

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeal of --)
)
SUFU Network Services, Inc.) ASBCA No. 54503
)
Under Contract No. F41999-96-D-0057)

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OPINION BY ADMINISTRATIVE JUDGE JAMES

This appeal arises from the contracting officer's (CO) 15 January 2004 final decision that denied three interpretations of the captioned contract's terms and conditions stated in the contractor's 14 November 2003 letter. The Board has jurisdiction of this appeal under the Disputes clause of the captioned non-appropriated fund instrumentality (NAFI) contract. In *SUFU Network Services, Inc.*, ASBCA No. 54503, 04-1 BCA ¶ 32,606, we denied respondent's "Motion to Dismiss for Lack of Jurisdiction," and held that "it is appropriate for the Board to render declaratory relief in this appeal" to decide the contract interpretation issues stated in the contractor's 14 November 2003 letter. After a four-day hearing, the parties submitted post-hearing briefs.

FINDINGS OF FACT

1. Based on Request for Proposals (RFP) No. F41999-96-R-0022, as amended on 7 March 1996, the "AFNAF Purchasing Office" (AFNAFPO) on 26 April 1996 awarded Contract No. F41999-96-D-0057 (the contract) to USFI Network Services, Inc.¹ to install and operate a Lodging Facility Telecommunications System (LFTS) at designated guest

¹ USFI's name was changed to "SUFU Network Services, Inc." in March 2001 (R4, tab 10). For convenience, we refer to the contractor as "SUFU."

lodgings at European Air Force (USAFE) bases for 10 years (R4, tab 1 at A-1, F-4, tab 1b at C-22, C-24 ¶ 6.1).

2. Pages C-1 to C-22 of contract § C derived from the RFP; pages C-23 to C-43 derived from SUFI’s final proposal (SP) (tr. 1/47, 173). Mr. Carl Stephens, principal drafter of SUFI’s proposal, understood that the SUFI proposal provisions “superseded” or “controlled” the RFP provisions of the same paragraph number. The contract did not state that SUFI’s proposal provisions “superseded” or “controlled” the RFP provisions, nor does the record show that Mr. Stephens communicated his foregoing understanding to the Air Force before contract award. (Tr. 1/166, 189-93)

3. Pertinent contract provisions are excerpted below. The derivation of provisions in § C is shown by prefixes RFP or SP.

SECTION A The replacement changes and deletions listed below incorporate all of the amendments to the original solicitation. . . .

1. Incorporate Section B submitted by USFI, Inc., paragraphs 5.1 through 5.7, Pages B-1 through B-8.
2. Incorporate Section C submitted by USFI, Inc., Pages C-1 through C-43.

. . . .

SECTION B SUPPLIES OR SERVICES AND PRICES/COSTS

. . . .

5.2 A schedule for the **Government** percentage of long distance revenues follows. . . . These figures represent revenue derived only from long distance [calls] and do not include potential revenue the **Government** will realize from the sale of debit cards. . . .

. . . .

5.4.1 **USFI**[’s] . . . [l]ong distance per/minute prices for calls originating in the lodging facility and terminating in the United States are guaranteed for the first year. [**USFI**] . . . will negotiate rate changes in excess of the US Consumer Price Index with the [CO] and the [CO’s] Technical Representative [COTR] at any time after the first year. . . .

5.4.2 Following is the guaranteed first year pricing for long distance traffic originating in the designated location . . . :

Ramstein:	\$0.99 per minute
Rhein-Main	\$0.99 per minute
Aviano	\$0.99 per minute

....

5.5 **USFI** . . . will provide interfaces to the host commercial network and to the Government DSN system as an additional service to lodging guests. The response to question #74 in the Questions and Answers document issued by the [CO] on 7 Mar 96 states that *“the only charge to the guest will be the negotiated long distance User Fee of which a percentage shall be paid to the government.”* This statement is appropriate for a facility located within the US, but clearly does not reflect the cost of making a local call in European countries. **USFI** . . . will, therefore, levy the following fees as a means of recovering these costs:

5.5.1 Local calls to host nation telephone system: \$.50 for the initial connection and first meter pulse, \$.30 for each additional meter pulse.

~~5.5.2 DSN Network Calls: \$.25 each~~ DELETED

....

[RFP] SECTION C STATEMENT OF WORK . . .

....

[RFP] 3.1.6 Trunking. The contractor shall provide trunking . . . to and from the local exchange service, interconnect toll service, and USAFE base/location DCO/DSN. . . .

[SP] 3.1.6 . . . The nomenclature used in the SOW . . . is unique to the post divestiture US operating norm of using Regional Bell Operating Companies for local service, and Inter Exchange Carriers (AT&T, MCI, US Sprint, etc.) for long distance. Trunking for lodging facilities will be to the host

commercial network, to the **Government** DSN system, and to the **USFI** long distance network. . . . **USFI** will . . . connect circuits through the local commercial telephone service so that lodging guests can directly call the immediate area surrounding the military installation through the host nation telephone system. . . .

. . . .

[RFP] 3.2.2 Dialing Plan. The Dialing Plan for the switching system shall utilize the NNX codes assigned by the local Telephone Company (TELCO). . . . Numbering shall be approved by the Lodging Facility Manager (LFM) and not in conflict with any computer management system already in place. Trunk access codes and feature operating codes shall be established by the contractor, with final approval by the government. For example:

<u>Dial Code</u>	<u>Usage</u>
0	Lodging Attendant
1 through 6	Station Number
7	Base DCO
8	Other Common Carriers
* 90	Commercial Operators
91	Commercial DDD
91-800	Commercial Toll free

* Access to off base operator assisted calls shall be restricted to lodging attendant.

[SP] 3.2.2 . . . Dialing plan in SOW reflects the US operating environment (toll free 800). **USFI** will propose . . . a standardized dialing plan appropriate to the host nation operating environment with USAFE representatives during post-award site survey so that all future lodging switches will use the same standardized dialing scheme.

. . . .

[RFP] 3.4.1.3 Full Access. The attendant console shall have full access to all main lines and trunks in the system with the ability to complete station-to-station, station-to-trunk, trunk-to-station, and trunk-to-trunk calls.

[SP] 3.4.1.3 The attendant console will have full access to all main lines and trunks in the system, and will be capable of completing station-to-station, station-to-trunk, and trunk-to-trunk calls providing there is a clear means of allocating any applicable toll charges. No arbitrary system restrictions will be made. **USFI** . . . will work with the COTR to ensure all parties are fully protected from fraud and abuse.

. . . .

[RFP] 3.4.2.3 Call Transfer. The attendant shall be able to transfer trunk calls to and from any station

[SP] 3.4.2.3 . . . feature may be blocked by **USFI** due to toll considerations.

. . . .

[SP] 3.3.4 USFI Debit Cards for over the counter sales at the lodging facilities reception desks . . . can be used in any card phone for calls to any destination in the world. Long distance charges are subtracted from the card balance as the cards are used. **USFI** offers the Government 15 percent of any revenues from Debit Card sales. . . . This option will be declined at the present time by the Government, however, the Government reserves the right to implement this at a later date.

. . . .

[RFP] 3.11 Expanded Service. The contractor shall provide expanded services after cut over in accordance with the terms of the contract as requested by the government. Expanded services are those services necessary to satisfy additional requirements over and above those provided at cut over.

[SP] 3.11 ~~USFI requests clarification of this item.~~ . . . Expanded service is defined as additional services or features required to support the lodging mission (i.e., addition of new buildings, rooms, and lodging offices).

. . . .

[SP] 4.1 . . . The USFI telecommunications system at each location will include the following:

. . . .

[SP] 4.1.2 All facilities necessary to connect lodging facility guests to the USFI long distance network.

[SP] 4.1.3 All facilities necessary . . . for connecting lodging facility guests to the Government DSN private switching network . . . once adequate controls are developed with safeguards against fraud and toll skipping. . . .

[SP] 4.1.4 All facilities necessary to connect lodging facility guests to the local host nation commercial network.

. . . .

[SP] 4.4 Network Interfaces: USFI will provide the designated interface to each of the following systems:

[SP] 4.4.1 Host nation commercial network . . . Direct Inward and Outward dialing capability

[SP] 4.4.2 Defense Switched Network (DSN)

[SP] 4.4.3 USFI proprietary network.

. . . .

SECTION F DELIVERIES OR PERFORMANCES

. . . .

6. DELIVERY SITES: Upon contract award, delivery orders will be issued for Aviano Air Base, Italy, Rhein Main Air Base, Germany and Ramstein Air Base, Germany. Delivery orders may also be issued . . . for 9 other USAFE command bases [in Spain, Turkey, the UK and Spangdahlem, Germany].

(R4, tabs 1, 1b, 187; emphases, italics, and strikethroughs in original)

4. Contract § J specified, and SUFI's proposal included, 21 buildings for LFTS at three air bases:

<u>Air Base</u>	<u>Buildings</u>
Ramstein:	303, 304, 305, 306, 538, 540, 541, 542, 2408, 2409, 1018
Rhein Main:	600, 632, 633, 634
Aviano:	230, 232, 255, 256, 274, 275

(R4, tab 1, § J, attachments 4-6; ex. A-4, §§ 4, 6)

5. The contract (a) incorporated by reference the FAR 52.243-1 CHANGES-FIXED-PRICE (AUG 1987) clause and included a Disputes clause stating: "Except as otherwise provided in this contract, any dispute or claim concerning this contract which is not disposed of by agreement shall be decided by the [CO]," and pending the contractor's appeal and the ASBCA's decision thereon, "the Contractor shall proceed diligently with the performance of the contract and in accordance with the [CO's] decision" and (b) included in § I:

60. ORDERING (APR 1984).

a. Any supplies and services to be furnished under this contract shall be ordered by the issuance of delivery orders by the individuals or activities designated in the Schedule. . . .

....

61. DELIVERY ORDER LIMITATIONS (APR 1984).

a. Minimum Order: When the NAFI requires supplies or services covered by the contract in an amount of less than one system per base, the NAFI is not obligated to purchase, nor is the Contractor obligated to furnish, those supplies or services under the contract. . . .

....

62. INDEFINITE QUANTITY (APR 1984).

a. This is an indefinite quantity contract for the supplies or services specified . . . in the Schedule. The quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract.

b. Delivery or performance shall be made only as authorized by orders issued in accordance with the Ordering

clause. . . . The NAFI shall order at least the quantity of supplies or services designated in the schedule as the “minimum.”

(R4, tab 1 at I-1, -8, -10, -11)

6. SUFI’s proposal interpreted the RFP to offer the successful contractor “the exclusive right to transport long distance traffic and a percentage of any revenue derived from that traffic in exchange” (R4, tab 187 at 6, ¶ 1.1; tr. 1/41-42, 169-70). Contract § B incorporated a SUFI-proposed table of “Government Percentage of Revenue” whose incremental percentages corresponded to nightly long distance telephone call revenues from \$0 to \$100, \$101 to \$200, etc., for each of the 10 years of the contract term. There was a threshold (\$100 for all 10 years, and \$200 for years 1 through 3) beneath which the Air Force received no share; its share increased from 1% to 10% of revenues over the threshold. (R4, tab 1 at B-2) James Pearson, SUFI’s President, stated that SUFI based its proposal on the assumption that, once a delivery order (DO) was issued for an air base, the Air Force was required to order LFTS service from SUFI at any new facility or building or any additional rooms in a previously designated building at such base (tr. 1/94). SUFI’s 20 March 1996 final proposal did not state such an assumption (R4, tab 187).

7. AFNAFPO requested SUFI to clarify the term “adequate controls” in ¶ 4.1.3 of its SP. SUFI said, “‘adequate controls’ refer mainly to attendant-extended calls We intend to block any unauthorized network access which would result in un-recoverable toll charges, whether that access is from the DSN or the public network.” (Ex. A-6 at 5)

8. AFNAFPO answered offeror questions 28 and 29 regarding the RFP:

28. Question: How can the contractor redeem [sic] his investment if the subscribers communicate using 1-800 toll free numbers or by using the call-back service via an automated operator from the U.S.?

Answer: *The 1-800 option in Europe is currently not effective. The caller must still pay for the international connection via the long distance carrier.*

29. Question: How are calls to be accounted for when subscribers have access to DSN and toll-free skipping worldwide?

Answer: *DSN is “For Official Use Only” and long distance calls are booked through the DSN operator. Toll free*

numbers requiring long distance changes [sic] should incur the user fee for international connectivity.

(R4, tab 50 at 4-5; emphases in original)

9. On 1 May 1996 AFNAFPO issued DO Nos. 1, 2 and 3 respectively for LFTS at Ramstein, Rhein Main, and Aviano Air Bases including the 21 buildings specified in contract § J for such bases (R4, tabs 11 at 4, 12 at 3, 13 at 3-4).

10. The contract required SUFI to dig underground trenches, lay the necessary telephone cable throughout each air base, wire each lodging facility for telephone service, and provide telephone handsets in each guest room. SUFI constructed the foregoing telephone infrastructure at no cost to the Air Force (compl. & answer, ¶ 16), but incurred about \$4.8 million for such construction (R4, tab 211 at 1; tr. 1/92-93). The only compensation SUFI receives under the contract is paid by guests who place local or long distance telephone calls from lodging facilities, whose charges are collected by the Air Force and reimbursed to SUFI at the agreed share of the charge (compl. & answer, ¶ 7; R4, tab 1 at C-1, ¶¶ 1.1.1, 1.1.2).

11. At the late May or early June 1996 post-award conference, in reply to the Air Force question whether it would allow calling card access for lodging guests, SUFI said it would block such access. CO Janice Jones asked SUFI to consider allowing such access at some future time when the parties could agree on compensation. (Tr. 1/208-09, 3/298-99, 4/168-71)

12. On 3 June 1996 AFNAFPO issued DO No. 4 for LFTS at Landstuhl Air Base building Nos. 3751, 3752, 3753, 3754 and 3756 and Vogelweh Air Base building Nos. 1002, 1003, 1004, 2778, 2790 and 2794 (R4, tab 14).

13. SUFI's 27 March 1997 instructions to Ramstein lodging guests, in Contract Data Requirements List (CDRL) items A010 and -11, stated that they could not use a calling card "from another company" because there "is no agreement with other carriers to take and pay for traffic from these facilities"; they could not dial USA 1-800 numbers toll free, but would be charged \$.85 per minute for such call because of its transatlantic cost; and they could call 0130 toll free numbers in Germany without a charge, but could not "access the German toll free numbers to AT&T, Sprint and MCI." SUFI's data under CDRL items A010 and -11 did not require government approval. Wayne Sellers, the CO's Technical Representative (COTR), reviewed and expressed no objections to those instructions to the CO or to SUFI. (R4, tab 1 at H-5, J-2 at 3; ex. A-11 at 1084, 1269; tr. 1/197-201, 3/261-64)

14. After SUFI initiated LFTS service at Ramstein in January 1997, and thereafter at the other air bases, lodging guests began to use several practices, called "toll skipping," to

avoid paying toll charges for SUFI's long distance network. Such practices included exceeding the prescribed bi-monthly frequency and the 15-minute duration of so-called, toll-free, "morale" calls, and calling the lodging front desk operator, base operator, base information number, or DSN network operator, who then placed ("patched") long distance calls to the U.S. and other nations via an AT&T, MCI, Sprint, or other long distance carriers' calling card. (Ex. A-14 at 1; tr. 1/201-05, 2/43-45)

15. SUFI notified the CO of "toll skipping" and resulting loss of long distance revenues on 28 May 1997 (R4, tab 56; tr. 4/182); 15 June 1997 (ex. A-13 at 2; tr. 1/204); 25 June 1997 (R4, tab 191; tr. 1/205); 31 July 1997 (R4, tab 193), 8 August 1997 (R4, tab 195) and 8 March 1999 (R4, tab 177).

16. On 2 July 1997 CO Thomas Miller (R4, tab 1 at 1) told USAFE (and COs Jones and Cedric Henson) that AFNAFPO was prepared to negotiate with SUFI "additional services . . . [to] provide access to other long distance carriers and the use of pre-paid calling cards in exchange for certain limitations on DSN service and a minimal fee for 1-800 numbers to obtain access" (R4, tab 16; tr. 4/185-86).

17. When the Air Force declined to establish "adequate controls" of outgoing DSN calls by issuance of a "control number" for each guest call by the DSN switchboard operator, SUFI blocked guest access to the DSN operator and information numbers on or about 1 August 1997 (R4, tab 194 at 47, 49; tr. 1/205-06, 2/47).

18. In April 1998, on a test basis, SUFI allowed Vogelweh lodging guests to use AT&T, MCI and Sprint calling cards for long distance calls at a \$1.00 connection fee to SUFI, and calculated a \$785.70 or 79.5% revenue reduction (ex. A-24; tr. 1/65, 210).

19. On 27 May 1998 COTR Sellers proposed to the CO to modify the contract:

1. Clarify level of DSN service within Lodging guest rooms.

Add [¶] 3.1.5.1. DSN Service. The contractor shall provide DSN connectivity for in-room use. The level of DSN service shall be limited to base level. Base level includes DSN telephone prefixes within the base's immediate area Requirements shall be determined on a base by base basis during the site survey in accordance with the LFTS contract, page C-22, and [¶] 6.11.

Add [¶] 3.1.5.1.2. DV Suites. The DSN level of service for DV suites shall be at least equal to the service installed at the time of the site survey. The number of DV Suites will not exceed the percentage authorized by Air Force instructions.

Add [¶] 3.1.5.1.2 [sic]. Secure Communications Devices. Secure communications devices . . . will remain in DV Suites and directly connected to the in-room DSN line. These devices shall not be connected to the contractor's commercial telephone instrument.

2. Request for contractor proposal to provide Calling Card access. **Note:** Calling Card trial tests at Vogelweh Lodging found that as a minimum \$1.00 but not greater than \$1.50 connection fee adequately compensates the contractor. When an acceptable access fee is obtained from USFI, the contract needs to be changed as follows:

Add [¶] 3.4.1.3. Calling Cards. Contractor shall provide calling card access so Lodging guests may use personal commercial Calling Cards. [Emphasis in original.]

(R4, tab 20; tr. 1/210-11, 4/83-86)

20. Ms. Charlotte Guilmenot, contract specialist working with CO Jones, began to draft contract Modification No. 5 (Mod. 5) on 27 May 1998 (tr. 3/315, 4/136). Ms. Guilmenot's 3 June 1998 message to SUFI, copied to CO Jones, stated: "calling card access fee..... I need to mod the contract to address this fee and need to get a final fee from you. At one time we discussed \$1.00...is that still good?" (R4, tab 21). SUFI's 8 June 1998 message to the CO replied: "we ran a test on the calling card access at Vogelweh for a month. [SUFI] does not like the idea of opening up that access permanently because we recovered some \$80 in access fees versus over \$900 in lost calls Would you be amenable to the access, then charge the call as a local call?" (R4, tab 22).

21. On 10 July 1998 AFNAFPO issued DO No. 6 for LFTS in buildings 1, 2, 3 and 38 at Spangdahlem/Bitburg/Eifel West Air Bases (R4, tab 15 at 1).

22. On 17 July 1998 COTR Sellers received, without approving or objecting to, SUFI's telephoning instructions for lodging guests at Rhein Main, Vogelweh and Landstuhl Air Bases, which instructions were essentially the same as those provided in March 1997 for guests at Ramstein Air Base (ex. A-31).

23. The parties stipulated that AFNAFPO issued a DO for LFTS at Sembach Air Base (tr. 4/535-36). In September 1998 the Air Force added Vogelweh Air Base building No. 1034 apparently without a written modification to DO No. 4 (R4, tabs 14, 24; tr. 1/219).

24. On 21 September 1998 COTR Sellers advised Ms. Guilmenot that SUFI “didn’t want the calling card option in lodging” and Ms. Guilmenot replied: “I need for you to give me the okay for the modification which I faxed to you in July [not in evidence] I will issue another mod to address . . . the calling card issue . . . but for now lets [sic] get this mod signed addressing the DSN issue” (R4, tabs 24, 25). Mr. Sellers understood Ms. Guilmenot to mean that she was going to pull the calling card language out of the DSN modification for consideration in another modification once she was able to negotiate an acceptable charge with SUFI on calling card access (tr. 3/273).

25. In late 1998 Ms. Cecilia Briggs Ansola² became SUFI’s General Manager at Ramstein Air Base (tr. 3/50-51). On 5 January 1999, SMSGT Shelly Yeager replaced Mr. Sellers as COTR (R4, tab 202 at 3; tr. 2/99-100). Ms. Guilmenot asked COTR Yaeger to work out the language of contract Mod. 5 with SUFI, and to provide AFNAFPO coordinated language that could be executed in Mod. 5 (tr. 2/105-06).

26. Ms. Ansola’s 3 March 1999 message to COTR Yaeger stated that at Vogelweh and Spangdahlem air bases, “0130, 0800, and 00800 [German toll free numbers, R4, tab 81 at 1494] have a \$1.00 connection fee” (R4, tab 30). On 4 March 1999 COTR Yaeger asked Ms. Ansola to “coordinate” on the following proposed change:

Change [contract § B, ¶] 5.5.1 to read:
Germany: Local calls to host nation telephone system:

. . . .

International Toll Free: \$1.00 connection fee.

Ms. Ansola’s 4 March 1999 reply to COTR Yaeger stated:

There is no connection fee for calls except the \$1.00 for the toll free numbers.

. . . .

Toll Free Calls: \$1.00 connection fee. (Some international “toll free” calls may be subject to billing. For example, international toll free calls to other countries, where a host nation passes along a charge, will be subject to our standard per minute charges for that country.)

² Cecilia Briggs and Cecilia Ansola are the same person (tr. 1/220-21).

(R4, tab 225) We find that, in the context of the foregoing messages, the “Toll Free Calls” provisions under discussion referred to 0130, 0800 and 00800 numbers in Germany and did not address calling card calls.

27. Ms. Ansola’s 8 March 1999 message to COTR Yaeger stated in pertinent part:

Calling Cards:

The basic solicitation never asked for access to competitors’ calling cards, and our response to the solicitation did not offer access to competitors calling cards. . . .

. . . USFI set up a trial access at the Vogelweh facility in March 1998, and suffered considerable loss in revenue. This access requires a formal modification to the contract since the AF already agreed to the interfaces offered by USFI. USFI will not agree to any contract modifications unless the AF can offer a means of offsetting losses incurred on the part of USFI.

. . . .

DSN Access:

. . . USFI offered to provide access to long distance DSN only on the condition that the AF implement strict controls over unrestricted access to DSN. This has never been provided

January of 1998 we blocked calls to the operator because we started analyzing those calls because of the long duration’s [sic]. The attendants were connecting lodging guests to any requested phone number for unlimited time at no cost. This not only violates the intent of the contract, it is in direct conflict with the agreement that we would pass DSN calls after fraud-prevention controls were implemented.

(R4, tab 177; tr. 2/109-13, 3/55-56)

28. Ms. Ansola’s 11 March 1999 message to COTR Yeager inserted the bolded words in the following provision proposed for Mod. 6:

Germany: Calls to the host nation telephone system: Local calls, **including base information**, \$.15 per minute, calls within a 50km radius are \$.49 per minute, and calls exceeding the 50km radius are \$.99 per minute. Mobile phone calls:

\$1.49 per minute. **Host Nation Information: \$1.99 first minute and \$.99 additional minutes.** Toll free calls: \$1.00 connection fee. (Some international “toll free” calls may be subject to billing. For example, International toll free calls to other countries, where a Host Nation passes along a charge, will be subject to contractor’s standard per minute charge for that country.[])

(R4, tab 31; tr. 3/62-63, 175)

29. COTR Yeager’s 15 March 1999 e.mail forwarded SUFI’s 11 March 1999 revised provisions for Mod. 6 quoted above to Ms. Guilmenot and commented: “Credit Card Use: USFI tested this and found it was not feasible. Since USFI rates are below other Credit Card rates we do not require use of other providers.” (R4, tab 180)

30. COTR Yeager understood that the phrase “toll-free calls, \$1.00 connection fee” did not apply to calling cards and credit cards (tr. 2/122-23, 171, 176). According to Ms. Guilmenot, at some time between 15 and 26 March 1999, she spoke with COTR Yeager about her “misunderstanding” that the proposed \$1 connection fee language was not related to “credit card use”; Ms. Guilmenot understood that “the \$1 connection fee, once . . . agreed upon . . . would open access whether it was credit card use, debit card or whatever the patrons choose to use” (tr. 4/140-41, 144-45). COTR Yeager recalled no such conversation with Ms. Guilmenot (tr. 2/120, 124-25). COTR Yeager understood that “Toll-free calls: \$1.00 connection fee” meant that “toll free calls were going to be charged at \$1.00 connection fee, whether . . . within Germany, within Europe. But I did understand that calling cards were not part of that [Mod.], that they were still going to be blocked,” the “Air Force was not forcing SUFI to open up access to credit cards, or calling cards of other long distance networks,” and her understanding was coordinated and shared with AFNAFPO at all levels (tr. 2/118, 176-77).

31. Ms. Guilmenot also said that she discussed her foregoing understanding of the connection fee provision with Ms. Ansola either before or after 15 March 1999 and before 26 March 1999, but did not document such communication (tr. 3/326-27, 4/145-53, 161). Ms. Ansola denied that Ms. Guilmenot had discussed such understanding with her (Ansola) at any time between 15 March 1999 and the time Mod. 5 was fully executed (tr. 3/67, 4/527-28). Ms. Ansola understood the “toll-free calls: \$1.00 connection fee” provision (proposed for Mod. 6 but later included in Mod. 5) did not include calling card access (tr. 3/64), because calling card calls are not “toll-free” to the user or caller (tr. 3/178).

32. Ms. Guilmenot’s testimony that she had advised SUFI before the CO signed Mod. 5 that the toll free calls provision allowed lodging guests to use calling cards of other long distance carriers was inconsistent with her testimony that, when questioned by CO Max Browning in 2003-04, she could recall nothing about Mod. 5 and calling card access

(tr. 4/293-94) and her April 2004 deposition testimony that she had never heard anyone tell SUFI that Mod. 5 opened up access to other long-distance carriers and she had no “opinion as to whether this phrase, toll free calls, \$1 connection fee, included calling card access” (tr. 3/329, 4/198-99). Considering the foregoing inconsistent and impeached testimony and Ms. Guilmenot’s demeanor (selective recall, uncertain recollections, and evasive answers) we accord no probative value to her foregoing testimony.

33. Mod. 5, signed by the CO on 26 March 1999 and by SUFI on 9 June 1999: (a) added to § C paragraphs entitled DSN Service, DV Suites and Secure Communications Devices that were essentially identical to the draft May 1998 texts (see finding 19), (b) provided, under the heading, “REFERENCE SEC B, 5.5.1,” the identical text sent to COTR Yaeger on 11 March 1999 (see finding 28), except that Mod. 5 eliminated highlighting and added the closing parenthesis at the end thereof, and (c) deleted a proposed ¶ 3, adding rooms at air base lodgings, at SUFI’s insistence (“Do not agree!”), which deletion was initiated by CO Jones on 16 July 1999 (R4, tab 6 at 2).

34. Based on documents in evidence and the credible testimony of witnesses, we find that: (a) a caller incurs the tolls or charges for calls made by means of a calling card, credit card, or a pre-paid debit card; such calls are not “toll free” (tr. 1/67-68, 223, 2/115, 184, 205, 3/178, 297); (b) calls initiated by dialing 0130, 0800, or 00800 in Germany are “toll free” to the caller, and the recipient pays the cost (R4, tabs 173 at 1, 218 at 5; tr. 1/67, 223-24, 228-29, 2/115, 4/467-68, 487); (c) by initiating a call by dialing 0130, 0800, or 00800 in Germany, the caller incurs a connection fee, and a caller who then accesses a calling card to transmit a long distance call incurs the toll or charges therefor (R4, tab 30; tr. 1/68, 230-39, 3/191); and (d) the foregoing facts were known to SUFI and to CO Jones in 1999 (tr. 1/67-68, 3/297).

35. SUFI’s March 1999 dialing instructions to lodging guests, revised to reflect Mod. 5, to which COTR Yaeger raised no objection, stated:

If you call a 0130 or 0800 number in Germany, you will be charged a \$1.00 connection fee. You cannot access the German toll-free numbers to AT&T, Sprint, MCI and other long-distance carriers. [Emphasis in original]

(Ex. A-48; tr. 2/121, 3/67-69, 228)

36. After Mod. 5 was executed, Ms. Guilmenot understood that SUFI was blocking access to calling cards (tr. 3/324). In discussions with respect to an anticipated Mod. 8, on 23 February 2000 Ms. Guilmenot told SUFI that “we will address the ‘rates and calling cards’ down the road a bit” (R4, tab 176; tr. 3/324). SUFI’s Mr. Stephen Myers “[m]et with SMSgt Shelley Yaeger on 3/8/00 She . . . wants us to start thinking about adding calling cards or reducing our rates” (ex. A-54 at 180; tr. 2/124, 212-14). Neither COTR Yaeger

nor Ms. Guilmenot asserted that Mod. 5 previously had opened calling card calls (tr. 2/124, 214, 3/71, 324-25).

37. On 31 March 2000, bilateral contract Mod. 8 extended the contract term to 15 years, ending 25 April 2011 (R4, tab 9 at 1). At the hearing of this appeal, Mr. Myers, who signed Mod. 8, said he would have “negotiated some sort of other consideration” if the Air Force had told him that it did not have to allow SUFI to service new buildings on site for which it had issued DOs, such as new buildings at Ramstein and Spangdahlem Air Bases (tr. 2/210-12). The record contains no evidence that Mr. Myers communicated such statement to the Air Force before the hearing.

38. In March-April 2000 the Air Force added Ramstein Air Base building No. 310 apparently without a written modification to DO No. 1 (R4, tab 11; ex. A-54 at 2; tr. 3/132-33).

39. On 13 September 2000, COTR Yaeger accepted without objection SUFI’s September 2000 instructions to Spangdahlem and Bitburg Air Base lodging guests that stated: “You cannot access the German toll free numbers to AT&T, Sprint, MCI and any other long distance carriers” (ex. A-57 at 958; tr. 3/70-71).

40. On 1 October 2000 Ms. “Sam” Adams replaced SMSGT Yaeger as COTR (R4, tab 202 at 1). USAFE officials John Fortuna and COTR Adams understood that SUFI was blocking access to calling cards, as did CO Miller (R4, tabs 85 at 1, tab 87 at 1-2; tr. 3/40-41, 246-47, 4/12-13).

41. In about January 2001, the Air Force changed the “morale call” number to “480-HOME,” accessible via the DSN operator or information numbers at Ramstein and nearby air bases (tr. 3/59-60). Discovering sequences of morale calls exceeding 15 minutes and no adequate Air Force controls over such calls, SUFI blocked DSN “480-HOME” calls from lodging guest rooms, with the knowledge of, and without objection from, COTR Adams (R4, tabs 84, 85, 87 at 1841; tr. 3/60-62, 239-40, 4/13-14).

42. From July 2001 to February 2002, the parties discussed, with regard to long distance calls, lowering the rates, restrictions on DSN calls, and calling card access to other carriers. The Air Force suggested that lower rates or calling card access to other carriers would increase lodging guest telephone usage and revenues, but SUFI was not convinced that idea was sound. (R4, tabs 90, 91; exs. A-80, -82; tr. 2/216-19, 3/20-22, 71-72, 250-51)

43. After SUFI notified the Ramstein Air Base lodging manager Bill Branham on 23 January 2002 that Deutsche Telecom service provided at building No. 908 since 1996 would expire 31 March (2002), SUFI installed wiring between building Nos. 305 and 908

and added building No. 908 to the LFTS, apparently without written modification of DO No. 1 (R4, tabs 11, 171; ex. A-206; tr. 1/57-58, 189, 3/135-37).

44. In early 2002, after the Air Force inquired whether SUFI would provide LFTS services at Aviano Air Base, the parties discussed, but did not resolve, differences in designated lodging facilities, Europe-wide DSN access, and lower rates; SUFI told the CO that it was not “economically feasible” to service Aviano in March 2002; and the parties agreed to cancel DO No. 3 (R4, tabs 13 at 7, tabs 37-44; exs. A-83; tr. 4/14-16).

45. From March 2002 to March 2003 the parties considered, but did not reach mutual agreement on, alternatives to relieve the pressure of guest complaints about SUFI’s long distance rates: Air Force purchase of SUFI’s infrastructure and equipment at the air bases; Air Force assumption of SUFI’s operating costs; Air Force performance of equipment maintenance; a “mutual buy out” and convenience termination of the contract (R4, tabs 98-99, 101-04, 182; ex. A-97; tr. 2/220-28, 4/252-57, 379-80).

46. On 10 May 2002 the CO modified DO No. 1 to include Kapaun Air Station building Nos. 2778, 2790 and 2794 (R4, tab 11 at 12).

47. From March 1999 to March 2003 no one in AFNAFPO or USAFE suggested to SUFI that the “Toll free calls: \$1.00 connection fee” provision in Mod. 5 encompassed the use of calling cards to access long distance carriers other than SUFI (tr. 2/220, 3/72, 329-30, 4/7).

48. According to CO Jones, who signed Mod. 5, the toll free calls, \$1.00 connection fee, provision opened calling card access (tr. 3/293), despite the absence therein of the May 1998 draft text, “calling card access so Lodging guests may use personal commercial Calling Cards” (finding 19; tr. 3/295). Asked if she communicated the foregoing interpretation of Mod. 5 to anyone from SUFI between 15 and 26 March 1999, Ms. Jones responded, “No, sir, I don’t recall that” (tr. 4/207).

49. From mid-2000 to mid-2003 SUFI’s Ms. Ansola and USAFE representatives met and corresponded to plan the LFTS requirements for new lodging facilities to be constructed at Ramstein and Spangdahlem Air Bases (R4, tabs 82, 169, 170, 101; exs. A-87, -91, -113). Some SUFI and Air Force personnel “assumed” that the LFTS for those new facilities would be ordered from SUFI, but the Air Force did not so state in writing, and no CO so stated to SUFI (tr. 2/126, 211, 3/12-13, 131-33, 137-43, 219-22). On 11 November 2002, when CO Henson told SUFI’s Mr. Myers that USAFE would not ask SUFI to provide telephone services at the new Ramstein facility and nothing in the contract prevented USAFE from servicing that new building, Myers disagreed with that interpretation (R4, tab 104).

50. On 15 April 2003 Mr. Timothy Wible became General Manager of lodging facilities at Ramstein Air Base (tr. 4/113, 257, 442-43, 482). After reading the SUFI contract and its modifications, on 22 April 2003 Mr. Wible wrote to CO Cedric Henson:

3. We request that the following remedies be made:

a. The contractor immediately unblock access to other long-distance carriers (calling card access). While there is a provision to charge for toll-free numbers, there is not a provision for charging for calling card access. We insist that our guests receive free access to other long-distance carriers, and cannot support any fees for calling card use.

b. The contractor unblock access to all “local” DSN calls [Emphases in original]

(R4, tab 49; ex. A-103 at 1; tr. 4/482-83)

51. CO Henson’s 20 May 2003 message to Mr. Wible stated that the “contract does not have a requirement to provide free access to toll free calling cards.” On the same day Mr. Wible replied:

Calling cards (nor the blocking of calling cards) were not addressed by the contract. . . . Access to German toll free numbers was addressed at length (the charge is \$1.00). Calling cards to other carriers is [sic] accessed over a German toll free number. What paragraph in the contract gives SUFI the legal right to block access to specific German toll free numbers (i.e. calling card carriers).

(Ex. A-103; tr. 4/7, 328-31, 484-85)

52. At a meeting on 22 May 2003, COs Tom Miller, Cedric Henson and Max Browning told Col. Tim Hanson, Director of Services, HQUSAFE, that they disagreed with Mr. Wible’s 20 May 2003 interpretation of Mod. 5 to open calling card access (R4, tab 208; tr. 4/391-92, 395-98).

53. On 9 July 2003 SUFI gave AFNAFPO a \$7.2 million estimate for a convenience termination settlement (R4, tab 120). In August 2003 COs Henson and Browning met with USAFE officials in Germany. USAFE said that SUFI’s convenience termination settlement proposal was unacceptable and would not be pursued farther. CO Henson stated that they believed that “Mod. 5 gave us the ability to access toll free calls over the host nation [network] at a \$1 connection fee with no restrictions.” USAFE urged the COs to direct

SUFI immediately to open up calling card access. The COs said they would first try to negotiate a better long distance rate with SUFI before issuing such a direction. (Tr. 4/259-61, 285-88, 321-22, 380-81, 401)

54. On 28 August 2003 CO Browning told Mr. Myers that if SUFI allowed access to calling cards under Mod. 5, all other problems would be solved. Myers replied that SUFI did not intend that Mod. 5's access to commercial 800 numbers meant opening up calling cards. (Ex. A-141; tr. 2/247, 4/261)

55. The parties met on 10 September 2003, reviewed at length their disagreements about whether rate reduction would increase revenues and whether Mod. 5 allowed blocking calling card access. CO Henson stated that the Air Force did not have to order LFTS services for new buildings at Ramstein and Spangdahlem Air Bases from SUFI. The Air Force requested SUFI to submit a proposal to decrease rates. (R4, tab 137; tr. 1/84-86, 2/252, 3/111, 4/381-82, 411-14)

56. SUFI's 22 September 2003 letter to CO Henson summarized its proposal:

- ? SUFI will reduce its per minute rate to the U.S. to any amount set forth by the Air Force.
- ? SUFI will allow calling card access at a connection fee of \$1.00-\$2.00.
- ? SUFI will pay 25% commission on all call revenue that exceeds monthly minimum, in addition to existing commission schedule on page B-2 (revised).
-
- ? Air Force will set its own per minute rate to the U.S.
- ? Air Force will guarantee SUFI a minimum of \$110,000 per month in call volume for all existing locations. . . .
- ? Air Force will refund the \$100,000 prepayment.

As part of this proposal SUFI would expect to receive all future delivery orders for new lodging facilities within USAFE. (i.e. Ramstein and Spangdahlem Hotels). . . .

If the terms and conditions of this proposal are acceptable we would suggest performing a test at Sembach AB, to reduce the initial risk to the Air Force. During this test period, the Air Force must guarantee SUFI a minimum of \$17,700 per month. . . . based on SUFI's average performance at Sembach for the past 3 years. . . .

(R4, tab 138)

57. On 14 October 2003 Mr. Wible sent USAFE a projection that if widespread calling card use were introduced at Ramstein Air Base, \$97,673 in revenue would be generated, based on average call length data experienced at Travis AFB, California, versus an unstated but calculable ($2,024 \times \$95.94 = \$194,183$) in revenue at an assumed \$95.94 per month per extension (*i.e.*, about a \$96,500 monthly revenue loss) (R4, tab 209; tr. 4/459-60). On 15 October 2003 Mr. Wible sent USAFE a comparison of \$110,308 in expected revenues at German air bases, extrapolated from actual July 2003 long distance call revenues at Ramstein Air Base and “projected” \$60,625.95 in revenues at those bases if calling cards were used for 87.5% of calls, *i.e.*, about a \$50,000 monthly loss in revenue (R4, tab 210; tr. 4/459-60).

58. CO Browning’s 5 November 2003 letter to SUFI stated:

We have reviewed your rate reduction proposal dated, 22 Sep 03, and conclude that the proposal is an unacceptable transfer of risk without compensation. . . .

In the absence of a negotiated agreement to restructure our rates, the Air Force has elected to open toll free calls, to include calling cards at the \$1.00 connection fee, as stated in Modification 5. Economic changes in the market place have changed since this modification was executed and it is now beneficial for the Air Force to invoke its right to implement this service. USAFE is agreeable to allow SUFI to sell branded proprietary prepaid phone cards for sole use within the SUFI contracted facilities. . . . USAFE will consider other proposals to help reduce your costs under the contract in exchange for concessions on the rates. Your proposal should include detailed financial statements to support your costs. In reference to future expanded services, USAFE will select telephone services for new facilities it determines most advantageous to its business model.

Effective within 10 days of receipt of this letter, remove all restrictions on toll free calling. . . .

(R4, tab 45)

59. SUFI’s 14 November 2003 letter to the CO stated that “SUFI disputes your contract interpretations” in the foregoing 5 November 2003 letter, and requested a CO’s final decision on three contract interpretation issues:

1. whether Modification 5 (or any other part of the Contract) requires SUFI to remove restrictions on toll-free calls accessing other long-distance carriers;
2. whether SUFI has the right under the Contract to service the new Ramstein and Spandahlem facilities and any other additional lodging facilities on the bases SUFI services under the Contract;
3. whether, if the Air Force incorrectly takes the final position(s) that (a) SUFI must remove restrictions on access to other long-distance carriers and/or (b) SUFI may not service the new guest facilities on bases it already services, the Air Force positions, both individually and in combination, are material breaches of contract that permit SUFI to cancel the Contract and stop work.

(R4, tab 46)

60. In his 15 January 2004 final decision, the CO disputed and denied each of SUFI's 14 November 2003 contract interpretations (R4, tab 47).

61. The Air Force refused SUFI's 26 January 2004 request to suspend the CO's direction for SUFI to allow access to other long-distance carriers, and SUFI opened up such access in February 2004, which the Air Force has begun actively to advertise to guests (R4, tab 48; exs. A-180, -184; tr. 2/259-60, 3/144).

62. On 6 February 2004 appellant timely appealed the CO's final decision to this Board, which docketed the appeal as ASBCA No. 54503. There is no dollar amount at issue in this appeal, but only a request for contract interpretation relief. Monetary damage claims have not yet been submitted to the agency. (Compl. & answer, ¶ 2)

63. For the first three months following the CO's order (February- April 2004), the only period for which comparable data is in evidence, SUFI's average monthly contract billings were 18 percent less than the average monthly billings for the same three-month period in the preceding four years. This reduction occurred notwithstanding a 12 percent increase in the average monthly "bednights" for the same period. On a per bednight basis the revenue reduction was 27 percent. (R4, tab 216) We find that the CO's order for SUFI to remove restrictions on toll-free calls accessing other long-distance carriers substantially diminished SUFI's revenues.

DECISION

I.

The first issue is “whether Modification 5 (or any other part of the Contract) requires SUFI to remove restrictions on toll-free calls accessing other long-distance carriers” (finding 59). As shown by the parties’ course of dealing, (i) “restrictions” refer to “blocking” (findings 3 (§C ¶¶ 3.4.1.3, 3.4.2.3), 7, 11, 17, 27, 36, 40-41, 50-51, 55, 58), (ii) a caller incurs the tolls or charges for calls made by means of a calling card, credit card, or a pre-paid debit card; such calls are not “toll free” (finding 34(a)) and (iii) “toll free calls” refer to calls for which the recipient, not the caller, pays the cost (finding 34(b)). SUFI did not restrict lodging guests from making wholly “toll free” calls. It restricted calls accessed by the German “toll free” number 0130, 0800 or 00800 and transmitted via the calling card of a competing long distance carrier (findings 11, 27, 35-36). SUFI argues that the original contract, Mod. 5, and the parties’ course of dealing, authorized it to restrict lodging guests’ access to long distance carriers other than those used by SUFI (app. br. at 103-16).

According to respondent, Mod. 5’s provision, “toll free calls: \$1.00 connection fee,” is “clear and unambiguous” and “calling card access” was included in the phrase “toll free calls,” because such calls are placed “over the . . . host nation telephone system described in [§] B, ¶ 5.5.1, and not over the SUFI long-distance service as described in [§] B, ¶ 5.4.2” and such provision is “without restrictions” (gov’t br. at 143-44). This argument ignores the parties’ discussions of the terms in Mod. 5, which they interpreted to permit SUFI to restrict outgoing long distance calls via competing carriers that would avoid generating sharable long distance call revenues, *i.e.*, “toll skipping,” which SUFI had done for three years before Mod. 5 was executed (findings 3 (§ C, ¶¶ 3.4.1.3, 3.4.2.3), 7, 11, 13, 17, 27), and did for four years thereafter (findings 35-36, 39-40, 50-51).

According to respondent, the contract required guest access to calling card carriers other than SUFI, because § C, ¶ 3.2.2 required SUFI’s dialing plan to include “Other Common Carriers” and “Commercial Toll Free” numbers (finding 3; gov’t br. at 145-47). This argument ignores that SUFI proposed, and the Air Force accepted, dialing plans that restricted lodging guest access by calling cards to competing long distance carriers (findings 3, 22, 39). Respondent argues that contract § B, ¶¶ 5.4 and 5.5, did not authorize charges for toll free calls (gov’t br. at 147). Those provisions did not address toll free calls (finding 3).

Respondent asserts that before Mod. 5 was executed, the parties discussed changing the contract to allow use of calling cards by charging the call as a local call (gov’t br. at 148-53). This is true (finding 20) and contradicts the argument that the original contract allowed use of calling cards. SUFI’s proposal, § B, ¶ 3.1.6, defined its host nation telephone network to include “the immediate area surrounding the military installation” (finding 3). Thus, Mod. 5’s provisions added to § B, ¶ 5.5.1, for Germany (findings 28, 33),

encompassed toll free calls by dialing numbers 0130, 0800 and 00800 in the immediate area of each military installation (finding 26), not international long distance calls. Moreover, the parties' discussed the use of calling cards from 1997 to 1999, but they did not agree on compensation to SUFI for a change to allow calling card use and understood that Mod. 5 did not address calling card access, which was to be addressed in another modification (findings 20, 24, 27, 29-30).

Respondent argues that the key phrase in issue contemplated use of calling cards (gov't br. at 154-63). That phrase originated in Ms. Ansola's statement that German toll free numbers "0130, 0800, and 00800 have a \$1.00 connection fee," was modified in COTR Yaeger's proposed change language, "International Toll Free: \$1.00 connection fee" and further modified in Ms. Ansola's "Toll Free Calls: \$1.00 connection fee. (Some international 'toll free' calls may be subject to billing. For example, international toll free calls to other countries, where a host nation passes along a charge, will be subject to our standard per minute charges for that country.)." The last language is nearly identical to that set forth in Mod. 5. (Findings 26, 28, 33) No version of that phrase used the term "calling cards" (finding 26). The parties understood that Mod. 5 did not address calling card access, which was to be resolved in another modification, as analyzed above.

Ms. Guilmenot testified that before execution of Mod. 5, she told SUFI's Ms. Ansola that Mod. 5 opened up access to other long distance carriers. Ms. Ansola denied such statement, and appellant impeached Ms. Guilmenot's testimony. We accorded no probative value to Ms. Guilmenot's testimony. (Findings 32-33) CO Jones also testified that Mod. 5's toll free calls provision opened calling card access, but she did not communicate such subjective interpretation to SUFI before Mod. 5 was executed (finding 48). A party's uncommunicated interpretation of a contract provision does not bind the other contracting party. *See Loral Corporation, Defense Systems Division-Akron*, ASBCA No. 37627, 92-1 BCA ¶ 24,661 at 123,025.

Respondent argues that SUFI drafted the phrase in issue, and to the extent it is latently ambiguous, respondent's reasonable interpretation of it to allow access to calling cards governs under the rule of *contra proferentem*. That argument fails because respondent's interpretation was not communicated to SUFI and was plainly not reasonable, in view of the parties' course of dealing both before and after execution of Mod. 5 that calling card access was to be resolved by a later contract modification, and because calls made by means of a calling card are not "toll free" since the caller incurs the tolls or charges therefor (findings 24, 27, 29-32, 34(a)). Respondent's argument that there was "mutual assent" to the understanding that "toll free calls" included calling card calls fails for the same reasons.

We are persuaded that the material facts to resolve this issue are that: (1) the principal financial purpose of the contract was Air Force-SUFI sharing of revenues generated by outgoing long distance calls by lodging guests on SUFI's network (findings 3

(§ C, ¶¶ 3.1.6, 3.4.1.3, 4.1.2, 4.4.3), 6); (2) the Air Force COTR did not object to SUFI's dialing plans which notified lodging guests that access to long distance carriers other than those selected for SUFI's long distance network was blocked, both before and after Mod. 5 was executed (findings 13, 22, 35, 39); (3) the discussions leading to Mod. 5 show that SUFI objected to, and Mod 5 did not include, COTR Sellers' May 1998 text, "Contractor shall provide calling card access so Lodging guests may use personal commercial Calling Cards" (findings 19, 28, 33) and the parties understood that "calling card access" was not included in "toll free calls" in Mod. 5 (findings 26-31, 50-51); and (4) before and after July 1999 the parties discussed and tried to resolve the "calling card access" issue many times without reaching agreement on another modification to resolve that issue (findings 20, 24, 26, 36, 42, 45, 55-56).

We hold that neither Mod. 5 nor any other contract provision required SUFI to remove restrictions on outgoing lodging guest calls accessing other long distance carriers when the parties cannot share their tolls or charges in accordance with the agreed ratio, whether such calls are initiated by dialing a purportedly "toll free" number such as 0130, 0800, 00800, or the DSN local network, or otherwise, and that the CO's order to remove such restrictions was a breach of contract.

II.

The second issue is "whether SUFI has the right under the Contract to service the new Ramstein and Spandahlem facilities and any other additional lodging facilities on the bases SUFI services under the Contract" (finding 59).

The contract is an indefinite quantity type contract that required performance only as authorized by DOs issued thereunder. AFNAFPO had the duty to order only the "minimum" quantity of services "designated in the schedule." Schedule § C, ¶ 6.1, defined the "system" as the LFTS. Contract Schedule § I designated the minimum quantity of "one system per base" and Schedule § F.6 required AFNAFPO to issue DOs for Aviano, Rhein Main, and Ramstein Air Bases. (Findings 2-3) AFNAFPO issued DOs for the 21 buildings at Ramstein, Rhein Main, and Aviano Air Bases specified in the contract (finding 9). Therefore, AFNAFPO discharged its duty to order the "minimum" quantity of services designated in the schedule. *See Travel Center v. Barram*, 236 F.3d 1316 at 1319 (Fed. Cir. 2001) (once the government orders the designated minimum quantity, it satisfies its indefinite quantity contract obligation and is free to purchase additional supplies or services from any other source).

SUFI seeks to avoid the foregoing rule by several arguments (app. br. at 116-19). According to SUFI, its proposed § C, ¶ 3.11 "superseded" or "controlled" the RFP § C, ¶ 3.11, and so once respondent issued an order for an air base, it had to order "expanded service" for "new buildings" at such base from SUFI. The contract's § C included 43 pages, of which the first 22 derived from the RFP and the last 21 pages derived from the SP. The

contract did not state that the SP-derived pages “superseded” or “controlled” the RFP-derived pages, it expressly deleted (lined out) certain SP provisions, and it did not delete the phrase “as requested by the government” in RFP ¶ 3.11, or state that SP ¶ 3.11 superseded or controlled RFP ¶ 3.11. (Findings 2-3)

SUFI argues that its LFTS proposal was priced “per base” not “per facility” or “per building.” SUFI proposed a single \$.99 per minute price for all three air bases (finding 3), and the record contains no pre-award cost data to substantiate SUFI’s assertion. SUFI argues that “[o]nce a base is awarded, it is a requirements contract for that base,” but no contract provision so stated. SUFI argues that it invested in the switching capacity specified for each air base which exceeded the number of lodging rooms designated in the contract SUFI. Such excess switching capacity, however, was not tied to any duty of the government to order LFTS from SUFI for other lodging facilities on such air bases. SUFI argues that it is “common sense” that only one telephone system would be expected at a single air base. But for six years from April 1996 to March 2002 SUFI serviced 11 buildings at Ramstein Air Base while Deutsche Telecom serviced building No. 908 (finding 43), showing that the parties expected such services from different sources on an air base.

SUFI argues that AFNAFPO added building No. 1034 at Vogelweh (finding 23) and building Nos. 310 and 908 at Ramstein (findings 38, 43). AFNAFPO had the right but not the duty to increase the scope of SUFI’s DOs to include those additional lodging facilities. *See Travel Center, supra*. We hold that respondent’s failure to order SUFI to service new Ramstein and Spandahlem facilities and any other additional lodging facilities on the bases SUFI services under the Contract was not a breach of contract.

III.

We next decide whether respondent’s breach held in point I. above was “material.” Our governing appellate court has stated: “The standard of materiality for the purposes of deciding whether a contract has been breached ‘is necessarily imprecise and flexible.’ *Restatement (Second) of Contracts* § 241 . . .” *Stone Forest Industries, Inc. v. United States*, 973 F.2d 1548, 1550-51 (Fed. Cir. 1992). That provision states:

§ 241. Circumstances Significant in Determining Whether a Failure Is Material

In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

- (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;

(b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking into account of all the circumstances including any reasonable assurances;

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with the standards of good faith and fair dealing.

In the three month period following the CO's order to cease blocking calling card access, the only period for which comparable data is in evidence, SUFI sustained an 18% reduction in average monthly billings and a 27% reduction in average monthly bednight revenues (finding 63). Such reduction deprived SUFI of much of the benefit of the contract reasonably expected. *See Stone Forest, supra*, 973 F.2d at 1552: "removal of 15.89% of the timber initially contracted for, at this [51%] stage of contract performance, was a material breach by the United States." Since respondent has the duty to pay SUFI only its share of long distance telephone charges (finding 10), once such calls were diverted to other carriers and no revenues are generated for SUFI, such revenues were lost. Respondent's breach will cause it no forfeiture. The CO has given SUFI no assurance whatever that he will cure his breach, but instead has denied any government breach and declined to postpone his order (findings 60-61). From 1999 until at least 22 May 2003 the Air Force COs did not disagree that Mod. 5 did not open calling card access (findings 37, 40-41, 47, 51-52).

We hold that respondent's breach decided in I. above was a material breach of the contract that permitted SUFI to stop performance of the contract. We sustain the appeal to the foregoing extent, and deny the balance thereof.

Dated: 17 August 2004

DAVID W. JAMES, JR.
Administrative Judge
Armed Services Board
of Contract Appeals

I concur

I concur

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

MONROE E. FREEMAN, JR.
Administrative Judge
Acting Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contract Appeals in ASBCA No. 54503, Appeal of SUFI Network Services, Inc., rendered in conformance with the Board's Charter.

Dated:

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