellers when the next several weeks to few months have passed and we may anticipate whether there will be ongoing observance of the referral requirement." (R4, 3rd Supp., tab 278)

72. In its attached draft letter to Hancock, Minesen provided its own interpretation of perceived difficulties with occupancy rates. Dr. Neville stated, in pertinent part:

In mid-August 1996 we received a copy of a military directive which stated that Schofield had "lost a brigade." While we still lack an official statement regarding the number of personnel by which garrison strength was reduced, we estimate it at 2,000 to 3,000. Occupancy rose erratically after May, but we again experienced three consecutive months of average daily occupancy below eighty per cent in October through December 1996: October 77.9%; November 79.2%; December 62.1%. We have concluded that the decline in occupancy results from a permanent reduction in force at Schofield Barracks.

For some months we have documented and advised local command officers and the MWR Fund that Federal travelers to/from Fort Shafter and Tripler Army Medical Center were not being referred properly to the Inn as our contract provides. As a result of our efforts, in August the local command issued the above mentioned directive to Schofield, Shafter and

Tripler that all government travelers to Oahu were to be referred to the Inn. Subsequently we experienced numbers of arrivals from those other sources, instantly increasing our occupancy to a higher level. These changes, however, were short-lived, and the second period of three months below 80 per cent occupancy ensued, October through December.

Last week we met with officials from the MWR Fund at the Inn. They conferred with local command officers and personnel, as well as having lengthy conferences with us. The MWR representatives accept the fact that our contract requires "Travelers receiving government per diem payment, in order not to forfeit their per diem entitlement, will be required to patronize the TLF on a mandatory basis . . ." (MWR contract, Section 1, paragraph 7 page 3) [sic] While they acknowledge the difficulty of enforcing this obligation, they have pledged their efforts to strive for that compliance.

(R4, 3rd Supp., tab 278)¹²

73. On 7 February 1997, Mr. Isaacs forwarded to Hancock the Fund's interpretation of difficulties with occupancy rates. He stated:

As you have been advised by the Minesen Company, the occupancy rates at the Inn at Schofield Barracks have fallen below 80 percent for three consecutive monthly periods, twice within the last year. Occupancy rates fell in March 96 to 70.0 percent, in April 96 to 72.6 percent and in May 1996 to 72.2 percent. However, occupancy rates for the period July 94 through June 1996 averaged approximately 90.29 percent. Occupancy rates again fell in October 1996 to 77.9 percent, in November 1996 to 79.2 percent and in December 1996 to 62.1 percent. Average occupancy rates from the period July 1996 through December 1996 were 79.62 percent. Occupancy rates since opening have averaged approximately 88.16 percent per month.

¹² Dr. Neville's statement that BG Gaddis' directive required "all government travelers to Oahu . . . to be referred to the inn" is inaccurate (*see* finding 66).

The U.S. Army, the U.S. Army Community and Family Support Center (CFSC), and the U.S. Army Morale, Welfare and Recreation Fund (Fund) are fully supportive of the Inn at Schofield. When occupancy rates declined [sic] March 1996 through May 1996, the Army Garrison in Hawaii instituted a policy which it hoped would cure the low occupancy rates at the Inn. Occupancy rates did increase after the new policy was instituted. However, when occupancy rates fell again in October 1996 through December 1996, representatives of CFSC traveled to Hawaii to meet with The Minesen Company and representatives of the Garrison to seek methods of increasing the occupancy rate on a more permanent basis.

The Garrison in Hawaii has instituted a new policy that will require service members assigned to either Schofield Barracks, Fort Shafter or Tripler Army Medical Center, who are traveling inbound or outbound in a permanent change of station status to stay at the Inn at Schofield, while in a reimbursable status. In addition, the Garrison has made a commitment that all service members assigned to any of the above military installations in a Temporary Duty Status (TDY) would be required to stay at the Inn.

CFSC will attempt to institute a Lodging Success Program in Hawaii, similar to what has been instituted in Washington, D.C. This will require TDY travelers to Hawaii to make their hotel reservations through a central system with a control number to get reimbursement for their travel.

In addition, the Fund, by Contract Modification Number 6, has extended the debt service coverage guarantee through 11 August 1997.

Again the Fund, CFSC and the Army are fully committed to the success of the Inn at Schofield. If you have any questions, please contact the Contracting Officer at 703-325-5615.

(R4, 3rd Supp., tab 279)

74. Mr. Isaacs was successful in his efforts to have Oahu added to the Lodging Success Program (LSP) which was designed to provide official travellers with lower rates at certain commercial hotels (tr. 13/2857-58). Pursuant to the program, TDY travellers to Oahu were required to call Army Central Reservations and were referred to the Inn through a message (R4, tab 52). Officers within the office of the Deputy Chief of Staff for Personnel in Washington deleted the message in 1999 over the Fund's objections. They had received several complaints from travellers who were required to stay at the Inn even though it was not proximate to their duty station (tr. 13/2860-64).¹³

75. As a result of the Fund's efforts, a modified LSP message was promulgated in July 1999. It clarified that TDY travellers to locations in Oahu other than Schofield Barracks could, but were not required to, stay at the Inn. The message stated:

Oahu, Hawaii. TDY travel to Oahu is unique because of the Inn at Schofield Barracks. This is a third-party commercial hotel operated for the government on the installation. The inn is available for all official travelers to Oahu. Travelers to Schofield Barracks are required to stay at the inn if space is available. If Schofield travelers choose not to stay at the inn, they will be reimbursed only up to the amount they would have been reimbursed had they stayed at the Inn. The Inn at Schofield, 563 Kolekole Avenue, Oahu, Hawaii, zip code 96786, \$75.47.

(R4, tab 80, ¶ 14; tr. 13/2860-62)¹⁴

76. Another topic which was discussed by the parties in their January 1997 meeting in Hawaii was a room rate increase (R4, tab 47). In a letter dated 21 February 1997, Ms. Shukay granted a \$5.00 increase in lieu of the \$10.00 increase which Minesen had requested. Minesen declined the increase; and, on 9 April 1997, the CO granted the full \$10.00 increase (R4, 3rd Supp., tab 292).

¹³ The LSP message relating to the Inn may have violated Army Regulation 210-50, Chapter 3, ¶ 3-46c(3), which provided: "Personnel on TDY to a particular city or to a DoD installation where Government housing is not available will not be required to commute to another DoD installation having available housing" (R4, 3rd Supp., tab 284).

¹⁴ The reference to reimbursement embodies changes to the JFTR which were made in 1997 and 1998 and are discussed below in findings 78, 79.

77. The parties' various efforts in 1997 to increase the Inn's occupancy rates apparently bore fruit. The rates for that year were as follows: January – 92.6%; February – 97.9%; March – 90.8%; April – 86.1%; May – 80.8%; June – 96.1%; July – 98.2%; August – 96.7%; September – 96.5%; October – 94.0%; November – 92.2%; December – 82.8% (ex. G-33).

78. However, beginning in November 1997, a series of changes in the JFTR fundamentally altered the parties' contractual relationship. It will be recalled that clause 7 of the contract, entitled "TLF DEFINED AS GOVERNMENT QUARTERS," required travellers to Schofield Barracks, in order not to forfeit the lodging portion of their per diem entitlement, to stay at the Inn if room was available (finding 38). But, as of 1 November 1997, the JFTR changed "reimbursement if the member did not stay in adequate available Gov't quarters from no reimbursement to reimbursement for actual costs NTE [not to exceed] Government quarters cost." In plain English, this meant that a service member on TDY to Schofield Barracks could, at his or her discretion, opt to stay on the economy and still receive a per diem amount equal to the Inn's room rate, regardless of whether the Inn had a vacancy (R4, 5th Supp., tab 743 at U4E-1).

79. Similarly, and more importantly, the JFTR was changed on 1 July 1998 for PCS travellers. As of that date, subparagraph U9201B.1 on ¶ U9C-2 provided, in pertinent part: "When Government quarters are available and other lodging is used, reimbursement for lodging is limited to the Government quarters cost." (R4, 5th Supp., tab 742). Once again, servicemembers on PCS status to Schofield Barracks could opt to stay on the economy and receive per diem equal to the Inn's room rate even if there was a vacancy at the Inn.¹⁵

80. Even according to Army personnel conversant with the contract, including Mr. Jefferis, the COR at the time, these changes in the JFTR had a negative impact on the Inn's occupancy rate (tr. 10/2155). Apparently in response to the changes, Minesen was forced significantly to increase its marketing costs. For example, in 1994 and 1996, Minesen spent only \$5,789.89 and \$9,841, respectively, on marketing. But in 1997 through 2001, it spent \$52,495; \$123,570; \$125,032; \$63,311; and \$66,618, respectively, on marketing (ex. A-43).

81. It is not altogether clear that Minesen's increased marketing efforts bore fruit. In 1998, the occupancy rate dipped below 80% in four of the 12 months. Similarly, the occupancy rate was below 80% for seven of the 12 months in 1999 (ex. G-33).

¹⁵ The JFTR is promulgated by the Per Diem Travel and Transportation Allowance committee, a body within the Department of Defense (tr. 15/3093-94; *see generally* 37 U.S.C. § 411).

82. On 26 January 1998, LTG William M. Steele, commanding officer of the U.S. Army, Pacific, forwarded a memorandum to the commander of the 25th I.D. (Light) and the U.S. Army, Hawaii, which, although it attempted to strike a balance with respect to the Army's support of the Inn, ultimately weakened the extracontractual policy established by BG Gaddis in his earlier memorandum. LTG Steele stated, in pertinent part:

2. With the continuing interest by USCINCPAC (reference a) and other organizations in our lodging policies for the Inn at Schofield, I want to share with you some of my thoughts on the subject.

3. Clearly, the Inn at Schofield provides an invaluable asset to our soldiers and their families especially for those stationed at Schofield Barracks. However, a balance must be struck between maintaining the viability of the Inn at Schofield (INS) and minimizing adverse impacts on soldiers and families assigned to installations in southern Oahu.

4. As guidance, the INS should continue as the Army's primary TLF on Oahu. However, statistics show minimum required levels of occupancy to meet contractual requirements can be met most of the year with just Schofield Barracks travelers. Therefore, the occupancy rate of the INS should be maintained above the minimum level necessary to keep it viable, remembering that there are no gold stars for going over the target. As long as the occupancy rate is above this target level, liberal exceptions should be granted to southern Oahu soldiers so that extensive travel can be avoided. Procedures must be clearly established and published that explain the process to apply for exceptions. In addition, a management system needs to be established where a government employee is the decision-maker on exceptions to policy and issuance of Certificates of Non-availability (CNA) rather than the INS staff.

5. We should be able to tell soldiers, 2 weeks out from arrival, where they will stay. Once a southern Oahu soldier is issued a CNA and finds suitable lodging, he/she should not be

required to relocate into the INS unless they choose [sic] to do so.

(R4, tab 58)

83. On 24 August 1998, Ms. Shukay executed Modification No. P00007 to the contract which named Ms. Joan Newhart as her successor CO (R4, tab 60).

84. On 16 December 1998, Mr. Jensen forwarded a letter to Ms. Newhart in which he stated, in part:

Thank you for taking the time to meet with us last week. We hope that you left the meetings sufficiently impressed with a sense of urgency regarding the matters presented to you.

Our sense of impending doom is not exaggerated. Documents and data we provided you well document the fact that occupancy levels at the Inn at Schofield Barracks ("Inn") have this year dropped to below the 80% level for the months of October and November. We forecast the same unacceptable level of occupancy for this month, December.

Whereas in the past USACFSC has been able to take curative action to pull low occupancy levels back up to above the 80% level, recent changes to the Joint Federal Travel Regulations ("JFTR") apparently now render any such efforts of no consequence. Specifically, these JFTR changes now permit reimbursement at the government quarters rate to all government travelers, if they elect to stay at other lodging even when government quarters, such as the Inn, are available.

By such JFTR changes, therefore, USACFSC is now placed in a position of being in default of, and unable to carry out, its obligation under the contract, i.e. the JFTR change is in direct opposition to the contractual requirement that government travelers are "required to patronize the TLF on a mandatory basis." You are, of course, well aware that by the terms of the contract the Inn is designated as a temporary lodging facility ("TLF"), and our clientele are limited to government travelers.

We have already conveyed to you our thoughts as to how imperative it is for USACFSC to intercede in this matter and salvage the contract by revitalizing the mandate for government travelers to Oahu to utilize the Inn as their TLF when government quarters are not otherwise available.

(R4, tab 63)

85. In a paper dated 24 December 1998 which was drafted as part of a briefing for MG Huffman, the Army's Judge Advocate General, Mr. Isaacs admitted that the changes in the JFTR (findings 78, 79) comprised one of the factors which had "negatively affected" the Inn's occupancy rate (R4, tab 64). Similarly, in an e-mail also dated 24 December 1998, BG Craig Whelden, the commander of USACFSC, stated that the changes in the JFTR comprised one of the "things" that "had made a dent in the occupancy levels" at the Inn (R4, tab 65).

86. Ms. Newhart responded on 14 January 1999 to Mr. Jensen's letter of 16 December 1998. She stated, in part:

Thank you for your letter of December 16, 1998 requesting CFSC's assistance in improving occupancy levels at the Inn at Schofield Barracks (ISB). We agree that direct intervention on our part is necessary to influence occupancy at ISB and to that end, have taken the following steps since I met with you in early December:

1. Mr. Pete Isaacs, Chief Operating Officer of CFSC, and I briefed BG Whelden, CG of CFSC on December 24, 1998, and enlisted his support in boosting occupancy.
2. BG Whelden e-mailed LTG Smith on December 24, 1998 explaining the ISB situation, requesting a meeting with him, and soliciting his support for the ISB. LTG Smith indicated his understanding of the issues, a willingness to discuss solutions, and his support of the ISB.
3. At the end of this month, Mr. Isaacs and I will be coming to Oahu to meet with you and to meet with local military leaders to discuss how to boost occupancy at ISB.

4. I requested that Mr. Dean Perez, COR for this contract, meet with MG Adams of Trippler [sic] Army Medical Center to set up a meeting with you to discuss the Medevac business. I understand that he was successful and the meeting will take place on January 15, 1999.
5. I have spoken with Mr. Jim Thomas, Director, Army Lodging, regarding the new Defense Travel System. Mr. Thomas is planning a meeting with the Program Manager of that system to discuss potential problems that it will cause Army Lodging (including ISB).

(R4, tab 66)¹⁶

87. On 8 February 1999, LTG Smith forwarded the following memorandum to the commander of the 25th I. D. (Light), the commander of the U.S. Army, Alaska, the commander of the U.S. Army, Japan/9th TAACOM, and the commander of the 9th Regional Support Command at Fort Shafter:

1. The Community and Family Support Center recently briefed me on the Inn at Schofield, a temporary lodging facility located on Schofield Barracks, Hawaii. This 192-room facility was completed and opened in 1994 to fill a critical need for adequate temporary housing for soldiers and their families. There is no comparable facility in the Schofield Barracks area.
2. Use of the Inn by military travelers (PCS and TDY) helps ensure the viability of excellent accommodations on Schofield Barracks. It also helps the installation morale, welfare and recreation fund and is consistent with CFSC's lodging Success Program for the island of Oahu. Accordingly, I encourage all major subordinate commanders to follow current policies that provide for use of the Inn by travelers to Hawaii.
3. We continue to seek ways [sic] the quality of life for our soldiers and families in Hawaii. We are currently exploring development of a 21st century military convention center

¹⁶ LTG Smith was the commander of the U.S. Army, Pacific (R4, tab 65).

complex. This complex will include comfortable and clean rooms adjacent to high tech meeting areas and first class eating establishments. Joint partnerships between the Community & Family Support Center, U.S. Army Hawaii and this MACOM will seek to include the Army's newest theme restaurant "Reggies" and state of the art technical conference capabilities in these conference facilities.

4. If we upgrade our conference capabilities, improve the amenities of the Nehelani club and use the Inn in accordance with current lodging policies, we will go a long way toward ensuring that quality temporary housing remains available to those who need it the most, our young soldiers and their families. Your support for this effort as you and those you supervise travel to this command or entertain travelers from other commands will help us retain a valuable Army asset here in Hawaii.

(R4, tab 70)

88. On 20 May 1999, Ms. Newhart forwarded to Mr. Jensen a letter in which she recited Minesen's complaints about occupancy in detail, as well as the Fund's various efforts to rectify the situation. She wrote, in part:

On April 19, 1999, you requested a conference call with me and Pete Isaacs because of your continued frustrations with the occupancy problem and because you stated you may be short of cash to make your May 1 loan payment. On April 26, 1999, during that conference call, you expressed your frustration that the meetings in Hawaii in late January, 1999 [sic] did not improve occupancy significantly. Although occupancy in January was 81.4% and in February was 81.5%, in March it dropped to 74.66% and you did not expect it to be above 80% in April (actual April occupancy was 78.97%). Because of the decreased occupancy and a lowered average daily rate (ADR) due to a shift in type of occupants from Permanent Change of Station (PCS) to Temporary Duty (TDY), you stated that Minesen was short of cash and requested assistance from CFSC in paying May's loan payment. Mr. Isaacs stated that there is no contractual vehicle for us to give Minesen cash or to pay the loan. I called you

back the next day to set up a meeting on May 3, 1999 to discuss Minesen's financial situation and to develop a plan of action.

Besides the two (2) of us, Mr. John Jefferis, LTC Heuer, Mr. Conrad Miller (Minesen partner), Mr. Lester Goo (Minesen attorney), and Ms. Karen Hindson (Minesen attorney who attended by phone) were in attendance. Although the purpose of the meeting was to discuss Minesen's financial situation, you opened the meeting by stating that Minesen had paid the May loan payment on April 30. The meeting proceeded with a discussion of problems and issues, including:

- you stated that Minesen is losing approximately \$100,000 per month below its breakeven point due to reduced occupancy and the shift of occupancy away from PCS lodging, which lowers the ADR and, ultimately, Minesen's profitability.
- the problems caused by the change in the JFTR, which allows travelers to be reimbursed at the ISB rate even if they don't stay in Government quarters and the net addition of 648 family housing quarters since your contract began.
- Minesen's frustration with the COR for not being responsive to them.
- Minesen's complaints that many violations to the JFTR are occurring at the local commands with no assistance from the Army (local and CFSC) in preventing/correcting them.
- the economic conditions in Hawaii which allow Government travelers to stay at Waikiki beach for prices lower than ISB.
- Minesen's frustrations with the JFTR change and not getting any support from the Army to try to change it.

- I gave you a copy of LTG Smith's February 8, 1999 letter stating that his subordinate commanders should follow current policies that provide for use of the ISB by travelers to Hawaii.
- Although you requested assistance in changing the JFTR, we advised you that the Per Diem Committee, which maintains the JFTR is an independent committee. We informally made inquiries into the possibility of changing the JFTR for Hawaii, but the committee made clear that they will not entertain any such request.
- You requested that LTC Heuer provide a copy of the Army's most recent Lodging Success Program message. He provided that to you in a letter dated May 10, 1999.
- You requested that I follow up with the per diem committee regarding a letter you sent them dated December 16, 1998. I received a notice that the letter was forwarded by the per diem committee to the Army Chief of Staff for Personnel and am in the process of following up with that office.
- I requested that you provide case-by-case information to the COR, Dean Perez, when you discovered individuals or groups not following the JFTR rules and that you copy me on the information. I stated that I would ensure the COR's responsiveness. Since our May 3 meeting, Dean has followed up on several of these items for you. I would appreciate it if you would continue this follow-up so that we can resolve these problems as they occur.

Finally, we received a letter from your attorney, Lester Goo, dated May 6, 1999 which requested that CFSC send out a worldwide message clarifying the status of ISB as the approved Government quarters on Oahu. Our Army Lodging Directorate is currently working on this action and I will forward a copy of the message to you when it is completed. In response to Mr. Goo's request for copies of various documents, I am advised that Army regulations require us to treat this as a Freedom of Information Act (FOIA) request.

Accordingly, I have forwarded Mr. Goo's request to the FOIA Officer at CFSC, Mr. Lorraine Kent, for coordination with the various commands where the requested documents might be located.

(R4, tab 76)

89. On 7 June 1999, Ms. Karen S. Hindson, Minesen's attorney, forwarded the following certified claim to Ms. Newhart:

This letter constitutes a claim by the Minesen Company ("Minesen") pursuant to Section II, paragraph 6, Disputes clause of Contract Number NAFBA3-93-C-0001. Minesen requests a written decision of the contracting officer within sixty (60) days.

The Inn at Schofield Barracks ("ISB") was designed and constructed under subject contract and has been in operation by Minesen since June 1994. ISB is a transient lodging facility ("TLF") which, by contract, houses only eligible patrons as defined in the contract. Paragraph 7 of Section I of the contract provides, in part: "Travelers receiving government per diem payment, in order not to forfeit their per diem entitlement, will be required to patronize the TLF [inn at Schofield Barracks] on a **mandatory basis** as long as confirmed reservation priorities are in accordance with those provided at Section III, Operation Requirements." (emphasis added)

The U.S. Army Morale, Welfare, and Recreation Fund ("the Fund") has been in breach of this contract requirement that travelers receiving government per diem be required to patronize ISB since at least September 1995, when ISB's occupancy plummeted from 98.5% to 68.7%. Prior to September 1995, the lowest monthly occupancy had been 94.8% which was experienced in the first full month of operation. While the Fund was probably in breach of the requirement since the inception of the contract, ISB first became aware of this problem when the occupancy collapsed.

Minesen representatives immediately reported the sharp drop in occupancy at ISB to the Contracting Officer's Representative. Despite Minesen's continual efforts since that time to secure the Fund's compliance, the Fund continues in its breach.

As a result of the Fund's continuing breach of contract, since September 1995 the occupancy at ISB has fluctuated widely. On several occasions, ISB has fallen below 80% average occupancy for three consecutive months, triggering a requirement to notify the project lender of an event of default. The Fund's attempted corrective action has in some cases resulted in a temporary increase of occupancy at ISB, but nonetheless fell far short of contract compliance.

We must be clear that the contract does not require the Fund to deliver any specific level of occupancy at ISB; rather, the contract simply requires that all travelers receiving per diem payment be required to patronize the ISB as TLF. If all such travelers *in fact* had patronized the ISB as required, the Fund would not be in breach of this provision regardless of ISB's occupancy rate.

Minesen has been damaged by the Fund's failure to comply with the contract and hereby seeks the following remedy and relief under the contract's Disputes Clause:

- a. Minesen seeks payment from the Fund of the sum of \$2,541,670.14, representing lost revenues resulting from the Fund's breach of contract through May 1999. The damages for lost revenues continue to accrue each day that the Fund is in breach of the contract. The basis for the calculation is the difference between: (1) the actual occupancy for each month since September 1995 that the average occupancy was less than 96% times the average daily room rate for that month, and (2) an occupancy of 96% at the same average daily room rate;
and
- b. Minesen seeks one of the two following actions by the Fund –

1. Immediate and continuing compliance by the Fund with the contract requirement to require all travelers receiving government per diem payment to patronize the Inn; *or*
2. Immediate termination of the contract under the Termination for Convenience by the Fund after Beneficial Occupancy provision at Section II, paragraph 10b (modification P0005). The termination payment calculated in accordance with paragraph 10c would be \$25,506,325.00, the discounted present value of all projected future net cash flows under the remaining years of the contract.

(R4, tab 77)

90. On 15 October 1999, Ms. Newhart issued a final decision in which she denied Minesen's claim in its entirety (R4, tab 87). This appeal followed and was docketed by the Board's recorder as ASBCA No. 52488.

91. The lease which was an attachment to the contract required Minesen to pay the Inn's utility bills (finding 46). In addition, the MoA executed by Minesen, the Fund, and the U.S. Army Garrison at Schofield Barracks obligated Minesen to "[p]romptly settle utility charges upon verification of accuracy" (finding 52). Moreover, clause 24 of the contract, "SERVICES TO BE PROVIDED BY THE GOVERNMENT," stated:

The Government will provide utilities, but the cost of utility services shall be paid by the Contractor to the Government. All utility costs and hookups will be paid or provided by the Contractor in accordance with provisions of this contract.

(R4, tab 1)

Finally, clause 25 of the contract, as amended by bilateral Modification No. P00003, provided:

CONTRACTOR FURNISHED UTILITY LINES. The Contractor shall be responsible for hookup of all utility lines to the TLF. Construction of all utility lines as part of this project is at no cost to the U.S. Government and ownership of

all utility lines remain [sic] the property of the U.S. Government, to include any warranty rights applicable to the installation and construction of these utility lines.

(R4, tab 1, 1st Supp., tab 4)

92. During the Inn's construction phase, Minesen installed an electric meter as part of its contractual responsibilities (R4, 2nd Supp., tab 30; tr. 7/1677-78). But, as representatives of Schofield Barracks Department of Public Works (DPW) subsequently discovered, the meter ran backwards. Under DPW's supervision, the errant meter was replaced and was subsequently calibrated by employees of Hawaiian Electric Company (HECO) (tr. 7/1677-79, 16/3433; R4, 2nd Supp., tab 30).

93. As a result of an apparent oversight, DPW had not billed Minesen for utilities for a full year after the Inn opened in June 1994 (tr. 10/2167). On 17 May 1995, DPW forwarded an invoice for Minesen's utility charges to the Defense Finance and Accounting Service (DFAS), Pacific Command, at Pearl Harbor in an amount of \$80,263.50. The invoice included discrete amounts for electricity, water, and sewage (R4, 3rd Supp., tab 434). The sewage charge was calculated at 70% of the water charge which was 10% less than the rate charged to other customers of the Honolulu Board of Water Supply (R4, 2nd Supp., tab 30). The electric rate charged by DPW to Minesen was the same rate charged to DPW's other commercial customers and was calculated using a standard formula (R4, 3rd Supp., tab 433; tr. 8/1744-46). On 2 June 1995, DFAS forwarded to Minesen a utilities bill in the amount of \$80,263.50 (R4, 3rd Supp., tab 435). This bill reflected utility usage for the period of October 1994 through April 1995 (tr. 8/1749). Minesen did not pay the bill (tr. 8/1750).

94. On 6 July 1995, DFAS forwarded a utilities bill to Minesen in the amount of \$9,323.43. This bill reflected utility usage for the month of May 1995 (R4, 3rd Supp., tab 436). Minesen did not pay the bill (tr. 8/1750). Also during the summer of 1995, Minesen was billed for utilities used during June and July in the amounts of \$11,650.76 and \$9,647.11, respectively (R4, 3rd Supp., tabs 438-439). It did not pay these bills (tr. 8/1750).

95. In an attempt to close out its books on the Minesen account for the fiscal year, DPW estimated its utility usage for August and September 1995 in an amount of \$23,455.24. DPW's intent was to go back and reconcile this bill at the beginning of the next fiscal year (tr. 8/1749-50; R4, 3rd Supp., tab 440). DFAS forwarded an invoice in this amount to Minesen on 4 October 1995 (R4, 3rd Supp., tab 441). On 4 December 1995, DFAS forwarded a reconciled statement to Minesen in a lower adjusted amount of \$489.94 (R4, 3rd Supp., tab 441). Nevertheless, Minesen did not pay the revised bill.

96. On 8 September 1995, DFAS sent Minesen a past due notice for the unpaid utility bills (R4, 3rd Supp., tab 445); there is no record evidence demonstrating that Minesen responded to this notice.

97. On 18 December 1995, Ms. Mayleen Young of DFAS telephoned Mr. Jensen and inquired about the unpaid bills. Mr. Jensen stated that he had not received any bills, whereupon, Ms. Young verified the address to which the bills had been sent as being correct (tr. 8/1760-61; R4, 3rd Supp., tab 446).

98. On 20 December 1995, Ms. Young forwarded five unpaid utility bills to Mr. Jensen. She asked him to "review and process" the bills "as soon as possible" (R4, 3rd Supp., tab 447).

99. Mr. Jensen responded to Ms. Young's letter on 5 January 1996. He stated that he had not received a utility bill "of any kind" for 18 months and assumed that he was being given free utilities. Mr. Jensen went as far as to question whether the invoices which Ms. Young had forwarded to him were even "bills." In addition, he disputed the electrical, water, and sewage rates. Finally, Mr. Jensen suggested a meeting to resolve the matter (R4, 2d Supp., tab 21).¹⁷

100. DFAS continued to forward utility bills to Minesen. The bill for October 1995 was \$10,852.38 (R4, 3rd Supp., tab 442); that for November 1995 was \$11,608.33 (R4, 3rd Supp., tab 443); that for December 1995 was \$7,479.46 (R4, 3rd Supp., tab 451); that for January 1996 was \$6,702.69 (R4, 3rd Supp., tab 454); that for February 1996 was \$7,149.21 (R4, 3rd Supp., tab 456); and that for March 1996 was \$7,466.89 (R4, 3rd Supp., tab 458).

101. On 7 June 1996, COL Dennis Fontana, the Director of Public Works at Schofield Barracks, forwarded a memorandum to the Fund's Headquarters in Alexandria, Virginia, in which he stated, in part:

1. This memorandum is to advise you that the Minesen Company, who manages day-to-day operations of the Inn at Schofield Barracks, has been delinquent in paying their utility

¹⁷ Despite these assertions, Mr. Jensen admitted that he had factored in an element for utilities in the room rate set forth in Minesen's BAFO (tr. 12/2523-24). In addition, in its audited financial statement dated 31 December 1996, Minesen accrued a liability of \$500,000 for unpaid utility charges (R4, 2nd Supp., tab 29 at 4-5).

bills for the past 18 months (Oct 94-Mar 96). The amount of unpaid bills total [sic] approximately \$185,109.06 which includes \$133,850.10 in FY95 and \$51,258.96 in FY96 bills (01 Oct 95 through 31 Mar 96).

2. Request that CFSC-HD [the Fund's Headquarters] work together with the Minesen Company to resolve this on-going problem of delinquent utility bills as soon as possible. According to a conversation between Mr. Richard Gorman, Chief of Operations, Hospitality Directorate and Mr. Alan Goo, Chief of DPW Staff Engineer Division on 3 June 1996, the Inn is responsible for paying their own bills and CFSC would handle it.

(R4, 3rd Supp., tab 462) Despite COL Fontana's efforts, the bills remained unpaid.

102. On 14 November 1996, COL Fontana wrote directly to Mr. Jensen. He stated, in part:

The Directorate of Public works (DPW) requests payment from the Minesen Company for utilities procured for the Inn at Schofield Barracks for FY95 and FY96.

The Hawaiian electric meter testing that was done recently confirmed the accuracy of the DPW's estimates. Also included are the billing totals for unpaid water and sewage charges for FY95 and FY96. The following are total costs for each category by FY:

	FY95	FY96	
ELECTRIC	\$215,072.12	\$190,466.26	
WATER	\$29,270.01	\$24,237.08	
SEWAGE	\$39,854.88	\$41,276.98	
SUB TOTALS	\$284,197.01	\$255,980.32	
TOTAL			\$540,177.33

We are enclosing spreadsheets for the above.

In closing, the DPW will continue to support the Inn at Schofield Barracks and we will meet with you to rectify any problems that may be present to ensure excellent service.

(R4, 2nd Supp., tab 26) The bill was not paid.

103. On 10 January 1997, Mr. John Jefferis, the COR, forwarded a memorandum to the Fund's ISB Task Force, in which he stated, in pertinent part:

I have asked for your assistance to resolve the outstanding utility bill owed by the Minesen Company for the operation of the Inn at Schofield Barracks since its opening. We must resolve this issue before we tackle those addressed by the Minesen company [sic].

I must report that I have worked this issue with the USAHAW DPW for the six months I have been COR of the contract and have yet to resolve it. A brief chronology of billing is as follows:

Minesen claims the first time they received a bill for utilities was in Dec 95. It covered the period from opening of the Inn. (No bill was presented for the construction period although there is a early MOA that specified such.) Mr. Jensen of the Minesen Company sent a letter on 5 Jan 96 to the Defense Finance and Accounting Office regarding the bill. No response was ever received. (It appears from recent conversations with Mr. Jensen, that issues from that letter still need to be addressed).

When I became involved as COR in Jun 96, I arranged a meeting between the Minesen Company and DPW to resolve the utility issue.

The key issue was the failure to produce monthly bills and the extreme fluctuation in monthly amounts without supporting documentation as to when readings were taken and what they were . . . the basics for verifying monthly bills. It was also reported by DPW that the electric meter was running backwards . . . placing doubt on the validity of the outstanding bills. DPW agreed to provide a copy of monthly bills to the

Inn at the same time they were sent to DFAS for formal billing. They would include documentation on readings. DPW learned for the first time that the meter was installed by Minesen, but was to become the property of the government at conclusion of the construction. (Documentation may still be lacking in this transfer). DPW responded by replacing the meter with a type they could rely upon and one with which they were more familiar.

Another issue addressed by Minesen was that sewage was not listed in the original contract, but was being charged at 70% of the water usage. That was considered excessive by the Minesen Company as several uses of the water did not end up in the sewage. The DPW checked with the Honolulu Board of Water Supply to see if that challenge was supported by other customers of theirs. In fact, they used a standard of 80% of the water usage; therefore, the DPW felt comfortable with their 70% level.

An unresolved question had to do with why the first MOU indicated an electric charge for 6 cents per kilowatt hour while current bills are in the 12 to 13 cent range. DPW accounting personnel have researched back to the mid 80s and can find figures no smaller than 9 cents per kilowatt hour. I have been unable to find out where those original numbers came from. I know the proforma budget presented by Minesen was for \$15,000 per month of utilities. Current bills are just under \$20,000.

When the new meter installed by DPW was read for the months of August and September, the figures were 3 to 4 times higher than those previously shown on the Minesen installed meter and significantly above that expected from the engineering calculations Minesen had reviewed before construction.

In October I arranged a third party (HECO) to verify the accuracy of the new meter. Based on that action, what I thought was an agreed upon format for computation, the DPW created a bill for FY 95 & FY 96 (the bill for \$540,177).

(They did not generated [sic] a bill for the construction period or the first 4 months of operation Jun-Sep 94).

I believe we have Mr. Jensen's agreement that rather than apply some seasonal fluctuation in daily temperatures and evaluate operational changes impacting electrical usage, DPW would extrapolate the current readings compared to current occupancy and against the occupancy numbers over the months of operations.

MY QUESTION . . . Is the Minesen Company in default of its contract/loan agreement if the bills are reasonably verifiable?

(R4, 2nd Supp., tab 30)

104. On 13 January 1997, Ms. Shukay gave a detailed response to Mr. Jensen's arguments that Minesen was not required to pay utility bills. She stated, in part:

In our view there has always been a requirement for the contractor to pay utilities. In the Request for Proposal [sic] (RFP) dated November 30, 1988, for the construction of the Transient Lodging Facility, paragraph b.(2) of General Requirement and Criterion entitled Utilities stated that "the successful offeror will be required to purchase and install appropriate utility lines and meters for necessary utility services from the site boundaries. **Utilities will be provided through contract with the Installation Energy Office and shall be considered an operating cost of the facility.**" (emphasis added) The RFP also required The Minesen Company to install temporary utilities for the duration of the construction period and set specified rates to be charged.

Similarly paragraph 24 of Section I of the Contract between the Fund and The Minesen Company executed January 14, 1993, provides that the Government will provide utilities, but the **cost of utility services shall be paid by the Contractor to the Government. All utility costs and hookups will be paid or provided by the Contractor in accordance with provisions of this contract** (emphasis added). Section III, paragraph 4 of the Contract specifies that an operating agreement (the MOA) would be signed by the

Minesen Company and the Installation Commander to include utilities.

In the Lease between the Secretary of the Army and The Minesen Company, executed by The Minesen Company on February 1, 1993, paragraph 24 Cost of Utilities and Other Services states: That the Lessee shall pay the cost, as determined by the said officer of **producing and/or supplying any utilities and other services furnished by the Government or through Government-owned facilities for the use of the Lessee, including the Lessee's proportionate share of the cost of operation and maintenance of Government-owned facilities by which such utilities or services are provided or supplied. Payment shall be made in the method prescribed by the said officer, upon bills rendered monthly.** (emphasis added)

The Memorandum of Agreement between The Minesen company, The U.S. Army Community and Family Support Center and the 25th Infantry Division (Light)/U.S. Army Garrison Hawaii executed by The Minesen Company on March 17, 1994 spelled out the responsibilities for provision and payment for utilities in a final and formal manner. The 25th Infantry Division (Light)/U.S. Army Garrison Hawaii was to provide appropriate utilities to the Inn on a reimbursable basis. The rates charged would not exceed those charged to other commercial activities located on Schofield Barracks, such as the First Hawaiian Bank and the Department of Education. Invoices were to be provided to the Minesen Company on a monthly basis. It was then your obligation to promptly settle utility charges upon your verification of accuracy.

There was never any intention that you would not be required to pay for utilities. Rates to be charged were those charged to other commercial activities on Schofield Barracks. We concur that Schofield Barracks should have charged you for utilities on a monthly basis during the construction period at the rate specified in the RFP and after the beneficial occupancy date at the commercial rate. The bills that you have received are only for the period October 1994 through

December 1996, four months after the beneficial occupancy date.

We can not understand why you have never brought it to the attention of the Fund that you were not receiving utility bills. This situation should have been resolved prior to the closing of the loan with John Hancock. Your Real Property Mortgage, Assignment of Rents, Security Agreement and Financing Statement with John Hancock in paragraph 2.11 provides that The Minesen Company “shall pay or cause to be paid all charges for utility services, . . . at any time serving all or any part of the Mortgaged Property, will comply or cause compliance with all contracts relating to any such services and systems, . . .”.

We must inform you that it is your obligation to pay the outstanding utility charges in compliance with the Lease and the Contract.

(R4, 2nd Supp., tab 31) The references to “emphasis” in this letter were made by the CO herself.

105. The efforts of COL Fontana, Ms. Shukay and Mr. Jefferis notwithstanding, Minesen did not pay the past due utility bills. Beginning with the bill for October 1996, however, Minesen did commence paying the current bills in March of 1997 (tr. 12/2357, 16/3433).

106. On 29 January 1997, Mr. Jefferis forwarded a memorandum to COL Fontana of DPW regarding the unpaid utility bills. He stated, in part:

1. References:

a. Meeting on 14 January between Directorate of Public Works and U.S. Army Community and Family Support Center, SAB.

b. Meeting on 16 January 1997 between Directorate of Public Works (DPW) and U.S. Army Community Family Support Center (USACFSC), SAB.

2. In the meeting in reference 1b above, Mr. Don Nelson of the Corps of Engineers and Mr. John Jefferis, Contracting Officer's Representative met with you regarding additional information required from DPW by USACFSC in order to resolve the outstanding utility bills owed by The Minesen Company. As you were advised, The Minesen Company has agreed to pay the utility bills for the months of October and November 1996, as they consider these verifiable bills.

3. DPW should be able to supply the Defense Finance Accounting System (DFAS) with verifiable bills (based on accurate meter readings) for the months of August and September 1996. DFAS should then submit a bill based on these readings to The Minesen Company. Copies should also be furnished to the undersigned.

4. DPW should also be able to provide DFAS with verifiable bills (based on actual meter readings) for the water and sewer bills for the period July 1994 through July 1996. DFAS should then submit a bill based on these readings to The Minesen Company. Copies should also be furnished to the undersigned.

5. In order to collect the outstanding utility bills for the period July 1994 through July 1996, the following information should be provided to the undersigned as soon as possible:

a. An explanation as to how DPW computed the electrical usage (estimated KWH used on occupancy rates.) Is there any basis in industry standard or in accordance with DOD or Army policy or regulations?

b. How DPW arrived at the 100% occupancy consumption figure of 153,907 KWH used to compute the monthly consumption based on actual occupancy rates.

c. An explanation and breakdown for electric charges. What is the rate charged to HECO to DPW for electricity? What are the add-on charges by DPW?

d. Copies of old bills sent to other Rate B customers (electricity, water and sewer) showing rates charged by DPW for every month from July 1994 through September 1996. It would be extremely helpful if we received bills sent to at least two Rate B customers.

6. After you have completed your computations for the August 1996 and September 1996 utility bills and the July 1994 through July 1996 water and sewer bills and sent these to DFAS for billing of The Minesen Company, it is recommended that DPW send a bill to DFAS for the electric bills for the period from July 1994 through July 1996. DFAS should then bill The Minesen Company for this electric bill. Copies of the official bills from DFAS should be furnished to the undersigned.

7. The materials you provide will be forwarded to the contracting officer so that she may place the Minesen Company on notice for the payment of these bills accompanied by complete documentation explaining development, rationale, and supporting meter readings.

(R4, 4th Supp., tab 200)

107. On 6 March 1997, Mr. Steve Stomber, Director of Real Estate, Pacific Ocean Division, U.S. Army Corps of Engineers, wrote the following letter to Mr. Jensen:

It has been brought to my attention that monthly utility bills were not being sent to the Minesen Company until June of 1996 and that monthly utility bills were not being paid by The Minesen Company. Part of the problem was a faulty electric meter that rendered inaccurate readings. As this meter has now been replaced, future utility bills for electricity, water and sewer bills should be paid in accordance with the instructions set forth below. In addition, after corrected utility bills are sent to you for the period July 1994 through September 1996, these utility bills should be paid.

For future utility bills, the Schofield Barracks Directorate of Public Works (DPW) will obtain a meter reading on a cycle of between 25 and 35 days. By the 20th of each month, DPW

will provide the Defense Finance Accounting System (DFAS), a statement containing the charges to be billed to The Minesen Company for utility services, together with a record of the electrical rate and amount of kilowatt hours of electricity used, and the amount of water and sewage used by the Inn during the billing period, and the rate for electrical charges, water usage, and sewage employed in preparing the utility bill. Copies of this statement will be promptly furnished by DPW to The Minesen Company. DFAS will issue a bill for utility services to The Minesen Company in accordance with standard DFAS procedures. The bill will set forth a date by which the charges are to be paid.

Upon your receipt of the bills from DFAS, you will be expected to pay the bills by the due date or you will be charged penalties and interest.

(R4, 2nd Supp., tab 38)

108. For fiscal year 1997, Minesen paid current utility bills in a total amount of \$234,118.82 (ex. A-31).

109. As of 4 April 1997, Minesen had not paid the past due bills. On that date, Ms. Shukay approved a \$10.00 room rate increase. She stated, in part:

With our actions to achieve and maintain occupancy above the 80 percent budgeted level, we believe this room rate increase will allow you to (1) comply with the contractual requirement to deposit 4 percent of your FY97 gross revenue into the reserve replacement account (RRA), and (2) begin to pay the outstanding utility bills due the U.S. Army.

(R4, 2nd Supp., tab 39)

110. On 22 April 1997, Mr. Jensen forwarded a letter to Ms. Shukay in which he asserted, in part:

8. We still have not received the analysis of utility bills from Don Nelson and Joe Zocchi pursuant to our January meetings. We are paying our utility bills currently. Next week Conrad and I are planning to meet with representatives of DPW to see

if we can narrow the issues and come to agreement. We are unsure whether we need to tender a proposal for resolution to you or to DPW. Please advise us on this as soon as possible.

As part of this review, we would like to point out how circular the matter is. Any amount the Inn pays for utilities to the Army, is recovered from our guests through the room rate which, in turn, is reimbursed to them from the Army. As a business we are a “middle man”, incurring costs which we then recover through the price. If we are to be retroactively billed for an expense, we need to either retroactively increase our revenues or seek a room rate increase to generate the revenue to match the past expense. The current utility expense is included in our 1997 budget, but this expense was not budgeted in 1995. In 1996 it was not budgeted at the volume or the rate it is being currently billed.

(R4, 1st Supp., tab 44) (Emphasis in original).

111. On 21 and 22 May 1997, representatives of the parties met at the Inn to discuss various contractual issues, including the unpaid utility bills. In her memorandum for record dated 5 June 1997, Ms. Shukay wrote, in pertinent part:

f. UTILITY BILLS: The Minesen Company acknowledged its liability for the unpaid utility bills. However, it disputes the amount of the water and sewer bill because they state they are approximately 20 to 30% higher than rates charged to high volume commercial businesses in Honolulu. Minesen will investigate the issue further and, if warranted, officially provide written notification to the Contracting Officer of their intended dispute. Minesen believes an adjustment to the utility bill would lower the bill 50-75,000 dollars.

Despite the fact the ISB opened in June 1994, Minesen states the first notice for paying the utility bill was received in December 95. It was then subsequently discovered that the meter had been incorrectly installed and was in fact “running backward.” In July 96, the meter was changed. An estimated bill was developed for electrical use by using 4 months of metered use as a baseline and then computed by using an

occupancy ratio of the extrapolated periods to the baseline. These estimated quantities of kw hours were multiplied by the existing kwh rates charged by DPW during the estimated periods.

Minesen's major complaint regarding this methodology is that the rate per kwh billed to them tripled from the rate planned by them in the Best and Final Offer. A discussion took place on how this problem came about. This increased rate for utilities was not reflected in the derivation of the room rates used during the period of the back billing (June 94-Apr 96). Additionally Minesen claims DPW did not come forward and set up the utility contract as specified in the MOA. If this had occurred, Minesen would have requested an increase in room rates to recover this increased cost.

From May 96-Oct 96 the utility costs were covered by the established room rate. Minesen has \$50K to pay these bills and has paid all utility bills from Oct 1996 to present.

The pre-opening utility bill, which is estimated to be relatively small, has been eliminated by 25thID.

We are hoping DFAS will not attempt to levee [sic] interest charges to Minesen for the past due utility bills. Because this is all due to DPW's inability to provide bills to Minesen on a timely basis, if DFAS does apply interest charges, we will ask DPW to intercede on Minesen's behalf.

Since the utility bill problem occurred over a three-year period, it is unreasonable to expect Minesen to pay the bill immediately. Given operational requirements and the desire to mitigate the need for increased room rates, the payback period will be targeted at three years.

The strategy developed for resolving the utility bill begins with the acceptance that the three key players (Minesen, CFSC and the staff of the 25thID) will all agree to the solution. The plan that was developed jointly by the Minesen Company and the CFSC to pay the utility bills and to

resolve all the issues and, as a result, will set the stage for successful future operations.

The key principles which determined the solution to resolving the utility issue were:

- (1) minimizing the need for rate increases solely to pay the utility bill;
- (2) increasing operational efficiencies by Minesen Co.;
- (3) increasing patronage of the ISB by implementation of Lodging Success; and
- (4) by reestablishing 25thID support for the ISB.

Ms. Shukay also included the following statement in her memorandum:

As occupancy rates increase, the ability for Minesen to pay the utility bill also increases. The following table depicts the utility payment generated at various occupancy levels.

<u>Occupancy Level</u>	<u>Annual Utility Contribution*</u>
80%	0
85%	\$30K
90%	\$60K
95%	\$90K

*Numbers are believed to be close approximation, but are being validated by Minesen.

CASH PAYMENT – Minesen has \$50K for utilities which was included in the room rates from May 96-Oct 96. Additionally, there is approximately \$300K in the RRA account for replacing furniture, fixtures, and equipment. Given the aggressive capital repair strategy that has been employed by Minesen and the current high quality condition of the facility, it is estimated that the current RRA account balance is in excess of the short term capital requirements needed to maintain the ISB. Therefore, the plan calls for a \$50K disbursement from the RRA simultaneously with a Modification to the contract by end of July 1997. Combined

with the Minesen \$50K contribution on 1 July 1997, this provides for a \$100K cash payment for utilities, the \$50,000 from the RRA to be paid by the end of July 1997. Minesen and CFSC will analyze in much greater detail the time-phased RRA requirements to ensure the RRA will provide total facility upgrade at the end of the 32 year [sic] lease. After this assessment is completed, the room rate pricing structure will be re-evaluated for the needed marginal contribution to achieve a 3-4 year utility bill payment.

(R4, tab 53)

112. On 6 June 1997, Ms. Shukay forwarded the following letter to KPMG Peat Marwick LLP:

1. I hereby agree not to find The Minesen Company in default, under Section I, Item 12.a. of the Contract, as modified by P0003, through 31 January 1998, for failure to meet the past deposit requirements of the replacement reserve account (RRA).
2. I also agree not to find The Minesen Company in default under para 5.c.(5) of the MOA, through 31 January 1998, in regards to the past due utility charges of the Inn from June 1994 through September 1996.
3. The above agreements are conditional upon the following actions, that The Minesen Company dba Inn at Schofield Barracks (Inn) agreed to at our joint meeting 21-22 May 1997, in Denver.
 - a. Make an initial payment of \$50,000.00 towards the past due utility bill, by 1 July 1997.
 - b. Making a second payment towards the past due utility bill of \$50,000.00, the amount to be taken from the RRA, after a contract modification, by the end of July 1997.
 - c. Paying the remainder of the past utility bill over the next three years, through efficiencies to be gained from increased occupancy over 80% and using an agreed portion of

profits and gains from efficiencies, such as contracting out the deli or expanding the mini mart.

d. Transferring \$27,000 into the RRA by 1 July 1997.

e. Continuing their current deposits in the RRA account.

4. We continue to reserve our right to terminate the contract for delinquent contractual conditions other than those discussed above.

(R4, 2nd Supp., tabs 41, 42)

113. On 15 July 1997, Ms. Shukay forwarded the following letter to Mr. Jensen:

This letter is authorization for The Minesen Company to withdraw \$100,000.00 from the RRA account to make an initial good faith payment to DFAS for past utilities owed.

Please provide me a copy of the payment check and invoices as you make payments towards [sic] the past bills.

I remain available under the terms of the contract to help you negotiate a payment plan with DFAS and to resolve any utility bill issues.

(R4, 2nd Supp., tab 43) Minesen complied with this authorization and made the payment on that same date (R4, 2nd Supp., tab 44).

114. On 19 November 1997, Mr. Jensen wrote to Ms. Shukay as follows:

Attached is our proposed payment schedule for the utility re-payment plan. There are two features

- 1) A temporary \$1.00 per night room rate increase, all of which goes towards the re-payment.
- 2) Graduated plan where The Minesen Company will contribute per the attached schedule.

Using these two sources of funds, we project the payment would be accomplished in three (3) years.

This will be implemented upon your authorization.

(R4, 2nd Supp., tab 76, attach. K) In a facsimile copy sent to Mr. Jensen on 3 December 1997, Ms. Shukay stated that this payment plan was unacceptable. She asked him to provide her with a plan that did not increase room rates (R4, 1st Supp., tab 51, 2nd Supp., tab 58).

115. During fiscal year 1998, Minesen paid current utility bills in a total amount of \$224,859.97 (ex. A-31).

116. In a letter of 17 December 1997, Mr. Jensen responded to Ms. Shukay's request for a repayment plan. He stated, in part:

We are not going to retrace the history of the DPW billing debacle – our earlier letters setting out the facts are in your file. Please note, however, that the “mistakes” to which you allude were not made by The Minesen Company. We budgeted all of our known expenses while DPW failed to bill for over a year and a half (December of 1995 after an opening date of June 1994). We budgeted \$50,000 for this expense after DPW commenced billing and we have paid DPW \$100,000 on the old charges. Therefore, we have already paid \$50,000 which was not budget [sic] in previous room rates in addition to paying the current charges (which continue to be billed in a confusing manner, with larger bills appearing at times of lower occupancy and rates changing without notice or explanation).

In May MWR personnel proposed a plan for payment of the utility bill, which was to be presented to General Gaddis and DPW, which we were told was done. The plan agreed upon was for a \$1 per room night increase earmarked for the past utility bill plus a TMC payment from efficiency savings due to occupancy over 80% of the balance of the amount needed to retire the bill in 3 years. We agreed that the amount estimated at various levels of occupancy was realistic. It was

our understanding that this plan was agreed upon and would be put into effect after the October budget review meeting.

Since CFSC has now decided not to approve the \$1 per night room rate increase, TMC will still pay the amount designated from efficiencies at various levels of occupancy, as set out in a schedule developed by Mr. Jefferis and distributed for the second time at our November meeting. The time required to repay the entire debt will depend upon occupancy. We would anticipate making a quarterly payment during the month following the end of each calendar quarter based on occupancy for that period. As you may conclude from this, any changes which adversely affect occupancy will delay payment of the old utility bills.

(R4, 1st Supp., tab 53)

117. At some point in December 1997, Mr. Dean Perez, who was to be appointed as the new COR on 13 January 1998, met with Mr. Jensen and believed that he had concluded an agreement with Minesen on a five-year repayment plan for the past due utilities (R4, 2nd Supp., tab 49 at 2, 1st Supp., tab 57). Based upon this alleged agreement, Ms. Shukay forwarded a letter to Mr. Jensen on 22 December 1997, in which she stated, in part:

2. Your proposal on the utility repayment plan is approved as follows:

a. Payments are to be for a period of 5 years, commencing on 1 November 1998 with 5 yearly payments of \$90,339.60, for a total of \$451,698.00. All checks should contain the contract number and reason in remarks section.

b. Payment to be made to DFAS, Honolulu
Operating Location, Bldg 77, Ford Island, ATTN: PC/FPVA,
Pearl Harbor, HI 96860-7553.

(R4, 1st Supp., tab 54). Ms. Shukay's letter notwithstanding, Mr. Jensen testified at the hearing that the "second agreement was something that Dean Perez dreamed up by himself that we were never part of" (tr. 12/2598-99). On 11 March 1998, Mr. Jensen informed Mr. Perez telephonically that Minesen did not agree with the five-year

repayment plan. Ms. Shukay noted in response that "Mr. Jensen is in default under the contract if he does not make past utility payment" (R4, 2nd Supp., tab 49 at 2-3).

118. On 26 March 1998, Ms. Shukay transmitted the following letter to Mr. Jensen:

This is a followup to my 26 January 1998 letter which outlined the basis of payment for the amount owed on the past due utility bill for the Inn at Schofield. I have been informed that DFAS will take action and begin assessing interest on the amount outstanding. It is imperative The Minesen Company notify DFAS within the month on their quarterly payment plan to include the date they can expect receipt of the \$100,000 payment due in July 1998.

If The Minesen Company does not initiate a payment plan with DFAS, I as the Contracting Officer, will unilaterally modify the contract directing The Minesen Company to begin quarterly payments over the 5-year period commencing July 1, 1998.

Please respond immediately and provide the Minesen Company's intentions in payment of past due utilities.

(R4, 2nd Supp., tab 51)

119. On 16 April 1998, Mr. Jensen forwarded a lengthy response to Ms. Shukay's letter. He stated: "Please note that the proposed payment plan is inconsistent with any of our previous discussions and, contrary to your statements, there has never been any agreement by The Minesen Company to any of the specific payment terms proposed by you" (emphasis in original). After reciting his version of recent developments on this issue, Mr. Jensen asserted: "The payment plan that you specified was not our proposal and, in fact, until you wrote to us, we were never aware that any such payment plan particulars were being considered" (emphasis in original). Mr. Jensen closed his substantive remarks by stating: "A better solution, however, would be for all of you to return to our proposal of November 1997" (*see* finding 114; R4, 2nd Supp., tab 53).

120. Ms. Shukay replied to Mr. Jensen's letter on 23 April 1998. She stated, in part:

Please resolve this debt. I don't want to unilaterally MOD the contract, but it is my right to do so, and I don't want to put you in default for debts owed, as the Hancock Loan and the Contract terms and conditions speak to that.

I am disappointed when you make the statements you do. Simply put, I am past the point of agreeing to any other proposals as I think giving you five (5) years to pay a debt is very reasonable. Accept the five year [sic] plan and come up with a monthly or quarterly payment to DFAS over that 5-year time frame. I am willing to work with DFAS for you on a reasonable payment plan. If I don't pay my utilities, they turn them off. Just because you are on an Army Installation, and are servicing our soldiers and their families you are given an exception.

(R4, 2nd Supp., tab 57)

121. Mr. Jensen responded to Ms. Shukay's letter on 27 April 1998. He wrote:

Like you, we would like to resolve the issue of the utility bill but need to understand what you are proposing. We request clarification on the proposal referred to [sic] paragraph 6 of your e-mail, as follows:

“Accept the five-year plan and come up with a monthly or quarterly payment to DFAS over that 5-year time frame.”

We request this clarification because in the past, specifically May 1997 in Denver and November 1997 in Honolulu, we have agreed to proposals on this matter made by CFSC personnel, which were then abandoned upon your return to your home office. In this context, who is the proper party to approve any utility repayment plan?

We propose a five year [sic] plan, paid monthly based on a minimum level of occupancy. If the approval of others is required, please obtain it and advise us before we respond specifically to the proposal.

Your prompt attention to this is appreciated.

(R4, 2nd Supp., tab 56)

122. In an e-mail to Mr. Jensen dated 19 May 1998, Ms. Shukay stated to Mr. Jensen that "you and I need to work out the utility bill payment plan and put this baby to rest." She also indicated that she would soon be replaced as contracting officer (R4, 2nd Supp., tab 58).

123. On 28 May 1998, Mr. Jensen forwarded an e-mail to Ms. Pauline Barney, the Inn's manager, "Subject: Email from D Pisserez [sic]," in which he asserted, in part:

We have gotten two or three emails from Wanda, utility bill payment issue. Do you want to see those too? They are just the same old song and dance, when are we going to pay etc.

(R4, 2nd Supp., tab 59)¹⁸

124. On 3 June 1998, Ms. Shukay referenced her earlier e-mails and wrote to Mr. Jensen, in part:

Pete, I've sent you several other e-mails with no response. Is there a reason for not responding?

Does the [sic] The Minesen Company plan on payment of the past utilities? If so, when do you plan to start those payments, if you have not, and how much will you pay and how often. DPW and DFAS have asked CFSC to ensure you make these payments. I can't force you to do so, and I don't want to put The Minesen Company into a default.

¹⁸ Mr. Dean Perez was the then COR on the contract (finding 117).

I will fax this e-mail and enclosures one more time and hope you respond.

(R4, 2nd Supp., tab 60) As of 4 June 1998, Mr. Jensen had not replied to Ms. Shukay's various e-mails (R4, 2nd Supp., tab 61).

125. On 16 June 1998, Mr. Jensen forwarded the following response to Ms. Shukay:

In response to your letter of April 23, 1998, we are presenting our proposal for settlement of the long-standing utility bill dispute. You are well aware of our objection to both the estimated amounts for those periods when the meters were not read and to the lack of compliance with timely, verifiable billing as required by our contract. For the record, the monthly bills at the present time (based on meter readings) are significantly less than the monthly amounts estimated (without meter readings). Again, we did not include utilities in our operating budget for the periods concerned.

However, in the interest of settling the issue, we will agree to repay \$515,000, of which \$100,000 has already been paid at your request as a "good faith payment", at the rates set out below based on occupancy. These rates, which range from the breakeven level of 80 percent up to 90 percent, will result in payment of the bill in less than 5 years if occupancy is 90 percent or more. It has now been demonstrated that when Army personnel comply with the lodging requirements of our contract with you, occupancy will be at or above 90 percent.

MONTHLY OCCUPANCY	FEE PER OCC. ROOM	MONTHLY PAYMENTS
80%	\$.00	\$.00
82%	.30	1,437.00
84%	.60	2,943.00
86%	.90	4,520.00
88%	1.20	6,167.00
90%	1.50	7,884.00

This proposal builds upon negotiations and discussions with John Jeffries, during the time he was our designated COR, but does not require the \$1.00 per day room rate increase previously requested. We hope the fact that this proposal was not unilaterally created by The Minesen Co. will be persuasive to you, as we wish to put this matter to rest.

(R4, 2nd Supp., tab 62)

126. Ms. Shukay replied to Mr. Jensen's letter on 1 July 1998. She wrote:

Thank you for your proposal dated 16 June 1998, which I received via mail around 25 June 98. I immediately reviewed your proposal and staffed it through LTC Heuer, CFSC-JA; John McLaughlin, Director of Contracting and LTC Newsome, Director of Army Lodging. Based on the the [sic] reviews, I agree with your proposal for installment payments of debt, but I require you to do the following:

- a. make an immediate payment of some amount;
- b. future monthly payments – which should begin immediately – be graduated to a lower occupancy level {say 72%} and also to a higher occupancy level {two or more tiers in the 90-100% range}; and
- c. a minimum payment which must be made every month, no matter what level of occupancy the Inn experiences {even it [sic] it's only \$500.00}.

If you would revise your letter to me based on the above, I believe we can then put this issue to rest.

(R4, 2nd Supp., tab 63)

127. Mr. Jensen responded to Ms. Shukay's proposal on 3 August 1998. He stated:

Although the total utility payment amount owed is still in dispute, in response to your letter of July 1 we want to

proceed along the lines of your request to settle this issue as follows:

1. We will make an immediate payment of \$10,000.
2. We cannot agree to make payments when we are operating below the "breakeven point" because, by definition, when below that point our cash receipts are less than our operating expenses. This makes it unrealistic to utilize any level below 80 per cent as a payment requirement. That is why we proposed the starting level of payments to be 82 percent, the first step above the breakeven point.
3. At the same time, however, we will agree to add another level of payment starting at 95 per cent, this being at the rate of \$1.80 per room night.

This offer may be considered a revision of the payment schedule set out in our letter of June 16 to you.

We hope this response to your suggestions will resolve this matter.

(R4, 2nd Supp., tab 65)

128. In a letter dated 7 August 1998, Ms. Shukay accepted Minesen's proposal. She wrote:

1. Thank you for your revised offer for payment of the past due utility bill for the Inn, dated 3 August 1998.
2. I accept your offer as proposed.
3. Additionally, I will be finalizing your offer in a Modification to the Contract, which will be forwarded to you next week.
4. The Modification will basically contain: the acceptance of your immediate payment of \$10,000.00 to DFAS with copy to Contracting Officer, future monthly payments starting 10 Sep 98 and thereafter monthly on the 10th of each month; the proposed payment plan starting at occupancy level of 82% at a fee of \$0.30 per occupied room = to \$1,437.00 a month. Stated plan graduates by

2% occupancy and \$0.30 cent fee per occ. Room to \$1.50 at 90%-94% and increasing at 95%-100% to \$1.80 per occupied room.

5. I am basing your monthly payments on a 5800 room occupancy per month.
6. I am in agreement with you that we shall revisit this Modification in November meeting and if you come up with any proof that the total bill presented you is incorrect, we will relook the issue, as you continue to make the payments as agreed upon.
7. Anytime during the repayment plan period you provide the Contracting Officer with valid data backing up your claim that the bill is inaccurate, the Contracting Officer will revisit this issue.
8. Will you please provide me a copy of the "immediate payment" to DFAS in the amount of \$10,000.00.

We are all pleased to firm up this agreement.

(R4, 2nd Supp., tab 66)

129. Mr. Jensen replied to Ms. Shukay's letter on 10 August 1998. He stated:

We are very glad to have reached agreement with you on the past utility bill issue and want to formalize our agreement in writing at the earliest possible time.

We are concerned about the use of a contract modification to accomplish that, however. There seems to be no necessity to treat this as a contract modification since it addresses a matter not addressed in the contract. Also, the limited purpose of this agreement will be completed in a few years, whereas the contract has a prolonged life. As you know, a contract modification survives during the life of the primary contract. There are always implications and risks of contract modification, which we propose to avoid by an alternative approach.

We suggest that we execute a letter agreement, which will be legally binding on both parties. To expedite closure on this matter, we have drafted such a letter agreement and transmit it

to you herewith. Do you think it is necessary that DFAS also sign this agreement to avoid future misunderstandings? If so, we will ask that you expedite obtaining that signature.

We are hoping that this can be reviewed, signed and returned quickly to remove this issue which has already taken far too much of everyone's time.

Please let us hear from you at the earliest possible time.

(R4, 2nd Supp., tab 67)

130. Pursuant to Modification No. P00006 to the contract, Ms. Joan Newhart became successor contracting officer, effective on 24 August 1998 (R4, tab 60).

131. On 16 October 1998, Ms. Newhart executed an agreement on payment of past utility bills and forwarded the document to Mr. Jensen who signed it on 28 October 1998. It provided:

1. The Minesen Company will make a payment of \$10,000 upon signing this agreement, and will document such payment to the Contracting Officer.
2. The Minesen Company will begin to make payments on a regular basis beginning in November. Payment shall be made to DFAS not later than the 20th day of the following month and continuing until the bill is fully discharged, based on the following schedule of payments:

PERCENT OCCUPANCY	RATE PER ROOM NIGHT
82-83	.30
84-85	.60
86-87	.90
88-89	1.20
90-94	1.50
95-100	1.80

Percent Occupancy will be computed on the basis of 192 rooms available. Payments will be made on this basis until the charges are fully paid, even if the total

amount of the charges is revised as set out in the following paragraph.

3. The parties agree that payment according to the above terms shall be effective upon the signing of this agreement and shall continued [sic] unabated according to its terms. These terms notwithstanding, the parties recognize that The Minesen Company disputes NAFI's stated position that the amount owed for past utility usage is \$515,000.00 (of which \$100,000.00 was paid by The Minesen Company in July 1997). Not later than December 31, 1998, The Minesen Company shall have the opportunity to submit objective data and allied documents supporting a lesser figure as the total amount due for past utility usage. All submission shall be addressed to the Contracting Officer for review, evaluation and decision. Amendments/revisions, if any, to the total amount shall be by the Contracting Officer's written decision. The Contracting Officer will inform the Minesen Company of the date the decision will be made not later than February 28, 1999. Any technical review, coordination and/or approval by DPW and DFAS, if necessary, shall be the responsibility of the Contracting Officer.

(R4, 2nd Supp., tab 68) On 27 November 1998, Minesen forwarded a check to DFAS in the amount of \$10,000 (R4, 2nd Supp., tab 70).

132. On 31 December 1998, Mr. Jensen sent a letter to Ms. Newhart concerning the "Disputed Amount owed to DFAS for utilities." He stated that there were two issues to be discussed. The first was that the "amount of billing is incorrect." Reciting various factors, Mr. Jensen concluded that the balance due for unpaid utilities was \$292,909. The second issue, wrote Mr. Jensen, was that "any amount due must be paid for with room rate increases, not out of TMC profits." He, therefore, concluded that the parties' "current agreement contradicts [the] contract." (R4, 2nd Supp., tab 76).

133. On 12 March 1999, Ms. Newhart responded to Mr. Jensen's letter of 31 December 1998. She stated:

The purpose of this letter is to resolve the disputed amount owed to DFAS for utilities and to update you on the status of current utility issues.

In your letter dated December 31, 1998 regarding the disputed amount owed to DFAS for utilities, you proposed the balance due for the past utilities be reduced to \$292,909 and provided back up documentation to support your position. During our discussion at the Inn at Schofield Barracks (ISB) on January 20, 1999, I informed you that all parties had agreed to accept your proposed amount. Please sign the enclosed contract modification in blocks 15 and 16 to finalize our oral agreement and return one copy to me. I will countersign and return a completed copy to you. Per our bilateral agreement dated October 16, 1998 (copy enclosed), the Minesen Company is responsible for making monthly payments to DFAS based upon percent occupancy until the debt is fully discharged.

As you know, CFSC has proposed to USAGH and USARPAC that the balance due of \$292,909 be forgiven in exchange for a \$3 reduction in the ADR (average daily rate). Our legal office has determined that this decision must be made by USARPAC with appropriate Department of Justice approval. We will not proceed with this issue unless USARPAC so requests.

Mr. Pete Isaacs has been working with Col. Hirai to obtain approval for USAGH to pay ISB's utilities in exchange for a \$3 reduction in ADR. We are awaiting written approval and the effective date. Upon receipt, I will prepare a bilateral contract modification effecting this change to the contract.

At my last visit with you in late January, you told me of difficulties you have had in getting verified utility bills since last August. You stated that because of these difficulties, you have not paid a utility bill since then, although you have accrued the payment. We have requested assistance from Col. Hirai in resolving this issue. We have requested his assistance in obtaining a verified bill from August 1, 1998 to the effective date that USAGH will begin paying ISB's utilities. You will then be responsible for paying that utility bill promptly. I would appreciate it if you could keep me up to date on any progress you are making on this issue. I do not

want to get into another protracted utility dispute and will make every attempt to help you resolve this issue.

Ms. Newhart attached to her letter proposed Modification No. P00008 to the contract, which provided:

The Contracting Officer and contractor hereby agree that the balance due for past utilities is \$292,909 as proposed by the contractor in a letter to the Contracting Officer dated 31 Dec 98, Subj: Disputed Amount Owed to DFAS for Utilities. Per the "Agreement on Payment of Past Utility Bills for the Inn at Schofield Barracks, Contract NAFBA3-93-C-0001" dated 16 October 1998, the Minesen Company shall make monthly payments to DFAS based upon percent occupancy until the outstanding balance of \$292,909 is fully discharged.

(R4, tab 72) Mr. Jensen did not sign the proposed modification (tr. 17/3578-79).¹⁹

134. On 11 May 1999, Mr. Jensen forwarded the following letter to Ms. Newhart:

As a follow up to our meeting on May 3rd, I have not signed the contract MOD on the utility bills on advice of legal counsel. We are going to challenge the contention, [sic] these bills cannot be forgiven.

We have also learned recently from DPW documents that the rates being charged are twice as much as they should be. In fact, the 6 cents per kilowatt hour in the RFP is in fact the correct number.

We will continue to keep you informed as we develop a new proposal for your consideration.

(R4, 2nd Supp., tab 95)

¹⁹ The scheme proposed by the Fund whereby past utility bills would be forgiven in exchange for a reduction in the average daily rate was never approved (tr. 11/2400-03, 17/3579).

135. As of 26 May 1999, Ms. Newhart had apparently not received Mr. Jensen's letter of 11 May 1999. On that date, she wrote, in part:

The purpose of this letter is to express concern that you have not responded to my letter of March 12, 1999 regarding the modification of contract NAFBA3-93-C-0001. In the modification, I agreed with your December 31, 1998 proposal to change the amount of past due utilities to \$292,909 to be paid in accordance with our agreement dated October 16, 1998. At our May 3, 1999 meeting, you stated that you were preparing further information for my consideration, but I have not received anything to date. I request that you either sign and return the modification to me or provide additional information for my consideration no later than June 5, 1999. At that time, if I have not received either the modification or additional information, the modification and associated agreement will be withdrawn.

Regarding your current utility bill, on May 6, 1999 I e-mailed you requesting information on why you haven't paid your utility bills since last August. You responded that you were preparing a letter to me detailing the situation on the current utility bills. I know that utilities have been a challenging issue, but I am willing to work with you to help you resolve problems that you are having. In fact, on May 21, 1999, I asked Dean Perez, COR, to set up a meeting between you and the Department of Public Works at Schofield Barracks to resolve any remaining issues with the current bills. I am concerned because the bills now total approximately \$155,000 and you have not provided me any information explaining the non-payment. Please provide this information to me by June 5, 1999 also.

(R4, 2nd Supp., tab 98)

136. Illustrating the deteriorating nature of the parties' relationship, Mr. Jensen forwarded the following letter to Ms. Newhart on 1 June 1999:

The inability of anyone from DPW or CFSC to do what the contract requires "Produce verifiably accurate utility bills on a monthly basis" is the reason this matter continues to drag on.

As I told you and LTC Heuer, in your May 3rd meeting, we have new documentation that the rate charged by DPW is wrong. Your offer to withdraw the current agreement seems fair. The agreement was always based on the erroneous assumptions contrary to the contract, that The Minesen Company should pay the utility cost out of their profits.

As discussed with you on May 3, 1999, we are pursuing a legal manner in which The Minesen Company can be excused from paying these erroneous and untimely bills. Regardless of the amount due these bills will either be forgiven or a claim will be filed to recoup revenue that was never realized by The Minesen Company. I will keep you informed as to our progress.

As to the second matter in your letter, again CFSC and DPW cause a problem and then blame The Minesen Company for the outcome.

During our December meeting we informed you that we had not received ANY utility bills since August. Again in our January meeting when you and Pete Isaacs were here and made the offer (that we accepted) to lower our room rate in lieu of paying utilities. [sic] We informed you we still had not received any bills since August. The bills for August, September, October and November arrived the next day. Then December and January came a couple of weeks later. It didn't seem to matter because we had agreed with your proposal that we not pay any utilities in the future. It wasn't until late April that we were informed you were backing out of your earlier agreement and that we need to pay these bills now.

Utilities are only challenging because DPW can not produce them in a timely manner. Your offer to work to resolve the problem has a hollow ring. The problem we are having is cash flow. CFSC's inability to support the contract requirement that official travelers to Oahu must utilize the Inn at Schofield Barracks, in particular the last nine months has caused us to operate at a loss. You are worried about

\$155,000 utility bill. The Minesen Company is worried about the \$700,000 of lost revenue in the last nine months.

Let me state one more time, DPW does not produce bills in a timely manner and The Minesen Company becomes the problem. Tripler Guest House, a function of DPW, drives business away from the Inn. Then DPW can not understand why we don't just write them a check. Unlike the Government, The Minesen Company needs money in the bank to cover its checks.

Bottom line, ensure contract compliance by the Army and there will not be a utilities problem.

Please remember we asked for the meeting with DPW after one of our lawyers attended a function where an employee of DPW stated that "they were confused why The Minesen Company would not accept their proposal of debt forgiveness" and "why The Minesen Company refused to meet with them. Although they had met with Dean our COR, they could never get a meeting with The Minesen Company".

Joanie, rest assured The Minesen Company wants to solve this problem. We will continue to work with you to resolve this issue equitably and keep you informed as soon as we have anything to report.

(R4, 2nd Supp., tab 99)

137. Ms. Newhart replied to Mr. Jensen's letter on 16 June 1999. She wrote, in part:

Thank you for your June 1 response to my May 15 letter of concern. As discussed in my letter, I am formally withdrawing modification P00008 dated March 12, 1999 which accepted your proposed amount of \$292,909 for the past utility bill. In addition, the Agreement on Payment of Past Utility Bills dated October 16, 1998 is now voided because we have been unable to come to a timely agreement on the amount of those bills.

As I mentioned in my letter, I would like for us to work together to resolve these continuing utility problems. To this end, I have requested that LTC Heuer and John Jefferis attend the meeting scheduled for June 25 at 1:30 PM between you, Dean Perez and the DPW. I understand the challenges you have faced in getting timely and accurate utility bills from the DPW and will request attendance by appropriate personnel so that the attendees can jointly resolve all outstanding utility issues. I will request Col. Hirai's assistance in ensuring that the appropriate DPW personnel attend.

I would appreciate your continued cooperation and assistance in resolving the following issues at this meeting:

1) Past Utility Bills: bring the new documentation you have showing that the rate charged by DPW is wrong. After this meeting we will need to work toward another modification to get the outstanding past utility bill paid.

2) Current utility Bills: if there are any outstanding issues with the unpaid utility bills since August 1998, bring the appropriate documentation to resolve them. As I informed you in my May 20 letter summarizing issues we have addressed to date, our proposal to have USAGH fund your utilities in exchange for lowering the ADR has been found legally unsupportable. These current utility bills need to be paid promptly.

In addition, I will ask Mr. Perez to establish a plan with DPW to provide you with monthly, verified utility bills and follow up to ensure the plan is working each month.

(R4, 2nd Supp., tab 100)

138. The parties met as scheduled on 25 June 1999. On 13 July 1999, Ms. Newhart wrote, in part, to Mr. Jensen as follows:

This letter confirms my understanding as to the agreement reached on June 25, 1999 regarding payment of outstanding utility bills.

a. Past Due Utility Bills: The DPW at Wheeler Army Airfield will prepare an explanation of the method by which rates are calculated, as well as the usage amounts. The amount for past utility bills will then be presented to you for expeditious payment.

b. Current Utility Bills: You have been presented invoices for utilities from the August, 1998 [sic] to the present, but have not paid to date. At the meeting, you stated your intention to 'double up' utility payments beginning in June of 1999. Please send me a proposed schedule of your anticipated repayment plan for these recent utility bills.

(R4, tab 82)

139. Mr. Jensen replied to Ms. Newhart on 21 July 1999. He wrote, in part:

We have received your letter of July 13, 1999 regarding recent discussions in Honolulu concerning utility bills and a proposed "buy-out" of the Inn at Schofield Barracks ("Inn"). Whereas lengthy two-way discussions did indeed take place with representatives of the U.S. Army Community and Family Support Center ("USACFSC") regarding various aspects of the utility bill and a buy-out initially proposed by LTC Ronald Heuer, your organization's Command Judge Advocate, our understanding of the results of these meetings does not comport with the information provided to you and which you summarized in your July 13, 1999 letter. We therefore are now writing to correct any misunderstandings you may have in this regard, as you were not present at these meetings. We understood, however, from LTC Heuer's comments at the beginning of the discussions that he was representing you because you were unavailable.

a. Past Utility Bills. Our meeting on June 25, 1999 with LTC Heuer at the Department of Public Works ("DPW") at Wheeler Army Airfield primarily focused upon the methodology used in calculating utility bills. We raised a number of questions regarding both the quantities of electricity used and usage rates. In response, COL Totten tasked his subordinates to provide us with a written

memorandum detailing their procedures and calculations. We, in turn, at Dean Perez's request, agreed to once more provide our input and our calculations. (We earlier provided these calculations in detail to you.) It was our understanding at the end of this meeting that representatives from DPW and the Inn would meet again to further discuss the data and procedures to be provided by DPW, and that the parties would focus their attempts at determining which aspects of the past utility bills were not in contention, and, more significantly, what portions we would "agree to disagree on." We never arrived at any consensus as to amounts due nor any agreement as to the methodology for calculation of usage amounts and rates. I recall no agreement that the amount for past utility bills would automatically be accepted as accurate, or that such amount would then be presented for expeditious payment. In fact, as DPW's methodology for calculation still remains a mystery to us, and as the contract requires verification of accuracy prior to payment, there really can be no one-sided automatic agreement to pay, as you seem to describe. You may recall that our proposal in October 1998 for graduated payments of past due amounts, based upon current occupancy levels, was initially accepted but then later unilaterally "taken off the table" by your agency. I am therefore unaware of any payment method that has been fully agreed upon and is now in effect.

b. Current Utility Bills. There was no discussion regarding any "doubling up" of utility payments. When COL Totten asked, "So when are you going to pay up?" I responded that our ability to pay our utility bills was a direct function of our occupancy level. As you are well aware, for a number of months in 1998 and the beginning of 1999, our occupancy levels were far below the "break-even" point and directly impaired our ability to cover utility bills. I mentioned during the meeting that occupancy levels had much improved now, and we would therefore be able to meet present-day utility payments. However, I recall no agreement to "double up" on payments. Current utility bill payments are now in issue only because you informed me during our discussions in January 1999 that CFSC had embarked upon a new plan whereby the Inn would not be required to pay utility bills. We

understand that in May 1999, you subsequently reversed yourself regarding this new plan. As a consequence of your comments in January 1999, however, the Inn did not set aside any funds for payment of utility bills.

(R4, tab 84)

140. Ms. Newhart responded to Mr. Jensen's letter on 19 August 1999. She stated, in part:

a. Past utility bills through September 1996. While I was not present at the June 25 meeting, I am advised that after extensive discussion, you essentially concurred with the DPW staff regarding the methods for calculating rates and utility usage; however, as you state in your letter of July 21, DPW agreed to provide you a written explanation of their calculations. I am currently awaiting DPW's provision of a full statement of the circumstances surrounding utility services to the Inn, as well as a written explanation of how rates were calculated, and usage figures for the period during which utilities were not paid. As soon as I receive this documentation, I will immediately provide it to you and ask for your analysis and response. After I receive your analysis, we will try to reach agreement with you regarding payment of the utility bills. However, should we reach in [sic] impasse and be unable to execute a bilateral agreement, I plan to issue a unilateral modification fixing the amount of the utility charges owed and directing The Minesen Company to pay the bill as verified by DPW according to a payment term which I deem fair and reasonable.

Regarding your comments on your previous proposal to pay these bills, it was not "unilaterally taken off the table" by my agency, but was withdrawn after three (3) months because you did not sign the resulting modification in which we agreed with your proposal to reduce the amount significantly, nor did you provide additional information regarding the rates charges as promised at our May 3, 1999 meeting and again requested in my May 26, 1999 letter to you. In your June 1, 1999 letter to me, you even stated "your offer to withdraw the current agreement seems fair." As of this date, you still have

not provided any additional information to me as to any legal manner in which The Minesen Company can be excused from paying the bills in question. I remind you that I am obligated to collect this debt owed the Government.

b. Current utility bills. I have confirmed with several Government participants in the June 25, 1999 meeting that you did, in fact, say that you intended to 'double up,' payments on unpaid utility bills from Fall of 1998 through May of 1999. In order to avoid any confusion that might have arisen from my use of the term, by 'doubling up' I mean your statements during the meeting that you intended to pay off the most recent unpaid utility bills by, for example, paying in June, 1999, for the November and December 1998's utility bills and June's utility bill; and in July, 1999, by paying January and February, 1999's utility bills and July's utility bill, etc. You stated at the meeting that you would make these payments during the summer because of the enhanced revenue you would experience from increased occupancy. You also stated, incorrectly, that you could not be expected to make utility payments if your operations were not profitable. On this point, I remind you that your obligation to pay utility bills to the Government continues without regard to your reported profitability. In my July 13 letter, I requested your anticipated repayment plan for these recent utility bills which you have not yet provided. Please provide that to me by September 7, 1999.

(R4, tab 85)

141. Mr. Jensen replied to Ms. Newhart on 20 September 1999. He stated, in pertinent part:

This letter is a response to your recent inquiries regarding the payment of utility bills by The Inn at Schofield Barracks ("Inn"). Our communications with you in this regard were not with the intent of avoiding any obligations that may be due under the contract, but rather to ensure that any amounts assessed are based on a mutually agreed upon set of criteria. These criteria, of course, necessarily focus on the methods by

which utility usage is calculated and the conditions under which payment is made.

As you may recall, we have repeatedly raised questions with you and your predecessor (Ms. Wanda Shukay) regarding the computation of amounts billed for utility usage. We have disputed for several years now both the methods used by the Department of Public works ("DPW") to calculate utility usage as well as rates assessed. From the beginning, the cost determinations produced by DPW have been erratic and open to serious challenge, both technically and conceptually. These issues are, even at this moment, without satisfactory resolution.

We felt that, after three and [sic] half years, finally some forward progress would be made when, on June 25, 1999, we met with COL Totten, DPW Director, his subordinates, and LTC Ronald Heuer, USACFSC's attorney, regarding this utility bill dispute. At the end of the meeting, we proposed to meet with DPW representatives to resolve our differences regarding the way that amounts of usage and rates were calculated. COL Totten assured us that he would have his staff promptly put in writing and send to us their calculation and assessment methods. We agreed to exchange memos regarding our calculation methods, and then to sit down together and meet to discuss our differences and hopefully arrive at a mutually agreeable resolution of the issues.

Unfortunately, almost three months have now passed since our meeting with DPW, and we still have received no communications from DPW in this regard. Unless we receive information from DPW, we will have no basis upon which to engage in discussions regarding what differences we may have in our respective calculation methods. Recently, our attorney was contacted by Dean Perez, the Contracting Officer Representative ("COR"), who stated that DPW's methods and the Inn's methods should be sent to him, and that he would then determine what the differences are. Such an arrangement was not discussed and was certainly not part of any agreement reached during our June 25, 1999 meeting with

DPW, and we feel that it would be counter-productive to now involve Mr. Perez in this process.

Indeed, Mr. Perez has neither the capacity nor the authority to act as ombudsman in matters such as these. It would seem reasonable and, from our point of view, necessary, to have the technicians and engineers from DPW and from the Inn to get together and resolve the technical issues regarding utility usage and rate applications. Only in this fashion can we anticipate some mutually acceptable resolution of this issue. As a point of interest, we would envision such a meeting as involving a fairly small number of people, ideally endowed with judgement [sic] and decision-making authority. The meetings we've had in the past have often included an astonishing number of DPW staffers, an arrangement that has proven unwieldy and even counterproductive.

In any case, if DPW is unable or unwilling to provide the requested information. [sic] The amount of the past utilities can only be settled in the amount of \$185,109.06 (of which we have already paid \$110,000). This figure is per Colonel Dennis Fontana's letter dated June 7, 1996. This amount, as their records show, reflects meter readings that match our meter readings; and is really the only figure verifiable by DPW's records. As you know, our contract call [sic] for payment only upon verification of amounts of utilities used. Based upon the history of past inaccuracies by DPW, we are certain that you understand our concern and reluctance to accept DPW's figures without challenge.

Information provided to you regarding our meeting with DPW on June 25, 1999 is inaccurate in that we never agreed to "double up" on utility payments. The term "double up" was an expression first uttered by COL Totten, as he made a broad, sweeping, and mostly inaccurate generalizations [sic] about the Inn's ability to make payments. We never agreed to that form of payment. Rather, we stated nothing more than our willingness to pay for utilities based upon our financial ability, which was based directly upon our level of occupancy and our average daily room rate.

(R4, 1st Supp., tab 111)

142. Ms. Newhart replied to Mr. Jensen in a letter of 8 October 1999. She wrote as follows:

Your letter of September 20, 1999 regarding payment of utility bills (electricity, water and sewage) under Contract NAFBA3-93-C-0001 does not address a plan for paying your overdue utility bills.

I am concerned that The Minesen Company has not made progress toward payment of the substantial sum owed to the U.S. Government for utilities during the periods June 1994 through September 1996 and August 1998 through present. The Minesen Company's failure to pay these bills is a material breach of Section 1, paragraph 24 of the contract.

For the past month, 25th Infantry Division (Light) and U.S. Army Hawaii (USARHAW), and U.S. Army Pacific (USARPAC) attorneys have worked with the U.S. Army Garrison, Hawaii (USAG-HI) Directorate of Public Works (DPW) staff to review all utility bills presented to Inn at Schofield Barracks to verify their accuracy. From October 5 through today, Mr. Joseph Zocchi, U.S. Army Community and Family Support Center (USACFSC) contract attorney and I have also reviewed every aspect of those bills.

Based on this detailed review, DPW has recalculated the total balance due for all accounting periods. In conjunction with this letter, the Defense Finance and Accounting Service (DFAS) will provide you a written invoice for the total amount due. Per the invoice, full payment of the bill is due by 15 October 1999. If you desire, Mr. Dean Perez, the Contracting Officer's Representative (COR), will coordinate a meeting between the Minesen Company and the DPW staff to review the underlying documents to the invoice. Should you dispute this invoice, under the terms of the contract you must pay the invoice in full, then submit a claim to me under the "Disputes" clause of the contract. I would also like to emphasize that you are responsible for paying all future utility bills in full and on time.

Should you not pay this invoice in full by 15 October 1999, I will issue you a cure notice for this breach of Section 1, paragraph 24 of the contract. Per the "Termination for Default" clause of the contract, you will then have 60 days to pay the invoice in full to the satisfaction of DPW, or I will terminate the contract for default.

Mr. Jensen, I do not wish to terminate this contract for default, but I must take action to facilitate the collection of this substantial sum owed the U.S. Government. Should you have any questions regarding this letter, please feel free to call me at (703) 681-5303.

(R4, 2nd Supp., tab 106)

143. On 7 October 1999, Ms. Lynette Oh, Chief of DFAS's Financial Management Division, forwarded an invoice for Minesen's past due utility payments to DFAS's Chief in an amount of \$669,745.66 (R4, 3rd Supp., tab 597). On 8 October 1999 at 0900 hrs, Messrs. Zocchi and Perez of the Fund, as well as Mr. Jim Suster of DFAS, presented the invoice to Mr. Jensen at the Inn (R4, 3rd Supp., tab 599).

144. Ms. Newhart forwarded a copy of her letter of 8 October 1999 to Mr. Harold Goldstein, Hancock's senior investment officer (R4, 2nd Supp., tab 106). On 11 October 1999, Dr. Neville sent a memorandum to Mr. Goldstein in which she wrote, in part:

This letter is the notice required under terms of our Note Purchase Agreement with your company of an Event of Default. You were also notified of this Event by a letter from the Nonappropriated Fund Contracting Directorate, U.S. Army Community and Family Support Center, dated October 8, 1999, a copy of the notice given to us.

The matter causing declaration of a default is an unpaid bill from the Department of Public works at Schofield Barracks, about which we have been negotiating with NAF Contracting for three and a half years. The matter had its genesis in the failure of DPW to bill for utility service for a year and a half after the Inn opened for operation. The first bills were very high and obviously incorrect. After our complaint and a delay of months, it was determined by DPW that the electric meters were running backward. We have not yet been able to

understand how that could have been the case and be undetected by meter readers. Apparently the bills were "estimated" despite a contractual requirement that the bills be "verifiable." The rates also seemed excessive by all standards we were able to identify. Also, electric usage seemed to be totally (and illogically) unaffected by occupancy at the Inn. Eventually a set of bills was produced that seemed to be "only" about \$100,000 too high.

Our potential liability in this dispute has been carried on our financial statements for over a year in the amount of \$390,000 plus monthly accrual from August 1998 to date, currently \$253,000. We have made several offers to resolve the dispute. At one time agreement was reached between our company and USACFSC representatives that it would be fair and reasonable to add a \$1 charge per day to the room rate as a way to raise the necessary funds. This was based on the fact that the cost of utilities was not budgeted (because of DPW's failure to bill) and therefore not included in the room rate which contractually is required to be sufficient to cover reasonable operating expenses, both previous and forecast. (Learning that other military installations on Oahu do not bill private companies on their bases for utilities, and because DPW returned our utility deposit, we concluded they were not going to bill and we did not need to budget for the item.) However, the Commanding General at USACFSC refused to let the \$1 per day be added to the room rate. Later we accepted a negotiated \$100,000 reduction in the bill and a plan to pay the bill on a monthly basis at a rate based on occupancy. This offer was accepted by the Contracting Officer in a memo, but the necessary formal paperwork was never executed because after reaching agreement, USACFSC demanded we also modify unrelated sections of our contract, which we refused to do. We have made payments of \$110,000 toward the amount of the bill for service from June 1994 through September 1996.

Beginning August 1998 DPW once again ceased billing. We made repeated calls to no avail trying to obtain a bill. All bills after September 1996 had been paid promptly. In January 1999 Mr. Pete Isaacs told us that the plan was to stop

billing for utility services from August 1998 on. However, in May 1999 the Contracting Officer told us that she had been unable to get approval of that plan Mr. Isaacs had treated as a fait accompli. In June 1999 we met with DPW and USACFSC representatives trying to reach agreement on the correct amount of the bill. The meeting concluded with a promise that DPW would soon furnish us the backup documentation on the methodology they had used to estimate the bills during the months they failed to read the meter. That has not been furnished to this date.

We are currently uncertain how to proceed. A meeting was scheduled to be held with our Contracting Officer at the Inn last week, but although we stood by for three days she did not appear or cancel the meeting, instead having this rather peremptory letter with an extremely short time line delivered to us.

(R4, 2nd Supp., tab 107)

145. Minesen did not pay the invoice for past utilities. Accordingly, on 19 October 1999, Ms. Newhart forwarded the following letter to Mr. Jensen:

You are hereby notified that the U.S. Army Community and Family Support Center (hereinafter referred to as "the Fund") considers your failure to pay the substantial sum owed to the U.S. Government for utilities, as reflected in the Defense Finance and Accounting Service's Statement of Account dated October 7, 1999, a condition that constitutes a material breach of section I, paragraph 24, of contract NAFBA3-93-C-0001, and an event warranting a termination for default pursuant to its terms. Therefore, in accordance with section II, paragraph 7, of the contract, unless The Minesen Company cures this condition within 60 days after receipt hereof, this Termination for Default shall become effective.

Because the Fund plans to assume operation of the Inn at Schofield Barracks (ISB) in the event of termination of the contract for default, under section I, paragraph 40, of the contract, "Examination of Records," I am preparing to visit

ISB during the week of November 8, 1999, to examine records I deem pertinent to the transition from The Minesen Company to the Fund. I would appreciate it if you and Ms. Barney would be available during this time to assist me.

Mr. Jensen, I would like to state once again that I do not wish to terminate this contract for default, but will have no choice should The Minesen Company fail to cure its nonpayment of the outstanding utility bill. If you have any questions regarding this notice or the process to follow, please feel free to call me at (703) 681-5303.

(R4, 1st Supp., tab 118)

146. On 22 October 1999, Mr. Lester Goo, Minesen's attorney, forwarded a letter to Ms. Newhart in which he wrote, in part:

We ask that, in accordance with your above-referenced letter of October 8, 1999, you provide to the Inn all written documentation in support of the amounts which you claim are owed for utility usage. This written information should include data necessary for our verification, including actual meter readings, notes taken regarding operation of the meters which were used, cost rates used, and methods by which cost rates were applied.

We ask that you provide all such written information to the Inn not later than Wednesday, October 27, 1999. We understand that you and one of your attorneys were here approximately two weeks ago to review this same information, and therefore it should be readily available and retrievable. As Mr. Dean Perez works in the local area, it should prove no great difficulty for him to deliver all such documents to the Inn by the requested time.

(R4, 1st Supp., tab 119)

147. On 29 October 1999, Ms. Newhart responded to Mr. Goo's inquiry in a letter to Mr. Jensen. She stated, in part:

In your letter of October 22, 1999, you requested written documentation in support of the amounts listed in the utility bill. To clarify your request, I assume you mean the outstanding amounts due for utilities as reflected in the Defense Finance and Accounting Service's Statement of Account, dated October 7, 1999. I understand from my Contracting Officer's Representative, Mr. Dean Perez, that during a meeting with him on October 22, 1999 you took advantage of our offer to have Mr. Perez set up a meeting between you and the Directorate of Public Works for a review and explanation of all billed utility charges. According to Mr. Perez, that meeting took place on Thursday, October 27, 1999 and Mr. Perez provided you with the documents requested in your letter.

(R4, tab 88)

148. COL Howard O. McGillin, Jr., who participated in the meeting of 22 October 1999, as a representative of the Fund, testified about the meeting as follows:

And so Dean Perez and I met with Mr. Jensen, with Mr. Miller, and with Lester Goo, their local attorney, over at the, at the inn in one of their meeting rooms, went through a pretty detailed explanation for about two hours of what we had uncovered and discovered in the process, to try to assure them that we had come up with the rates, as we finally determined them, that were correct.

Dean also presented some additional work that he and the Contracting Officer had done, because they didn't use all of our, all of our data because of the uncertainty that we had about those first two time periods. They had a different calculation that they made, that Dean presented. I was not, I didn't brief that part of the, the discussion.

(Tr. 8/1859)

149. On 2 November 1999, Ms. Newhart wrote to Mr. Jensen, in part, as follows:

I would like to stress once again that I do not wish to terminate contract NAFBA3-93-C-0001 for default. However, absent Minesen's compliance with its contractual obligation to pay utility costs, its contract will be terminated for default on December 20, 1999. The U.S. Army Community and Family Support Center (CFSC) is presently making contingency plans for this eventually.

(R4, 1st Supp., tab 121). Mr. Jensen did not respond to this letter (tr. 17/3493-94).

150. On 1 December 1999, the Fund's attorneys received a "global settlement" offer from Minesen regarding the unpaid utility bills. In a memorandum to LTG Smith, the Commanding General of U.S. Army, Pacific, Mr. Isaacs described the offer as "the same repayment schedule we negotiated and agreed to in Oct. 98." (R4, 6th Supp., tab 37)

151. Ms. Newhart did not accept Minesen's settlement offer (R4, 1st Supp., tab 123). On 15 December 1999, Mr. Jensen forwarded a letter to Ms. Newhart, accompanied by two receipts signed by DFAS. He wrote, in part:

Attached is your copy of a signed receipt for the delivery funds to James A. Sustar, Chief, Accounting Operations, DFAS. This payment of \$669,745.66 satisfies the demands of your Termination for Default notification. This accomplished, it is now our demand that Termination for Default be immediately vacated and all actions associated with the alleged default be immediately stopped.

(R4, 1st Supp., tab 124)

152. The Fund accepted Minesen's payment. As part of this transaction, DFAS waived interest and penalty charges in an amount of approximately \$110,000 (tr. 8/1800).

153. On 18 February 2000, Minesen filed a certified claim which contained four subclaims. It summarized the claim as follows:

The first claim is a claim in the amount of \$25,506,325 based upon the Army's breach of contract for misrepresentation of a material fact regarding projected troop strength at Schofield

Barracks. The second claim is a claim in the amount of \$25,506,325 for the Army's breach of contract through the bad faith administration of the contract. The third claim is a claim in the amount of \$1,440,681.50, less amounts previously recovered in room rates, for breach of contract for the improper Army recovery of utilities costs. The fourth claim is a claim in the amount of \$592,207.75 for the Army's continuing breach of Contract from June 1999 through January 2000.

(Ex. A-88 at 1-2)

154. In a final decision issued on 24 May 2000, the CO denied Minesen's claim in its entirety (R4, 3rd Supp., tab 389). This appeal followed and was docketed by the Board's recorder as ASBCA No. 52811. The Board subsequently consolidated the two appeals, with ASBCA No. 52488 being the lead appeal file.

DECISION

INTRODUCTION

The parties have filed post-hearing briefs encompassing 1,340 pages, not counting voluminous enclosures. Based upon the sheer volume of these presentations and the numerous arguments and counter-arguments contained therein, it would appear obvious that the Board cannot accord equal weight to every allegation made by each party. Accordingly, the Board has evaluated the parties' various arguments in an attempt thoroughly to address those contentions which it concludes are both salient and dispositive.

Minesen's complaints encompass 12 counts. Five of the counts are contained in the complaint for ASBCA No. 52488; and seven of the counts appear in the complaint for ASBCA No. 52811. In Count I, Minesen alleges that the Fund breached the contract by not requiring that "all Army travelers patronize the Inn on a mandatory basis" (complaint, ¶ 78). We sustain Count I in part as set forth below and deny it in all other respects. In Count II, Minesen argues that the Fund constructively terminated the contract for convenience. There is no record evidence supporting this conclusion. Therefore, the Board denies Count II. In Count III, Minesen contended that the Fund "substantially deactivated" Schofield Barracks as that phrase is defined in the contract's Termination for Convenience clause. Minesen has abandoned this claim, and the Board denies Count III as moot (app. br. at 44). Through Count IV of its complaint, Minesen argues that changes in the JTFR constituted a cardinal change and, consequently, a breach of contract. To the

extent that we have sustained in part Counts I and VI and hold below that the Fund breached the contract, Count IV is denied as duplicative. In Count V, Minesen argues that the Fund anticipatorily repudiated the contract. As held below, the Board denies Count V in its entirety.²⁰ In Count VI, Minesen essentially repeats the allegations contained in Count I. We sustain Count VI, in part, as set forth below, and deny it in all other respects. Through Count VII, Minesen argues, once again, that the Fund breached the contract by substantially deactivating Schofield Barracks. Minesen has abandoned this claim, and the Board denies it as moot (app. br. at 44). In Count VIII, Minesen contends that the Fund breached the contract by not disclosing superior knowledge. As held below, we deny this count in its entirety. Through Count IX, Minesen argues that the Fund administered the contract in bad faith. Minesen has abandoned this claim, and we deny it as moot (app. br. at 44). In Count X, Minesen contends that the Fund breached the contract by not complying with its duty to cooperate. As held below, we deny this claim in its entirety. Through Counts XI and XII, Minesen argues that the Fund breached the contract as a result of its conduct regarding payment of utility bills. As held below, the Board denies these claims in their entirety.

ISSUES OF CONTRACTUAL INTERPRETATION

One of Minesen's principal arguments is that the contract (finding 38) mandated that all official travellers to Schofield Barracks, as well as all unaccommodated travellers to Fort Shafter and Tripler Army Medical Center, were required to stay at the Inn if space was available (app. br. at 30). The Board notes initially that Minesen's position on this issue has migrated considerably during contract performance. For example, on 24 January 1997, Dr. Neville, one of Minesen's principals, stated: "Our position is clear and consistent: The contract requires that all Army travellers to Oahu be referred to the Inn" (finding 71). Yet, in its post-hearing brief, Minesen contended that this requirement extended to Schofield travellers, as well as unaccommodated travellers to Shafter and Tripler (app. br. at 30).

There are other problems with Minesen's argument. Specifically, it alleges that the feasibility study authored by HVSI in 1987 substantiates this purported contract

²⁰ In its first complaint, Minesen contends that the Board should order all travellers to Oahu to patronize the Inn. Assuming we have such power, because, as held below, we reject Minesen's interpretation of the contract in this regard, we deny this request. Minesen also contends that if we do not order the Fund to require all travellers to Oahu to patronize the Inn, we should terminate the contract for convenience. Because we disagree with Minesen's interpretation of the contract, we also deny this request. Under the circumstances, any decision to terminate the contract for convenience is within the contracting officer's discretion.

requirement that all Army travellers to Central Oahu had either to stay at the Inn or to forfeit the lodging portion of their per diem if space at the Inn was available (app. br. at 6-7). The study stated no such requirement. It simply described a marketing area which included not only the military installations located in central Oahu but also other installations “located along the southern south central portion of the island, such as Pearl Harbor Naval Base and Hickham Air Force Base” (finding 3). Moreover, the study recognized that the “majority of personnel on duty for the Army requiring transient lodging facilities utilize the guest houses situated on their assigned installation” (finding 5). Hence, it contemplated that most travellers to Shafter and Tripler would stay at their respective guest houses.

Even if the feasibility study had somehow stated such a requirement, Minesen cannot demonstrate reliance. In its proposal, Minesen estimated that it would capture 90% of unaccommodated PCS and TDY travelers to Schofield Barracks. But it also estimated that it would capture only 50% of unaccommodated PCS travellers and only 45% of unaccommodated TDY travellers to Fort Shafter. In addition, Minesen estimated that it would capture only 75% of unaccommodated PCS travellers and only 70% of unaccommodated TDY travellers to Tripler Army Medical Center (finding 13). If Minesen had relied on the feasibility study as requiring that all unaccommodated Shafter and Tripler travellers had to stay at the Inn, it would logically have estimated similar, elevated capture percentages for all three installations. It did not do so. Therefore, the Board must reject Minesen’s argument that the study created such a requirement.

There is an even more serious problem with Minesen’s contentions in this regard. In order to prevail, it must persuade the Board that its interpretation that the contract required all unaccommodated travellers to Tripler and Shafter to stay at the Inn was contemporaneous with the execution of the contract. *Coastal Dry Dock & Repair Corp.*, ASBCA No. 31894, 87-1 BCA ¶ 19,618 at 99,237. It cannot do so. Through several documents which it either authored or reviewed during that time period, Minesen interpreted the contract as requiring only PCS and TDY travellers to Schofield to stay at the Inn if space were available. It specifically stated that travellers to Tripler were eligible – but not required – to stay at the Inn (findings 17, 30, and 31). Hence, it is clear that at the time when it executed the contract, Minesen did not interpret the contract as it later did during “the heat of dispute.” *Honeywell, Inc.*, ASBCA No. 25556, 83-2 BCA ¶ 16,551 at 82,325.

Finally, in construing the intent of contractual language, we must interpret a contract in its entirety. *Julius Goldman’s Egg City v. United States*, 697 F.2d 1051, 1057-58 (Fed. Cir. 1983). As part of their contractual responsibilities, the parties – as well as “the Installation Commander or his designee” – were required to file an “Operating Agreement” (finding 45). As executed on 17 March 1994, this instrument

was designated a Memorandum of Agreement (MoA). It was signed by the Schofield Commander, the Fund's parent organization, and Minesen. The MoA, *inter alia*, required the Schofield Commander to "[r]efer all Schofield Barracks official travellers to the Inn at Schofield Barracks for assignment of quarters." The MoA was silent regarding official travellers to other military installations on Oahu. In addition, there is no record evidence demonstrating that similar MoAs were executed with respect to either Tripler or Shafter (finding 52). In sum, the Board must reject Minesen's contention that Clause 7 of the contract required unaccommodated travellers to Shafter or Tripler to stay at the Inn if space was available.

The Fund did not breach the contract by failing to disclose superior knowledge regarding the contents of GAO and AAA audit reports which criticized the Army's transient lodging policies (findings 23, 26, 27). The gravamen of Minesen's argument is that these reports "concluded that the Army had been unable to require the use of government quarters because of inadequate policies, procedures and practices" (app. br. at 32). Minesen seriously overstates the reports' conclusions. The final GAO report merely asserted that "transient personnel were sometimes granted the higher off-base per diem when lodgings set aside for their use were available." Moreover, years before the Minesen contract was executed, the Secretary of the Army promised to "establish controls to ensure that installations fully use on-base facilities" (finding 26). There is nothing here that could have presaged problems which ultimately developed with respect to the Minesen contract. Likewise, the problems encountered at Fort Bliss and Fort Drum which were discussed in the AAA report resulted from the fact that these facilities were not defined as "government quarters" (finding 27). The Fund remedied this potential pitfall by identifying the TLF as government quarters in the contract (finding 38). Minesen's contentions in this regard are, thus, unavailing.

We also reject Minesen's argument that by acquiescing in the changes to the JFTR in 1997 and 1998 which allowed official travellers to receive a modified portion of their lodging *per diem* even if government quarters were available, the Fund repudiated the contract effective 1 July 1998 (app. br. at 35-38, 479-499). As our appellate court stated in *Dow Chemical Co. v. United States*, 226 F.3d 1334, 1344 (Fed. Cir. 2000), "[r]epudiation occurs when one party refuses to perform and communicates that refusal distinctly and unqualifiedly to the other party." There is no persuasive evidence in this record to support such a stark conclusion. But our analysis does not end here. Clause 7 of the contract provided, in part: "Travellers receiving government per diem payment, in order not to forfeit their per diem entitlement, will be required to patronize the TLF on a mandatory basis . . ." (finding 38). Reading the contract as a whole, this sentence constituted the core of Minesen's benefit of the bargain. The Inn was located on a secure military installation and was not open to the general public. In order to capture a market for its services, Minesen had to rely on an incentive to encourage official travellers to stay

at the Inn. This device was the mandatory forfeiture provision of Clause 7. In acquiescing to the 1997 and 1998 changes in the JTFR which removed this mandatory forfeiture provision, the Fund affected a basic alteration in the parties' contractual relationship. In order to restore that balance, the Fund was required to fashion a contractual remedy which could range from a reimbursement scheme to a termination for convenience. It failed to do so and, thus, breached the contract, entitling Minesen to recover damages.²¹

ISSUES OF CONTRACTUAL ADMINISTRATION

The Board rejects Minesen's argument that the Fund either repudiated or breached the contract by demanding, under threat of a termination for default, \$669,745.66 in unpaid utilities (app. br. at 501-512). Initially, we hold that the contract squarely placed on Minesen the responsibility "for hookup of all utility lines" and for payment of utility bills (findings 46, 52, 91). Further, as ultimately modified, the "Termination for Default" clause gave the Fund "the unilateral right to terminate this contract for default in the event the Contractor violates any of the terms or conditions of this contract or the lease at any time during the life of this Contract" (finding 59).

Initially, the Board notes that it was Minesen's obligation to hook up the electric meter properly and that its failure to do so impacted negatively upon the billing process for the utilities (finding 92). Further, we disagree with Minesen's allegation that it did not receive a utility bill until December 1995, a year and a half after the Inn opened (app. br. at 502). Record evidence demonstrates that DFAS forwarded utility bills to Minesen's proper address as early as 2 June 1995 and that Minesen did not pay these bills, and, instead simply ignored them (findings 93-97).

Ignoring the bills which had been forwarded to him, as well as the contract's clear requirements, Mr. Jensen wrote to DFAS on 5 January 1996 that he had not received a utility bill "of any kind" for 18 months and assumed that he was being given free utilities (finding 99). Matters remained unchanged in June 1996 when COL Fontana of DPW informed the Fund that Minesen had not paid any utility bills up to that point (finding 101). Even as of November 1996, when COL Fontana wrote directly to Mr. Jensen, the utility bills remained unpaid (finding 102). Minesen did commence paying current utility bills in March 1997, but the earlier bills remained unpaid (finding 105). Despite the fact that these bills remained unpaid, Ms. Shukay in June 1997 refrained from terminating the contract for default and undertook to resolve the problem amicably (finding 112).

²¹ The Fund's breach in this regard occurred as of 1 November 1997 with respect to TDY travellers and as of 1 July 1998 regarding PCS travellers (findings 78, 79).

The parties exchanged a number of proposals and counter-proposals on the utilities issue (findings 111-14, 116-27). On 7 August 1998, Ms. Shukay accepted Minesen's proposal for repayment of the utility bills, but somehow this did not resolve the dispute even though Mr. Jensen later confirmed that the parties had reached agreement (findings 128, 129).

In fact, in a letter dated 31 December 1998, some three years after the dispute had gained traction, Mr. Jensen reopened the issue. He concluded that the parties' "current agreement contradicts [the] contract" (finding 132). On 12 March 1999, Ms. Newhart, the successor CO, restated the parties' agreement and forwarded to Mr. Jensen a bilateral modification. Mr. Jensen refused to sign the modification, and the parties were again at loggerheads (findings 133, 134).

The situation deteriorated in the summer of 1999 despite the fact that the parties had clearly reached agreement on this issue a year earlier.²² Their agreement notwithstanding, Ms. Newhart had DPW recalculate "the total balance due for all accounting periods" and presented a revised invoice to Minesen (finding 142). On 8 October 1999, the invoice was presented to Mr. Jensen at the Inn (finding 143). Although Minesen did not dispute any specific amounts, the Fund provided further written documentation to Minesen in a meeting held on 27 October 1999 (finding 147). Only after the CO threatened default did Minesen respond with a "global settlement" offer that tracked the parties' 1998 agreement (finding 150). Ms. Newhart did not accept this offer, and Minesen finally made payment in the full amount (findings 151, 152).

Based upon this record evidence, the Board must hold that the CO did not abuse her discretion or breach the contract by threatening a default. After several years of effort, the parties reached agreement on this issue in 1998. Thereafter, Minesen reneged on the agreement and refused to make payment. It, therefore, gave the CO no choice but to enforce the terms and conditions of the contract.

Finally, the Board rejects Minesen's contentions that the Fund breached its implied contractual duty to cooperate with Minesen. We note at the outset that many of Minesen's allegations relate to the Fund's purported failure to require unaccommodated travellers to Shafter and Tripler to stay at the Inn (app. br. at 517-533). Because the contract contained no such requirement, these contentions are irrelevant. Moreover, in its administration of the contract, the Fund made great efforts to cooperate with Minesen. It altered the contract's reservation policy, as Minesen had requested (findings 62, 63). The

²² The Board rejects Minesen's contention that the parties never reached agreement on the unpaid utilities issue (app. br. at 504). Clearly, they did so in August 1998 (findings 128, 129).

Fund also honored Minesen's requests for room rate increases on several occasions (findings 64, 76). In addition, the Fund complied with its debt service commitment and also extended the debt service commitment (finding 65). Moreover, the Fund was instrumental in having an LSP message added to the Army's Central Reservation System even though, technically, the Inn did not qualify for inclusion in the program (findings 74, 75). Thus, an objective reading of the record demonstrates that the Fund did fulfill its implied contractual duty to cooperate with Minesen.

CONCLUSION

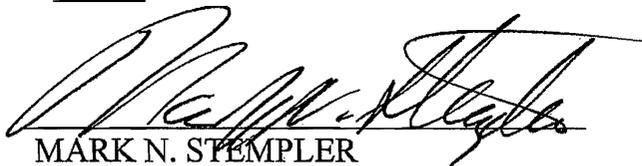
The appeals are sustained in accordance with this decision and are denied in all other respects. The appeals are remanded to the parties for a determination of quantum.

Dated: 20 November 2006



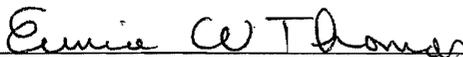
MICHAEL T. PAUL
Administrative Judge
Armed Services Board
of Contract Appeals

I concur



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

I concur



EUNICE W. THOMAS
Administrative Judge
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 Nos. 52488, 52811, Appeals of The Minesen Company, rendered in conformance with the Board's Charter.

Dated:

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